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SEA LEVEL RISE: SMALL ISLAND STATES AND HUMAN RIGHTS

DOCTORAL DISERTATION

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PODIZANJE RAZINE MORA: MALE OTOČNE DRŽAVE I LJUDSKA PRAVA

DOKTORSKA DISERTACIJA

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Extended Abstract

Interaction between climate change and human rights is a multi-faceted phenomenon. One particular aspect of it can be found within the situation of small island states faced with sea level rise, which might eventually render their territory submerged and prompt populations to migrate across international borders. The aim of this work is therefore to investigate how the sea level rise shapes international (human rights) law in regard of small island States and different players' responsibilities in providing legal responses to situations of States being at risk of losing their territory and of populations in need to relocate, which will have lasting consequences on many of their rights. In doing so, the research focuses on two key topics – self-determination as a collective human right, which is, in case of islanders, defined by statehood of small island states and human rights of populations on the move across international borders.

In order to reach this, there are two research objectives for this work. First objective is to determine how sea level rise will affect legal personality of small island states and whether right to self-determination can function as a guarantor of continuation of legal personality of peoples of small island states even after their islands become uninhabitable and submerged. Regarding that, the following research questions are envisaged: 1) Are traditional elements of statehood (territory, permanent population, independent government) only criteria for legal personality of small island states? 2) What adaptation and transformation measures could be taken to safeguard territory and population? 3) What role does the recognition of other states play in continuation of legal personality of small island states? 4) Which concepts could be progressively developed to ensure continuation of legal personality after relocation and submergence?

Second objective is to see how sea level rise will affect other human rights law of the populations of small island states. Regarding this objective, the following research questions are noted: 1) What will be their legal status during and after relocation? 2) Are they covered by the interpretation of existing refugee law instruments, or drafting new ones might be expected? 3) What are international bodies concerned with human rights doing in preparing

answers to challenges connected with this new type of possible migratory activities? 4) How will different states respond to possible influx of these migrants?

The planning of the chapters of this work follows a pattern that aims at giving the overview of key legal issues of small island states facing with possible deterritorialization due to sea level rise as a consequence of global phenomenon of anthropogenic climate change. In addition, deeper insight and special attention will be given to the fate of populations of small island states in light of conceptual changes to different aspects of human rights that are envisaged due to sea level rise and their need for relocation in order to continue their life in habitats that are suitable for human habitation, but also in a fashion that respects their civil and political, economic, social and cultural rights.

Before going into the specific problems, Chapter 1 of the dissertation aims to define them and clearly establish who the different players are and which are the key problems that can be identified in law as to treatment of both the states and the populations.

Chapter 2 of the work introduces the human rights perspective and maps the human rights law approaches to sea level rise, while at the same time identifying the sources of international human rights law applicable to the problem.

Chapter 3 is entirely devoted to the problem of self-determination of peoples of small island states, which is inextricably linked with the question of statehood of small island states and legal personality of peoples. This part will also explore how the international community might recognize and respond to the problem of deterritorialization of states due to sea level rise. Of proposed solutions, there are five that this work will critically examine. First of them is finding new territory for deterrritorialized states and its populations. As there is no *terra nullius* in the contemporary world, this solution for certain includes cooperation between the small island state and other states that might cede or lease land to small island state and its population. This part aims to explore the possibilities for such arrangements and, more importantly, whether this could help the small island states to preserve their statehood in the situation in which their previous territory is substituted for a part of land that is belonging to another state and what would be the legal status of such a piece of territory in any given

situation. Second solution is rooted in the generally consensually accepted existence of a few *sui generis* entities in international law (possibly the best known are the Holy See and the Sovereign Military Order of Malta). In this solution, it is envisaged that the small island states could (similarly to the position of the pope in traditional law after the loss of Papal State and the Order after the loss of temporal power) be treated as international legal persons even though they lost the territory over which they previously ruled. Third solution is the only one that could keep small island states and their populations *in place*, and that is the preservance of territory through works. Even if this solution would be technically possible, it would be questionable from a legal standpoint. Fourth solution is to create completely novel concept of legal personality that would be specifically tailored to meet the needs of small island states. Fifth and final solution, extinction of sovereignty, is the least feasible for the small island states and self-determination of its peoples, but may become the case if international law fails to adapt to the novelty of losing the territory due to natural processes and must therefore be explored.

Chapter 4 of the thesis is entirely devoted to the human rights concerns in the process of relocation. From a human rights perspective, the question whether a small island state will continue to exist after its deterritorialization is a key to an understanding of the legal position of the population during and after relocation, foremost in relation to the right to self-determination as described in Chapter 3, but also right to nationality that will in many regards determine their status. Moreover, the population of small island states, although comparatively small in numbers, will be more affected, especially when taking into account that their states, as primary guarantees of their rights, might be extinguished or at least significantly altered in their powers. This part therefore aims to give an overview of which and whose rights will be affected by the sea level rise and which entities will have to alter their views and policies towards respecting and promoting the human rights. Moreover, specific subchapters are devised to function as in-depth analysis of some of the rights that will be especially affected and regimes that might provide international legal remedies (nationality and other political rights, especially in the light of the process of relocation). Similarly to the situation with the statehood of small island states, legal concepts and practice

will have to adapt to accommodate the respect for previously analysed human rights in the environment changed by the sea level rise. The three solutions analysed are recognizing the nationality of deterritorialized small island states (although that also raises the question of quality and universal recognition of such a nationality), applicability of protection of stateless persons under international law to the specific situation of nationals of deterritorialized small island states, environmentally displaced persons as a separate legal concept and position in analogy to other, conventional types of displacement (refugees, complementary protection against *refoulement* under general international human rights law).

Keywords: small island states, human rights, self-determination, legal personality, international migrations, *non-refoulement*

Prošireni sažetak

Interakcije klimatskih promjena i ljudskih prava fenomen je koji ima brojne uzroke, posljednice i zahvaća različite odnose. Jedan od njegovih posebnih aspekata je i situacija u kojoj se nalaze male otočne države sučene s podizanjem razine mora koje bi moglo, u konačnici, potpoiti njihovo državno područje ili ga učiniti nenaseljivim te primorati stanovništvo na prekogranične migracije u druge države. Cilj ovog rada je stoga istražiti kako porast razine mora oblikuje međunarodno pravo (ljudskih prava) u odnosu na male otočne države i odgovornosti različitih aktera u pružanju pravnih odgovora na situacije u kojima su države u opasnosti od gubitka svog teritorija i stanovništva koje se treba preseliti, što će imati trajne posljedice na mnoga njihova prava. Pritom se istraživanje usredotočuje na dvije ključne teme – samoodređenje kao kolektivno ljudsko pravo, koje je, u slučaju otočana, definirano državnošću malih otočnih država i ljudska prava stanovništva koje se kreće preko međunarodnih granica.

Kako bi se to postiglo, predvišena su dva istraživačka cilja. Prvi cilj je utvrditi kako će porast razine mora utjecati na pravnu osobnost malih otočnih država i može li pravo na samoodređenje funkcionirati kao jamac nastavka pravne osobnosti naroda malih otočnih država čak i nakon što njihovi otoci postanu nenastanjivi i potopljeni. S tim u vezi, predviđena su sljedeća istraživačka pitanja: 1) Jesu li tradicionalni elementi državnosti (teritorij, stalno stanovništvo, neovisna vlada) jedini kriteriji za pravnu osobnost malih otočnih država? 2) Koje bi se mjere prilagodbe i transformacije mogle poduzeti kako bi se zaštitio teritorij i stanovništvo? 3) Kakvu ulogu priznanje drugih država igra u nastavku pravne osobnosti malih otočnih država? 4) Koji bi se koncepti mogli postupno razvijati kako bi se osigurao nastavak pravne osobnosti nakon preseljenja i potapanja?

Drugi cilj je utvrditi kako će porast razine mora utjecati na druge zakone o ljudskim pravima stanovništva malih otočnih država. U vezi s tim ciljem, predviđena su sljedeća istraživačka pitanja: 1) Kakav će biti pravni status stanovništva malih otočnih država tijekom i nakon preseljenja? 2) Jesu li otočani obuhvaćeni tumačenjem postojećih instrumenata prava izbjeglica ili se očekuje izrada novih? 3) Što međunarodna tijela koja se bave ljudskim pravima rade u pripremi odgovora na izazove povezane s ovom novom vrstom mogućih

migracijskih aktivnosti? 4) Kako će različite države odgovoriti na mogući priljev ovih migranata?

Plan poglavlja ovog rada slijedi temeljnu misao vodilju obuhvaćanja pregleda ključnih pravnih pitanja malih otočnih država koje se suočavaju s mogućom deteritorijalizacijom zbog porasta razine mora kao posljedice globalnog fenomena antropogenih klimatskih promjena. Osim toga, dublji uvid i posebna pažnja posvećuje se stanovništvu malih otočnih država u svjetlu konceptualnih promjena različitih aspekata ljudskih prava koje se predviđaju zbog porasta razine mora i njihove potrebe za preseljenjem na način koji poštuje njihova građanska i politička, ekonomska, socijalna i kulturna prava.

Prije nego što se uđe u specifične probleme, prvo poglavlje disertacije ima za cilj definirati ih i jasno utvrditi tko su različiti akteri i koji su ključni problemi koji se mogu identificirati u pravu u pogledu postupanja i prema državama i prema stanovništvu.

Drugo poglavlje rada predstavlja perspektivu ljudskih prava i mapira pristupe porastu razine mora u pravu ljudskih prava, a istovremeno identificira izvore međunarodnog prava ljudskih prava primjenjivih na problem.

Treće poglavlje u potpunosti je posvećeno problemu samoodređenja naroda malih otočnih država, koji je neraskidivo povezan s pitanjem državnosti malih otočnih država i pravne osobnosti naroda. Ovaj dio također ispituje kako bi međunarodna zajednica mogla prepoznati i odgovoriti na problem deteritorijalizacije država zbog porasta razine mora. Od predloženih rješenja, pet ih se kritički ispituje u ovome radu. Prvo od njih je pronalaženje novog teritorija za deteritorijalizirane države i njihovo stanovništvo. Budući da u suvremenom svijetu ne postoji *terra nullius*, ovo rješenje zasigurno uključuje suradnju između male otočne države i drugih država koje bi mogle ustupiti ili dati u zakup zemljište maloj otočnoj državi i njenom stanovništvu. Ovaj dio ima za cilj istražiti mogućnosti za takve aranžmane i, što je još važnije, bi li to moglo pomoći malim otočnim državama da očuvaju svoju državnost u situaciji u kojoj je njihov prethodni teritorij zamijenjen dijelom zemljišta koji pripada drugoj državi i kakav bi bio pravni status takvog dijela teritorija u bilo kojoj danoj situaciji. Drugo rješenje utemeljeno je na općeprihvaćenom postojanju nekoliko *sui generis* subjekata u

međunarodnom pravu (moguće najpoznatiji su Sveta Stolica i Suvereni Malteški Red). U ovom rješenju predviđeno je da se male otočne države (slično položaju pape u tradicionalnom pravu nakon gubitka Papinske države i Reda nakon gubitka svjetovne vlasti) mogu tretirati kao međunarodne pravne osobe iako su izgubile teritorij nad kojim su prethodno vladale. Treće rješenje je jedino koje bi moglo zadržati male otočne države i njihovo stanovništvo na mjestu, a to je očuvanje teritorija izgradnjom umjetnih otoka ili naprava ili umjetnim podizanjem postojećih otoka. Čak i ako bi ovo rješenje bilo tehnički moguće, bilo bi upitno s pravnog stajališta. Četvrto rješenje je stvaranje potpuno novog koncepta pravne osobe koji bi bio posebno prilagođen potrebama malih otočnih država. Peto i posljednje rješenje, prestanak suvereniteta, najmanje je izvedivo za male otočne države i samoodređenje njihovih naroda, ali može postati slučaj ako se međunarodno pravo ne prilagodi novini gubitka teritorija zbog prirodnih procesa te ga je stoga nužno ispitati.

Četvrto poglavlje rada u potpunosti je posvećeno pitanjima ljudskih prava u procesu preseljenja. Iz perspektive ljudskih prava, pitanje hoće li mala otočna država nastaviti postojati nakon svoje deteritorijalizacije ključno je za razumijevanje pravnog položaja stanovništva tijekom i nakon preseljenja, prvenstveno u odnosu na pravo na samoodređenje kako je opisano u 3. poglavlju, ali i pravo na državljanstvo koje će u mnogim aspektima odrediti njihov status. Štoviše, stanovništvo malih otočnih država, iako relativno malobrojno, bit će posebno pogođeno, posebno kada se uzme u obzir da bi njihove države, kao primarna jamci poštivanja njihovih ljudskih prava, mogle izgubiti suverenost ili biti značajno ograničene u svojim ovlastima nad svojim dotadašnjim stanovnicima. Stoga ovaj dio ima za cilj dati pregled toga koja će i čija će prava biti pogođena porastom razine mora i koji će subjekti morati promijeniti svoje stavove i politike prema poštivanju i promicanju ljudskih prava. Nadalje, posebna potpoglavlja osmišljena su kako bi funkcionirala kao dubinska analiza nekih od prava koja će biti posebno pogođena i režima koji bi mogli pružiti međunarodni pravni okvir (državljanstvo i druga politička prava, posebno u svjetlu procesa preseljenja). Slično situaciji s državnošću malih otočnih država, pravni koncepti i praksa morat će se prilagoditi kako bi se zadovoljilo poštivanje prethodno analiziranih ljudskih prava u okolišu promijenjenom porastom razine mora. Tri analizirana rješenja su priznavanje

državljanstva deteritorijaliziranih malih otočnih država (iako to također postavlja pitanje univerzalnog priznavanja takvog državljanstva), primijenjivost međunarodnopravne zaštite osoba bez državljanstva na specifični položaj stanovništva deteritorijaliziranih malih otčnih država, klimatski migranti kao zaseban pravni concept te pozicija analogna drugim konvencionalnim oblicima zaštite raseljenih osoba u međunarodnome pravu (izbjeglice, komplementarna zaštita od *refoulementa* prema općem međunarodnom pravu ljudskih prava).

Ključne riječi: male otočne države, ljudska prava, samoodređenje, pravni subjektivitet, prekogranične migracije, *non-refoulement*

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List of abbreviations

AOSIS – Alliance of Small Island States

CRMW - International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families

Friendly Relations Declaration - Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations

GCM – Global Compact for Safe, Regular and Orderly Migration

HRComm – Human Rights Committee

ICCPR – International Convenant on Civil and Political Rights

ICESCR – International Covenant on Economic, Social and Cultural Rights

ICJ – International Court of Justice

ILA – International Law Association

ILC – International Law Commission

IOM – International Organization for Migration

IPCC – Intergovernmental Panel for Climate Change

PCIJ – Permanent Court of International Justice

SIDS – Small Island Developing States

UNCLOS – United Nations Convention on the Law of the Sea

UNDRIP – United Nations Declaration on the Rights of Indigenous Peoples

UNESCO – United Nations Educational, Scientific and Cultural Organization

UNFCCC – United Nations Framework Convention on Climate Change

Introduction

In an ever more complex global society, where new crises emerge daily, it is difficult for one topic to remain in focus, especially if it unevenly affects different parts of the world. However, sea level rise and its effects on global coastal areas and peoples living in them seems to have taken this track. This work aims to comprehensively look into the relation between effects of sea level rise on particular states within the larger small island states group, namely the ones that are so low-lying that sea level rise indeed presents an existential threat to them and human rights of their populations due to inundation that will render their territory uninhabitable.

On the 16th January 2024, the United Nations General Assembly decided to convene the first-ever high-level plenary meeting on the existential threats posed by sea level rise.[1] The meeting was held on the 25th September of the same year, with the clear mandate, summarized by the prime minister of Tuvalu, Feleti Penitala Teo in his opening remarks in the following words: "Today is our historical opportunity to turn the global tide and to embark on a common path that secures prosperity, dignity and rights to all affected countries and communities (…) todays summit hails a new kind of international cooperation, increases awareness of the multi-dimensional threats of sea level rise, it calls for a comprehensive multipronged approach (…)".[2] A day-long summit unfolded according to an expected track. Representatives of small island states and costal states, often in very clear and sometimes even undiplomatic words, stressed their vulnerabilities and threats to very existence of their societies, statehood and human rights of their populations, while representatives of other states expressed their concern and sympathies for the situation and assured of their support.[3] While this is in no case unprecedented, what seems to be unfolding is a realization of

[1] High Level Plenary Meeting on Addressing the Existential Threats Posed by Sea Level Rise, United Nations General Assembly, A/78/L.35, 2024. See also: Scope, Modalities, Format and Organization of the High-level Plenary Meeting on Addressing the Existential Threats Posed by Sea Level Rise, United Nations General Assembly, A/RES/78/319, 2024.

[2] See: High-Level Meeting on Sea Level Rise, available at: https://www.un.org/pga/78/high-level-meeting-on-sea-level-rise/ (accessed: 29th September 2024).

[3] *Ibid.*

structured approach towards "building common understanding, mobilizing political leadership and promoting multisectorial and multi-stakeholder collaboration and international cooperation towards the objective of addressing the threats posed by sea level rise".[4] The outcome still lays ahead, as the declaration, which will summarize and define the outcomes of the process is expected to be adopted in 2026. However, the path seems to be marked, with the international community recognizing sea level rise as one of the primary concerns within the complex patterns of redefinition that climate change brings to the contemporary world.

The meeting did not come out of nowhere. Sea level rise already has significant impact on everyday lives of peoples living in low-lying coastal areas around the world. The high-level meeting came only as a focal point of the long line of statements by the most vulnerable states in many formats, including the "world's plenary body" regarding the existential threat that sea level rise continues to pose for themselves and their peoples. For example, in 2021, the then foreign minister of Tuvalu, Simon Kofe, gave a speech addressing the 26th United Nation Framework Convention on Climate Change (hereinafter UNFCCC) Conference of Parties standing in knee-deep seawater off the cost of his island state, warning the assembled representatives of states of the existential threats that sea level rise brings to small island states.[5] This eye-catching action came as a visual warning of what is an ongoing reality of peoples of small island states, and the states themselves – sea level rise gradually inundates them, rendering them uninhabitable and, finally, completely covered by the sea. This creates an unprecedented situation for international law, with a number of key concepts, which seemed defined, even self-explanatory, coming under scrutiny and might even come out redefined. Indeed, this being so is confirmed by the work of the two important forums of international legal scholarship, namely the International Law Association (hereinafter ILA) and the International Law Commission (hereinafter ILC).

[4] Scope, modalities, format and organization of the High-Level Plenary Meeting on Addressing the Existential Threats Posed by Sea Level Rise, United Nations General Assembly, A/RES/78/319, 2024, Paragraph 2.

[5] Tuvalu minister stands in sea to film COP26 speech to show climate change, available at: https://www.reuters.com/business/cop/tuvalu-minister-stands-sea-film-cop26-speech-show-climate-change-2021-11-08/ (accessed: 11th November 2024).

The ILA, one of the two most respected learned societies (the other being the Institute of International Law) concerned with "the study, clarification and development of international law, both public and private, and the furtherance of international understanding and respect for international law"[6] understood the effects that sea level rise has on international law already in 2012, when an initiative came from a group of members to establish the Committee on International Law and Sea Level Rise. Governing bodies of the ILA accepted the initiative, and the Committee started its work over the course of the years 2013 and 2014, when the first meeting of the Committee was held.[7] The mandate of the Committee encompassed three interconnected fields of international law, namely the law of the sea concerning baselines, law of statehood and legal personality, and, finally, migration and human rights issues, namely those related to protection of persons whose livelihoods are endangered due to sea level rise.[8] The Committee concluded its work ten years later, in 2024, when it adopted its Final Report, which summarized the key findings of the three interconnected topics that were under its consideration.[9] Moreover, the Committee articulated its positions regarding the relation between human rights and sea level rise in its Sydney Declaration of Principles on the Protection of Persons Displaced in the Context of Sea Level Rise, which was adopted by the ILA at its 2018 Conference based on the text that emerged out of the Committee's preparatory work.[10]

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[6] Constitution of the International Law Association, Article 3, Paragraph 1. See: Constitution of the International Law Association, 2016, available at: https://www.ila-hq.org/en/about-us (accessed: 30th September 2024).

[7] For an overview of history of establishment of the Committee, see: Minutes of the Closed Session, ILA Committee on International Law and Sea Level Rise, Washington, 2014, p. 1.

[8] Formally, the mandate that ILA Executive Committee granted to the Committee on International Law and Sea Level Rise was two-folded and defined as follows: "(1) to study the possible impacts of sea level rise and the implications under international law of the partial and complete inundation of State territory, or depopulation thereof, in particular of small island and low-lying States; and (2) to develop proposals for the progressive development of international law in relation to the possible loss of all or of parts of State territory and maritime zones due to sea level rise, including the impacts on statehood, nationality, and human rights" (see: Final Report, ILA Committee on International Law and Sea Level Rise, submitted to the Athens Conference of the ILA, 2024, p. 1).

[9] Formally, the ILA Executive Council dissolved the Committee on International Law and Sea Level Rise in 2024, following the Resolution 01/2024 of the ILA's 81st Conference held in Athens, which recommended this. See: Resolution 01/2024, 81st ILA Conference, Athens, 2024, p. 3.

[10] See: Sydney Declaration of Principles on the Protection of Persons Displaced in the Context of Sea Level Rise, Resolution 6/2018, 78th Conference of the ILA, Annex, 2018, pp. 3-6.

Somewhat later, the topic has been included in the agenda of the ILC, the subsidiary organ of the United Nations General Assembly tasked with the "promotion of the progressive development of international law and its codification".[11] Initially, in 2018, the topic entered the long-term programme of work of the ILC,[12] a fact that was subsequently noted by the General Assembly later the same year.[13] In 2019, at its seventy-first session, the ILC included the topic Sea-level rise in relation to international law into its programme of work,[14] where it remained ever since. The topic was from the very beginning divided into three subtopics, namely the issues related to the law of the sea, issues related to statehood and issues related to the protection of persons affected by sea level rise.[15] Over the course of its considerations

[11] Article 1 Paragraph 1 of the Statute of the International Law Commission, Establishment of an International Law Commission, United Nations General Assembly, A/RES/174(II), 1947, Annex.

[12] Report of the International Law Commission, Seventieth Session, in: General Assembly, Official Records, Supplement No. 10, A/73/10, 2018, pp. 8-9.

[13] Report of the International Law Commission on the Work of its Seventieth Session, United Nations General Assembly Resolution, A/RES/73/265, 2018, Paragraph 9.

[14] Report of the International Law Commission, Seventy-first Session, in: General Assembly, Official Records, Supplement No. 10, A/74/10, 2019, p. 340.

[15] Within the second and third subtopic, namely statehood and protection of persons affected by sea level rise, which are of interest for this work, the Commission proposed the following questions: 1) regarding statehood: "(i) Analysis of the possible legal effects on the continuity or loss of statehood in cases where the territory of island States is completely covered by the sea or becomes uninhabitable; (ii) Legal assessment regarding the reinforcement of islands with barriers or the erection of artificial islands as a means to preserve the statehood of island States against the risk that their land territory might be completely covered by the sea or become uninhabitable; (iii) Analysis of the legal fiction according to which, considering the freezing of baselines and the respect of the boundaries established by treaties, judicial judgments or arbitral awards, it could be admitted the continuity of statehood of the island States due to the maritime territory established as a result of territories under their sovereignty before the latter become completely covered by the sea or uninhabitable; (iv) Assessment of the possible legal effects regarding the transfer — either with or without transfer of sovereignty — of a strip or portion of territory of a third State in favour of an island State whose terrestrial territory is at risk of becoming completely covered by the sea or uninhabitable, in order to maintain its statehood or any form of international legal personality; (v) Analysis of the possible legal effects of a merger between the island developing State whose land territory is at risk of becoming completely covered by the sea or uninhabitable and another State, or of the creation of a federation or association between them regarding the maintenance of statehood or of any form of international legal personality of the island; 2) regarding protection of persons affected by sea level rise: " (i) The extent to which the duty of States to protect the human rights of individuals under their jurisdiction apply to consequences related to sea-level rise; (ii) Whether the principle of international cooperation be applied to help States cope with the adverse effects of sea-level rise on their population; (iii) Whether there are any international legal principles applicable to measures to be taken by States to help their population to remain in situ, despite rising sea levels; (iv) Whether there are any international legal principles applicable to the evacuation, relocation and migration abroad of persons caused by the adverse effects of sea-level rise; (vi) Possible principles applicable to the protection of the human rights of persons displaced internally or that migrate due to the adverse effects of sea-level rise."

of the topic, the rapporteurs appointed by the ILC for the topics produced issues papers, of which second issues paper[16] and its additional paper[17] are of great value for this work and have comprehensively prepared the ground for the expected draft articles on the relation between sea level rise and international law. Thus, the work of ILC so far has confirmed that indeed fundamental topics of international law such as statehood and protection of persons affected by sea level rise are those opened by the developments connected to the phenomenon of sea level rise. Both these subtopics, apart from being international law problems *par excellence*, are also deeply rooted into human rights perspective. While this might not seem obvious, the issues of statehood are inextricably connected to the right that has been repeatedly labelled as the precondition of all other human rights – namely, the right to self-determination of peoples.[18] With the subtopic concerning protection of persons affected by sea level rise, the link to human rights law is also as clear as with statehood – human rights law still seems to be the only body of general international legal rules that remains applicable in all scenarios of relocation that might become reality due to the negative effects of sea level rise on habitability of small island states.[19]

These developments confirm what has been the first and overall motive to engage into this work: sea level rise redefines many basic concepts of international law. Moreover, they confirm that human rights perspective is indeed indispensable in addressing two of the three issues that sea level rise creates for international law. As the ILA's Committee on

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State.Report of the International Law Commission, Seventieth Session, in: General Assembly, Official Records, Supplement No. 10, Annex B, A/73/10, 2018, pp. 328-329.

[16] Galvão Teles, Patrícia, Ruda Santolaria, Juan José, Sea-level Rise in Relation to International Law, Second Issues Paper, A/CN.4/752, 2022.

[17] Galvão Teles, Patrícia, Ruda Santolaria, Juan José, Sea-level Rise in Relation to International Law, Additional Paper to the Second Issues Paper, A/CN.4/774, 2024. See also: Galvão Teles, Patrícia, Ruda Santolaria, Juan José, Sea-level Rise in Relation to International Law, Final Consolidated Report of the Co-Chairs of the Study Group on Sea-level rise in Relation to International Law, A/CN.4/783, 2025.

[18] The Human Rights Committee, in its General Comment no. 12 called the right to self-determination: "an essential condition for the effective guarantee and observance of individual human rights and for the promotion and strengthening of those rights" (General Comment No. 12, Article 1 (Right to Self-determination), Human Rights Committee, 1984, available at: https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/TBSearch.aspx?Lang=en&TreatyID=8&DocTypeID=11 (accessed: 2nd December 2023) Paragraph 1).

[19] Compare: Galvão Teles, Patrícia, Ruda Santolaria, Juan José, Sea-level Rise in Relation to International Law, Additional Paper to the Second Issues Paper, A/CN.4/774, 2024, p. 53.

International Law and Sea Level Rise noted in its Final Report adopted in 2024: "People living in States affected by sea level rise and their governments face complex challenges in the area of human rights. On the one hand, the adverse impacts of sea level rise undermine the enjoyment of human rights, including: the right to life and other civil and political rights; social rights, such as the rights to adequate food, water and health; economic rights; and cultural rights. Effective protection and fulfilment of such rights requires, on the other hand, positive action by the affected States at a time when their capacity to do so may be considerably diminished as a consequence of the loss of habitable territory and associated problems. The fact that affected individuals and communities may be displaced or decide to migrate to other States adds a further dimension to the challenge of implementing measures to respect, protect and fulfil the human rights of those affected."[20] Similarly, Co-Rapporteurs of the ILC on the topic Sea-level rise in relation to international law have observed that "Although sea-level rise does not in itself constitute a violation of human rights, it has the potential to adversely affect the enjoyment of human rights, protected by both international and regional conventions, especially those of already vulnerable persons and groups. Moreover, it has the potential to increase future vulnerability, as relatively safe communities today may become increasingly vulnerable."[21] Following these conclusions and concurring with it, this work adopts the human rights perspective. This is done, firstly, by addressing the issue of legal personality of those states that are mostly endangered by sea level rise through the lenses of the right to self-determination as a human right, the one on which depends realization of all other human rights.[22] Secondly, the perspective is broadened in order to include human rights issues that are likely to arise during the process of planned relocation. As noted in the aforementioned Sydney Declaration of Principles on the Protection of Persons Displaced in the Context of Sea Level Rise: "Planned relocations shall be implemented in ways that safeguard the human rights and dignity of those who move, including the principle

[20] Final Report, ILA Committee on International Law and Sea Level Rise, submitted to the Athens Conference of the ILA, 2024, p. 49.
[21] Galvão Teles, Ruda Santolaria, *op. cit.* (footnote 16), p. 60. See also, generally: Report of the United Nations High Commissioner for Human Rights (OHCHR) on the Relationship between Climate Change and Human Rights, A/HCR/10/61, 2009, pp. 23 *et passim*.
[22] For the understanding of self-determination as a condifion for realization of other human rights, see infra in 3.1.

of family unity, as well as the human rights and dignity of those who receive relocated persons."[23] However, relocations, as will be noted, can also be spontaneous and thus individual, without central planning, which involves even greater dangers for human rights of persons on the move, as they are likely to face inadequate standards of human rights protection, as already evidenced in prominent cases involving individual migrations in which sea level rise was unsuccessfully used as a reason for granting either refugee status or complementary protection under general human rights law.[24] Finally, we are aware that human rights law has its limitations. As noted by scholars, human rights law was not devised to respond to climate change related issues,[25] even less to such extreme cases as disappearance of an entire state and relocation of all of its population due to climate change induced sea level rise.[26] However, principle of human dignity obliges all states and should be an overarching foundation for any policy or legal action that aims to provide solutions for affected states and peoples.[27] That includes unilateral, bilateral, or multilateral international legal efforts taken by both affected small island states and other states.

In order to reach this, there are two research objectives for this work. First objective is to determine how sea level rise will affect legal personality of small island states and whether right to self-determination can function as a guarantor of continuation of legal personality of peoples of small island states even after island states become uninhabitable and submerged. Regarding that, the following research questions are envisaged: 1) Are traditional elements

[23] Paragraph 3 of the Principle 6 of the Sydney Declaration. See: Sydney Declaration of Principles on the Protection of Persons Displaced in the Context of Sea Level Rise, Resolution 6/2018, 78th Conference of the ILA, Annex, 2018, pp. 3-6.

[24] Ioane Teitiota v. New Zealand, Human Rights Committee, CCPR/C/127/D/2728/2016, 2019.

[25] See, for example, Atapattu, Sumudu, The Right to a Healthy Life or the Right to Die Polluted? The Emergence of a Human Right to a Healthy Environment Under International Law, *Tulane Environmental Law Journal*, vol. 16, no. 1, 2002, pp. 67-68, 98.

[26] For example, in 2008, one commentator was of an opinion that "human rights law was not very well suited to address the problems facing populations of sinking island States". See: Open Ended Consultation on the Relationship Between Climate Change and Human Rights, Office of the United Nations High Commissioner for Human Rights, 2008, available at: https://www2.ohchr.org/english/issues/climatechange/docs/SummaryofDiscussions.doc (accessed 13th November 2024), pp. 3-4.

[27] Galvão Teles, Patrícia, Ruda Santolaria, Juan José, Sea-level Rise in Relation to International Law, Additional Paper to the Second Issues Paper, A/CN.4/774, 2024, p. 50. For further explanation of the relationship between human dignity and human rights, see infra in 2.2.

of statehood (territory, permanent population, independent government) only criteria for legal personality of small island states? 2) What adaptation and transformation measures could be taken to safeguard territory and population? 3) What role does the recognition of other states play in continuation of legal personality of small island states? 4) Which concepts could be progressively developed to ensure continuation of legal personality after relocation and submergence?

Second objective is to see how sea level rise will affect other human rights law of the populations of small island states. Regarding this objective, the following research questions are noted: 1) What will be their legal status during and after relocation? 2) Are they covered by the interpretation of existing refugee law instruments, or drafting new ones might be expected? 3) What are international bodies concerned with human rights doing in preparing answers to challenges connected with this new type of possible migratory activities? 4) How will different states respond to possible influx of these migrants, especially if existing international legal instruments provide inadequate?

The planning of the chapters of this work follows a pattern that aims at giving the overview of key legal issues of small island states facing with possible deterritorialization due to sea level rise as a consequence of global phenomenon of anthropogenic climate change. In addition, deeper insight and special attention will be given to the fate of populations of small island states in light of conceptual changes to different aspects of human rights that are envisaged due to sea level rise and their need for relocation in order to continue their life in habitats that are suitable for human habitation, but also in a fashion that respects their civil and political, economic, social and cultural rights.

Before going into the specific problems, Chapter 1 of the dissertation aims to define them and clearly establish who the different players are and which are the key problems that can be identified in law as to treatment of both the states and the populations.

Chapter 2 of the work introduces the human rights perspective and maps the human rights law approaches to sea level rise, while at the same time identifying the sources of international human rights law applicable to the problem.

Chapter 3 is entirely devoted to the problem of self-determination of peoples of small island states, which is inextricably linked with the question of statehood of small island states and legal personality of peoples. This part will also explore how the international community might recognize and respond to the problem of deterritorialization of states due to sea level rise. Of proposed solutions, there are five that this work will critically examine. First of them is finding new territory for deterritorialized states and its populations. As there is no *terra nullius* in the contemporary world, this solution for certain includes cooperation between the small island state and other states that might cede or lease land to small island state and its population. This part aims to explore the possibilities for such arrangements and, more importantly, whether this could help the small island states to preserve their statehood in the situation in which their previous territory is substituted for a part of land that is belonging to another state and what would be the legal status of such a piece of territory in any given situation. Second solution is rooted in the generally consensually accepted existence of a few *sui generis* entities in international law (possibly the best known are the Holy See and the Sovereign Military Order of Malta). In this solution, it is envisaged that the small island states could (similarly to the position of the pope in traditional law after the loss of Papal State and the Order after the loss of temporal power) be treated as international legal persons even though they lost the territory over which they previously ruled. Third solution is the only one that could keep small island states and their populations *in place*, and that is the preservance of territory through works. Even if this solution would be technically possible, it would be questionable from a legal standpoint. Fourth solution is to create completely novel concept of legal personality that would be specifically tailored to meet the needs of small island states. Fifth and final solution, extinction of sovereignty, is the least feasible for the small island states and self-determination of its peoples, but may become the case if international law fails to adapt to the novelty of losing the territory due to natural processes and must therefore be explored.

Chapter 4 of the thesis is entirely devoted to the human rights concerns in the process of relocation. From a human rights perspective, the question whether a small island state will continue to exist after its deterritorialization is a key to an understanding of the legal position

of the population during and after relocation, foremost in relation to the right to self-determination as described in Chapter 3, but also right to nationality that will in many regards determine their status. Moreover, the population of small island states, although comparatively small in numbers, will be more affected, especially when taking into account that their states, as primary guarantees of their rights, might be extinguished or at least significantly altered in their powers. This part therefore aims to give an overview of which and whose rights will be affected by the sea level rise and which entities will have to alter their views and policies towards respecting and promoting the human rights. Moreover, specific subchapters are devised to function as in-depth analysis of some of the rights that will be especially affected and regimes that might provide international legal remedies (nationality and other political rights, especially in the light of the process of relocation). Similarly to the situation with the statehood of small island states, legal concepts and practice will have to adapt to accommodate the respect for previously analysed human rights in the environment changed by the sea level rise. The three solutions analysed are recognizing the nationality of deterritorialized small island states (although that also raises the question of quality and universal recognition of such a nationality), environmentally displaced persons as a separate legal concept and position in analogy to other, conventional types of displacement (refugees, stateless persons, complementary protection against *refoulement* under general international human rights law).

In Chapter 1, we shall first outline the general context of sea level rise and the legal problems and dilemmas it causes.

Chapter 1 – **Anthropogenic Climate Change, Sea Level Rise and Peoples of Small Island States**

Multi-faceted legal questions that sea level rise opened are a part of the wider interaction between law and climate change. This chapter therefore opens with a discussion of the relevant parts of this wast complex of interconnected legal questions by naming those relevant for the topic of sea level rise. Among these, anthropogenic nature of climate change seems especially relevant in the human rights context. Next, this chapter proceeds with the

analysis of how sea level rise poses an existential threat for small island states, which is in turn connected to self-determination and wider human rights legal narratives.

1.1. **Climate change as a distinctive crisis of contemporary international legal system and its relation to sea level rise**

It is not an easy task to define climate change, especially in legal terms, where definitions have to be precise and clear in order to be of practical value in application of the law. UNFCCC, concluded back in 1992, gave a sort of over-encompassing, broad definition of climate change being "a change of climate which is attributed directly or indirectly to human activity that alters the composition of the global atmosphere and which is in addition to natural climate variability observed over comparable time periods".[28] Similarly, the Intergovernmental Panel on Climate Change (hereinafter IPCC) uses a definition that undstands climate change as "a change in the state of the climate that can be identified (e.g., by using statistical tests) by changes in the mean and/or the variability of its properties and that persists for an extended period, typically decades or longer".[29] Although these definitions do not resolve all the issues of determining which phenomena might and which might not be regarded as "climate change", they do clearly define climate change as a set of processes that can be directly or indirectly attributed to human activity, which clearly defines them as anthropogenic.

Conceptualizing climate change as an anthropogenic phenomenon that will redefine many aspects of human life is not new. Back in the seventies in literature,[30] and in the eighties on the scene of international relations,[31] the issue of climate change has been thoroughly

[28] Article 1, Paragraph 2 of the United Nations Framework Convention on Climate Change (see: United Nations Framework Convention on Climate Change, 1992, *United Nations Treaty Series*, vol. 1771, no. 20822, 1994).
[29] Climate Change 2023, Synthesis Report, Intergovernmental Panel on Climate Change, 2023, Annex I., p. 122.
[30] In the context of emerging discussions about the relations between human activity and changes in the environment during the seventies, it is interesting to mention how human rights perspective emerged very early and was consistently considered as one of those that should be a key to finding a common interest in promoting international cooperation. Good overview of these processes' can be found in: Gormley, W. Paul, *Human Rights and Environment: The Need for International Co-Operation*, Leiden, 1976, pp. 6-18.
[31] Recognizing climate change as a serious and important problem that should be discussed on the highest levels of international relations was a gradual process. For example, in 1987, the United Nations General Assembly

discussed as a phenomenon that is not induced solely by nature, but that human activity has a strong impact on what is happening and how global warming effects changes in climate across the world. Resorting back to the meaning of the notion "anthropogenic", it can be observed that this means that something, some consequence, is humanly induced.[32] Therefore, anthropogenic is opposite to natural, to something that is induced by the nature without the impact of human activities. In that meaning, the notion of Anthropocene saw its debut into the climate change discourse at the start of the 21st century within the realm of natural sciences.[33] In line with that reasoning it has been proposed to reconsider the

adopted a series of resolutions based in part on the report of the World Commission on Environment and Development (the Bruntland Commission, as it was known according to the name of its president). These are the resolutions: A/42/187, which took note of the "Our Common Future" Report, A/42/184, which advocated for enhancing international cooperation in the field of environment, A/42/185, which established the periodical sessions of the Governing Council of the United Nations Environmental Programme (see: International Cooperation in the Field of Environment, United Nations General Assembly, A/42/184, 1987; Bienal Cycle of Sessions of the Governing Council of the United Nations Environment Programme, United Nations General Assembly, A/42/185, 1987; Report of the World Commission on Environment and Development: Resolution, A/42/187, United Nations General Assembly, 1987). In addition to acting as a catalyst to the General Assembly's attention, the Bruntland Report specifically included sea level rise to its mapping of threats which global warming causes to the international peace and security. The Bruntland Commission, *inter alia*, specifically referring to the threat of sea level rise, wrote that "Sea levels may rise during the first half of the next century enough to radically change the boundaries between coastal nations and to change the shapes and strategic importance of international waterways - effects both likely to increase international tensions. The climatic and sea-level changes are also likely to disrupt the breeding grounds of economically important fish species. Slowing, or adapting to, global warming is becoming an essential task to reduce the risks of conflict." (Report of the World Comission on Environment and Development, A/42/427, 1987, p. 290). A year later, another seminal moment at the General Aseembly came in. In 1988, the UN General Assembly adopted Resolution A/43/53 in which it, using rather strong and direct language climate change as a "common concern of mankind" and endorsed the establishment of the IPCC to provide scientific expertise about its progress in order to have data that will help states to mitigate it (see: Protection of Global Climate for Present and Future Generations of Mankind, United Nations General Assembly, A/43/53, 1988).

[32] For a detailed, yet instructive explanation of difference between natural and anthropogenic environmental problems, see: Lerche, Ian, Glaesser, Walter*, Environmental Risk Assessment.*, Berlin-Heidelberg, 2006, pp. 1-20.

[33] In 2000, Paul J. Crutzen and Eugene F. Stoermer wrote a rather short essay in IGBP Global Change News, in which they wrote that "Considering these and many other major and still growing impacts of human activities on earth and atmosphere, and at all, including global, scales, it seems to us more than appropriate to emphasize the central role of mankind in geology and ecology by proposing to use the term "Anthropocene" for the current geological epoch" (Crutzen, Paul J., Stoermer, Eugene F., The Anthropocene, *IGBP Newsletter*, vol. 41, 2000, pp. 17-18.). This has been followed by*, inter alia*, Stephen R. Palumbi and another piece by Paul J. Crutzen in which the profound effects of human interfierence with the geological processes of the Earth have been further highlighted (see: Palumbi, Stephen R., Humans as the World's Greatest Evolutionary Force, *Science*, vol. 293, no. 5536, 2001, pp. 1786-1790; Crutzen, Paul J., Geology of Mankind, *Nature*, vol. 415, no. 6867, 2002, p. 23).

geological epoch the Earth is currently going through.[34] The Holocene has been designated as an official geological epoch for more than 11 000 years and provided the human civilisation with environmental stability.[35] On the contrary, Anthropocene is an era of "change, uncertainty and, probably, considerable instability in the Earth system".[36] This meaning of the word is generally accepted, but what is not accepted universally is the link between climate change and human activities. In the Anthropocene debate, this has mostly been reflected in the different views as to when the Anthropocene began and relaced Holocene. Thus, one proposal went on to put the beginning of Anthropocene as early as the introduction of organized agriculture and cultivation of land some 5000 to 8000 years ago, which contributed to release of additional amounts of carbon dioxide and menthane into the atmosphere and thus stopped the formation of another Ice Age.[37] Another proposal defined the Industrial Revolution of the 18th and early 19th centuries as a decisive tipping point for the Anthopocene, a point in time when human activites and economic development began to decisevely rely on fossil fuels.[38] However, the most common proposal determined the beginning of Anthropocene in the period immediately following the Second World War known under the designation of "Great Acceleration", characterized by the exponential economic growth and rapid expansion of the use of nuclear energy both for civil and military purposes.[39]

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[34]See arguments in: Zalasiewicz, Jan, Williams, Mark, Smith, Alan, Barry, Tiffany L., Coe, Angela L., Bown, Paul R., Brenchley, Patrick, Cantrill, David, Gale, Andrew, Gibbard, Philip, Gregory, F. John, Hounslow, Mark W., Kerr, Andrew C., Pearson, Paul, Knox, Robert, Powell, John, Waters, Collin, Marshall, John, Oates, Michael, Rawson, Peter, Stone, Philip, Are we now living in the Anthropocene?, *GSA Today*, vol. 18, no. 2, 2008, pp. 4-7.

[35] Vidas, Davor, Zalasiewicz, Jan, Williams, Mark, What is Anthropocene – and Why it is Relevant for International Law, *Yearbook of International Environmental Law*, vol. 25, no. 1, 2014, quoted in: Torres Campubí, Alejandra, *Statehood under Water: Challenges of Sea-Level Rise to the Continuity of Pacific Island States*, Leiden/Boston, 2016, p. 9.

[36] *Ibid.*

[37] Rudiman, William F., The Anthropocene, *Annual Review of Earth and Palnetary Sciences*, vol. 41, 2013, quoted in: *ibid.*, p. 11.

[38] Waters, Collin N., Zalasiewicz, Jan A., Williams, Mark, Ellis, Michael A., Snelling, Andrea M., A Stratigraphical Basis for the Anthropocene? in: Waters, Collin N., Zalasiewicz, Jan A., Williams, Mark, Ellis, Michael A., Snelling, Andrea M (eds.), A Stratigraphical Basis for the Anthropocene, *Special Publications of the Geological Society of London*, vol. 396, 2014, pp. 9 *et passim*.

[39] Torres Camprubí, *op. cit.* (footnote 35), p. 11.

In response to various academic proposals and a lively debate on Anthropocene as a purpoted new geological era, The International Commission on Stratigraphy[40], formally took up the question of inclusion of Anthropocene into the Geological Time Scale. In 2009, the Subcomission on Quarternary Stratigraphy, one of the subcomissions of the International Commission on Stratigraphy, established the Anthropocene Working Group, with the specific purpose "to determine whether this was sufficiently compelling for a new stratigraphic unit to be included in the Geological Time Scale ".[41] After years of deliberations, the formal proposal had been put forward to the International Commission on Stratigraphy in 2023. The proposal advocated for the formal inclusion of Anthropocene in the Geological Time Scale. The Anthropocene Working Group sided with the proposal that the starting point of Antropocene should be placed in the middle part of the 20th Century, the time of rapid economic growth, sometimes described under the notion of "Great Acceleration".[42] The proposal had been followed by the argumentation described by the Antropocene Working Group as "a wide array of stratigraphic proxy signals that allow an Anthropocene chronostratigraphic unit to be precisely delimited and widely identified and correlated".[43] Based on that, the Anthropocene Working Group proposed that Antropocene should be included as a new, distinct era into the Geological Time Scale. The decision of the International Commission on Stratigraphy was, however, decisively against formally including Anthropocene in the Geological Time Scale. While this can be viewed as a setback for those that advocated the inclusion of Anthropocene into the Geological Time Scale for

[40] According to its Statutes, the International Commission on Stratigraphy is "a body of expert stratigraphers founded for the purpose of promoting and coordinating long-term international cooperation and establishing and maintaining standards in stratigraphy. "(Statutes of the International Commission on Stratigraphy, Article 2). Among its principal objectives is the "establishment, publication and revision of the ICS International Chronostratigraphic Chart which is the standard, reference global Geological Time Scale " (Statutes of the International Commission on Stratigraphy, Article 2, Paragraph a). See: Statutes of the International Commission on Stratigraphy, available at: https://stratigraphy.org/statutes (accessed: 26th July 2024).

[41] The Anthropocene, available at: https://www.iugs.org/_files/ugd/f1fc07_40d1a7ed58de458c9f8f24de5e739663.pdf?index=true (accessed: 27th July 2024).

[42] The Anthropocene Epoch and Crawfordian Age: proposals by the Anthropocene Working Group, Executive Summary submitted to the ICS Subcommission on Quaternary Stratigraphy, available at: https://eartharxiv.org/repository/view/6853/, p. 3.

[43] *Ibid.*

over two decades, there are also different opinions, which rather determine that the rejection can actually be seen as benefiting the environmental cause.[44]

Whatever might be the final outcome of Antropocene debate on a larger scale, the imlications of human effects on changing climate has profound influences on international law and international relations. Therefore, anthropogenic nature of climate change, and sea level rise as a part of it, is one of the key elements of legal understanding and dealing with these processes. Law reacts to both the natural and humanly induced phenomena. But reactions are overly different. If something is of natural origin, law can only accept it and find legal solutions that will provide suitable adaptation for the phenomenon. However, if something is anthropogenic, it means that it has causes in human activity, and that there is, generally speaking, room for constructing responsibility to react to these circumstances by those who caused it. The notion of anthropogenic nature of climate change so becomes one of the crucial factors in understanding legal paths of dealing with it and its effects, one of which is the sea level rise. The relation between Anthropocene and international law has been the topic of two projects led by the Fridtjof Nansen Institute, which created contures of the links between the two, on the outset, highly divergent concepts. In projects named "International Law for the Anthropocene Epoch?"[45] and "Climate Change and Sea Level Rise in the Anthropocene: Challenges for International Law in the 21st Century"[46], the Fridtjof Nansen Institute undertook a thorough survey of the interferences between the concept of Anthropocene and various international legal issues. The projects identified sea level rise to be "among the key factors prompting a thorough re-examination of several fundamental aspects of international

[44] See, for example: Boivin, Nicole, Braje, Todd, Rick, Torben, New opportunities emerge as the Anthropocene epoch vote falls short, *Nature, Ecology & Evolution*, vol. 8, 2024, pp. 844-845.

[45] For information about the project, see: International Law for an Anthropocene Epoch?, available at: https://www.fni.no/projects/international-law-for-an-anthropocene-epoch (accessed: 18th June 2024). The project period of this project was from 2011 to 2015.

[46] Climate Change and Sea Level Rise in the Anthropocene: Challenges for International Law in the 21st Century, available at: https://www.fni.no/projects/climate-change-and-sea-level-rise-in-the-anthropocene-challenges-for-international-law-in-the-21st-century (accessed: 18th June 2024). The project period of this project was forn 2014 to 2019.

law“ [47] based specifically, among others, on the issues of small island states' legal personality and status of its peoples which will be prompted to migrate.[48]

The IPCC has, especially during the course of the 21st century, made itself into one of the primary points of reference for climate change data assessment for various scientific researchers, governmental and non-governmental institutions.[49] Main task given by the General Assembly to the IPCC when it was established was to provide member states with the information about the state of knowledge of the science of climate change, social and economic impacts of climate change and global warming and to provide scientific assessment and basis for possible response strategies to delay, limit or mitigate the impact of adverse climate change, to identify and possibly strengthen existing legal instruments in this field, and, finally, to propose elements for inclusion into progressive development of international law in this field.[50] In doing this, especially concerning the providing scientific assessment of climate change and its effects, IPCC is producing periodical reports on vast variety of issues connected with climate change. While IPCC reports had been questioned and criticised, they have been considered to reflect the best scientific knowledge about the various phenomena

[47] Vidas, Davor, Sea-Level Rise and International Law: At the Convergence of Two Epochs, *Climate Law*, vol. 4, no. 1-2, 2014, p. 81.

[48] *Ibid.*, pp. 77-80; McAdam, Jane, Shoud I Stay or Should I Go? available at: https://lsj.com.au/articles/should-i-stay-or-should-i-go/ (accessed: 20th June 2024).

[49] During more than thirty years that have passed since the endorsement by the General Assembly and subsequent activities of the World Meteorological Organization and United Nations Development Fund that provided the initial resources for the IPCC, it positioned itself as an expert point of reference primarily by its Assessment Reports, which are produced in clearly defined cycles. Instructive overview of the most important structural and procedural characteristics of the IPCC, that remained basically unchanged, can be found in: Agrawala, Shardul, Structural and Process History of the Intergovernmental Panel on Climate Change, *Climatic Change*, vol. 39, 1998, pp. 621-642.

[50] This is explicitly mentioned in the Resolution A/43/53 of the United Nations General Assembly when stating that one of the tasks of the IPCC should be to provide “comprehensive review and recommendations with respect to (…) Elements for inclusion in a possible future international convention on climate.” (Protection of Global Climate for Present and Future Generations of Mankind, United Nations General Assembly, A/43/53, 1988, Paragraph 10, Subparagraph e).

connected to climate change at the time of their issue.[51] One of these is the sea level rise, an issue that is on agenda of the IPCC from the very beginning of its work.[52]

Special Report on the Ocean and Cryosphere in a Changing Climate, approved by the IPCC on its 51st Session in Monaco in 2019 and afterwards published, is a vast document touching upon many issues of the effects of climate change and ocean development. Chapter 4 of this Report is entirely devoted to implications of sea level rise on communities, hence its title "Sea Level Rise and Implications for Low-Lying Islands, Coasts and Communities". In this part of the Report, projections are given for the course of sea level rise during the 21st Century. The authors admit that there is a lot of uncertainty about the actual sea level rise projections and that they can vary significantly due to a vast variety of factors, from the physical geography of different parts of the world to, of course, the actual number of various contributions to the overall climate change processes by the states and non-state actors across the world.[53] Although with the aforementioned reservations, the authors conclude that there it is very likely that sea level rise will steadily continue to happen on an accelerated rate of yearly rise, which will create difficulties in many coastal and low-lying regions across the world.[54] Sea level rise is a phenomenon that has many consequences, one of the most important being melting down of glaciers, but also other factors, like thermal expansion, are observed that play a significant part in sea level rise.[55] Incitement of all of these is, with high certainty, according to the IPCC, attributed to human activity, what makes them, in line with the aforementioned definition, anthropogenic. Numbers given suggest that global mean sea

[51] Voigt, Christina, State Responsibility for Climate Change Damages, *Nordic Journal of International Law*, vol. 77, no. 1-2, 2008, p. 12.

[52] Sea level rise has been one of the impacts of climate change discussed from the very First Assessment Report, produced back in 1990, which served as one of the key documents in drafting process for the UN Framework Convention on Climate Change. For example, the Summary, prepared for policymakers concurrently with the First (and every subsequent) assessment report clearly states that "The projected global warming will cause sea-level rise…", and gives assessments regarding the progress of it. See: Policymaker Summary of Working Group II (Potential Impacts of Climate Change), Intergovenmental Panel for Climate Change, 1990.

[53] *IPCC Special Report on the Ocean and Cryosphere in a Changing Climate*, Intergovernmental Panel for Climate Change, 2019, pp. 323, 350 *et passim*.

[54] *Ibid.*

[55] *Ibid.*

level will, by 2100, rise between 0.43 m and 0.84 m, with significant regional variations.[56] This rise will have serious effects in different regions and parts of the world, one of which that is especially mentioned and to which specific measures for possible adaptation are addressed are urban atolls. In fact, unrelated to the specific issues of small island state, but relevant as a case in point, reports of low-lying islands inundated due to the rising sea levels have already started to emerge. For example, islands of Tebua Tarawa[57], Te Abanuea (Bikeman)[58], Suribhananga[59] and Locacharra[60] are reported to have already wanished under rising sea levels. Particular small island states, due to their geographical configuration, fall into this category. Due to the extremely low elevation, and relatively high population density (although the absolute numbers of population inhabiting these islands is rather small), risks connected to them are of special relevance, especially taking into account that their basic

[56] *Ibid.*, Similar numbers can also be found in the Executive summary to policymakers, a supplement document to the Report which summarizes most important points for policymakers, those who will direct practice of states in constructing answers to the problems of sea level rise. Some projections give figures that are slightly different, for example, the Sixth Assessment Report projected 0.28 to 1.01 m and the Fifth Assessment Report of the IPCC projected 0.26 to 0.98 m, but all projections show a steady and clear trend of constant sea level rise. Projections are, of course, relative to scale on which global warming will be happening and could be higher or lower. See: 2021: Ocean, Cryosphere and Sea Level Change. In *Climate Change 2021: The Physical Science Basis. Contribution of Working Group I to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change*, Intergovenrmental Panel for Climate Change, 2021, pp. 1211-1326; *Climate Change 2013: The Physical Science Basis. Contribution of Working Group I to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change*, Intergovernmental Panel fot Climate Change, 2013, p. 1182.

[57] Tebua Tarawa was an island that formed part of the Tarawa Atoll lagoon in the Republic of Kiribati. In 1999, it disappeared under the sea, purpotedly due to rising sea levels. See: Kirby, Alex, Islands Disappear under rising seas, available at: http://news.bbc.co.uk/2/hi/science/nature/368892.stm (accessed 20th June 2024).

[58] Te Abaunea (also konwn under the name Bikeman) was an island in the Tarawa Atoll lagoon which disappeared in 1999 along with the Tebua Tarawa. See: *Ibid.* While the exact combination of reasons that contributed to the "disappearance" of the islands of Tebua Tarawa and Abaunea have been questioned by various scientific exemainations, sea level rise is cited as one of the relevant contributing factors. See: Kempf, Wolfgang, Representation as Disaster: Mapping Islands, Climate Change, and Displacement in Oceania, *Pacific Studies*, vol. 38, no. 1-2, 2015, pp. 207-210.

[59] Suribhananga was an island in the Sunderbans mangrove forest situated in the Bay of Bengal, which adminstratively forms part of the Indian State of West Bengal See: Regional Training Manual on Disaster Risk Reduction for Coastal Zone Managers, Asian Disaster Preparedness Center, 2009, p. 43.

[60] Like Suribhananga, Locacharra was an island in the Sunderbans mangrove forest situated in the Bay of Bengal, which adminstratively forms part of the Indian State of West Bengal. While the Governement of West Bengal claimed that disappearance of the islands of Suribhananga and Locacharra is a result of variations in ocean currents and therefore cannot be attribruted to climate change, scientific investigations reached a different conclusion See: *ibid*.

habitability will be at risk, which is a clear and imminent danger to which the Report is pointing to.[61]

The Special Report on the Ocean and Cryosphere in a Changing Climate also devotes sustantive subchapters to mitigation and adaptation strategies for coping with the effects of sea level rise.[62] Before that, there is a thoughtful identification of likely risks and effects to different ecological factors, from agriculture to social cohesion and indigenous identity and transgenerational pass of knowledge.[63] It is envisaged how not only physical submergence of territory, as the immediate consequence of sea level rise is at stake, but that also many parts of the life that is interconnected with this exact territory would be affected. Among such practices, traditional fisheries and agriculture that provide for a significant part of identity of small island nations are especially vulnerable.[64] Also, social cohesion and capital of different endangered groups is defined as one of the endangered values, especially taking into account underdeveloped nations and communities.[65] All this clearly points out to a very large, over-encompassing societal risks connected to the sea level rise. In legal terms, many of these risks point to human rights concepts that are made to protect them, but some also to other parts of international law that might have to be reconsidered or, in some cases, even adapted if international community wants to properly deal with effects of sea level rise that are, as IPCC rightly and with detailed insight points out, much larger than it might seem.

Moreover, the IPCC has, in many of its documents apart from the one cited above that is entirely and specifically devoted to ocean development (including sea level rise), mentioned and discussed these issues and adaptation to sea level rise risks connected to climate change. The primary body of work of the IPCC are the so-called Assessment Reports, that are

[61] One whole chapter of the cited part of the Special Report on the Ocean and Cryosphere in a Changing Climate, titled Exposure, Vulnerability, Impacts and Risk Related to Sea Level Rise (chapter 4.3) is devoted to it.
[62] See Subchapter 4.4. of the Special Report on the Ocean and Cryosphere in a Changing Climate, titled "Responding to Sea Level Rise".
[63] See Subchapters 4.3.2. and 4.3.3. of the Special Report on the Ocean and Cryosphere in a Changing Climate.
[64] Report identifies this risk as loss of indigenous knowledge and local knowledge and devotes specific subparagraph to it, see: *Ibid.*, Subparagraph 4.3.4.2.2.
[65] Similarly, risk of losing social capital is identified as a specific risk arising from effects of sea level rise on small island communities and their way of life, see: *Ibid.*, Subparagraph 4.3.4.2.3.

periodically published (the last Assessment Report was published in the 2021-2022 assessment cycle, and the previous had been published in assessment cycle 2013-2014). In these reports sea level rise is listed and discussed, among other threats to nature and human life connected to climate change. Sixth cycle of the assessment procedure of the IPCC, finished with a Report, various parts of which have been published over the course of 2021, 2022 and 2023. Regarding this, it can be observed that already the guidance points to the chapters for the part of the Assessment Report that have formulated a working agenda for the Working Group II[66] contained sea level rise as one of the challenges that will affect regions across the world.[67] Moreover, wording under which sea level rise is mentioned also contains observing how it will affect development, which might serve as an important notice to how sea level rise is not viewed only as a physical phenomenon, but also a societal one.[68] This shows how the IPCC is giving constant attention to the problem of sea level rise in assessment and responding to the challenges connected to climate change.

The Sixth Assessment report indeed made numerous references on sea level rise. For example, the Working Group II's contribution to the Report, titled Climate Change 2022: Impacts, Adaptation and Vulnerability contains a whole chapter devoted to small islands. In it, there are many adaptation measures considered, including measures in-situ and those migration-based.[69]

Similarly, previous Assessment Report, that was published in 2014 as a concluding document of the fifth cycle, also dealt with the issues connected to the sea level rise. Part A, Chapter 5 of the part of the Report prepared by the Working Group II specifically addressed sea level rise and possible response and adaptation strategies.[70] In this Part, there are, apart from the

[66] The IPCC works through its working groups, composed of experts in various scientific fields related to climate change. The Working Group II of the IPCC main task is to assess vulnerabilities and explore possibilities for adaptation to effects of climate change. For the information on the Working Group II's mandate under the IPCC structure, see, generally: Working Group II, available at: https://www.ipcc.ch/working-group/wg2/ (accessed; 21st December 2025).

[67] Chapter Outline of the Working Group II Contribution to the IPCC Sixth Assessment Report, Intergovernmental Panel for Climate Change, 2018.

[68] *Ibid.*

[69] 2022: Small Islands, in: *Climate Change 2022: Impacts, Adaptation and Vulnerability*. Contribution of Working Group II to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change, 2022.

[70] *Ibid.*, Chapter 5.

estimations of mean sea level rise, a list of anthropogenic factors that significantly contribute to this process. The first and foremost, by far most important anthropogenic factor contributing to the sea level rise is global warming induced by the greenhouse gasses emissions. Therefore, the whole Chapter is structured accordingly, with different projections given regarding situations in which there is a low, medium or high level of these emissions. As far as other anthropogenic factors contributing to the sea level rise are concerned, it is acknowledged that they vary across regions and parts of the world, but the link between sea level rise and human activity is clearly and definitely established.

Over the years of its existence, as it has already been mentioned, the IPCC has, completely in line with its mandate established by the General Assembly, made itself into the primary body of scientific analysis and assessment of climate change processes. But there are also other international organisms that deal with the assessing of the problem of climate change, some of them intentionally framing it into the legal and, more specifically, human rights language. In these reports, sea level rise as a part of climate change complex plays a significant role.

In framing climate change effects into the legal language one of the more comprehensive works is that of the World Bank. Concerned with how climate change interacts with human rights and economic development, the World Bank produced a report titled Human Rights and Climate Change: A Review of the International Legal Dimensions. This report, prepared and published back in 2011 and principally authored by Siobhan McInernay-Lankford, Mac Darrow and Lavanya Ramajani, is structured quite differently from the documents produced by the IPCC, although it concerns the same topics, at least some of them. First and foremost, it is framed as a document that aims to link relevant body of law in the field of international human rights protection and threats stemming from climate change that are, basically, the same ones detected by the IPCC. In doing this, again, sea level rise cannot be overlooked.[71]

[71] The Report, finalized in 2011, is a comprehensive document, covering many of the aspects of anthropogenic climate change effects on human rights. It is especially worth mentioning in this chapter because it links data and expertise from many scientific areas, including natural sciences and sociology with a sound legal approach framed through relevant human rights body of law and legal concepts, therefore being a particularly useful tool and source. See: McInernay-Lankford, Siobhan, Darrow, Mac and Ramajani, Lavanya, *Human Rights and*

In the report, problem of sea level rise, which is detected as one of the challenges to human rights protection that comes as a part of climate change complex, is mentioned three times (excluding footnotes), every time in different context. Two of these are especially worth mentioning in depth, because they directly involve interactions between sea level rise, small island states and human rights. First one is, actually, imbedded into a quote from an earlier report by the Office of the High Commissioner for Refugees[72] that, in turn, in itself builds upon observations of the IPCC and United Nations Development Programme. Therefore, mentioning of the sea level rise as a concrete threat to a concrete human right is done through raising the question of ensuring the right to adequate housing and going as far as discussing the possibility of a new legal instrument that should specifically tackle the problem of the human rights law reaction to the sea level rise displacement. What is more important and original in this mention is the context in which it is placed. Unlike the IPCC reports, that primarily function as a neutral, scientific fact-presenting reports that are not dealing with legal aspects of climate change, the World Bank Report does exactly that, integrating natural sciences, social dimensions and legal issues. Based on this conceptual premises, this report gives concrete examples and follows up to diplomatic and other efforts of states that are endangered by the sea level rise and efforts in legal science to deal with these issues.

As it was already mentioned at the beginning of this chapter, the whole body of work of the IPCC clearly establishes anthropogenic nature of climate change processes. As the mentioned World Bank Report clearly states, citing other documents, the focus of whole body of human rights law is on the human welfare.[73] From this stem the basic objective of human rights law, and that is to respect the dignity of a human person. Climate change is, as it is already mentioned, and will be explained further, a threat to this basic value in different aspects. Moreover, climate change processes, sea level rise among them, are induced, or at least

Climate Change: A Review of the International Legal Dimensions, Washington D. C., 2011, pp. 1-10, 17-18. For a newer World Bank report tackling specific issues of sea level rise in the Pacific, see also: Freestone, David, Çiçek, Duygu, *Legal Dimensions of Sea Level Rise: Pacific Perspectives*, World Bank Group, Washington D. C., 2021, especially pp. 58-61 briefly addressing statehood and population movement issues, while the report is mostly devoted to law of the sea problems.

[72] Report on the Right to Adequate Housing, Fact Sheet no, 21, rev. 1, Office of the High Commissioner for Human Rights, 2009.

[73] McInernay-Lankford *et al.*, *op. cit.* (footnote 71), p. 56.

facilitated, by human activities, primarily those in economic sphere. Therefore, human rights, which were, at its foundation, conceived as a tool for prevention of humanly induced (therefore, anthropogenic, albeit in a completely different meaning of the term as opposed to its usage in climate change-related discourse) harms to human dignity should address its impacts .[74]

Human rights-based approach is a concept inaugurated by the United Nations Secretariat in order to assess and address human rights in different contexts.[75] Originally, it has been devised to assess vulnerabilities of communities in the context of development and was therefore explained by the various United Nations specialized agencies and programmes that agreed to implement it to mean as follows: "a conceptual framework for the process of human development that is normatively based on international human rights standards and operationally directed to promoting and protecting human rights. It seeks to analyse inequalities which lie at the heart of development problems and redress discriminatory practices and unjust distributions of power that impede development progress and often result in groups of people being left behind".[76] With the rise of awareness on the impact of climate

[74] The driving theoretical and practical motivation behind conceptualizing human rights, to put it very briefly, can be found in preventing what have been historically some of the worst activities of humans against humans, which makes these harms (wars, crimes, degrading treatment of various kinds), also anthropogenic in nature, but it also somewhat overlooks processes that are induced by humans, but not directly inflicted from humans on other human beings. Various implications of this relation in the specific context of sea level rise constitute the main topic of this work. For a discussion of similar conceptual questions, see, for example: Woods, Kerri, *Human Rights and Environmental Sustainability*, Cheltenham-Northampton, 2010, pp. 26-33.

[75] The human rights-based approach originated in the appeal of the then United Nations Secretary-general, Kofi Annan's call to all United Nations agencies to "enhance the human rights programme and integrate it into the broad range of the Organization's activities, including in the development and humanitarian areas". The call was part of the proposed comprehensive reform of the United Nations, delivered in form of the Secretary-General's report in 1997. At the same time, the Secretary-general envisaged that the Office of the United Nations High Commissioner for Human Rights would be the institution monitoring the process of implementation of these proposals. See: Renewing the United Nations: a programme for reform, Report of the Secretary-general, A/51/950, 1997, pp. 63-66. This had been followed by various United Nations specialized agencies and programmes adopting their agendas for integrating the human rights-based approach into their work. The process culminated in 2003, when United Nations agencies adopted the document named The Human Rights Based Approach to Development Cooperation Towards a Common Understanding Among UN Agencies, which specifically named various actions aimed at implementing the human rights-based approach. See: The Human Rights Based Approach to Development Cooperation Towards a Common Understanding Among UN Agencies, available at: https://unsdg.un.org/resources/human-rights-based-approach-development-cooperation-towards-common-understanding-among-un (accessed: 21st December 2025).

[76] Human Rights-Based Approach, available at: https://unsdg.un.org/2030-agenda/universal-values/human-rights-based-approach (accessed: 26th July 2024).

change to vulnerabilities of persons and the effective protection of their human rights, the human rights-based approach began to be progressively applied to climate change, with an aim to "guide policies and measures of climate change mitigation and adaptation".[77]

After years of it being concept promoted by several independent commissions and the United Nations Development Programme,[78] in 2012, following endorsments at the 2005 World Summit,[79] the United Nations General Assembly accepted the definition of human security. Defining human security as an approach "to assist member States in identifying and addressing widespread and cross-cuting challenges to the survival, livelihood and dignity of their people", the General Assembly agreed that it should be "people-centered, comprehensive, context specific and prevention-oriented".[80] At the same time, the United Nations General Assembly warned that human security is an approach that must not create new rights or impose new obligations on states instead of existing.[81] The human security discourse has consistently been criticised resulted as focused on securitization of human rights issues, while at the same time being too weak and too broad in scope to achieve any meaningful results for peoples on the ground.[82] Even with such a broad scope as to encopass issues ranging from health to use of landmines, climate change threats to human security have not been in the foreground of the human security discourse when it emerged as an approach officially endorsed by the UN in the second decade of the 21st Century.[83] This has,

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[77] Applying a Human Rights-Based Approach to Climate Change Negotiations, Policies and Measures, Office of the High Commissioner for Human Rights, Information Note, 2010.

[78] For the history of human security discourse and how it became gradually adopted by the independent commissions and the United Nations Development Programme broadened to a wide variety of issues, including climate change, see: Bajipai, Kanti, The Idea of Human Security, *International Studies*, vol. 40. no. 3, 2003, pp. 196-204.

[79] See: 2005 World Security Outcome, Unted Nations General Assembly, A/RES/60/1, 2005.

[80] See: Follow-up to paragraph 143 on human security of the 2005 World Summit Outcome, United Nations General Assembly, A/RES/66/290, 2012.

[81] *Ibid.*

[82] For summaries of various critiques of human security approach, see: Newman, Edward, Human security: Reconciling Critical Aspirations with Political Realities, *British Journal of Criminology*, vol. 56, no. 6, 2016, pp. 1174-1177, also: Fukuda-Parr, Saiko, Messineo, Carol, Human Security, in: Brown, Graham K., Sturt, Charles, *Elgar Handbook of Civil War and Fragile States*, 2014, pp. 21-38.

[83] Compare: Bartnett, Jon, Matthiew, Richard A., O'Brien, Karen L., Global Environmental Change and Human Security: An Introduction, in: Matthiew, Richard A., Bartnett, Jon, McDonald, Brian, O'Brien, Karen L., *Global Environmental Change and Human Security*, Cambridge/London, 2010, p. 15.

however, started to change, with the UN Secretary-General recognizing climate change as one of the priorities of human security discourse in his 2024 Report.[84] While withstanding critiques,[85] the human security discourse has been described as an effort not "to securitize human rights issues, but rather to humanize security".[86] Sea level rise indeed poses an existential threat to populations of small island states, while at the same time having a drastic impact on the protection of human rights of its members.[87] Moreover, migrations that are likely to happen might influence not only the societies of small island states, but also societies of host states that are willing to receive thereby making the emphasis on the universal and cooperation-oriented concepts of human security and human rights more appropriate.

Finally, as evidenced by the discussions held at the level of the two principal organs of the United Nations, the General Assembly and the Security Council, these processes can have a profound impact on international peace and security as well. This line of thought, which became known under the notion of securization of climate change,[88] "reached its full

[84] Human Security, Report of the United Nations Secretary-general, A/78/665, 2024, pp. 12-13.

[85] For example, Lauren Nishimura, in the article that sharply divided the security-based and rights-based approach, criticized security-based discourse on the account that, when adopted, "Assistance becomes charity rather than obligation" and "While security issues are important to recognize, framing climate change primarily as a national security issue can hinder protection efforts and naturalize the external political and economicfactors at play." See: Nishimura, Lauren, Climate Change Migrants': Impediments to a Protection Frameworkand the Need to Incorporate Migration into Climate Change Adaptation Strategies, *International Journal of Refugee Law*, vol. 27, no. 1, 2015, pp. 121, 127.

[86] Estrada-Tanck, Dorothy, *Human Security and Human Rights under International Law*, London, 2016, p. 4.

[87] In the context of debates on relation between international peace and security and climate change, the fact that climate change is "not only as a full-fledged threat, but also one that largely supersedes any other threat that Small Island Developing States may ever encounter" prompted Torres Camprubí to call them "existential survivalists", as opposed from "hegemonic survivalists", those being the developed states. While the two groups have different reasons for perceiving climate change as a threat to their existence, they have still cooperated in "fostering international responses to climate change impacts". See: Torres Camprubí, Alejandra Eugenia, *Climate Change and International Security: Revealing New Challenges to the Continuation of Pacific Islands' Statehood*, PhD Thesis, Universidad Autónoma de Madrid, 2014, p. 158.

[88] The Copenhagen school of security studies is well known for its pioneering work in broadening the concept of security to include various new concerns, including envirnonmental ones. Thus, it recognized that environmental threats, sea level rise being among them, can jeopardize human security. However, it stopped short of subsuming that this could mean that human security could be emancipated from state security. While it recognized "society" as a corollary object of security discourse along with the "state", this remained in the realm of overall security discourse which both favoured "traditional" security threats and state-centric approaches. This state-centric approach accepted by a relatively contemporary school of thought with progressive ideas can serve as an illustration of how deeply state is rooted as a central subject and object of international relations. For the concept of widening of security discourse to include environmental threats by

bloom"[89] in the last years of the second decade of the 21st Century.[90] As a result of intensive lobbying work done by the small island states together with the European Union in order to characterize climate change as a security issue that creates existential threats to their legal personality and population,[91] in 2009, the General Assembly debuted the topic "Climate Change and International Security" on its agenda, when, during its 85th plenary meeting, the General Assembly endorsed the resolution entitled Climate Change and its Security Implications.[92] This has been followed by the Report of the Secretary General.[93] In the Security Council, development has been slower, and the while that organ first debated the possible implication of climate change on international peace and security in 2007,[94] it did that again only in 2011.[95] While international security discourse has a different focus from the human rights perspective in relation to climate change,[96] the case of threat that sea level

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the Copenhagen school, see: Buzan, Barry, Hansen, Lene, *The Evolution of International Security Studies*, Cambridge, 2009, p. 187 *et passim*. The approach, however, has been criticized by many, among others Walt and Booth, see: Booth, Ken, *Theory of World Security*, Cambridge, 2007, p. 161 *et passim.* Some of the most prominent critics came from the European critical security studies, especially the so-called Welsh school of security studies. They reconceptualized security studies with the aim of putting individual human person into the center of security analysis discourse. The Welsh school critically assessed the state-centric approach to security and defined individual's emancipation as the endgoal of security, whith the states being a mean of achievement of this. Thereby, it enabled the environmental threats to human security

[89] Torres Camprubí, Alejandra, Securitization of Climate Change: The Inter-Regional Institutional Voyage, *Yearbook of International Environmental Law*, vol. 27, 2016, p. 103.

[90] Torres Camprubí ascribes successes in proper securitization of climate change discourse in the projects that developed as a result of "direct cooperation between Pacific and the EU" which "started to develop in 2008", albeit admitting that some of the elements of securitization of climate change problems had been present earlier. See: Torres Camprubí, Alejandra, Securitization of Climate Change: The Inter-Regional Institutional Voyage, Yearbook of International Environmental Law, vol. 27, 2016, p. 101.

[91] See: Torres Camprubí, *op. cit.* (footnote 35), p. 241.

[92] See Resolution A/63/281, in which the General Assembly „Invites the relevant organs of the United Nations, as appropriate and within their respective mandates, to intensify their efforts in considering and addressing climate change, including its possible security implications" (Climate change and its possible security implications, United Nations General Assembly, A/63/281, 2009, Operative Paragaph 1).

[93] In September 2009 the Secretary General issued a report under the title Climate Change and its Possible Security Implications. See: Climate Change and its Possible Security Implications, Report of the Secretary-General, A/64/150, 2009.

[94] Security Council Official Records, 62nd year, 5663rd meeting, United Nations Security Council, S/PV.5663, 2007.

[95] Letter dated 1st July 2011 from the Permanent Representative of Germany to the United Nations addressed to the Secretary-General, S/2011/408, 2011.

[96] Generally, human rights narrative in relation to climate change has focused on two intersected fields, namely the recognition of a separate human right to healthy environment and the establishment of a causal link between

rise poses to the small island states presents an intersecting point between the two approaches. This is because the threat of dissaperance of a whole state due to inundation, combined with migration of its peoples, indeed is a threat that can disrupt international equilibrium based on the concepts of territorial integrity of states, self-determination, fundamental right of state survival, and general protection of human rights. Therefore, while adopting the human rights perspective, this work cannot and will not overlook the threats that sea level rise poses to international peace and security, especially in relation to legal personality based on the fundamental human right of self-determination.

But before going in depth to different facets of the legal problems that sea level rise as a part of the anthropogenic climate change complex causes, different players in this field must be identified.

1.2. **Small island states: sea level rise as an existential threat**

Identifying different players that, on the one hand, are responsible and should react to sea level rise, and on the other, will be most vulnerable and affected by its consequences, is not an easy task. Climate change, and sea level rise as one of its visible consequences, have far more different ways in how they might redefine human life(style) than one might think at the first sight. This work is focusing only on the small island states, which will be affected in many ways, two of them being profoundly redefining towards both their basic continuation as states and way of living and rights of every single individual comprising populations of these states. Therefore, first of the players that will be identified and explained are the small island states. After them, the interest will turn to the other side of the climate change induced relations, and that is to those which are most likely to provide assistance in addressing problems small island states will be facing. Those are the host states. In regard to that, the

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the existing human rights protection schemes and climate change. On the other hand, securitization narrative has been centered around the understanding of internatioonal peace and security as a concept enshrined in the Chapter VII of the United Nations Charter See: Charter of the United Nations and Statute of the International Court of Justice, 1945, available at: https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=I-1&chapter=1&clang=_en (accessed: 27th November 2023).

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role of the host states is not only related to their provision of humanitarian assistance to the peoples of small island states, but rather to a wider context. In their reports, the co-chairs of the Sea Level Rise in relation to International Law topic in the ILC repeatedly called, basing their approach on the support of governments, for a combination of rights-based and needs-based approach in considering issues related to human rights protection and statehood of small island states faced with sea level rise.[97] Drawing on the previous work of the ILC which led to the adoption of Draft Articles on the Protection of Persons in the Event of Disasters, co-chairs noted that "A similar approach would seem justified in regard to the protection of persons affected by sea-level rise, since the two approaches (rights-based and needs-based) are not necessarily mutually exclusive but are best viewed as complementary: the protection of persons affected by sea-level rise should meet their needs, and such response must take place with full respect for their rights."[98] Knowing that the situation of total loss of habitable territory, which small island states are facing, is indeed unprecedented, it will require new legal concepts to develop under international law to ensure that needs of peoples of small island states are ensured, and their rights respected. Therefore, the double role of state organs of small island states and other states as both national and international law makers, to recall one aspect of the theory of *dédoublement fonctionelle* by Georges Scelle,[99] becomes highly relevant. The will of other states to accept the changed reality and their *opinio juris* as to the status of legal personality of small island states and safeguarding human rights of their population, including the right to self-determination, is crucial in their survival as legal

[97] See: Galvão Teles, Patrícia, Ruda Santolaria, Juan José, Sea Level Rise in Relation to International Law, Second Issues Paper, A/CN.4/752, 2022, pp. 58-59; Galvão Teles, Patrícia, Ruda Santolaria, Juan José, Sea Level Rise in Relation to International Law, Additional Paper to the Second Issues Paper, A/CN.4/774, 2024, pp. 59 *et passim* for the comments of governments.

[98] Galvão Teles, Ruda Santolaria, *op. cit.* (footnote 16), p. 59.

[99] French jurist George Scelle developed his theory of dédoublement fonctionelle around the idea that in international law there is a global net of mutually intersecting legal orders, in which national legal organs serve a dual role – when they are acting in international capacity, they can be regarded as international lawmakers, which when they are, in turn, acting as states organs on a national level – they function as creators of national legal orders. While these roles of state organs, according to Scelle, do not intersect, the results of their work do as the two legal orders, namely the national and international one, are inextricably linked to one another. For a synthesis of this and other dimensions of Scelle's theory of dédoublement fonctionelle, see: Cassese, Antonio, Remarks on Scelle's Theory of "Role Splitting"*(dédoublement fonctionnel)* in International Law, *European Journal of International Law*, vol. 1, no. 1, 1990, pp. 212-215 *et passim*.

persons under international law. At the same time, ensuring that human rights of persons who had to relocate from their ancestral small island states will have much intersection with the national legal systems and status they will be willing to provide for islanders, accommodating their human rights stemming from the international legal obligations of the same states. Finally, an important role in linking those groups of stakeholders is usually given to international organizations, and their position must also be noted.

1.2.1. **The notion of "small island states" in international legal doctrine and practice**

The Working Group of the ILC that dealt with the possible solutions for progressive development of international law aimed at addressing various problems that sea level rise will create (and is already creating), is simply using the notion "island states". The Working Group did that without further qualifications, primarily to distinguish island states from other states that will be tackled by the sea level rise, but are not at risk of being completely flooded and submerged.[100] Again, as the work is in progress and the ILC has not yet produced the draft articles or other such document that could serve as a basis for possible codification efforts, there is no straight definition given, or, at least, there is no definition declared as such.[101] However, by looking more closely into the Report, a working explanation can be

[100] Aurescu, Bogdan, Cissé, Yacouba, Galvão Teles, Patrícia, Oral, Nilüfer, Ruda Santolaria, Juan José, Sea-level Rise in Relation to International Law, in: Report of the International Law Comission, Seventieth Session, in: General Assembly, Offical Records, Supplement no. 10, A/73/10, 2018, p. 329 *et passim.*

[101] For specific issue of sea level rise, see: Sea Level Rise in Relation to International Law, Analytical Guide to the Work of the International Law Commission, available at: https://legal.un.org/ilc/guide/8_9.shtml (accessed: 16th August 2021). Formally, the topic has been on the agenda of ILC since 2019. In line with the practice of the ILC, since than it has been included in all annual reports of the ILC. See: Report of the International Law Commission, Seventy-first Session, in: General Assembly, Offical Records, Supplement no. 10, A/74/10, 2019, pp. 340-341; Report of the International Law Commission, Seventy-second Session, General Assembly, Offical Records, Supplement no. 10, A/76/10, 2021, pp. 186-201; Report of the International Law Commission, Seventy-third Session, General Assembly, Offical Records, Supplement no. 10, A/77/10, 2022, pp. 324-341; Report of the International Law Commission, Seventy-fourth Session, General Assembly, Offical Records, Supplement no. 10, A/78/10, 2023, pp. 89-106. The ILC decided to establish Study Group in relation to the topic, which dealt with two groups of topics, one being the marine spaces, delimitations and boundaries, while the other considered issues of statehood and protection of persons affected by sea level rise. Since its establishment, the Study Group produced two Issues Papers as a basis for further discussion of the topic in the ILC and the Sixth Committee of the General Assembly. For this work, Second Issues Paper, authored by Patricía Galvão Teles and Juan José Ruda Santolaria, Co-Chairs of the Study Group, considering issues of statehood and protection of persons affected by the sea level rise, is of especial relevance. See: Galvão Teles, Ruda Santolaria, *op. cit.* (footnote 16), pp. 1-107.

found, specifically in the part that is considering the issues of statehood in relation to sea level rise. Part of the sentence in which the concerned explanation is found, although not formed, even grammatically, as a definition is the following: "(…) the territory of island States is completely covered by the sea or becomes uninhabitable".[102] The cited words might seem obvious, but become very important when trying to distinguish between (small) island state that are affected, at least from a legal point of view, much worse by the sea level rise than other states that will also experience intensive harms due to sea level rise, but whose statehood is not in danger.

From the previously mentioned documents, it can be observed that the first major player in an effort to analyse new reality that sea level rise brings to some of the key institutes of general international law and international law of human rights have to be small island states. To determine what is a small island state and which states can actually be classified in this category, at least for the purposes of this work, a handful of criteria can be identified based on what has previously been mentioned. Those criteria are quite simple and can be summarized in two points: 1) the entity is a state in the sense of international law[103]; 2) the state' s entire territory is so low-lying that it is in a real danger of being completely submerged due to sea level rise or that all of its inhabitable territory is facing the risk of uninhabitability.[104]

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[102] Aurescu *et al.*, *op. cit.* (footnote 100), p. 329.

[103] It is well established in the customary international law that three basic elements that an entity has to have in order to be considered a state are: 1) territory, 2) population, 3) independent government. This was codified by the Montevideo Convention on the Rights and Duties of States, which added the fourth element to these three, the capacity to enter into relations with other states. In the context of effects of sea level rise, these traditional elements of statehood are one of the primary points at which convergence between traditional international law and reality might occur, which is one of the topics that concerns both small island states and international community, but also, might have profound effects on rights of populations. On these elements, see further discussions *infra*, especially in 3.2. For explanations on traditional elements of statehood see many classical systems of international law, for example: Andrassy, Juraj, Bakotić, Božidar, Seršić, Maja, Vukas, Budislav, *Međunarodno pravo 1*, Zagreb, 2010, pp. 81-82; Oppenheim, Lassa Francis Lawrence, *International Law: A Treatise*, (edited by H. Lauterpacht), London-New York-Toronto, 1957, p. 118; Rousseau, Charles, *Droit international public, Tome II: Les sujets de droit*, Paris, 1974, p. 18 *et passim.*

[104] Compare: Hampson, Françoise, The Human Rights of Indigenous Peoples in States and Territories Threatened with Extinction for Environmental Reasons, Working paper, E/CN.4/Sub.2/AC.4/2004/CRP.1, 2004, p. 6, including those states which have some higher ground that might remain above sea level, however not being suitable for human habitation in the assessment of most vulnerable states. The importance of this

Before proceeding to the overview of how small island states define and see themselves in the international community, one notice regarding the terminology. Terminology can sometimes, especially when inconsistently applied and used, create many misunderstandings and even outright confusion. Often broad and inconsistently applied categories like "small islands", "developing islands", "small developing islands" are found in different documents that tackle the issues of specific problems that this category of states is facing. In the early stages of recognizing specific developmental issues that small island states face due to effects of climate change, they were often referred to as "developing small islands/states/countries". For example, this is the case in the Report of the Sixth Committee of the Third conference of the UNCTAD from 1973.[105] This name, of course, is in accordance with the general aims of the UNCTAD, but it, in a way, is a restricting one, because of its emphasis on economic problem of development, which is only one of the aspects of problems that small island states are facing. Indeed, in the early decades of recognizing peculiarities of problems of small island states they encountered many definitional problems.[106] Later on, different names were used, most neutral being "small states", as the co-signatories call themselves in the text of the Declaration on Global Warming and Sea Level Rise, better known as Malé Declaration after the capital of Maldives in which it was signed. This name is too general in its scope, covering not only small island states, but also different states that could be classified as "small states", which is, of course, a very uncertain and unclear category. "Small islands" is the first of the names used by the ILC[107] when referring to the states in question and is, in

element lies in the fact that there are states which are small island states in physical sense (they consist entirely of small islands), albeit are not so low-lying that physical submergence or uninhabitability constitute a significant risk to their existence. States such as the Kingdom of Tonga or the Republic of Fiji, while exclusively composed of small islands, have geographical and geological features (higher ground suitable for human habitation) that allow them to remain excluded by this criterion. The implications of this are significant, as for these states sea level rise does not imperil their legal personality nor does it create a necessity for cross-border migrations of their populations.

[105] See, for example: Report of the Sixth Committee of the Third conference of the UNCTAD in: Proceedings of the United Nations Conference on Trade and Development, TD/180, vol. 1, New York-Santiago de Chile, 1973, pp. 283 *et passim.*

[106] For an overview of the definitional problems encountered in the early decades of recognizing peculiarities of problems of small island states, see: Hein, Philippe, Small island developing States: origin of the category and definition issues, in: *Is a special treatment of small island developing States possible?,* United Nations Conference on Trade and Development, 2004, pp. 1-22.

[107] Aurescu *et al.*, *op. cit.* (footnote 100), p. 329.

turn, a completely neutral name. Second one, "small island developing states" is also used by the same body.[108] Another name, "disappearing island states" is sometimes used in literature,[109] but it seems here that this might be too strong to be completely accepted as a name for a category, because "disappearance" of states due to sea level rise has many alternatives, some of which are separate topics of this work. Similarly, "deterritorialized states" is sometimes used,[110] but it suffers from the same problem, because there are plans to preserve territory of small island states. Moreover, notion of "deterritorialized state" is in itself somewhat of an oxymoron, because, territory is one of the key elements in international law that define an entity as a state. The ILA Committee on International Law and Sea Level Rise used different notions, some of which are "affected states"[111] and "states of origin",[112] the former being prevalent in the discussions on continuity of legal personality, while the latter used in the context of protection of persons from the effects of sea level rise. "Endangered states",[113] another name found in the literature, is of general nature and, while it does capture the idea that states' very existence is threatened by sea level rise, seems generic, as "endangered" can serve as a qualification for various states, for example those endangered by armed conflict, which, moreover, do not have to be small islands. Sometimes, "atoll island states" is used to describe the small island states, as they are mostly indeed "countries which are formed almost or uniquely of one or more atoll islands"[114]. However, this notion seems being based solely on geographical criteria, missing to integrate the

[108]Report of the International Law Commission, Seventy-second Session, General Assembly, Offical Records, Supplement no. 10, A/76/10, 2021, p. 7 *et passim.*

[109] Notably, Grote Stoutenburg uses "disappearing island states" in her comprehensive monograph on the topic of relations between sea level rise, international law, and small island states. See: Grote Stoutenburg, Jenny, *Disappearing Island States in International Law*, Leiden-Boston, 2015, *passim*.

[110] Rayfuse, Rosemary, W(h)ither Tuvalu? International Law and Disappearing States, *University of New South Wales Faculty of Law Research Series*, no. 9, 2009. p. 9 *et passim.*

[111] See: Committee on International Law and Sea Level Rise, Final Report, International Law Association, 2024, pp. 20 *et passim*.

[112] See: Sydney Declaration of Principles on the Protection of Persons Displaced in the Context of Sea Level Rise, Resolution 6/2018, 78th Conference of the International Law Association, Annex, pp. 3-6.

[113] von Paepcke, Frederik, *Statehood in Times of Climate Change*, Frankfurt am Main, 2015, p. 18.

[114] Yamamoto, Lilian, Esteban, Miguel, *Atoll Island States and International Law*, Berlin/Heidelberg, 2014, p. 30.

economical, societal and cultural specificities of the small island states, thereby pointing only to physical dimension of the sea level rise.

Moreover, this whole methodological confusion that different names might cause is only intensified by the different contexts in which the same or similar categories are used. Therefore, it might be best to, in an effort to define small island states as one of the players in the field of legal answers to sea level rise, to start from a working definition and to choose one of the possible terms that will be consistently used when addressing this category of states. In the case of this work, the notion "small island states" is used, except when, for reasons of specific source using some other variant for collectively naming these states or other specifically indicated reason, explicitly stated otherwise. This is because "small island states" is the most comprehensive of possible variants, encompassing both physical nature of states as islands, and being small in the amount of dry land they comprise,[115] which are the most important factors contributing to their vulnerability to sea level rise. To put it another way, small island states will be used in this work because it is a comprehensive name that clearly denotes the entities in question as states in the sense of international law and also puts an emphasis to them as being small islands, which, in turn, points out to the main reason of their specific endangerment by the sea level rise. It is, of course, clear that "small island states" as a category is much broader than just few of the states at risk of being completely submerged by the sea level rise, comprising many other states that are not low-lying, but low-lying states that are a subject of this work are, in turn, part of the category and calling them as such is not wrong and, actually, as explained, covers the most important peculiarities of

[115] Small island states are "small" only in size of the dry land they comprise. In contrast, their maritime entitlements can be, and in many cases indeed are, vast. For example, the internal waters and territorial sea of Tuvalu comprise significant sea spaces under sovereignty of the state. For details, see: Tuvalu: Submission in Compliance with the Deposit Obligations Pursuant to the United Nations Convention on the Law of the Sea (UNCLOS), available at: https://www.un.org/depts/los/LEGISLATIONANDTREATIES/STATEFILES/TUV.htm (accessed: 22nd December 2025). Similar situations exist in relation to other small island states, some of whch have proclaimed archipelagic waters, which further increases sea areas under their sovereignty (see, for example, information on the archipelagic waters of the Republic of the Maldives at: Maldives: Submission in Compliance with the Deposit Obligations Pursuant to the United Nations Convention on the Law of the Sea (UNCLOS), available at: https://www.un.org/depts/los/LEGISLATIONANDTREATIES/STATEFILES/MDV.htm (accessed: 22nd December 2025). However, maritime entitlements without dry land that is capable for human habitation, cannot resolve the self-determination and statehood dillemmas, nor provide a stable base for population. For the further discussion, see *infra* in 3.2.1., 3.2.2. *et passim*.

their position. In absence of a better name ("low-lying small island states" might be better, but it seems rather too long), the name "small island states" is used.

In the next subchapter, we move away from the abstract language of legal scholarship to concrete examples of small island states endangered by sea level rise.

1.2.2. **Overview of the small island states**

Going from legal language that has to be, at least to some extent, an abstract in form and shape, to the empirics, there are just a few, handful states in the contemporary world that fulfil the set criteria.[116] These are: Kiribati, Tuvalu and Marshall Islands in the Pacific Ocean and the Maldives in the Indian Ocean, which are also the largest of the group.[117] All these states fulfil are indeed states in the sense of international law (they have a territory, population and independent government) and their territory is entirely composed of small islands that are, on average, just a few meters higher than the sea level, therefore being at a special risk due to sea level rise, knowing that losing one of the elements of statehood results, as it is clear both from the doctrine of international law, but also from the practice of states and *opinio juris* that form the customary international law, results in a loss of statehood, a legal possibility to be considered as a state in international law. However, this does not mean that only these states are at risk of severe consequences of sea level rise connected losses of territory, let alone their populations, which are comparatively small in comparison to populations of some other low lying coastal areas in states that may not be at risk of being completely submerged.[118] What is, however, at stake for the small island states, as opposed

[116] The two criteria are that an entity is a state in the sense of international law and that its entire territory is so low-lying that it is in a real danger of being completely sumberger or uninhabitable. For further discussion of the criteria see *supra* in 1.2.1.

[117] Both Jenny Grote Stoutenburg in her book Disappearing Island States in International Law, which is more concerned with issues of statehood, and Jane McAdam, whose monograph Climate Change, Forced Migration and International Law deals primarily with, as title clearly points out, aspects of migrations and human rights of populations, list these states as most likely to experience total loss of territory due to sea level rise. See: Grote Stoutenburg, *op. cit.* (footnote 109), pp. 1-3.; McAdam, Jane, *Climate Change, Forced Migration and International Law*, Oxford, 2012, pp. 36-37.

[118] For an overview of different populations endangered by pressures to migrate due to climate change, see: Williams, Angela, Turning the Tide: Recognizing Climate Change Refugees in International Law, *Law and Policy*, vol. 30, no. 4, 2008., pp. 502-529.

to all other states faced with varous negative impacts of sea level rise, is their very survival. In international law, there already exist the doctrine of fundamental right to state survival. It emerged under that name in 1996, when the ICJ (hereinafter ICJ) delivered its Nuclear Weapons Advisory Opinion, albeit in the context of self-defence,[119] which is distinct from the threats to survival that small island states face with. The question that is posed here is whether this right could be translated to a different set of circumstances, where survival of states is not at stake due to an armed attack or case of unlawful intervention but rather due to anthropogenic natural process of sea level rise based on considerations for populations human rights', especially right to self-determination. That being mentioned, this work is focusing on small island states because of their, and consequently that of their populations, specific position in the process of (re)creating international law in many of its traditional facets, institutes and concepts, from the law of statehood to international law of human rights that should address the problems of the populations that will lose their homes and, possibly, also jobs and ways of life. Before going into the specifics of mentioned problems, a short overview of every one of the states mentioned and concerned is given.

1.2.2.1. **The Republic of the Maldives**

The Maldives, or as they are officially called, the Republic of Maldives, are the biggest of the four. They are composed of a more than a thousand islands grouped around 26 coral atolls scattered around the vast ocean area, which are all low lying, the highest altitude being just 2.4 meters above the sea level,[120] which makes them the lowest-lying sovereign state in the contemporary world. According to data from the last estimations, Maldives are home to a population of little more than three hundred thousand, mostly concentrated around the capital city, Malé, but 188 islands have permanent population, which is very concentrated at some places, which makes population density very unequal in different parts of the state's

[119] In its Nuclear Weapons Advisory Opinion, the ICJ observed that: "the Court cannot lose sight of the fundamental right of every State to survival, and thus its right to resort to self-defence, in accordance with Article 51 of the Charter. when its survival is at stake". See: Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, *I.C.J. Reports*, 1996, p. 263.

[120] Republic of Maldives, available at: https://www.britannica.com/place/Maldives (accessed: 16th August 2021).

territory.[121] Various effects of sea level rise have already started to significantly affect livelyhoods of peoples of Maldives. Reports point to already ongoing evacuations of islands, floods, saltwater intrusions, coral bleeching, and shortages of drinking water.[122] Traditional industries like fisheries, agriculture, sand and coral mining as well as tourism, which form the basis of the Malidives' economy are already significantly affected and projections of sea level rise seem to only point to worsening of the situation.[123] Classified as a upper-middle income economy, Maldives, apart from being the only country among the four outside of the Pacific, is also the most developed one economically.[124] Currently, Maldives has a presidential republic system of government but, thorough the long history, had different systems of government and levels of autonomy, always having some sort of a local government that had some level of independence in running internal affairs, never being a colony *stricto sensu*, however being dominated by Portugese, Duch and British respectively throught the early modern period, while retainig significant authonomy in internal affairs under local rulers.[125] In 1887, the sultan of Maldives entered into a protection agreement with the United Kingdom, which however again had no influence on the internal self-government, at least formally.[126] The Maldives have acceded to the United Nations Membership in 1965,[127] shortly after the protectorate has been terminated.

1.2.2.2. **The Republic of Kiribati**

Kiribati, officially the Republic of Kiribati, are situated in the Pacific and are, just as it is the case with Maldives, dominantly composed of small islands forming a total of 33 coral atolls

[121] *Ibid.*
[122] See: Climate Risk County Profile: Maldives, World Bank Group and Asian Development Bank, 2021, pp. 15-20.
[123] *Ibid.*, pp. 19-21.
[124] See: Maldives, CIA World Factbook, available at: https://www.cia.gov/the-world-factbook/countries/maldives/#economy (accessed: 10th June 2023).
[125] Ryavec, Karl E., Chapter 5. Maldives, in: Chapin Metz, Helen (ed.), *Indian Ocean: five island countries*, Washington D.C., 1995, p. 259.
[126] *Ibid.*
[127] See: Admission of the Maldive Islands to membership in the United Nations, United Nations General Assembly, A/RES/2009(XX), 1965.

that are just a few meters above the sea level,[128] and therefore being at risk of being completely submerged. The only exception is the island of Banaba, which is of volcanic origin and has a maximum elevation of 81 meters above sea level, but, due to small size, phosphate mining that rendered most of its surface uninhabitable it cannot be possibly expected that it will serve as an inhabitable ground that could provide refuge to inhabitants of islands that were left uninhabitable due to submergence as a consequence of sea level rise.[129] Regarding the population, Kiribati has a recorded population of a little more than one hundred thousand that is unevenly distributed around different island groups that form the state.[130] Effects of sea level rise on the economy and livelyhoods of peoples of Kiribati are similarly profound as in the case of Maldives. Sea level rise and related effects of climate change like droughts, coral bleaching and ocean acidification affect fisheries and agriculture, which are the vital sectors of the economy of Kiribati.[131] Due to sea level rise, living conditions on the islands are becoming increasingly difficult to sustain, which includes the spread of diseases like malaria and tuberculosis[132], food poisoning due to eating contaminated fish[133], land erosions[134], and inability to grow traditional crops[135]. Migrations due to uninhabitability of villages flooded under rising sea levels have already started to occur in

[128] Republic of Kiribati, available at: at: https://www.britannica.com/place/Kiribati (accessed: 16th August 2021).
[129] *Ibid.*
[130] *Ibid.*
[131] See: Kiribati: Climate Security Risk Assesment Profile, available at: https://www.undp.org/pacific/publications/climate-security-risk-assessment-profiles (accessed 21st June 2024).
[132] Russell, Lesley, *Poverty, Climate Change and Health in Pacific Island Countries*, Menzies Center for Healty Policy, University of Sydney, Sydney, 2011, p. 10.
[133] Mainly by eating fish which accumulated higher levels of ciguatera toxin in their bodies, which occurs in connection to rising sea temperatures. See: Human Health and Climate Change in Pacific Island Countries, World Health Organization, 2015, p. 66.
[134] Tebunginako village on Abaiang island is an early example of how coastal erosion and rising sea levels can significantly impact livelyhoods and prompt migrations in Kiribati. Since at least the late 1960s, the village has experienced constant saltwater intrusions and inundation, which eventually rendered it uninhabitable and propted residents to abandon it. See: Analysis of Coastal Change and Erosion - Tebungiako Village, Abaiang, Kiribati, South Pacific Applied Geoscience Commission, 2006, pp. 4-9; also: Migration not a matter of choice but survival, says Kiribati President, United Nations Office for Disaster Risk Reduction, press release, available at: https://www.undrr.org/news/migration-not-matter-choice-survival-says-kiribati-president (accessed 25th June 2024).
[135] See: Climate Risk Country Profile: Kiribati, The World Bank Group, 2021, p. 15.

Kiribati.[136] All this generated further conflict over land and resources which in some cases aquired violent proportions.[137] Whith economy centered around fisheries and turism, Kiribati is classified as a lower middle income economy.[138] Unlike the Maldives, Kiribati, nowadays also a presidential republic, once was a colony under direct control of the British Empire, and later went through various stages of decolonization, finally joining the UN only in 1999.[139]

1.2.2.3. **The Republic of the Marshall Islands**

The Republic of the Marshall Islands, another country composed exclusively of atolls,[140] is even smaller in landmass size and population than its neighbour, the Republic of Kiribati. Home to a population of just, according to estimations, fifty thousand persons,[141] it is composed of scattered islands with the highest elevation of just 10 meters above sea level.[142] Moreover, vast majority of population is concentrated around the capital city, Majuro, which is on an even lower elevation. The problems sea level rise is causing in the Marshall Islands are similar to those of the Maldives and Kiribati. Being an upper-middle income economy,

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[136] In 2015, Ioane Teitiota, a national of Kiribati who migrated to New Zealand, where he applied for international protection based on a claim that sea level rise threatens his human rights (specifically, right to life) and triggers the *non-refoulement* obligation of New Zealand. The case, which recieved widespread media attention, ended with both New Zealand immigration authorities and courts and, finally, Human Rights Committee rejecting his claim, although the Human Rights Committee confirmed that, in priciple, climate change related events can result in triggering the *non-refoulement* obligation of states under the ICCPR. See: Teiotiota v. New Zealand, Human Rights Committee, CCPR/C/127/D/2728/2016, 2019. For decisions of New Zealand courts, see quotes in: McAdam, Jane, Protecting People Displaced by the Impacts of Climate Change: The UN Human Rights Committee and the Principle of Non-Refoulement, *American Journal of International Law*, vol. 114, no. 4, 2020, p. 708, footnote 1, McAdam, Jane, The Emerging New Zealand Jurisprudence on Climate Change, Disasters and Displacement, *Migration Studies*, vol. 3, no. 1, 2015, p. 139. On the Teitiota v. New Zealand case see more *infra*.

[137] As explained by Corcoran, urban areas of Kiribati already experience significant shortages of land, which is a vital in Kiribati both as a housing and agricultural resource, but also as a crucial concept of traditional culture of Kiribati. See: Corcoran, John, *Implications of Climate Change for the Livelihoods of Urban Dwellers in Kiribati*, PhD Thesis, University of Waikato, 2016, pp. 179-183 *et passim*.

[138] Kiribati, Economy, CIA World Factbook, available at: https://www.cia.gov/the-world-factbook/countries/kiribati/#economy (accessed 24th June 2024).

[139] See: Admission of the Republic of Kiribati to membership in the United Nations, United Nations General Assembly, A/RES/54/1, 1999.

[140] Republic of Marshall Islands, available at: https://www.britannica.com/place/Marshall-Islands (accessed: 16th August 2021).

[141] *Ibid.*

[142] *Ibid.*

the Marshall Islands are however able to rely on the financial aid and enhanced migration opportunites from the United States due to their status under the Compact on Free Association.[143] The Compact on Free Association between the United States of America and the Republic of Marshall Islands has been concluded in 1983 and is in force from 1986,[144] and significantly renewed by a new agreement in 2003[145] and again in 2023,[146] providing Marshall Islands with a status that has been described as "middle ground between integration and independence".[147] The relationship of free association has not, however, prevented the Marshall Islands from becoming a member state of the United Nations,[148] thus confirming their statehood.[149] Under the Compact, Marshall Islands are provided with financial aid from the United States of America, which forms a significant part of the states' budget.[150]

[143] The United States of America have concluded compacts of free association with three independent states (Palau, Micronesia, Marshall Islands) which formed the Trust Territory of the Pacific Islands.

[144] For the text of the original Compact of Free Association between United States of America and the Republic of Marshall Island (concluded in 1983, entered into force in 1986) see: Compact of Free Association, Act of January 14, 1986, US Public Law No. 99-239, 1986.

[145] For the text of the 2003 amended version of the Compact, see: Compact of Free Association, as Amended, between the Government of the United States of America and the Government of the Republic of Marshall Islands, Treaties and Other International Acts Series, 2004, US Department of State, Treaties and Other International Acts Series, no. 04-501, 2004.

[146] For the text of the amendments, see: United States Congress, Consolidated Appropriations Act, 2024, Title II "Amending Compacts of Free Association". As for the changes to the structure of the Compact in this revision, they mostly concerned financial part of the agreement and extensions to various programmes of benefits for islanders in the United States of America. See: New Compact of Free Association Agreements with Micronesia, the Marshall Islands, and Palau Approved by Congress, AJIL Contemporary Practice of the United States, *American Journal of International Law*, vol. 118, no. 3, 2024, pp. 546-547.

[147] Keitner, Chimène I., Reisman, W. Michael, Free Association: The United States Experience, *Texas International Law Journal*, vol. 39, no. 1, 2003, pp. 2; Armstrong, Arthur John, Strategic Underpinnings of the Legal Regime of Free Association: The Negotiations for the Future Political Status of Micronesia, *Brooklyn Journal of International Law, Brooklyn Journal of International Law*, vol. 7, no. 1, 1981, p. 181.

[148] The Republic of the Marshall Islands officially became the United Nations member state in 1991. See: Admission of the Republic of the Marshall Islands to membership of the United Nations, United Nations Genral Assembly, A/RES/46/3, 1991.

[149] According to the Article 4 Paragraph 1 of the Charther of the United Nations, membership in the United Nations is "open to all (…) states". Therefore, statehood is one of the criteria for admission to the United Nations and only states can become members of the organization.

[150] The 2003 amended version of the Compact provided for the establishment of the Trust Fund for the People of the Republic of Marshall Islands, which was modified in 2023. In both cases, the United States of America and the Republic of Marshall Islands concluded a further implementation agreement. As explained in the identical Article 3 of the 2003 and 2023 Agreement Between the Government of the United States of America and the Government of the Republic of the Marshall Islands Implementing Section 216 and Section 217 of the Compact, as Amended, Regarding a Trust Fund, the purpose of the Trust Fund is "to contribute to the economic advancement and long-term budgetary self-reliance of the Republic of the Marshall Islands by providing an

Moreover, Marshallese benefit from enhanced migration opportunities to the United States, which are however not tailored to respond to migrations occurring due to sea level rise, especially if they become large scale group movements.[151] Regarding government organization, Marshall Islands are, similarly to previously mentioned states, a presidential republic that has gone through long decolonization process, actually one of the longest of any state, staying under the trusteeship regime until 1990.[152]

1.2.2.4. **Tuvalu**

Tuvalu, the smallest of the four island states, is a state of a little more than ten thousand inhabitants situated in the Pacific, which makes it the sovereign state with a third-smallest population in the world.[153] Just like the previously mentioned states, it is composed of only small, low-lying islands that do not exceed maximum elevation of 4.6 meters on one of the islands, other being even lower at their highest points.[154] This makes Tuvalu extremely

annual source of revenue, after Fiscal Year 2023, for assistance in education, health care, the environment, public sector capacity building, private sector development, and public infrastructure". See: Agreement Between the Government of the United States of America and the Government of the Republic of the Marshall Islands Implementing Section 216 and Section 217 of the Compact, as Amended, Regarding a Trust Fund, 2023, available at: https://rmicfatf.com/file-repository/ (accessed: 27th November 2024).

[151] Compare: Dema, Briana, Sea Level Rise and the Freely Associated States: Addressing Environmental Migration Under the Compacts of Free Association, *Columbia Journal of Environmetal Law*, vol. 37, no. 1, 2012, p. 201. For further analysis of the migration under the Compact, see *infra* in 4.6.

[152] Designated as "strategic trust territories", Palau, Micronesia, and Marshall Islands, along with Northern Mariana Islands, had been put under the trusteeship of the United States of America by the trusteeship agreement concluded with the United Nations in 1947 (see: Trusteeship Agreement for the Former Japanese Mandated Islands, 124th Meeting, United Nations Security Council, S/318, 1947). This arrangement lasted until 1990 for Marshall Islands and Micronesia and until 1994 for Palau, respectively, when the Trusteeship Agreement has been terminated by the Security Council and the former trust territories deemed "fully self-governing" (see: Resolution 683(1990), United Nations Security Council, S/RES/683(1990) for the Marshall Islands and Micronesia and Resolution 963 (1994), United Nations Security Council, S/RES/963/1994). Soon after, the three states became full United Nations members, the Marshall Islands achieving so in 1991. See, generally: Keitner, Reisman, *op. cit.* (footnote 147), pp. 33-38.

[153] In 2024, it has been estimated that the population of Tuvalu numbered 11,733 peopple. See: Tuvalu, People and Society, CIA World Factbook, available at: https://www.cia.gov/the-world-factbook/countries/tuvalu/#people-and-society (accessed: 26th June 2024). See also, Tuvalu, available at: https://www.britannica.com/place/Tuvalu (accessed: 17th August 2021).

[154] *Ibid.*

vulnerable to coastal erosions, which are already affecting it significantly.[155] Economy of Tuvalu is highly dependent on fisheries, with fish being a vital source of food for the Tuvaluans.[156] One of the center concepts of Tuvaluan society is fenua, defined as "a set of customary practices and territorial markers"[157] which "indistinguishably bundles together community/people/places"[158]. Tuvalu is one of the so-called Commonwealth realms, which means that the sovereign of Tuvalu is the head of the Commonwealth.[159] It is a parliamentary democracy and went through a long period of decolonization. Before, 1974, Tuvalu formed part of a unified Gilbert and Ellice Islands Colony, which replaced earlier unilaterally proclaimed United Kingdom's protectorate. In 1974, the referendum has been held on separating Gilbert and Ellice islands, which passed with an overwhelming majority.[160] Immediately after the referendum, Ellice Islands became a separate crown colony, which soon took the name Tuvalu, finally becoming an independent state in 1978.[161] Tuvalu acceded

[155] For example, in 2015, high tides caused infrastructural damage on Tuvalu. Compare: Doig, Eleanor, What Possibilities and Obstacles Does International Law Present for Preserving the Sovereignty of Island States, *Tilburg Law Review*, vol. 21, no. 1, p. 78.

[156] Tuvalu Fisheries, Annual Report 2022, Tuvalu Fisheries Department, Ministry of Fisheries and Trade, Government of Tuvalu, 2023, p. 13.

[157] Stratford, Elaine, Farbotko, Carol, Lazrus, Heather, Tuvalu, sovereignty and climate change: considering fenua, the archipelago and emigration, *Island Studies Journal*, vol. 8, no. 1, p. 69.

[158] *Ibid.*

[159] The relationship between Commonwealth realms is one of personal union. This means that the head of the Commonwealth is concurrently the head of state of all Commonwealth realms under distinct titles. A the same time, Commonwealth realms have distinct international legal personalities as independent states and rules of international law apply between them. Compare: Jennings, Robert Yewdall, The Commonwealth and International Law, *British Yearbook of International Law*, vol. 30, 1953, pp. 349-351. The Constitution of Tuvalu in Article 49 explictily defines "the Royal Majesty of the United Kingdom of Great Britain and Northern Ireland and Other Realms and Possession, Head of the Commonwealth, Defender of the Faith" as the head of state. See: The Constitution of Tuvalu Act, 2023, available at: https://tuvalu-legislation.tv/cms/images/LEGISLATION/PRINCIPAL/1986/1986-0001/1986-0001_2.pdf (accessed: 22nd December 2025). Therefore, while sharing the head of state with other Commonwealth realms, Tuvalu is an independent state and distinct legal person under international law.

[160] At the time the idea to split Gilbert and Ellice Islands was justified primarily by the ethnical differences between the Gilbertese, who are Micronesians and Ellice Islanders, who belong to Polynesian group. Moreover, political considerations also gave in to a splitting of the two islands groups, as during the colonial times administration had been situated at the Gilbert Islands, which led to administrative and legislative neglect of Ellice Islands. For explanation of the background of the referendum, see: Report of the Special Committee on the Situation with Regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples, vol. V, Supplement no. 23, A/9623/Rev.1, 1976, pp. 38-45.

[161] McIntyre, David M., The Partition of the Gilbert and Ellice Islands, *Island Studies Journal*, vol. 7, no.1, 2012, pp. 143-144.

to full UN membership only in 2000.[162] In 2023, Tuvalu and Australia concluded the first bilateral treaty specifically made to respond to to threats that sea level rise poses to legal personality of Tuvalu and human rights of its peoples, the Australia-Tuvalu Falepili Union Treaty, establishing a special mobility pathway for the islanders, tailored to respond to climate change-related migrations, which is a significant move in itself.[163]

1.2.3. **Common elements exacerbating vulnerability of small island states to sea level rise**

Having given a short overview of the most important facts about every one of the small island states that are the most endangered by the effects of sea level rise and whose population will have strong and possibly permanent consequences on the conceptualization of recognition and respect for some of their basic human rights, some common characteristics can be observed. All of the four states have, comparatively, small populations that could be easily overlooked by the bigger states and problems that are common to bigger populations across the world. Next, all of them are states whose economies are not based on arable land used for agriculture, for the simple reason that they are lacking such land, but specific geographic features of their territories direct their economies towards sea-oriented activities and service sector, dominated by tourism.[164] Finally, looking into the political history of all four states, it can be observed that they have all had some kind of dependency-like status that linked them towards colonial powers in the past and included them in decolonisation processes during the latter half of the twentieth century. With sea level rise, this relationship once again (if it ever had ceased to be at all) became relevant, as former colonial powers are likely once that are now in a position of developed states from which help would be sought. This could generate

[162] See: Admission of Tuvalu to membership in the United Nations, United Nations General Assembly, A/RES/55/1, 2000.

[163] Australia-Tuvalu Falepili Union Treaty, 2023, available at: https://www.dfat.gov.au/geo/tuvalu/australia-tuvalu-falepili-union-treaty (accessed: 29th June 2024). For further analysis see *infra* in 4.6.

[164] The World Bank estimates that tourism, which is, of course, site specific and intrinsically connected to geographical features of the islands, forms more than a quarter of the Maldives' GDP. Figures for other states mentioned are similar, with activities that dominate their economies are those connected to their specific geographical features. See: Maldives: Systematic Country Diagnostics: World Bank Report, World Bank Group, 2015, p. 58.

instances of colonialism "reproducing itself" in a new form due to increasing reliance of small island states on former colonial powers.[165]

To further the understanding and try to find a way how to make a deeper insight into how small island states are working on an international scale to make their problems connected to sea level rise visible, it seems best to make a deeper look into the how the vulnerability discourse on small island states has shifted over the course of the decades.

Chronologically, the first international documents to specifically address the issue were not concerned with climate change, but rather with development. In 1968, the UN debued the least developed countries category, which became the official designation in 1971.[166] Small islands were soon identified as one of the most numerous subgroups within the designation, requiring special attention.[167] This happened in 1972 under auspices of the United Nations Conference on Trade and Development. The Report of the Sixth Committee of the Third conference of the UNCTAD specifically noted that some developing countries "stressed the special problems of developing island countries, pointing to the disadvantages of being surrounded by the sea, such as the isolated nature of some of the economies concerned, their distance from the main markets and their transport and communications difficulties.".[168] Moreover, the Report raised an idea and pointed out to the international community that "developing small islands" have "natural handicaps to development that were rather different from the socio-economic problems often discussed, but which nevertheless deserved the special attention of the international community".[169] The sub-category soon received its proper designation, namely developing island countries. With the launch of the concept of

[165] Compare: Anguie, Anthony, The Heart of My Home: Colonialism, Environmental Damage, and the Nauru Case, *Harvard International Law Journal*, vol. 34, no. 2, 1993, pp. 505-506., who, based on the analysis of Australia-Nauru relations concludes that: "Colonialism is not a simple phenomenon. Its forms are various and subtle. It reproduces itself through its victims and continuously creates and represses new subjects. In this way, colonialism is like sovereignty itself."

[166] Identification of the least developed among the developing countries, United Nations General Assembly, A/RES/2724(XXV), see also: Hein, *op. cit.* (footnote 106), p. 2.

[167] Hein, *ibid.*, p. 3.

[168] Report of the Sixth Committee of the Third conference of the UNCTAD in Proceedings of the United Nations Conference on Trade and Development, TD/180, vol. 1, New York-Santiago de Chile, 1973, p. 287.

[169] *Ibid.*, p. 295.

New International Economic Order by the United Nations General Assembly in 1974,[170] which had proclaimed the the goal of the New International Economic Order was to "eliminate the widening gap between the developed and the developing countries"[171] the island states, being classified in the developing island countries category, began to receive increased international attention.[172] Following these developments, the notion of "developing small islands" and their problems was addressed on and off during the seventies and eighties. This was done through numerous studies and resulted in the United Nations General Assembly deciding to adopt five resolutions that delt with the issues of economic development of developing island states.[173] Overall, all these documents placed developing island states in the context of their specific economic and social development problems, not necessarily those induced or caused by either global warming, climate change or sea level rise as s specific issues.[174] At that time, debates often got stuck at the basics, namely on the criteria for inclusion of particular states in the category.[175] No definite list of criteria has ever

[170] United General Assembly established the New International Economic Order in 1974 with two resolutions (see: Declaration on the Establishment of New International Economic Order, United Nations General Assembly, A/RES/3201(S-VI), 1974; Programme of Action on the Establishment of New Economic Order, A/RES/3202(S-VI), United Nations General Assembly, 1974). The New International Economic Order paradigm also provided basis for the adoption of the Charter of Economic Rights and Duties of States by the General Assembly which sprecifically proclaims "taking into account the agreed differences in development of the developing countries and their specific needs" (Charter of Economic Rights and Duties of States, United Nations General Assembly, A/RES/3281(XXIX), 1975, Preambular paragraph c).

[171] Declaration on the Establishment of New International Economic Order, A/RES/3201(S-VI), United Nations General Assembly, 1974, Preambular paragraph 3.

[172] Compare: Grote Stoutenburg, *op. cit.* (footnote 109), pp. 12-13.

[173] These are the following resolutions of the United Nations General Assembly: Action Programme in Favour of Developing Island Countries, United Nations General Assembly, A/RES/31/156, 1976; Action Programme in Favour of Developing Island Countries, United Nations General Assembly, A/RES/32/185, 1977, Action Programme in Favour of Developing Island Countries, United Nations General Assembly, A/RES/34/205, 1979, Action Programme in Favour of Developing Island Countries, United Nations General Assembly, A/35/61, 1980 and Action Programme in Favour of Developing Island Countries, United Nations General Assembly, A/RES/37/206, 1982.

[174] For example, see: Specific Problems of Island Developing Countries, Report of the Meeting of the Group of Experts on Island Developing Countries of the UNCTAD, UNCTAD/ST/LDC/9, 1988.

[175] As Hein observes: "Numerous (and sometimes analytically useful) categorizations have been proposed, but most have not gone beyond research findings and consideration within academic circles." (Hein, *op. cit.* (footnote 106), p. 2). For an overview of the contemporary criteria used for inclusion into the developing island countries category, see: Developing Island Countries, Report of the UNCTAD Panel of Experts, TD/B/443/Rev.1, 1974, pp. 3-4.

been decided upon, which led to an increasing feeling of "fuzziness and lack of clarity".[176] As the developing island states category was created almost exclusively with their disadvantageous position in the global economy in mind, this offered an "easy pretext for inaction"[177] and eventually resulted in the gradual lessening of recognition of developing island countries as a separate category.[178] However, they can be useful in determining how small island states were identified as a specific group in international discourses, which helped the process of understanding their specific position and vulnerability also in the context of sea level rise related problems that they are facing.

Eventually, the actual raising of the interconnection and understanding of the international community of the specific problems that these states are facing with the ongoing sea level rise had to wait until the end of the ninth decade of the twentieth century. It finally occurred in concordance with the overall global awareness-raising processes regarding the effects of global warming and climate change.

In 1987, the president of the Maldives, Maumoon Abdul Gayoom raised existential threat of sea level rise for his state at the Commonwealth meeting, which led to the creation of Commonwealth Expert Group on Climate Change and Sea Level Rise.[179] On a wider plane, this came especially after the United Nations General Assembly in 1988 adopted the now famous Resolution A/43/53, which proclaimed the issues of global warming and climate change "a common concern of the mankind".[180] After that, small island states, seeing that

[176] Hein, *ibid.*, p. 17.
[177] *Ibid.*
[178] Compare: Grote Stoutenburg, *op. cit.* (footnote 109), p. 18.
[179] Two years later, in 1989, the Committee submitted the report under the title Climate Change: Meeting the Challenge (Holdgate Report) which in retrospective came to be recognized as the first systematic scientific report linking climate change, sea level rise, and its negative effects on insular societies. See: Holdgate, Martin W, Martin W, Bruce, Jim, Desai, Nitin, Mascarenhas, Ophelia, Shihab, Hussein, *Climate Change: Meeting the Challenge*, London, 1989. The Report has been followed by the Langkawi Declaration on the Environment, adopted by the Commonwealth member states the same year, which specifically advocated for the Commonwealth member states to "support low-lying and island countries in their efforts to protect themselves and their vulnerable natural marine ecosystems from the effects of sea level rise". The text of the Declaration is available at: The Langkawi Declaration, 1989, https://thecommonwealth.org/langkawi-declaration-environment-1989 (accessed 27th June 2024).
[180] Protection of Global Climate for Present and Future Generations of Mankind, United Nations General Assembly, A/43/53, 1988, Article 1.

issues of climate change and sea level rise are more and more becoming part of the international discourse, started to organize themselves and produced the first document that tried to articulate their positions regarding the effects that global warming and sea level rise will have on them. The Maldives initiative did not stop there, but continued with the convoking of the Small State Conference on Sea Level Rise that happened in November of the year 1989 in Malé, the capital city of the Republic of Maldives. The most important and, arguably, also the famous product of the proceedings of this conference was the Malé Declaration on Global Warming and Sea Level Rise (hereinafter Malé Declaration).[181] Functioning as somewhat of a programme for action of small island states, the Malé Declaration gives important information about how the very small island states define and see themselves in the context of threats that sea level rise is imposing onto them.

The states that signed the Malé Declaration call themselves "small states" in its text. By looking into the proceedings of the Malé Conference, it can be observed that participation amounted to fourteen different states, and not all of them are in the same position regarding the negative effects of sea level rise.[182] Therefore, neither the Declaration (which includes no definition or categorisation of the states that signed it) nor other documents of the Conference can give a definitive or conclusive answer to the problem of self-defining which states are those that can be regarded as small island states in the context of this work, being those whose very physical existence is endangered and population in need for relocation because their homes and living environment will be submerged. On the contrary, Malé Declaration had a much wider purpose and impact.

[181] Malé Declaration of 1989 begins with a comprehensive introduction in which signatory states are expressing their concern about the effects of climate change, especially pointing out the paradoxical situation of effects being mostly caused by developed states, but affecting underdeveloped. Next, there are eleven points that make the core of the text of the Declaration. See: Malé Declaration on Global Warming and Sea Level Rise, 1989, available at: http://www.islandvulnerability.org/slr1989/declaration.pdf (accessed: 11th October 2021).

[182] As it can be seen from the list of participants and signatories of the Declaration, states participating in the Malé Conference and co-signatories of the Declaration were small states, but many of them are not critically endangered by the sea level rise in sense that their whole territory might be submerged. For the explanations about characteristic of participating states of the Malé Conference, see: Small States Conference on Sea Level Rise, Malé, 1989, Report, available at: https://www.islandvulnerability.org/slr1989.html (accessed: 17th Ocotber 2021).

Following the Conference of 1989 and Malé Declaration as its most well-known result, but also as a part of overall process of bringing climate change related problems into the focus of international community, the interest for specific problems of small island states flourished especially in scientific field (including the legal science), but also somewhat gained a momentum in different international forums.

Crucial moment for the two documents and events that led to their adoption was not only that the United Nations General Assembly backed the signatory states by its resolution which called for inclusion of the topics in the, then forthcoming, negotiations leading to the UNFCCC,[183] but also the Establishment of the Alliance of Small Island States (hereinafter AOSIS), an intergovernmental organization of small island states that functions as an advocacy group for their cause and has ever since regularly, apart from its awareness raising and lobbying tasks, been a crucial point of reference for specific problems of small island states, including sea level rise, on international stage. The AOSIS first came into being as a lobbying group at the Second World Climate Conference in 1990[184] and soon established itself as a major negotiator in the deliberations which eventually led to the adoption of UNFCCC in 1992.[185] Since than, the AOSIS has continued to actively participate in the

[183] Possible adverse effects of sea-level rise on islands and coastal areas, particularly low-lying coastal areas, United Nations General Assembly, A/RES/44/206, 1989, see especially preambular paragraph 7 (on welcoming the Malé Declaration) and operative paragraph 4 (on incuding vulnerability of countries affected by sea level rise into the negotiations on the UNFCCC).

[184] As explained by a contemporary commentator, the foundation for AOSIS was a result of the process initiated at the Small States Conference organized by the Government of the Maldives in 1987, where paritipating states adopted the Malé Declaration on Global Warming and Sea Level Rise. In the aftermath of the Conference, they established an Action Group in order to "oversee the implementation of the decisions and recommendations of the Small States Coference on Sea Level Rise, and to pursue and follow up on global and regional resonse strategies". The Action Group, however "does not constitute nor represent all island states, neither is suitable for intergovernmental negotiations". Therefore, they needed a mechanism which would enable them to "a) arrive at and present a unified position on environmental concerns; b) represent their concerns at relevant international environmental negotiations; c) ensure that their concerns and needs are reflected in any final agreement; and d) ensure participation in the decision-making and follow-up process". Finally, AOSIS came into being as a "mechanism by which these objectives could be achieved". See: Heileman, Leo I. The Alliance of Small Island States (AOSIS): A Mechanism for Coordinated Representation of Small Island States on Issues of Common Concern, *Ambio*, vol. 22, no. 1, 1993, p. 55.

[185] For an overview of negotiation strategies of AOSIS at the early climate conferences, see: Betzold, Carola, 'Borrowing' Power to Influence International Negotiations: AOSIS in the Climate Change Regime, 1990–1997, *Politics*, vol. 30, no. 3, 2010, pp. 137-142.

debates on climate change, including being among the most prominent and vocal participants at the conferences of parties to the UNFCCC and international conferences on small island developing states (hereinafter SIDS).[186] The AOSIS currently has thirty nine member states, which includes all of the aforementioned small island states whose existence is most threatened by the rising sea levels.[187]

At the same time, a major development at the United Nations level happened with the recognition of SIDS as a separate category. This came at the United Nations Confence on Environment and Development held in Rio de Janeiro, held in 1992. Agenda 21, the most important outcome document of Rio de Janeiro conference, included a section named "Sustainable development of small islands"[188] in which SIDS were described as "special case both for environment and development".[189] Moreover, sea level rise was explicitly included among the key vulnerabilities of SIDS.[190] Apart from establishing the SIDS as a formal category within the United Nations system, the Agenda 21 also linked it to the emerging discourse on sustainable development, albeit in vague and general terms.[191]

The first conference specifically devoted to, as it was termed at the time "sustainable development of small island states" was held in Barbados in 1994, and produced a plan for action that specifically addressed the issues of small island states development, and was in its structure similar to the more general Agenda 21 that was developed around the same time addressing the general climate change and global warming mitigation strategies and action plans.[192] Already at that time, the Declaration of Barbados, one of the outcome documents of the conference, noted that "while small island developing States are among those that

[186] See an empirical analysis of the participation of AOSIS in the UNFCCC negotiations: Betzold, Carola, Castro, Paula, Weiler, Florian, AOSIS in the UNFCCC negotiations: from unity tofragmentation?, *Climate Policy*, vol. 12, no. 5, 2012, pp. 596-607.

[187] The list of AOSIS member states is available at: AOSIS Member States, available at: https://www.aosis.org/about/member-states/ (accessed 28th June 2024).

[188] Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3-14 June 1992, Vol. 1, A/CONF.151/26/Rev.1(Vol.I), 1992, pp. 271-274.

[189] *Ibid.*, p. 271.

[190] *Ibid.*

[191] *Ibid.*, p. 272.

[192] Barbados Conference also produced a Declaration and a Programme of Action, see: Report of the Global Conference on the Sustainable Development of Small Island Developing States, A/CONF.167/9, 1994.

contribute least to global climate change and sea level rise, they are among those that would suffer most from the adverse effects of such phenomena and could in some cases become uninhabitable".[193] After Barbados, and specifically after the overall surge of scientific, political and legal interest in effects of climate change, the conferences that specifically address the small island states and their problems are periodically held.[194] From then on, small island (developing) states firmly established themselves in the international discourse. However, the category never received a proper definition and the criteria for inclusion into it remained a point of debate.[195] This resulted in a proliferation of SIDS with different methodologies being used, often resulting in states of highly heterogenous characheristics being combined together in a list of SIDS.[196]

From the output of more recent conferences, it should be, especially bearing in mind the connection between human rights and specific problems of small island states, important to mention the Malé Declaration on the Human Dimension of Global Climate Change,[197] signed by the representatives of small island states in 2007. In this document, the leaders of the AOSIS emphasyzed that "small island, low-lying coastal, and atoll states are particularly vulnerable to even small changes to the global climate and are already adversely affected by alterations in ecosystems, changes in precipitation, rising sea-levels and increased incidence of natural disaster".[198] Years later, in 2024, anticipating the High-Level Meeting on the Sea Level Rise organized by the UN, the leaders of the AOSIS adopted the Declaration of the Heads of State and Government of the Alliance of Small Island States on the Sea Level Rise

[193] *Ibid.*, Annex I, Part I, section III, paragraph 2, p. 3.
[194] List of the events and conferences specifically devoted to small island (developing) states can be found at the webpage of the Office of Office of the High Representative for the Least Developed Countries, Landlocked Developing Countries and Small Island Developing States, see: Office of the High Representative for the Least Developed Countries, Landlocked Developing Countries and Small Island Developing States, Meetings, available at: https://www.un.org/ohrlls/content/meetings (accessed: 24th August 2021).
[195] For the detailed discussion of SIDS lacking a definition, see *supra* in this subchapter.
[196] Encontre, Pierre, SIDS as a category: adopting criteria would enhance credibility, in: *Is a special treatment of small island developing States possible?*, UNCTAD, 2004, pp. 93-95.
[197] Malé Declaration on the Human Dimension of Global Climate Change, 2007, available at: https://www.ciel.org/Publications/Male_Declaration_Nov07.pdf (accessed: 25th August 2021).
[198] *Ibid.*, 5th Preablular Paragraph.

and Statehood in which they clearly marked the link between statehood and human rights as embodied in the right to self-determination.[199]

Another important regional international organization of which small island states most affected by sea level rise are members is the Pacific Islands Forum (PIF).[200] Established in 1971 under the name of Pacific Islands Secretariat, it was renamed to its current name in 2000, and functions as a regional cooperation and coordination organization with a broad range of areas in which it operates, from peace and security to technology and development. While in the first decades the PIF focused on regional security issues, while at least from the 2008 Niue Declaration on Climate Change[201] the focus of the PIF shifted to the issues related to climate change and sea level rise effects. Three of four states implicated as those most vulnerable to total loss of habitable territory due to sea level rise, being located in the Pacific, participate in the PIF as member states of the organization.[202]

An emphasys of the human rights dimension of sea level rise came around that time. For example, in its 2008 submission to the Office of the United Nations High Commissioner for Human Rights, the Maldives specifically stressed that the hypotetical extinction of the state caused by sea level rise-iduced inundation "would violate the fundamental right of Maldivians to possess nationality and the right of the Maldives people to self-determination", along with other political, civil, economic, cultural, and social rights, which inundation would render "unattainable".[203] As already mentioned, at the same time, the PIF member states adopted the Niue Declaration on Climate Change, which advocated for "Pacific-tailored approaches to combating climate change", [204] while "recognizing the importance of

[199] Declaration of the Heads of State and Government of the Alliance of Small Island States on the Sea Level Rise and Statehood, 2024, available at: https://www.aosis.org/aosis-leaders-declaration-on-sea-level-rise-and-statehood/ (accessed 20th October 2024).
[200] See the website of the PIF, available at: Pacific Island Forum, available at: https://forumsec.org/ (accessed 29th June 2024).
[201] For the text of Niue Declaration, see: The Niue Declaration on Climate Change, 2008, available at: https://forumsec.org/publications/niue-declaration-climate-change (accessed 29th June 2024).
[202] These are Kiribati, Tuvalu, and the Marshall Islands.
[203] Submission of the Maldives to the Office of the UN High Commissioner for Human Rights under Human Rights Council Resolution 7/23 "Human Rights and Climate Change", 2008, p. 21.
[204] Niue Declaration on Climate Change, Paragraph 1. See: The Niue Declaration on Climate Change, available at: https://forumsec.org/publications/niue-declaration-climate-change (accessed 29th June 2024).

retaining the Pacific's social and cultural identity, and the desire of Pacific peoples to continue to live in their own countries, when possible".[205] In that regard, it seems that while Niue Declaration went on to recognize that adaptation is necessary, it does not favour it to happen through migration. On a UNFCCC plan, a major development happened with the adoption of the Cancún Adaptation Framework, adopted at the COP 16, held in 2010. The Cancún Adaptation Framework explicitly recognized "climate change induced displacement, migration and planned relocation" as a possible adaptation strategy.[206]

From that time on, the PIF has been particularly active in promoting awareness on the sea level rise and its effects on its members, adopting strategies[207] and political statements[208] affirming the statehood and protection of human rights of persons of the PIF member states, culminating in the 2023 Declaration on the Continuity of Statehood and the Protection of Persons in the Face of Climate Change-related Sea Level Rise.[209] Apart for these, members of the PIF had participated in the Rising Nations Initiative, created under the auspices of the Global Centre for Climate Mobility in "supporting the Pacific Atoll countries' efforts to preserve their sovereignty, protect their statehood, and safeguard the rights and heritage of affected populations in the face of the existential threats posed by climate change"[210]

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[205] *Ibid.*, Preambular Paragraph 6.

[206] Article 14 (f) of the Cancún Adaptation Framework invites all parties to enhance action on: "Measures to enhance understanding, coordination and cooperation with regard to climate change induced displacement, migration and planned relocation, where appropriate, at the national, regional and international levels. See: Report of the Conference of the Parties on its sixteenth session, held in Cancún from 29 November to 10 December 2010, Addendum, Part Two: Action taken by the Conference of the Parties at its sixteenth session, Decisions adopted by the Conference of the Parties, FCCC/CP/2010/7/Add.1, 2011, p. 5.

[207] In 2010, the PIF created the Framework for Pacific Oceanscape, while in 2014, the Framework for Pacific Regionalism was enacted. This was followed by the 2017 Blue Pacific Narrative, and the 2050 Strategy for the Blue Pacific Continent, adopted in 2022. See: 2050 Strategy for the Blue Pacific Continent, 2022, available at: https://forumsec.org/2050 (accessed: 30th June 2024), p. 11.

[208] In 2018, the leaders of the PIF adopted the Boe Declaration on Regional Security, in which they called climate change "the single greatest threat to the livelihoods, security and wellbeing of the peoples of the Pacific". See: Boe Declaration on Regional Security, 2018, available at: https://forumsec.org/publications/boe-declaration-regional-security (accessed: 30th June 2024).

[209] Declaration on the Continuity of Statehood and the Protection of Persons in the Face of Climate Change Related Sea Level Rise, 2023, available at: https://forumsec.org/publications/2023-declaration-continuity-statehood-and-protection-persons-face-climate-change (accessed: 10th October 2024), Paragraph 13.

[210] Rising Nations Initiative, About the RNI, available at: https://climatemobility.org/initiatives/rising-nations/ (accesed: 11th October 2024).

The initiative of small island states in getting international attention and testing limits of international law in providing answers to their vulnerabilities connected to sea level rise resulted in taking action in front of the international judiciary as well. In 2021, Antigua and Barbuda and Tuvalu concluded the Agreement for the establishment of the Commission of Small Island States on Climate Change and International Law.[211] This treaty thus established a new international organization that has eight member states (until the end of 2024, the two original members were joined by six other members of the AOSIS, namely Palau, Niue, Vanuatu, Saint Lucia, Saint Vincent and the Grenadines, Saint Kittis and Nevis).[212] Its task is "to promote and contribute to the definition, implementation, and progressive development of rules and principles of international law concerning climate change, in particular the protection and preservation of the marine environment, including through the jurisprudence of international courts and tribunals".[213] The Commission established the Committee of Experts, composed of international law scholars that contributes to the work in advisory capacity with a number of sub-committees, including those on sea level rise and human rights, respectively.[214] Notably, small island states members of the Commission in 2022 formally requested the advisory opinion of the International Tribunal for the Law of the Sea on questions related to the sea level rise and international law.[215] The proceedings which ensued culminated in 2024, when the International Tribunal for the Law of the Sea delivered its advisory opinion.[216]

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[211] Agreement for the establishment of the Commission of Small Island States on Climate Change and International Law, United Nations Treaty Series, 2021, vol. 3444, no. 56940, available at: https://treaties.un.org/Pages/showDetails.aspx?objid=08000002805c2ace&clang=_en (accessed: 27th December 2024).

[212] Commission of Small Island States on Climate Change and International Law, Members, available at: https://www.cosis-ccil.org/organization/members (accessed: 27th December 2024).

[213] Agreement for the establishment of the Commission of Small Island States on Climate Change and International Law, Article 2, Paragraph 1.

[214] COSIS 2024, Annual Report, Commission of Small Island States on Climate Change and International Law, 2024, p. 7.

[215] Request for Advisory Opinion, Commission of Small Island States on Climate Change and International Law, 2022, available at: https://www.itlos.org/en/main/cases/list-of-cases/request-for-an-advisory-opinion-submitted-by-the-commission-of-small-island-states-on-climate-change-and-international-law-request-for-advisory-opinion-submitted-to-the-tribunal/ (accessed: 27th December 2024).

[216] Request for Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law, Advisory Opinion, International Tribunal for the Law of the Sea, List of Cases, no. 31, 2024.

In a separate move, several small island states were among the co-sponsors of the request for an advisory opinion of the ICJ on the obligations of states in respect of climate change, which was formally requested by the UN General Assembly in 2023.[217] Within the text of the request, human rights concerns[218] and impacts of climate change on small island (developing) states[219] were explicitly included as a point of reference.[220] On 23rd July 2025, the ICJ delivered its advisory opinion.[221] In it, for the first time the ICJ directly, albeit lapidarily, addressed the problems of continuity of statehood that is imperiled by the climate change events, including sea level rise. Adopted unanimously by the judges, the advisory opinion contains the observation that "once a State is established, the disappearance of one of its constituent elements would not necessarily entail the loss of its statehood".[222] While carefully worded in conditional language, this pronouncement of the ICJ is significant as it offers a view that accommodates for changed realities and affirms of the main claims related to self-determinationa and statehood that small island states repeatedly pointed out in written comments and during the hearings.[223] However, this pronouncement received some criticism

[217] See the list of co-sponsors of the resolution in: Request for an Advisory Opinion of the International Court of Justice on the Obligations of States in Respect of Climate Change, United Nations General Assembly, Draft Resolution, A/77/L.58, 2023.

[218] In the chapeau of the question, the General Assembly noted "particular regard to the (…) International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights (…) the rights recognized in the Universal Declaration of Human Rights" (Request for an Advisory Opinion of the International Court of Justice on the Obligations of States in Respect of Climate Change, United Nations General Assembly, A/RES/77/276, 2023).

[219] First subquestion under the second question reqests the ICJ to answer "which are the legal cnsequences under these obligations (…) with respect to (…) States, including, in particular, small island developing States, which due to their geographical circumstances and level of development, are injured or specially affected by or are particularly vulnerable to the adverse effects of climate change?" (*Ibid*.).

[220] Moreover, the preamble of the Request for Advisory Opinion mentions sea level rise among adverse effects of climate change that are paritcularly affecting small island states (*Ibid*.).

[221] For the text of the advisory opinion, see: Obligations of States in Respect of Climate Change, General List, no. 187, 2025.

[222] *Ibid*., p. 107.

[223] See, for example: Written Comments of Tuvalu, available at: https://www.icj-cij.org/sites/default/files/case-related/187/187-20240814-wri-08-00-en.pdf (accessed: 29th December 2025), pp. 2-6; Written Statement of Kiribati, available at: https://www.icj-cij.org/sites/default/files/case-related/187/187-20240322-wri-13-00-en.pdf (accessed: 29th December 2025), pp. 47-49; Written Comments of Melanesian Sperhead Group, available at: https://www.icj-cij.org/sites/default/files/case-related/187/187-20240815-wri-01-00-en.pdf (accessed: 29th December 2025), p. 113 *et passim*; Verbatim Record 2024/35, 2nd December 2024, available at: https://www.icj-cij.org/sites/default/files/case-related/187/187-20241202-ora-01-00-bi.pdf (accessed: 29th December 2025), p. 102 *et passim*.

from members of the ICJ as well, especially as it might have broader consequences on the redefining of the concept of statehood under international law in general.[224]

All of the aforementioned actions show that small island states, have been highly active in steering the spotlight of the international community towards small island states and their activity. While focuses shifted from development, across general climate change-related problems, to sea level rise and back, small island states have made a case for themselves, mobilizing international community and raising awareness on sea level rise as an existential threat to them and their populations. They have made this through a constant effort and focus on their common vulnerabilities, which clearly makes them as a primary player in the debate about legal effects of sea level rise that primarily affects them.

In the next chapter, human rights, we proceed with the arguments for advancing human rights perspective in understanding the complexities of relations between sea level rise and international law.

Chapter 2 – **Human Rights Perspective as a Central Concept for Safeguarding the Legal Personality of Small Island States and the Protection of the Affected Peoples**

In this Chapter, we argue that the human rights perspective, both in light of the right to self-determination and other substantive human rights is a central concept that should govern international legal responses to the problem of loss of habitable territory and relocation due to sea level rise. Therefore, we will first delineate intersections between human rights under international law and sea level rise.

[224] In his Declaration appended to the advisory opinion, Judge Peter Tomka wrote, *inter alia*, that the ICJ's statement on statehood "can be read either as suggesting that international law does not "necessarily" preclude the possibility of continuity in one context, climate change–induced sea-level rise; or alternatively, as something more radical, if unintended: a quasi-endorsement of the deconstruction of the conditions of statehood as such" adding that "the right to self-determination, in the absence of an internationally agreed definition of "peoples", is understood and applied by reference to territorial units" and regretting that "The reader is left to ponder our Delphic pronouncement, unaided by any reasoning whatsoever. This bodes poorly. Oracular pronouncements may, by virtue of their conciseness, have helped the Court reach a unanimous Opinion, but this comes at a cost." See: Declaration of Judge Tomka, available at: https://www.icj-cij.org/sites/default/files/case-related/187/187-20250723-adv-01-02-en.pdf (accessed: 29th December 2025), pp. 1-3.

2.1. **Introducing the human rights perspective: sea level rise as a cause of multiple dangers for human rights of islanders**

Already in 1972, the Stockholm Declaration on the Human Environment proclaimed that man "has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being".[225] However, this very general statement does not mean much if the rights mentioned are not fitted into the framework which is capable of ensuring their protection. The complex relation between human rights protection and climate change more often than not resolves around a theoretical discussion on which path to take. The question that is often debated when discussing the relationship between human rights and climate change is: should the right answer be the "greening" of existing rights or a creation of new rights that would cover environmental protection and address its degradation?[226] It is well known that human rights were not designed with the environmental concerns in mind. [227] The relationship between human rights and climate change is becoming more established over the course of progressive development of international law concerning climate change.[228] The Paris Agreement of 2015 famously became the most recent binding international agreement directly dealing with climate change which has included reference to human rights, albeit only in its preamble.[229] The relevant part

[225] Principle 1 of the Stockholm Declaration on the Human Environment. For the text of the Stockholm Declaration, see: Report of the United Nations Conference on the Human Environment, Stockholm, 5th-16th June 1972, A/CONF.48/14/Rev.1, New York, 1973, pp. 3-5.

[226] See, for example: Adelman, Sam, Rethinking Human Rights: the Impact of Climate Change on the Dominant Discourse, in: Humphreys, Stephen (ed.), *Human Rights and Climate Change*, Cambridge, 2011, pp. 172-177, discussing the two approaches, even going so far as to claim that a foundation right to healthy environment, in a case approach favouring creation of new right(s) is used, should take precedence over existing rights.

[227] In a survey conducted in 2015, only 23% of the 294 relevant human rights instruments created under the auspices of the United Nations has been found to mention climate change, while 25% of them referred to migrants and refugees. At the same time, only 6% of those established connection between the two. See: Fernández, María José, Refugees, Climate Change and International Law, *Forced Migration Review*, vol. 49, 2015.

[228] This led some to go as far to claim that "The existing differentiated obligations approach taken in the international climate change legal framework is the best forum for coordinating international adaptation commitments." See: Burleson, Elisabeth, Climate Change Displacement to Refuge, *Journal of Environmental Law and Litigation*, vol. 25, no. 1, 2010, p. 35.

[229] This has led some authors to conclude that what small island states achieved with the Paris Agreement loss and damage mechanism is a "phyrric victory" which "does little to directly protect human rights". On the human rights in the Paris Agreement with the special focus on small island developing states, see: Adelman, Sam,

of the Paris Agreement thus reads: "when taking action to address climate change, respect, promote and consider their respective obligations on human rights, the right to health, the rights of indigenous peoples, local communities, migrants, children, persons with disabilities and people in vulnerable situations and the right to development, as well as gender equality, empowerment of women and intergenerational equity ".[230]

Recalling, among others, this reference to human rights in the Paris Agreement, the Human Rights Council has adopted a series of resolutions dealing with relation between climate change and human rights, even before 2015, when reference to human rights has been included in the Paris agreement. Although of non-binding character and not specifically devoted to the problem of relation between human rights and sea level rise, they can be of much help in identifying which and whose rights are affected by climate change. Until 2024, the Human Rights Council has adopted a mix of resolutions dealing with impact of climate change on enjoyment of various particular rights and those dealing with general issues of relation between human rights and climate change.[231] Following the action of the Human Rights Council, the United Nations General Assembly recognized the adverse impacts that

Human Rights in the Paris Agreement: Too Little, Too Late, *Transnational Environmental Law*, vol. 7, no. 1, 2018, p. 23 *et passim*.

[230] Paris Agreement, 2015, *United Nations Treaty Series*, vol. 3156, no. 54113, 2023, pp. 79-258, Preambular Paragraph 12.

[231] In fact, the first in the line of resolution on the topic has been adopted by the Human Rights Council in 2008 following a proposal by Maldives, a small island state. See: Human Rights and Climate Change, Human Rights Council, A/HRC/RES/7/23, 2008. This resolution has been followed by a follow-up resolution almost every year after that (see, *inter alia*, resolutions: Human Rights and Climate Change, Human Rights Council, A/HCR/RES/7/78, 2008, Human Rights and Climate Change, Human Rights Council, A/HCR/RES/10/4, 2009, Human Rights and Climate Change, Human Rights Council, A/HRC/RES/18/22, 2011, Human Rights and Climate Change, Human Rights Council, A/HCR/RES/26/27, 2014, Human Rights and Climate Change, Human Rights Council, A/HRC/RES/29/15, 2015, Human Rights and Climate Change, Human Rights Council, A/HRC/RES/32/33, 2016, Human Rights and Climate Change, Human Rights Council,A/RES/HRC/35/20, 2017, Human Rights and Climate Change, Human Rights Council, A/HRC/38/4, 2018, Human Rights and Climate Change, Human Rights Council, A/HRC/RES/41/21, 2019, Human Rights and Climate Change, Human Rights Council, A/HRC/44/7, 2020, Human Rights and Climate Change, A/HRC/RES/47/24, Human Rights Council, 2021, The Human Rights to a Clean, Healthy and Sustainable Environment, Human Rights Council, A/HRC/RES/48/13, 2021, Human Rights and Climate Change, Human Rights Council, A/HRC/RES/50/9, 2022, Human Rights and Climate Change, Human Rights Council, A/HRC/RES/53/6, 2023, The Human Rights to a Clean, Healthy and Sustainable Environment, Human Rights Council, A/HRC/RES/52/23, 2023., all addressing various aspects of the relationship between human rights and climate change).

climate change has for the traditional human rights and acknowledged the standalone human right to a clean, healthy and sustainable environment.[232] In its resolution 47/24, adopted on 14th July 2021, the Human Rights Council somewhat summarized its work on this topic by stating that: "adverse effects of climate change have a range of implications, both direct and indirect, that can increase with greater global warming, for the effective enjoyment of human rights, including, inter alia, the right to life, the right to adequate food, the right to the enjoyment of the highest attainable standard of physical and mental health, the right to adequate housing, the right to self-determination, the rights to safe drinking water and sanitation, the right to work and the right to development".[233] With the drastic level of threats that sea level rise poses for livelyhoods of their populations, small island states are, as Jane McAdam puts it, "the litmus test for the dramatic impacts of climate change on human society".[234] In the context of human rights protection, this becomes vivid when the range of rights which are affected by the processes instigated by sea level rise are taken into consideration.

Findings of the ILC co-rapporteurs for the topic Sea Level Rise in relation to international law confirm the views of Human Rights Council. Dealing with the very issue of relation between human rights law and sea level rise (unlike the Human Rights Council, which delt with the relation between human rights and climate change more broadly), the Second Issues Paper prepared by the co-rapporteurs identifies that sea level rise has "potentially specific effects on the dignity and human rights of persons affected by sea-level rise".[235] Therefore, the Second Issues Paper, albeit "without being fully comprehensive and without prejudice to a case-by-case analysis regarding the specific right and situation in question"[236] identifies

[232] In its Resolution 76/300, which recognized the right to a clean, healthy and sustainable environment, the United Nations General Assembly recognized explicitly that "environmental degradation, climate change, biodiversity loss, desertification and unsustainable development constitute some of the most pressing and serious threats to the ability of present and future generations to effectively enjoy all human rights" (Right to a clean, healthy and sustainable environment, United Nations General Assembly, A/RES/76/300, 2022, Preambular Paragraph 13).

[233] Human Rights and Climate Change, Human Rights Council, A/HRC/RES/47/24, 2021, Preambular Paragraph 15.

[234] McAdam, *op. cit.* (footnote 117), p. 119.

[235] Galvão Teles, Ruda Santolaria, *op. cit.* (footnote 16), p. 61.

[236] *Ibid.*

specific rights that are in peril due to events instigated by sea level rise. These are as follows, in the same order that the Second Issues Paper presents them: the right to life, the prohibition of cruel, inhuman or degrading treatment, the right to adequate housing, the right to food, the right to water, the right to take part in cultural life and to respect for cultural identity, the right to a nationality and the prevention of statelessness, the rights of children, public participation, access to information and access to justice, the right to self-determination and the rights of indigenous peoples.

The Second Issues Paper continues with delineating, in short, every one of the aforementioned rights and groups of rights and how they can be affected by sea level rise consequences. It seems that this path should be followed. Human rights violations can be established only in concreto, and the first step is to identify how specific rights can be adversely affected by sea level rise.

Similarly, the ILA Committee on International Law and Sea Level Rise has dealt with the issue of implications for the rights of affected persons in the context of climate-induced sea level rise. It its interim report issued in July 2022, while the issue is still under consideration, the Committee nevertheless identified the following rights: the right to life, to adequate food, to water, to health, to adequate housing. Moreover, the Committee, discussed also issues of culture, statelessness and self-determination, thereby bringing also them into the discourse on implications of sea level rise to affected populations.[237]

The aforementioned lists of rights affected by climate change and/or sea level rise show that the range of rights that are directly affected by consequences of sea level rise is very wide. The rights mentioned are not some theoretically created new rights. On the contrary, they are well-established rights.

In theory, this seems as a clear-cut, however in practice it is not, as it is often very hard to prove a violation of human rights in the context of climate change.[238] As observed by the

[237] Committee on International Law and Sea Level Rise, Interim Report, International Law Association, 2022, pp. 33-34.

[238] On the problems with constructing a case based on alledged violations of human rights stemming out of climate change effects, including sea level rise, and the litigation strategies, see, for instance: Tully, Stephen,

Office of the United Nations High Commissioner on Human Rights: "Qualifying the effects of climate change as human rights violations poses a series of difficulties. First, it is virtually impossible to disentangle the complex causal relationships linking historical greenhouse gas emissions of a particular country with a specific climate change-related effect, let alone with the range of direct and indirect implications for human rights. Second, global warming is often one of several contributing factors to climate change-related effects, such as hurricanes, environmental degradation and water stress. Accordingly, it is often impossible to establish the extent to which a concrete climate change-related event with implications for human rights is attributable to global warming. Third, adverse effects of global warming are often projections about future impacts, whereas human rights violations are normally established after the harm has occurred."[239]

Both the Human Rights Council and the UN General Assembly recognized human right to a healthy environment. While their decisions are non-binding, this nevertheless shows a will to recognize a new right, as those already existing are not offering full scale of protection to victims of climate change. For the purposes of this chapter, the conclusion is relevant insofar as it shows the constant pattern over which the problems will resolve. Those members of populations of small island states endangered by the sea level rise who seek to be protected under human rights instruments will constantly find themselves in a similar juridical problem. Namely, could various threats to human existence on small, low-lying islands that sea level rise creates be subsumed under the existing framework of protection of human rights?

This enables small island states to rely on them as a framework for protection of their population in possible scenarios of adaptation to sea level rise consequences. As it was already mentioned, universal character of human rights requires all states to respect them and

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Like Oil and Water: A Sceptical Appraisal of Climate Change and Human Rights, *Australian International Law Journal*, vol. 15, no. 1, 2008, pp. 219-225. See also: Farran, Sue, The Significance of Sea-Level Rise for the Continuation of States and Identity of their People, *Potchefstroom Electronic Law Journal*, vol. 24, 2021, p. 19, elaborating on the problems with framing the effects of sea level rise as human rights violations.

[239] Report of the Office of the United Nations High Commissioner for Human Rights on the relationship between climate change and human rights, Office of the United Nations High Commissioner for Human Rights, A/HRC/10/61, 2009, p. 23.

all peoples have a right to enjoy such a protection. It therefore provides an answer to the dilemma of many climate change adaptation strategies – how to fit a new reality into existing legal structures? With human rights approach this can, arguably, be done.[240] However, this does not mean there are no limitations connected to the relevance of human rights law in addressing specific set of problems populations of small island states are facing with. Therefore, next chapter will proceed with delineating the legal specificites of conceptual relevance of specific parts of human rights law that are relevant for their application in the protection of persons in small island states which are critically endangered by the sea level rise.

2.2. **Overarching principle of human dignity and its relevance in the context of sea level rise**

From the very beginning of conceptualizing human rights as universal, the idea was that they belong to every human being, whichever national, ethnic, religious or other social group they belong to.[241] This is clearly expressed in the Universal Declaration of Human Rights, which decrees that the human rights belong to every human being. Conceptually this notion is grounded in the principle of human dignity, which is inherent to every human person and remains an overarching principle that "undergirds international human rights instruments and has been interpreted as providing the ultimate foundation of human rights law".[242] One of the

[240] On the relation between relocation as adaptation and human rights see, generally, for example: Gromilova, Mariya, Revisiting Planned Relocation as a Climate Change Adaptation Strategy: The Added Value of a Human Rights-Based Approach, *Utrecht Law Review*, vo. 1, no. 1, 2014, pp. 81-82, 94-97; Hall, Margaux J., Weiss, David C., Avoiding Adaptation Apartheid: Climate Change Adaptation and Human Rights Law, *Yale Journal of International Law*, vol. 37, no. 2, 2012, p. 345-354.

[241] Article 2 of the Universal declaration of Human Rights thus reads: "Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty." (Universal Declaration of Human Rights, United Nations General Assembly, A/RES/217(III)[A], 1948, Article 2).

[242] Commentary to the Draft Article 5 of the Draft Articles on the Protection of Persons in the Event of Disasters, with Commentaries, in: Report of the International Law Commission on the Work of its Sixty-eighth Session, *Yearbook of the International Law Commission*, vol. II, Part II, Chapter IV, A/CN.4/SER.A/2016/Add.1 (Part 2), 2016, p. 33.

neatest synthesis of the meaning of human dignity for the contemporary human rights law was delivered by the International Criminal Tribunal for the Former Yugoslavia in its judgement in case Prosecutor v. Anto Furundžija, where that court observed that the principle of human dignity is "the very raison d'être of international humanitarian law and human rights law; indeed in modern times it has become of such paramount importance as to permeate the whole body of international law".[243] Indeed, human dignity is widely considered as a foundation for various human rights treaties, including the International Covenant on Civil and Political Rights (hereinafter ICCPR),[244] the International Covenant on Economic, Social and Cultural Rights (hereinafter ICESCR),[245] the International Convention on the Elimination of All Forms of Racial Discrimination,[246] the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,[247] the Convention on the Rights of the Child,[248] the Convention on the Elimination of All Forms of Discrimination against Women,[249] and the Convention on the Rights of Persons with Disabilities.[250] Notwithstanding that human rights protection enormously evolved over the decades from when the Universal Declaration was adopted, human rights are still protected with this basic idea in mind. Human dignity has never stopped to serve as a fundational principle behind the development of human rights in international law, grounding the human rights protection in the inherent value of an individual person. Moreover, human dignity has, arguably, evolved

[243] Prosecutor v. Anto Furundžija, International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case no. IT-95-17/1-T, 1998, Paragraph 183.
[244] International Covenant on Civil and Political Rights, 1966, *United Nations Treaty Series*, vol. 999, no. 14668, 1976, pp. 171-346., Preamble and Article 10 Paragraph 1.
[245] International Covenant on Economic, Social and Cultural Rights, 1966, *United Nations Treaty Series*, vol. 993, no. 14531, 1976, pp. 3-106, Preamble and Article 13 Paragraph 1.
[246] International Convention on the Elimination of All Forms of Racial Discrimination, 1965, *United Nations Treaty Series*, vol. 660, no. 9464, 1969, pp. 195-318, Preamble.
[247] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984, *United Nations Treaty Series*, vol. 1465, no. 24841, 1987, pp. 85-210, Preamble.
[248] Convention on the Rights of the Child, 1989, *United Nations Treaty Series*, vol. 1577, no. 27531, 1990, pp. 3-178, Preamble and Articles 23 (paragraph 1), 28 (paragraph 2), 37 (subparagraph c), 39, and 40 (paragraph 1).
[249] Convention on the Elimination of All Forms of Discrimination against Women, 1979, United Nations Treaty Series, vol. 1249, no. 20378, 1981, pp. 13-142, Preamble.
[250] Convention on the Rights of Persons with Disabilities, 2006, *United Nations Treaty Series*, vol. 2515, 2008, pp. 3-192, Preamble and Articles 1, 3, 16 (paragraph 4), 24 (paragraph 1), 25.

to the status of a principle which, while not guaranteed by any human rights instrument *in abstracto*, as a general binding rule, has some inherent value. Namely, every human being is protected against humiliation and degradation of his or her human dignity by upholding existing human rights, which have to be interpreted as to protect the inherent human dignity of every individual.[251]

It is not some special trait that makes a human being eligible for human rights protection. Individuals enjoys human rights because they are "born free and equal in dignity and rights".[252] Thus, human rights are enjoyed universally by individuals, either individually or, in case of rights based on citizenship,[253] or membership in a specific group, as individual members of a group.[254] Thus, vast majority of human rights are, essentially, individual rights. The only notable exception is the collective right to self-determination, which is rightfully designated as such as it is enjoyed collectively by peoples. Moreover, under the ICCPR, human rights must be respected in every situation, no matter what is a position of a person in a state that is due to provide such protection, provided that a person is within the territory of a state and subject to its jurisdiction.[255]

2.3. **Problem of (extra)territorial application of human rights treaties**

Human rights law is primarly territorial in nature, with the state that is sovereign over a territory is primarily oblidged to respect, protect and fulfil human rights of persons inhabiting that territory, with cases of extraterritoriality representing exceptions to that rule.[256] It is therefore territory, not nationality or citizenship that defines responsibility of states with

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[251] Petersen, Niels, Human Dignity, International Protection, in: Wolfrum, Rüdiger (ed.), *Max Planck Encyclopaedia of Public International Law*, vol. IV, 2012, p. 1019.

[252] Universal Declaration of Human Rights, Article 1.

[253] Article 25 of the ICCPR guarantees right to take part on the conduct of public affairs, right to vote and be elected in genuine periodical elections, and the right to have access to public service. These rights are limited to citizens only.

[254] Article 18 Paragraph 1 of the ICCPR guarantees freedom of religion which includes the right to manifest the chosen religion, both individually, but also in community with other religious. More directly, Article 27 of the same Covenant concerns the right of members of ehnic, religious or linguistic minorities to enjoy their culture, practice their religion or use their language in community with the other members of their group.

[255] ICCPR, Article 2, Paragraph 1.

[256] Milanović, Marko, *Extraterritorial Application of Human Rights Treaties*, Cambridge, 2011, p. 33.

regard to human rights treaties.[257] This is consistent with the principle of universality which underlines the human rights law as one of its basic principles.[258] At the same time, reality of international relations has made territorial jurisdiction a general rule for determining state responsibility for protection, respect and fulfilment of human rights. However, the Human Rights Committee (hereinafter HRComm) has, on multiple occasions, clarified that the notion of jurisdiction of a state under international human rights law cannot in all situations be equated with jurisdiction over sovereign territory of a state, and can even, in specific cases, include foreign territory.[259]

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[257] *Ibid*., p. 80.

[258] *Ibid.*

[259] In its views adopted in the Lopez Burgos case, the Human Rights Committee held that "Article 2 (1) of the Covenant places an obligation upon a State party to respect and to ensure rights "to all individuals within its territory and subject to its jurisdiction", but it does not imply that the State party concerned cannot be held accountable for violations of rights under the Covenant which its agents commit upon the territory of another State, whether with the acquiescence of the Government of that State or in opposition to it." (Lopez Burgos v. Uruguay, Human Rights Committee, CCPR/13/D/52/1979, 1981, Paragraph 12.3). Furthermore, in its views adopted the same year in the Casariego case, the same treaty body held that "it would be unconscionable to so interpret the responsibility under article 2 of the Covenant as to permit a State party to perpetrate violations of the Covenant on the territory of another State, which violations it could not perpetrate on its own territory" (Lilian Celiberti de Casariego v. Uruguay, Human Rights Committee, CCPR/13/D/56/1979, 1981, Paragraph 10.3). In his concurrent opinion to Lopez Burgos decision (with the same arguments repeated in the concurrent opinion to the Casariego), then-member of the Human Rights Committee Christian Tomuschat further elaborated that "To construe the words "within its territory" pursuant to their strict literal meaning as excluding any responsibility for conduct occurring beyond the national boundaries would, however, lead to utterly absurd results. The formula was intended to take care of objective difficulties which might impede the implementation of the Covenant in specific situations." (Individual opinion appended to the Committee's views at the request of Mr. Christian Tomuschat, Lopez Burgos v. Uruguay, Human Rights Committee, CCPR/13/D/52/1979, 1981, Appendix). Other treaty bodies and courts have later followed the same logic in interpreting their respective treaties. Thus, the Committee against Torture in its General Comment no. 2 on the implementation of article 2 by State parties required that "Article 2, paragraph 1, requires that each State party shall take effective measures to prevent acts of torture not only in its sovereign territory but also "in any territory under its jurisdiction." The Committee has recognized that "any territory" includes all areas where the State party exercises, directly or indirectly, in whole or in part, de jure or de facto effective control, in accordance with international law." (General Comment no. 2, Implementation of article 2 by State parties, Committee Against Torture, CAT/C/GC/2, 2008, Paragraph 16). This interpretation soon found its way into the Committee Against Torture's views adopted in individual case, namely J.H.A. vs. Spain (see: J.H.A. vs. Spain, Committee Against Torture, CAT/C/41/D/323/2007, 2008, Paragraph 8.2). Among regional human rights courts, both the Inter-American Court of Human Rights (see: Coard and others v United States, Case No. 10.951, Report No. 109/99, 1999) and the European Court of Human Rights (see: Öcalan v Turkey, European Court of Human Rights, Application 42221/99, 2005) have adopted similar views.

Therefore, every person under the jurisdiction of a state should be accorded protection of human rights on equal terms with all the others, being that within the sovereign territory of a state or outside of it.[260] The HRComm confirmed this in its General Comment no. 36 on the nature of legal obligations of state parties to the ICCPR. The HRComm wrote that state parties are obliged to: "respect and ensure the Covenant rights to all persons who may be within their territory and to all persons subject to their jurisdiction". It went on to clarify that "This means that a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party."[261] The HRComm went on to state that: "the enjoyment of Covenant rights is not limited to citizens of States Parties but must also be available to all individuals, regardless of nationality or statelessness, such as asylum seekers, refugees, migrant workers and other persons, who may find themselves in the territory or subject to the jurisdiction of the State Party. This principle also applies to those within the power or effective control of the forces of a State Party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained, such as forces constituting a national contingent of a State Party assigned to an international peace-keeping or peace-enforcement operation."[262] In Israeli Wall advisory opinion, the ICJ has adopted similar views by stating that "the International Covenant on Civil and Political Rights is applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory".[263] In the context of sea level rise induced mobility, this principle remains

[260] Morel, Michelle, de Moor, Nicole, Migration climatique: quell role pour le droit international, *Culture & Conflits*, vol. 88, 2012, p. 70.

[261] General Comment no. 31, The Nature of the General Legal Obligation Imposed on State Parties to the Covenant, Human Rights Committee, CCPR/C/21/Add. 13, 2004, p. 4.

[262] *Ibid.*, see also General Comment no. 15, The Position of Aliens Under the Covenant, Human Rights Committee, 1986, available at: https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/TBSearch.aspx?Lang=en&TreatyID=8&DocTypeID=11 (accessed: 20th March 2023) to which the Human Rights Committee makes reference.

[263] In reaching this conclusion, the ICJ had cited "constant practice" of the HRComm as a strong argument in favour of it. As the same time, the ICJ has adopted similar views as regards the ICESCR. See: Legal Consequences of the Construction of a Wall in Occupied Palestinian territory, Advisory Opinion, *I.C.J. Reports*, 2004, pp. 179-181. Conversely, the Grand Chamber of the European Court of Human Rights in the decision on admissibility in case Banković rejected the extraterritorial jurisdiction as displaced by the drafters of the ICCPR in wording of Article 2 of that treaty. See: Banković and others v. Belgium and others, Application no. 52207/99, 2001, Paragraph 78.

relevant. As summarized by the ILA' s Committee on the International Law and Sea Level Rise "This means that, as a rule, there will be at least one State (or other entity with international legal personality) exercising jurisdiction over persons impacted by sea level rise."[264] The same body continues by stating that "In the short term, most duties vis-à-vis individual rights will attach to affected States, but States of transit and host States may have obligations arising from rights of those who already have left their State. The balance of obligations between affected and host States, as they relate to individuals, can be expected to adjust with changes in the distribution of at-risk populations between them".[265]

At this point it should be mentioned that overall numbers of persons that fall into this category is not very large and therefore are, just as states of which they are nationals or in which they live, in risk to be overlooked. As pointed out,[266] overall combined population of small island states that are in focus of this work (Maldives, Kiribati, Marshall Islands, Tuvalu) does not exceed one million, which is a rather very small number that could be easily overlooked. However, unlike with states, most of the problems that populations of small island states are facing are not unique to them, but shared with other peoples around the world that live in low-lying areas vulnerable to sea level rise, but there are some peculiarities, like already mentioned continuation of nationality or problems of preserving identity specific to islanders.[267] All these are profoundly, at least from a legal point of view, questions of human rights and will be further discussed in this work.[268] Moreover, the questions of protection of rights of peoples on the move from small island states which are at risk of loss of legal personality due to climate change is inextricably linked to the very legal personality, as both

[264] Committee on International Law and Sea Level Rise, Final Report, International Law Association, 2024, p. 27.
[265] *Ibid.*
[266] For the demographic profile of small island states, see *supra* in 1.2.2.
[267] As shown by empirical studies, the latter risk of loss of common identity is cited by the very islanders as one of the core risks associated with sea level rise due to a strong sense of attachment to place being a commonplace in island's cultures. See: Oakes, Robert, Culture, climate change and mobility decisions in Pacific Small Island Developing States, *Population and Environment*, vol. 40, no. 4, 2019. p. 497.
[268] For further discussions of these topics, see *infra* in Chapters 3 and 4.

the right to self- determination and protection of other human rights of islanders lies, at least in part, on the continued existence of the very same small island state.[269]

2.4. **Conceptual relevance of specific parts of human rights law for sea level rise, small island states and their populations**

Sea level rise *per se* is not a violation of human rights.[270] To claim that sea level rise in particular (or climate change in general, for that part) represents a human rights violation would be the same as to claim that any other anthropogenic phenomenon that happened in nature represents it. Therefore, in trying to establish a compelling reasoning behind the human rights violation arising out of sea level rise, one is faced with the problem of establishing a causal link between the violation itself, the state and particular human right or rights that are claimed to be violated. In that, overcoming the first problem, instructive guidance can be found in international disaster law. The Inter-Agency Standing Committee's Operational Guidelines for the Protection of Human Rights in International Disasters conceptualize on a state's obligation to prevent harm from disasters, with the failure or, indeed, incapacity to take preventive measures being equivalent to a human rights violation.[271] Similarly, the ILC in its Commentary to the Draft Articles on the Protection of Persons in the Event of Disasters, includes preventive activities as those that are required to ensure respect and protection of human rights of persons affected by disasters.[272] This echoes the classic theoretical approach to the problem of nature of states' obligations under international human rights law. As widely stipulated in both universal and regional human rights treaties, states have duties to respect, protect and fulfil human rights on a non-

[269] As Torres Camprubí notes: "the protection of the State's continuity is a sort of by-product of the actions seeking to protect the population affected by relocation, since all contributions to the pre-emption of transnational climate-induced displacement may also be understood as being, in the long term, strategies for the preservation of Pacific Islands' statehood" (Torres Camprubí, *op. cit.* (footnote 35), p. 167.

[270] *Ibid.*

[271] See: Operational Guidelines on the Protection of Persons in Situations of Natural Disasters, Inter-Agency Standing Committee, The Brookings-Bern Project on Internal Displacement, 2011.

[272] Draft Articles on the Protection of Persons in the Event of Disasters, with Commentaries, in: Report of the International Law Commission on the Work of its Sixty-eighth Session, Yearbook of the International Law Commission, vol. II, Part II, Chapter IV, A/CN.4/SER.A/2016/Add.1 (Part 2), 2016, p. 13.

discriminatory basis.[273] The obligation to respect human rights is a negative obligation, which requires states to refrain from violating human rights by any act that would undermine the enjoyment of human rights. Within the context of sea level rise, the obligation to respect is not affected, except, as noted by the ILA' s Committee on International Law and Sea Level Rise, in cases of excessive restrictions of human rights beyond what is permitted under international law.[274]

The ICCPR, after proclaiming "obligation of States under the Charter of the United Nations to promote universal respect for, and observance of, human rights and freedoms" in its preamble,[275] goes on to stipulate in Article 2 that "Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status"[276]. Derogations from the obligations under the Covenant are possible only "in time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed" (Article 4, Paragraph 1), and even then some fundamental rights are not to be restricted.[277] Only under very specific, limited circumstances do the universal human rights as accorded by the ICCPR be restricted.[278] The Co-Rapporteurs of the ILC on the issues of sea level rise in relation to international law have observed that "sea-level rise could be considered an extreme circumstance in which

[273] See, in particular: ICCPR, Article 2 Paragraph 1, ICESCR, Article 2 Paragraph 2, American Convention on Human Rights: "Pact of San José, Costa Rica", 1969, *United Nations Treaty Series*, vol. 1144, no. 17955, 1979, pp. 143-212, Article 1 Paragraph 1, African Charter on Human and Peoples' Rights, 1981, *United Nations Treaty Series*, vol. 1520, no. 26363, 1988, pp. 217-292, Article 1 and Article 2, Convention for the protection of Human Rights and Fundamental Freedoms, 1950, *United Nations Treaty Series*, vol. 213, no. 2889, 1955, pp. 223-261, Article 1.

[274] Committee on International Law and Sea Level Rise, Final Report, International Law Association 2024, p. 27.

[275] International Convenant on Civil and Political Rights, Preambular Paragraph 4.

[276] ICCPR, Article 2.

[277] Paragraph 2 of the Article 4 of the International Convenant on Civil and Political Rights lists substantive rights from which no derogation is permissible even in situations which qualify as public emergency which threatens the life of the nation.

[278] International Convenant on Civil and Political Rights, Article 4.

derogation from human rights obligations was permitted under several treaties".[279] This conclusion is similar to what the ILC concluded in its Draft Articles on the Protection of Persons in the Event of Disasters, where it acknowledged that while "persons affected by disasters are entitled to the respect for and protection of their human rights" this must be "in accordance with international law".[280] This, in turn, means that "the provision contemplates an affected State's right of suspension or derogation where recognized under existing international agreements".[281] In any case, however, such derogations must be taken with caution and always assessed on a case-by-case basis.[282] Moreover, such derogations should be confined to the duration of the events or circumstances that justify them and in no case should be permanent.[283]

Obligation to protect human rights is, on the contrary, positive one. This obligation requires states to protect individuals from breaches of their rights that occur as a result of third-party acts or particular situations. There exists settled case law of human rights tribunals that requires states to protect human rights in disasters arising out of natural hazards.[284] Sea level

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[279] Galvão Teles, Ruda Santolaria, *op. cit.* (footnote 16), p. 64.

[280] Draft Article 5 of the Draft Articles on the Protection of Persons in the Event of Disasters, see: Draft Articles on the Protection of Persons in the Event of Disasters, with Commentaries, in: Report of the International Law Commission on the Work of its Sixty-eight Session, *Yearbook of the International Law Commission*, vol. II, Part II, Chapter IV, A/CN.4/SER.A/2016/Add.1 (Part 2), 2016, p. 34.

[281] Commentary to the Draft Article 5 of the Draft Articles on the Protection of Persons in the Event of Disasters, see: *ibid.*

[282] Compare: Galvão Teles, Ruda Santolaria, *op. cit.* (footnote 16), p. 64. Similarly, in the context of disasters in general, one author explained that: "it is prima facie recognised in human rights law itself that the full observation of some rights might need to be curtailed to allow an effective disaster response. At the same time, it is during purported public emergencies that the most egregious human rights abuses have occurred. Thus, theboundaries of what is permissible ought to be carefully and consciously observed." (Cullen, Miriam, Disaster, Displacement and International Law: Legal Protections in the Context of a Changing Climate, *Politics and Governance*, vol. 8, no. 4, 2020, p. 275).

[283] Article 4 Paragraph 1 of the ICCPR requires that any derogations must be confined to the "extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin". In the General Comment no. 29, the Human Rights Committee, intepreted this provision and expressed a view that derogations to the ICCPR in the state of emergency must operate on non-discriminatory basis, be proportionate and last no longer than circumstances that required implementation of these derogations. See: General Comment no. 29, States of Emergency (Article 4), Human Rights Committee, CCPR/C/21/Rev.1/Add.11, 2001, Paragraph 4.

[284] See, for example, judgements Budayeva and Others v. Russia, European Court of Human Rights, Application 15339/02, 21166/02, 20058/02, 11673/02, 15343/02, 2008; Öneryildiz v. Turkey, European Court of Human

rise seems to fit neatly into that, as its effects indeed have adverse effects that are "serious because of their intensity or duration and the physical or mental harm they cause" which than can lead to "degradation of the environment" that causes "foreseeable and serious violations of private and family life and the home".[285] Some human rights tribunals have, however, restricted this to an extent by allowing for different standard of obligation to protect as regards certain human rights in cases of natural and man-made hazards.[286]

Finally, regarding the obligation to fulfil human rights, the ICECSR oblidges states to "take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures".[287] The Covenant further requires that "the rights enunciated in this Covenant will be exercised without distinction of, any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status".[288] However, already during the drafting process that led to adoption of the text of the Covenant, this was opposed on the grounds "that it would be unrealistic for States to undertake such a guarantee; for instance, equality of pay between the sexes might be impossible to achieve immediately in some countries".[289] Therefore, the obligation of progressive realization was created. As interpreted by the Committee on the Economic, Social and Cultural Rights, states have "minimum core obligation to ensure the satisfaction of, at very least, mimimum essential

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Rights, Application 48939/99, 2004. See also: Burson, Bruce, Kälin, Walter, McAdam, Jane, Weerasinghe, Sanjula, The Duty to Move People Out of Harm's Way in the Context of Climate Change and Disasters, *Refugee Survey Quarterly*, vol. 37, no. 4, 2018, pp. 382, 386 *et passim* for the interpretation of the judicial findings contained in these judgements.

[285] Daniel Billy et al. v. Australia, Human Rights Committee, CCPR/C/135/D/3624/2019, 2022, Paragraph 8.12.

[286] In Budayeva and Others v. Russia, the European Court of Human Rights found that "positive obligations as regards the protection of property from weather hazards do not neccesarily extend as far as in the sphere of dangerous activities of a man-made nature", noting at the same time that this distinction does not apply to the right to life. See: Budayeva and Others v. Russia, European Court of Human Rights, Application 15339/02, 21166/02, 20058/02, 11673/02, 15343/02, 2008, Paragraphs 174 and 175.

[287] ICESCR, Article 2 Paragraph 1.

[288] ICESCR, Article 2 Paragraph 2.

[289] Draft International Covenants on Human Rights: Annotation prepared by the United Nations Secretary-general, A/2929, 1955, p. 59.

levels of each of these rights"[290] which is the first component of the nature of the obligation to progressively realize the rights contained in the ICESCR. To illustrate what this legal standard means, the Committee on Economic, Social and Cultural rights notes that "for example, a State party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is, prima facie, failing to discharge its obligations under the Covenant".[291] Apart from that, the states have the obligation to actively engage in "international assistance and cooperation" both through seeking such assistance if they do not possess the resources to ensure the realization of economic, social and cultural rights, and, on the other end, to provide such assistance to states which need it.[292] The obligation of progressive realization contained in this provision becomes especially relevant in the context of environmental degradation that affects a range of economic, social and cultural rights through processes such as salinization of aquifiers, loss of habitable and agricultural land and aggravation of living conditions in small island states. Moreover, in case of relocation, a question arises whether that means that the maximum available resources should be those possessed by the state into which islanders relocated or the small island state in which they formerly lived?

Therefore, the next chapter will proceed with the analysis of which and whose rights will be affected by the sea level rise and which entities will have to alter their views and policies towards respecting and promoting the human rights. We shall start with the right to self-determination, a primary right that is a prerequisite to enjoyment of all other human rights.

Chapter 3 – **Right to Self-Determination - From States to Peoples and Nations**

The right to self-determination, being the right essential for enjoyment of all other human rights, is of special relevance for peoples of small island states. This is so due to the fact that

[290] General comment no. 3, The nature of States parties' obligations (Article 2, Paragraph 1, of the Covenant), Committee on Economic, Social and Cultural Rights, 1990, available at: https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=9&DocTypeID=11 (accessed: 24th March 2023), Paragraph 10.
[291] *Ibid.*
[292] ICESCR, Article 2 Paragraph 1.

self-determination served as a basis for the establishment of statehood of small island states in the process of decolonization. Sea level rise imperils this most important expression of self-determination and therefore creates an intrinsic relation between this basic human right and the concept of legal personality of small island states. This relation is the most important topic of this Chapter. Before diving into the problem and legal ramifications of it, however, we give a brief historical and legal introduction into the concepts of self-determination and legal personality of states, peoples, and nations in international law, respectively.

3.1. **Right to self-determination – brief historical and legal introduction**

Self-determination is a complex concept involving legal, but also cultural, economic, social and political dimensions. It is commonly asserted that the principle of self-determination first emerged in political discourse the years following the First World War and the break-up of multinational empires in Europe. In the United States, president Thomas Woodrow Wilson's mentioned several times what will be later understood as a core of self-determination, albeit without using the very phrase self-determination.[293] In January of 1918, this line of thought reached a culmination in the "programme for world peace", commonly known as Fourteen Points. Future borders in Europe and political organization of new states were to be based on an "independent determination of political development and national policy" and "autonomous development" of peoples previously living in multinational empires like Russian and Austro-Hungarian, that found themselves in the process of dissolution.[294] Having

[293] For example, in his January 1917 "Peace without victory" speech in front of the United States Senate, Wilson emphasized that "that no nation should seek to extend its polity over any other nation or people, but that every people should be left free to determine its own polity, its own way of development, unhindered, unthreatened, unafraid, the little along with the great and powerful". See the text of the "Peace without victory" speech at: Address of the President to the Senate, 22 January 1917, available at: https://www-personal.umd.umich.edu/~ppennock/doc-Wilsonpeace.htm (accessed 29th November 2023). On the Wilson's conceptualizations of self-determination see also: Cassese, Antonio, *Self-determination of Peoples: A Legal Reappraisal, Cambridge*, 1995, pp. 19-23, Raič, David, *Statehood and the Law of Self-Determination*, The Hague/London/New York, 2002, pp. 177-184, Lulić, Mira, *Pravo na samoodređenje u suvremenom međunarodnom pravu*, PhD Thesis, Faculty of Law, University of Zagreb, 2005, pp. 54-55.

[294] The Fourteen Points were first laid out publicly in a speech delivered in front of the joint session of the United States Congreess in January of 1918. While there is no mention of the phrase self-determination within the text of the Fourteen Points, as Raič notes, "it is generally accepted that six out of the Fourteen Points implicitly address the concept" (see: Raič, *ibid.*, p. 181). For the text of the Fourteen Points Declaration, see:

only this in mind, self-determination might appear as a relatively recent principle which emerged only at the beginning of the 20th Century. However, the principle's theoretical foundations can be traced to the late 18th and early 19th Century, when the ideas of ethnic nation-states begun to emerge following the inauguration of principles of enlightenment, liberalism and nationalism stemming from the French Revolution and creation of nation-states (Kingdom of Italy, German Empire), a process which lasted throughout the better part of the 19th Century.[295] Moreover, self-determination was frequently cited as a solution for problems of coexistence of different nationalities in the early days of Russian communist thought.[296] At that time, self-determination was a strong political assertion, capable of mobilizing the masses and galvanizing revolutions, however it was not a legal concept, even less one with a defined scope. The Covenant of the League of Nations affirmed this by not mentioning self-determination at all, let alone elaborating on it.[297]

Fourteen Points, available at: https://www.britannica.com/event/Fourteen-Points (accessed 29th November 2023).

[295] For a similar view on origins of self-determination, see, for example: Cassese, *op. cit.* (footnote 293), p. 13, McWhinney, Edward, *Self-Determination of Peoples and Pluri-ethnic States in Contemporary International Law*, Leiden/Boston, 2007, pp. 1-2, McWhinney, Edward, Self-determination of Peoples and Plural-ethnic States Secession and State Succession and the Alternative, Federal Option, *Collected Courses of the Hague Academy of International Law*, vol. 294, 2002, pp. 177-178.

[296] Vladimir Ilyich Lenin formulated self-determination as a useful tool for furthering the class struggle, as it is a collective right held by people against "big states". He developed a theory of "national self-determination" already by 1916, when he published his Theses on the Socialist Revolution and the Right of Nations to Self-Determination. These theoretical considerations got their most notable political proclamation in the so-called Decree of Peace, published by the Bolsheviks in the 1917. Lenin, however, emphasized self-determination, as one might expect, more a useful concept for advancing the class struggle that as a standalone (legal) principle. On Leninist conceptualizations of self-determination, see: Cassese, *op. cit.* (footnote 293), pp. 14-19, Raič, *op. cit.* (footnote 293), pp. 184-188, Carrère d'Encausse, Hélène, Unité proletariénne et diversité nationale: Lénin et la théorie de l'autodétermination, *Revue français de science politiques*, vol. 21, no. 2, 1971, pp. 221-255, especially pp. 229-237.

[297] This prompted the Commission of Jurists appointed in 1920 by the Council of the League of Nations to conclude that, at that time, "Positive international law does not recognize the right of national groups, as such, to separate themselves from the state of which they form part by the simple expression of a wish, any more than it recognizes the right of other states to claim such a separation". See: Report of the International Committee of Jurists Entrusted by the Council of the League of Nations with the Task of Giving an Advisory Opinion upon the Legal Aspects of the Aaland Islands Question, *Official Journal of the League of Nations*, Special Supplement, no. 3, 1920, p. 5. Consequently, this statement, coupled with the absence of self-determination from the text of the Pact of League of Nations, prompted a doctrinal conclusion that self-determination at the time was not part of the positive international law. Compare: Cassese, *ibid.*, p. 30.

Following theoretical conceptualizations in the 19th and beginning of the 20th Century, self-determination gained real prominence in international affairs after the Second World War. This led to inclusion of self-determination as one of the governing principles in the Preamble and articles of the, at the time, freshly drafted United Nations Charter.[298] The United Nations Charter thus famously proclaimed that one of the purposes of the United Nations is to "develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples".[299] While this is without doubt a strong expression of the self-determination principle as one of the foundations of post-World War II legal order, the elaborations of what the practical value and scope of the principle came at a later stage.[300] In fact, multiple commentators are of the view that the principle of self-determination as espoused in the United Nations Charter in 1945 did not create any bindning international legal norm, but rather was a general principle of United Nations that was intended to guide the behaviour of states and the United Nations, but short of creating obligations for member states stemming directly out of it.[301]

As time progressed, United Nations membership was growing and the General Assembly majority has started to more and more reflect the views of newly independent states or

[298] Article 1 Paragraph 2 of the Charter of the United Nations explicitly includes self-determination as one of the principles of the United Nations by expressing that the purpose of the United Nations is, inter alia "To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace." However, it does not include the definition or scope of the term.

[299] Charter of the United Nations, Article 1 Paragraph 2.

[300] This can be illustrated by the fact that the notion of "peoples" as beneficiaries of self-determination was quite controversial and far from defined at the time of its inclusion into the Charter. For example, the Documents of the United Nations Conference on International Organization, which chronologise the *travaux préparatoire* for the Charter, indicate that "peoples" refers "to groups of human beings who may, or may not, comprise states and nations". See: *Documents of the United Nations Conference on the International Organization*, vol. XVIII, 1954, p. 658, also: Raič, *op. cit.* (footnote 276), p. 201, Ross, Nathan Jon, Low-lying States, Climate-change Induced Relocation, and the Collective Right to Self-Determination, PhD Thesis, Victoria University of Wellington, 2019., p. 41. Moreover, the Chapters XI and XII of the Charter which governed the trust and non-self-governing territories did not mention the principle of self-determination. See: Shaw, Malcom N., *International Law*, Cambridge, 2008, p. 252.

[301] Cassese, *op. cit.* (footnote 293), p. 43; Crawford, James, *The Creation of States in International Law*, Oxford, 2007, p. 112, pp. 42-43; Raič, *ibid.*, p. 201; Shaw, *ibid.*

developing ones that were very keen to insist on fast and decisive decolonization.[302] In other words, self-determination was gaining strong momentum as one of the key concepts of international (human rights) law.[303] Decisively, this atmosphere of advocacy for a fast and decisive decolonization has been expressed in the Declaration on the Granting of Independence to Colonial Countries and Peoples from 1960, in which self-determination is expressly quoted as a way for peoples to "freely determine their political status and freely pursue their economic, social and cultural development".[304] It is clear from the wording, and moreover from the political situation of the time, that self-determination was understood as a tool to quickly gain political independence and establish new independent states on the previous colonial territories.[305] The General Assembly consistently repeated its calls to bring the swift end to colonization in its subsequent resolutions.[306]

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[302] As observed by Raič: "This is reflected in the numerous resolutions adopted both by the Security Council and by the General Assembly affirming the existence of a right of self-determination, as well as in the diasmantling of almost the entire dependency system in terms of Non-Self-Governing Territories and Trust Territories in the course of the 1960s and 1970s." (Raič, *ibid.*, p. 218). See also the United Nations General Assembly resolution quoted there.

[303] For an overview of early activities of the General Assembly which predated the 1960 Declaration on the Granting of Independence to Colonial Countries and Peoples, see: Vukas, Budislav, States, Peoples and Minorities, *Collected Courses of The Hague Academy of International Law*, vol. 231, 1999, pp. 382-384.

[304] Declaration on the Granting of Independence to Colonial Countries and Peoples, United Nations General Assembly Resolution, A/RES/1514(XV), 1960, Article 2.

[305] Asamoah, Obed Y., *The Legal Significance of the Declarations of the General Assembly of the United Nations*, The Hague, 1966, pp. 177–185.

[306] This determination of the majority in the General Assembly to bring a full end to colonization is well illustrated by the decision to declare the 1990-2000 decade as the first International Decade for the Eradication of Colonialism. This has been followed by the subsequent decades (Second International Decade for Eradication of Colonialism, 2001-2010, Third International Decade for Eradication of Colonialism, 2011-2020, Fourth International Decade for Eradication of Colonialism, 2021-2030). See: International Decade for the Eradication of Colonialism, United Nations General Assembly, A/RES/43/47, 1988, Second International Decade for the Eradication of Colonialism, United Nations General Assembly, A/RES/55/146, 2000, Third International Decade for the Eradication of Colonialism, United Nations General Assembly, A/RES/65/119, 2010, Fourth International Decade for the Eradication of Colonialism, United Nations General Assembly, A/RES/75/123, 2020). While, already by the time of the first International Decade the remaining non-self-governing territories were mostly small islands with small populations and limited economic resources, the General Assembly noted in its Resolution 45/33 that "such factors as territorial size, geographical location, size of population and limited resources should in no way delay the speedy exercise by the peoples of non-self-governing territories of their inalienable right to self-determination and independence in conformity with the Declaration". See: Thirtieth Anniversary of the Declaration on the Granting of Independence to Colonial Countries and Peoples, United Nations General Assembly, A/RES/45/33, 1990.

To exclude any doubts about self-determination as a part of positive international law, it was included in the two international agreements that form a cornerstone of universal protection of human rights in international law.[307] This happened in 1966, when ICCPR and ICECSR were concluded. In both Covenants, self-determination occupies, arguably, the most prominent place as part of the common Article 1, which stipulates that:

"1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations."[308]

Inclusion of self-determination into the Covenants has had multiple effects. Covenants are universally applicable, their parties are not confined to a specific context, but rather have to respect, protect and fulfil their obligations arising from the Covenants with respect of every human being.[309] Self-determination thus became established outside a narrow context of post-war reshaping of the world and becomes a long-lasting, permanent principle which is a cornerstone of human rights protection and is not to be viewed as consumed once peoples achieve independence by exercising it.[310] Moreover, it should be noted that both the United

[307] On the transformation of the principle of self-determination into a binding human right by the two Covenants, see: Nowak, Manfred, *U.N. Covenant on Civil and Political Rights: CCPR Commentary*, 2005, pp. 13-14.
[308] ICCPR and ICESCR, common Article 1.
[309] This enabled self-determination to be, as Nowak, points out, constructed as a "continuing" right, rather than a "right which may be exercised only once". See: Nowak, *op. cit.* (footnote 307)., pp. 15-16.
[310] *Ibid.*

Nations General Assembly and the HRComm have identified self-determination as a right essential for enjoyment of other human rights.[311] Notwithstanding this, self-determination as included in the ICCPR and ICESCR still lacked a precise legal scope.[312] This, however, did not prevent the ICCPR and ICESCR, due to their wide, almost universal formal acceptance by states, to play a significant role in defining the customary law status of the right to self-determination.[313]

Finally, complete affirmation of self-determination as a key principle and right in international law came with the Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations (hereinafter Friendly Relations Declaration), adopted by the General Assembly in the 1970.[314] Although in a form of a United Nations General Assembly Resolution and therefore not a binding document *per se*, it is commonly agreed both by the practice and theory of international law that Friendly Relations Declaration reflects customary international law.[315] However, although being confirmed as a right of primary

[311] The General Assembly had first noted that "the right of peoples and nations to self-determination is a prerequisite to the full enjoyment of all fundamental human rights" already in 1952, well before the two were concluded and has maintained the position ever since. See: The Right of Peoples and Nations to Self-Determination, United Nations General Assembly, A/RES/637 (VII), 1953. Similarly, in its General Comment no. 12 the Human Right Committee referred to self-determination as "an essential condition for the effective guarantee and observance of individual human rights and for the promotion and strengthening of those rights". See: Article 1 (Right to Self-Determination): The Right to Self-Determination of Peoples, General Comment no. 12, Human Rights Committee, 1984.

[312] This led to initial doubts on enforceability of common Article 1. However, any doubt that remained has soon been dispersed by the consistent practice of the treaty bodies. For the most notable decisions of the Human Rights Committee and a commentary, see: Nowak, *op. cit.* (footnote 307), pp. 16-19.

[313] In 1990, the Committee of Experts conviened by the United Nations Educational, Scientific and Cultural Organization established that "Some peoples' rights are universally accepted. These include right to existence, the peoples' right to self-determination and other rights" (International Meeting of Experts on Further Study of the Concept of the Rights of Peoples: Final Report and Reccomendations, United Nations Educational, Scientific and Cultural Organization, SHS-89/CONF.602/7, 1990, p. 8.).

[314] In the Friendly Relations, the principle of self-determination is mentioned as part of "the principle of equal rights and self-determination of peoples " See: Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, United Nations General Assembly Resolution, A/RES/2625(XXV), 1970.

[315] Andrassy *et al.*, *op. cit.* (footnote 103), pp. 109-112.

importance, this again has not left self-determination without doubts regarding its specific meaning and scope.

From the formulation of the common Article 1 of the ICCPR and ICESCR which together form a cornerstone of international human rights law, it is clear that the right to self-determination belongs to "all peoples". Even the smallest population suffices, as confirmed in the case of Pitcairn, an island numbering only fifty persons, which have nevertheless been explicitly recognized as peoples posessing the right to self-determination by the United Nations General Assembly.[316] The notion of peoples is thus a key concept through which the rights holders of the right to self-determination should be defined. However, this is an exact point where the problems with the right to self-determination and its application begin to emerge. As observed by various authors, there is no universal definition of peoples which would be accepted under international law as binding, thus delimiting the right to self-determination with regard to the right's holders.[317] This led to various proposals of different bodies as to which criteria should be applied in defining peoples as holders of right to self-determination. Notably, the proposal which tried to delineate criteria under which peoples could be legally conceptualized was made by the group of experts convened by the United Nations Educational, Scientific and Cultural Organization (hereinafter UNESCO).[318] This proposal included a composite set of features, composed of a common identity (ethnic,

[316] Question of American Samoa, Bahamas, Bermuda, British Virgin Islands, Brunei, Cayman Islands, Cocos (Keeling) Islands, Gilbert and Ellice Islands, Guam, Montserrat, New Hebrides, Pitcairn, St. Helena, Seychelles, Solomon Islands, Turks and Caicos Islands and the United States Virgin Islands, United Nations General Assembly, A/RES/2869, 1971.

[317] For a similar conclusion, see, for example: Brilmayer, Lea, Secession and Self-Determination: A Territorial Interpretation, *Yale Journal of International Law*, vol. 16, no. 1, 1991, p. 198 pointing out how various criteria have been used to delineate peoples from minorities, Buchanan, Allen, Self-Determination, Revolution and Intervention, *Ethics*, vol. 126, no. 2, 2016, p. 470 who notes that international law does not "provide adequate guidance as to which groups have a legal right to some form of self-determination short of full independence", Crawford, James, *op. cit.* (footnote 301), pp. 124-125 mentioning a claim "that it is impossible to delineate with sufficient or indeed with any precision the unit to which the right of self-determination is to be attributed" as an argument against self-determination, Klabbers, Jan, The Right to be Taken Seriously: Self-Determination in International Law, *Human Rights Quarterly*, vol. 28, no. 1, 2006, pp. 193-194, noting how affirming self-determination as a "free and genuine expression of the will of the peoples" by the ICJ "creates more problems than it solves".

[318] International Meeting of Experts on Further Study of the Concept of the Rights of Peoples: Final Report and Reccomendations, United Nations Educational, Scientific and Cultural Organization, SHS-89/CONF.602/7, pp. 7-8.

historical, cultural, linguistic, religious, territorial of identity of economic life), common will of a group to be identified as peoples and existence of institutions belonging to peoples or other means that enable them to express their identity. Moreover, HRComm also engaged in the effort to discuss the criterion of "strength of the links to the territory" in the context of rights to self-determination of peoples of New Caledonia.[319]

Notwithstanding these developments, who exactly belongs to the people exercising right to self-determination is often an open question and was circumvented by defining territory on which peoples are to exercise their right rather than defining who the people(s) are. First of all, by applying the systemic interpretation to the two Covenants, one inevitably comes to the conclusion that peoples must be distinct from minorities. This prompted the assertion that only peoples are entitled to claim the right to self-determination, not minorities.[320] However, in recogizing composite nature of the notion of peoples, aforementioned UNESCO criteria are compatible with the idea that various legal concepts from statehood to autonomy constitute possible ways of achieving self-determination in various contexts and for various collective entities defined as peoples.[321] For example, indigenous rights complex does recognize right to self-determination of indigenous peoples, albeit under very specific set of circumstances.[322]

The peoples, an undefined, yet crucial concept, is, as we have seen, used in different cases. For small island states faced with sea level rise, indeed these overlapping, yet distinct legal

[319] See the case Gillot *et al.* v. France, Human Rights Committee, CCPR/C/75/D/932/2000, Paragraph 13.7.

[320] General Comment no. 23, Article 27 (Rights of Minorities), Human Rights Committee, CCPR/C/21/Rev.1/Add.5, 1994; Cassese, *op. cit.* (footnote 293), pp. 61-62; Cristescu, Aureliu, The Right to Self-Determination: Historical and Current Development on the Basis of United Nations Instruments, E/CN.4/Sub.2/404/Rev. 1, 1981, p. 41; Raič, *op. cit.* (footnote 293), pp. 265-266; Vukas, *op. cit.* (footnote 303) pp. 436-437.

[321] This further leads to a conclusion that expression of self-determination can in various situations depend on the situations that particular peoples find themselves in. Compare: Kirigis, Frederic L., Jr., Degrees of Self-Determination in the United Nations Era, *American Journal of International Law*, vol. 88, no. 2, 1994, pp. 308-309. See also discussion *infra* in 3.2. and 3.3.

[322] Article 26 Paragraph 2 of the United Nations Declaration on the Rights of Indigenous Peoples (hereinafter UNDRIP) stipulates that: "Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired." (United Nations Declaration on the Rights of Indigenous Peoples, United Nations General Assembly, A/RES/61/295, 2007).

categories are relevant. The "peoples" have no straightforward definition under international law.[323] At the same time, the term is used in various documents, from the United Nations Charter to human rights instruments. As Vukas puts it: "We witness an always more diversified use of this term simultaneously with the increased interest for the individual and different groups in international relations and international law."[324] Indeed, it is very hard to define distinctively people as a collective entity in possession of a right to self-determination, but *in extremis*, one could also argue that peoples, as a collective entity, are composed of individuals and individuals are finally those who exercise the right to self-determination.[325] However, this does not resolve doubts arising from the fluidity of the concept of peoples, as individuals exercise self-determination only as members of the peoples. Therefore, it remains essential to define who is a member of the peoples in order to have a right to exercise the self-determination collectively (via, for example, referenda).

Notwithstanding this, being established as a right, rather than only a political principle or theoretical concept by the common Article 1 of the two Covenants, the right to self-determination is a right of peoples. That means that, unlike other human rights contained in these and most other human rights instruments, right to self-determination is a collective right.[326] Peoples are those who exercise the right to self-determination collectively and enjoy it in perpetuity, as a continuous right.[327] The right to self-determination cannot be considered "consumed" or "extinguished" once statehood (in case of external self-determination) or a degree of autonomy (in case of internal self-determination) is achieved. Its continuing character reflects in that these achievements must be safeguarded. This can be illustrated by the permanent character of the right to self-determination figuring prominently in the United Nations General Assembly Resolution on Permanent Sovereignty over Natural Resources, in which the General Assembly stated that "permanent sovereignty over natural resources" is

[323] For further discussion on this problem, see *infra* in 3.2.9.2.
[324] Vukas, *op. cit* (footnote 303), p. 318.
[325] Thürer, Daniel, Burri, Thomas, Self-Determination, in: Wolfrum, Rüdiger (ed.), in: Wolfrum, Rüdiger (ed.), *Max Planck Encyclopaedia of International Law*, vol. IX, 2012, pp. 117-118, Vukas, *ibid.*, pp. 446-448.
[326] Nowak, *op. cit.* (footnote 307), pp. 14-15.
[327] As Nowak points out, basing his conclusion on the analysis of the travaux préparatoire of the ICCPR "the permanent character of the right of self-determination was emphasized, principally by the use of the present tense ('have' instead of 'shall have')" in the Article 1 of the Covenant. See: *Ibid.*, p. 12.

"a basic constituent of the right to self-determination".[328] In turn, this means that in order for self-determination under common Article 1 of the ICCPR and ICESCR to operate, a group must be identified as peoples in the first place, as otherwise the group could be only a minority, which is entitled to a different set of rights under Article 27 of the ICCPR.[329] This, however, does not mean that rights of minorities under Article 27 of the ICCPR does not include significant components of the right to self-determination, especially in its internal form.[330] In extreme cases of human rights violations, minorities can exercise even the external aspect of the right to self-determination, known under the (still controversial) doctrine of remedial secession.[331] Implications of this distinction are important in the context of the problems which are about to become more and more pressing as sea continues to rise and territory becomes inundated.

In trying to decouple these implications, Ross created a framework for understanding the right to self-determination. According to Ross, right to self-determination has strategic and operational aspects.[332] Strategic aspects can further be divided between objectives (strengthening universal peace, enabling other human rights, protecting groups' identities) and dimensions of the self-determination (external and internal dimension).[333] The objectives are goals which peoples shoud achieve by exercising the right to self-determination. Dimensions, on the other hand, explain how self-determination is sometimes achieved by statehood (external self-determination) and sometimes by autonomy within an existing state (internal self-determination).

The objectives and dimensions, depend on the operational aspects, which are divided between substantive and procedural.[334] Among substantive aspects, there are statehood, the

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[328] Permanent Sovereignty over Natural Resources, United Nations General Assembly, A/RES/1803(XVII), 1962, Preamble.
[329] Ross, *op. cit.* (footnote 300), p. 74.
[330] For the discussion of the degrees of self-determination, see: Kirigis, *op. cit.* (footnote 321), pp. 308-309.
[331] For the view on the concept of remedial secession, see, for example: Vidmar, Jure, Remedial Secession in International Law: Theory and (Lack of) Practice, *St Antony's International Review*, Vol. 6, No. 1, 2010, p. 50.
[332] Ross, *op. cit.* (footnote 300), p. 35.
[333] *Ibid.*
[334] *Ibid.*

right to be different, political status, economic, social and cultural development.[335] These are, in essence, various degrees of political and legal status that enable right-holders to exercise their right to self-determination.

Procedural aspects, on the other hand, are various processes to "freely determine" substantive aspects, democratic governance and a degree of autonomy, respectively.[336] As to the procedural aspects, their endgoal should be to enable the right's holders to express their will about the political and economic future. The Friendly Relations Declaration clearly postulates this by stipulating that "all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development, and every State has the duty to respect this right in accordance with the provisions of the Charter".[337] The ICJ neatly summarized this approach in its Western Sahara Advisory Opinion, writing that "the application of the right of self-determination requires a free and genuine expression of the will of the peoples concerned".[338] The way that this is implemented varies, with plebiscites, referenda and free elections being the most common tools of ascertaining the genuine expression of the will of peoples.[339] In the context of external self-determination resulting in statehood, theoretically, this notion returns a simple practical result – once peoples freely determine that they want statehood, they have a right to establish a sovereign state and maintain it. However, external self-determination in this sense is not achievable in all cases, especially outside decolonization, as it would be contrary to the principle of territorial integrity of states.[340] Notwithstanding this, it has been repeated multiple times in this work that small island states which are endangered by the sea level rise have indeed established themselves as sovereign states as a consequence of the

[335] *Ibid.*

[336] *Ibid.*

[337] Friendly Relations Declaration, The Principle of Equal Rights and Self-Determination of Peoples.

[338] Western Sahara, Advisory Opinion, *I.C.J. Reports*, 1975, p. 32.

[339] On the methods of implementation of self-determination see: Sureda, Andrès Rigo, *The Evolution of the Right to Self-Determination: A Study of United Nations Practice*, Leiden, 1973, pp. 294-306.

[340] This is because of the different interests being behind the two. As Brilmayer notes: "The standard account pits the principle of self-determination against the principle of territorial integrity. The first assumes government is defined as a collection of individuals; the latter, as an area of land." See: Brilmayer, *op. cit.* (footnote 317), p. 201.

decolonization process. In that process, granting of statehood to them has been interpreted as an outcome.[341] Moreover, there is a right to use appropriate means to withhold the outcomes of these views once they are implemented in practice. As explained by Cassese, once self-determination is implemented in the form chosen by the right's holders, its character as a "continuing right" included among human rights enshrined in the ICCPR requires it to be permanent in the sense that outside interference into the domestic democratic processes is contrary to the maintenance of the right to self-determination.[342]

Right to self-determination is not necessarily a territorial right. While self-determination as conceived during the decolonization period has been defined geographically, with peoples of a non-self-governing territory having the right to exercise their self-determination within the borders of that territory as a whole,[343] newer development brought about shifting the emphasis back to the notion of peoples as right-holders emancipated from a strict territorial definition.[344] Connection between self-determination and territory has been legally coated in the *uti possidetis juris* principle, which the ICJ famously defined as applicable to colonial self-determination outside Latin America[345] in the Frontiers (Burkina Faso v. Mali) judgement.[346] This has been followed by the Arbitration Commission of the Peace Conference

[341] Compare: Torres Camprubí, *op. cit.* (footnote 35), p. 269.

[342] Cassese, *op. cit.* (footnote 293), pp. 52-55.

[343] Raič, *op. cit.* (footnote 293), pp. 208-209.

[344] This has been summarized by judge Cançado Trinidade, who wrote that, in the context of achieving statehood as a result of recourse to self-determination "People and territory go together, but the emphasis is shifted from the status of territory to the needs and aspirations of people." (Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo (Advisory Opinion), Separate Opinion of Judge Cançado Trinidade, *I.C.J. Reports*, 2010, p. 150.

[345] As McWhinney notes: "Within Latin America itself, there is some tendency today to restrict the application of the *uti possidetis* doctrine to its special historical fact-context in Latin America at the moment of independence from the European Imperial Power (Spain or Portugal, as the case might be)." (McWhinney, *op. cit.* (footnote 295), p. 232.).

[346] In the Frontiers (Burkina Faso v. Mali) judgement, the ICJ famously stipulated that: "In this connection it should be noted that the principle of *uti possidetis* seems to have been first invoked and applied in Spanish America, inasmuch as this was the continent which first witnessed the phenomenon of decolonization involving the formation of a number of sovereign States on territory formerly belonging to a single metropolitan State. Nevertheless, the principle is not a special rule which pertains solely to one specific system of international law. It is a general principle, which is logically connected with the phenomenon of the obtaining of independence, wherever it occurs. Its obvious purpose is to prevent the independence and stability of new States being endangered by fratricidal struggles provoked by the challenging of frontiers following the withdrawal of the administering power." (Frontier Dispute (Burkina Faso v. Mali, *I.C.J. Reports*, 1986, p. 565).

on Yugoslavia (known as Badinter Commission by the surname of its chairman, former president of the Constitutional Council of France, Robert Badinter) which extended the application of the *uti possidetis juris* to the case of dissolution of a state.[347] In brief, the *uti possidetis juris* means that, in the creation of newly independent states, former colonial or administrative borders become state borders.[348] In principle, there should be no deviations according to ethnic, historical or other lines (which were often completely disregarded by colonial states in drawing of colonial borders).

We have pointed out that the right to self-determination belongs to the peoples and not to territories,[349] therefore to determine whether right to self-determination exists in any given case it is not crucial to determine a territory on which it is to be exercised, but rather whether a group of persons who claim this right constitutes peoples or not.[350] A specific expression of this can be found in UNDRIP, which explicitly recognizes the right to self-determination to indigenous peoples,[351] even though they are often in a situation of being expelled from their indigenous lands.[352] To that end, albeit on a more generalized level, the United Nations

[347] In its Opinion no. 3, the Badinter Commission stated that in the process of creation of independent states as a result of dissolution of former Yugoslavia: "Except where otherwise agreed, the former boundaries become frontiers protected by international law. This conclusion follows from the principle of respect for territorial status quo and, in particular, from the principle of *uti possidetis*. *Uti possidetis*, though initially applied in settling decolonization issues in America and Africa, is today recognized as a general principle as stated by the International Court of Justice in its judgement of 22 December 1986 in the case between Burkina Faso and Mali" (Conference on Yugoslavia, Arbitration Commission, Opinion no. 3, in: Conference on Yugoslavia, Arbitration Commission: Opinions on Questions arising from the Dissolution of Yugoslavia, *International Legal Materials*, vol. 31, no. 6, 1992, pp. 1488 – 1526.).

[348] See: *ibid*.

[349] Compare: Ross, *op. cit.* (footnote 300), p. 48.

[350] Compare: Ross, *ibid.*, pp. 49-50, Vukas, *op. cit.* (footnote 303) p. 418, 433-435.

[351] Article 3 of the UNDRIP thus declares that: "Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development." This is followed by Article 4, which elaborates on the forms of self-determination by stating that "Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions."

[352] Here it is interesting to point out that the UNDRIP does not rule out relocation of indigenous peoples. Article 10 of the Declaration only prohibits "forcible removals", simultaneously requiring that "No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return." Thus, even the option of return remains facultative. Similarly, the International Labour Organization Convention no. 169 on Indigenous and Tribal Peoples Article 16, Paragraph 2 stipulates that "Where the relocation of these peoples is considered

Special Rapporteur Aureliu Cristescu wrote that right to self-determination is established through the "connection with a territory", however that it continues "even if the people in question have been wrongfully expelled from it and artificially replaced by another population".[353] This brings about a parallel with the case of peoples of small island states, which will have to evacuate from their indigenous lands, these being, of course, the small islands. It is still unclear whether this relocation is to happen as an organized process in which a population is about to relocate as a group (*en masse* relocation), or as a series of individual relocations. In the former case, it is likely that the islanders will still be able to be recognized as peoples due to the simple fact that they will remain together, forming a compact community. However, in the latter case, there is a significant risk of fragmentation of communities, which will in turn lead to assimilation and, consequentially, acculturation in the host states' societies and loss of recognizable elements of peoples' identity.[354] Self-determination is thus also endangered as it might happen there will be no common identity to form a basis of it, or such identity would be too loose.[355] Self-determination, as a collective right, is enjoyed by the populations of small island states as a collective entity under the designation as peoples. If individual relocation becomes a case, it is highly doubtful whether individuals or small communities of islanders scattered around different states would still count as such. Contrary to that, in a planned relocation scenario, it is highly likely that an

necessary as an exceptional measure, such relocation shall take place only with their free and informed consent. Where their consent cannot be obtained, such relocation shall take place only following appropriate procedures established by national laws and regulations, including public inquiries where appropriate, which provide the opportunity for effective representation of the peoples concerned." (Convention no. 169 Concerning the Indigenous and Tribal Peoples, International Labour Organisation, 1989, *United Nations Treaty Series*, vol. 1650, no. 28383, 1991, pp. 383-410).

[353] Cristescu, *op. cit.* (footnote 320), p. 41.

[354] As Ross notes: "The risks of assimilation are greater if low-lying peoples move in opportunistic ways, rather than in relation to a systematic relocation enterprise that seeks to enable their enjoyment of self-determination. In piecemeal migrations, individuals' choices of destinations will be guided by, for example, where there are family members already. Other times, the choice will be limited to what opportunities are available, such as which countries' immigration regulations permit their relocation. Either way, there is a substantial risk of the people becoming geographically fragmented. This fragmentation exacerbates the risks of assimilation and highlights the need for relocation to be the subject of forward planning that respects the people as a self-determining unit, even where some individual members choose not to remain with the people." See: Ross, *op. cit.* (footnote 300), p. 17.

[355] Compare: Skillington, Tracey, Reconfiguring the Contours of Statehood and the Rights of Peoples of Disappearing States in the Age of Global Climate Change, *Social Sciences*, vol. 5, no. 3, 2016, p. 3.

agreement between a receiving state and a small island state will contain provisions which will address outcomes of self-determination and other rights that relocation process and its consequences could infringe upon. Thus, in case of series of individual relocations, there is a significant risk of peoples being unable to exercise not only self-determination with its substantive and procedural aspects, but also other interconnected rights such as rights of political participation of protection of identity.[356]

While self-determination as it is understood in contemporary international law is a product of decolonization, its effects extend beyond it.[357] In the advisory opinion delivered on the Legal Consequences of the separation of the Chagos Archipelago from Mauritius, ICJ explicitly proclaimed that the right to self-determination has a "broad scope of application" extending beyond decolonization.[358] Similarly, in its advisory opinion on the Legal consequences of the construction of a wall in occupied Palestinian territory, the ICJ concluded, relying on the numerous resolutions of the United Nations General Assembly, that the Palestinians have the right to self-determination.[359] Even more clearly, judges Wildhaber

[356] To that end, Ross adds: "If a low-lying state's population is fragmented across multiple third-party states, then any relevant legal arrangements and other facts will become highly relevant in determining whether they remain a people, transform into minorities, or some combination of the two." See: Ross, *op. cit.* (footnote 300), p. 46.

[357] Compare: *Ibid*., p. 48.

[358] It seems worthy to quote the relevant paragraph of the advisory opinion in full: "The Court will have to determine the nature, content and scope of the right to self-determination applicable to the process of decolonization of Mauritius, a non-self-governing territory recognized as such, from 1946 onwards, both in United Nations practice and by the administering Power itself. The Court is conscious that the right to self-determination, as a fundamental human right, has a broad scope of application. However, to answer the question put to it by the General Assembly, the Court will confine itself, in this Advisory Opinion, to analysing the right to self-determination in the context of decolonization." (Legal consequences of the separation of the Chagos Archipelago from Mauritius, Advisory Opinion, *I.C.J. Reports*, 2019, p. 131). In stating that, the ICJ *de facto* clearly distinguished the "colonial" and "non-colonial" self-determination, recognizing the relevance of the right both in decolonization context and outside it. However, in Kosovo Advisory Opinion, the ICJ has qualified this by stating that: "Whether, outside the context of non-self-governing territories and peoples subject to alien subjugation, domination and exploitation, the international law of self-determination confers upon part of the population of an existing State a right to separate from that State is, however, a subject on which radically different views were expressed by those taking part in the proceedings and expressing a position on the question." (Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, *I.C.J. Reports*, 2010, p. 438).

[359] Legal consequences of the construction of a wall in occupied Palestinian territory, Advisory Opinion, *I.C.J. Reports*, 2004, pp. 182-183.

and Ryssan of the European Court of Human Rights, in their concurring opinions in the case Loizidou v. Turkey, expressed the view that self-determination is relevant and applicable outside of decolonization already back in the last decade of the twentieth century.[360] Therefore, as Ross observed "The importance of each of these cases is that decolonization was irrelevant, or only relevant historically, but the right to self-determination was material."[361] Relevance of this characteristic of right to self-determination for peoples of small island states is in that the right to self-determination operates outside the context of decolonization, which is exactly the situation they will find themselves in due to relocations connected with sea level rise.[362] Moreover, said implications of the right become increasingly relevant in the case of small island states populations hosted by other states, as they create obligations also for those states.[363]

The right to self-determination, therefore, contains both substantive outcomes and procedural ways to achieve these outcomes.[364] In the era of decolonization, the most important substantive outcome of self-determination had been the statehood. In non-colonial situations, statehood as the outcome of self-determination is counterbalanced by the principle of national

[360] The two judges observed that: "Until recently in international practice the right to self-determination was in practical terms identical to, and indeed restricted to, a right to decolonisation. In recent years a consensus has seemed to emerge that peoples may also exercise a right to self-determination if their human rights are consistently and flagrantly violated or if they are without representation at all or are massively under-represented in an undemocratic and discriminatory way. If this description is correct, then the right to self-determination is a tool which may be used to re-establish international standards of human rights and democracy." (Concurring Opinion of Judge Wildhaber, Joined by Judge Ryssdal, Loizidou v. Turkey, European Court of Human Rights, Application no. 15318/89, 1996).

[361] Ross, *op. cit.* (footnote 300), p. 53.

[362] Here, one should note the opinion by Stoutenburg in which she argues that sea level rise as a part of climate change caused by greenhouse gas emmissions, faces the conceptual problem of domination. It is not the "immediacy of domination" from other state that is at stake, but rather the "freedom from outside interference" what peoples of small island states are trying to safeguard (compare: Grote Stoutenburg, *op. cit.* (footnote 109), p. 336. However, in stating that, Stoutenburg relies on the colonial concept of self-determination. In the process of decolonization, it was indeed "freedom from outside interference" the goal that peoples, by exercising their right to self-determination through creation of new independent states, were trying to achieve. In the case of sea level rise, this changes into the keeping as much as possible of the achieved results of self-determination intact. This is not to be done by seeking to safeguarf "freedom from outside interference", but rather through cooperation and support of other states.

[363] For the discussion of these obligations see infra in 3.1.11., 3.2. *et passim*.

[364] Compare: Ross, *op. cit.* (footnote 300), pp. 72-91.

unity and territorial integrity of states, as enshrined in the United Nations Charter,[365] the Friendly Relations Declaration[366] and various other documents. In traditional non-colonial situations, therefore, self-determination and territorial integrity of states principles should be in balance. While this is certainly a well-established interpretation which, according to some, echoes the international customary law, it must be emphasized that it was constructed around situations of existing populations or minorities which are living on territory of a state.

There are compelling voices among scholars and in international jurisprudence that self-determination, at least in the context of decolonization, should be considered a peremptory norm of international law or *jus cogens*.[367] The ICJ confirmed that right to self-determination is indeed of peremptory character in the Israeli Wall advisory opinion and again in the Chagos advisory opinion, albeit not directly, but through the application of rules on state responsibility on breaches of self-determination.[368] Five years later, the ICJ made the observation explicit. In its Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem advisory opinion, it stated that "The Court considers that, in cases of foreign occupation such as the present case,

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[365] The Declaration on the Granting of Independence to Colonial Countries and Peoples stipulates that: "Any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations" (Declaration on the Granting of Independence to Colonial Countries and Peoples, Paragraph 6).

[366] The Friendly Relations Declaration Preamble states that the General Assembly member states are "Convinced in consequence that any attempt aimed at the partial or total disruption of the national unity and territorial integrity of a State or country or at its political independence is incompatible with the purposes and principles of the Charter" (Friendly Relations Declaration, Preambular paragraph 14).

[367] For an assertion that self-determination has achieved jus cogens status, see, for example: Casesse, *op. cit.* (footnote 293), pp. 134-135 and authors cited there; Shaw, *op. cit.* (footnote 300), p. 91; Sparks, Tom, *Self-Determination in the International Legal System*, Oxford/New York/Dublin, 2023, pp. 215-219 and literature cited there. However, see a contrary opinion by Crawford, *op. cit.* (footnote 301), p. 81.

[368] In the Chagos Advisory Opinion, the ICJ wrote that "while it is for the General Assembly to pronounce on the modalities required to ensure the completion of the decolonization of Mauritius, all Member States must co-operate with the United Nations to put those modalities into effect" (Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, *I.C.J. Reports*, 2019, p. 139). Three of the judges of the ICJ who appended their opinions to the advisory opinion, commented on the majority's position by pointing out that the right to self-determination should indeed be regarded as *jus cogens* notwithstanding the possible ambiguities of the advisory opinion itself, which refrained from directly naming self-determination as part of *jus cogens*. See: Separate Opinion of Judge Robinson, *I.C.J. Reports*, 2019, p. 322; Separate Opinion of Judge Cançado Trinidade, *I.C.J. Reports*, 2019, p. 193; Separate Opinion od Judge Sebutinde, *I.C.J. Reports*, 2019, p. 285.

the right to self-determination constitutes a peremptory norm of international law."[369] While this is so in relation to the external self-determination in colonial contexts and, based on the recent pronunciation of the ICJ, in cases of foreign occupation, it is still highly contentious as to whether peremptory character of self-determination exists outside of decolonization process.[370] The ILC seems to be of an opinion that the right to self-determination is indeed of peremptory nature in all situations, as evidenced by that right being included on its non-exhaustive list of peremptory international legal norms, as adopted by it in 2022.[371] All these strogly point out in the direction that self-determination indeed has peremptory status under international law, at least in decolonization processes. However, outside of decolonization, while the ILC (and, arguably, the ICJ in the Occupied Palestinian Territories advisory opinion) maintain that self-determination is also of *jus cogens* nature in these situations, implications of such a pronunciation are still relatively unclear.

Be that as it may, a two-folded conclusion can be ascertained from this, coupled with the *erga omnes* nature of the right. First, provided that self-determination indeed is of peremptory character, breach of self-determination, including its outcomes as a right which is held "in perpetuity" by the peoples, is a breach of peremptory norm of international law, thereby constituting an internationally wrongful act. The ILC addressed the consequences of the breach of peremptory norm of international law in its Draft Articles on Responsibility of States for Internationally Wrongful Acts.[372] Namely, Article 40 and 41 of the Draft Articles are devoted to the consequences of a serious breach of an obligation arising out of the peremptory norms of international law. These articles introduce the threshold of a "serious breach". Only in case of a "serious breach", as stipulated by the Draft Articles, an obligation

[369] Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem, Advisory Opinion, International Court of Justice, General List no. 186, 2024, p. 66.
[370] Cassese, *op. cit.* (footnote 293), p. 53.
[371] See the text of the draft conclusions on identification and legal consequences of peremptory norms of general international law (jus cogens) in the: Report of the International Law Commission, Seventy-third Session, in: General Assembly, Official Records, Supplement no. 10, A/77/10, 2022, pp. 11 and 16, on which the annex, containing the non-exhaustive list of peremptory norms of international law as identified by the International Law Commission, in included.
[372] Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, *Yearbook of the International Law Commission*, vol. II, Part II, 2001, pp. 31-143.

for states not to recognize a situation arising from such a breach arises. A "serious breach" is defined in Article 40, Paragraph 2 of the Draft Articles as a breach that "involves a gross or systematic failure by the responsible state to fulfil the obligation".[373] There is, therefore, a question whether a transformation of the effects of self-determination due to sea level rise amount to a serious breach. The ILC has explained that serious breaches can occur with regard to any peremptory norm of international law, self-determination being explicitly listed among exemplary cases of such norms.[374] However, only if a breach fulfilled the criteria to be considered serious, obligations for all states arise. Furthermore, when such a breach occurs, states are under an obligation not to recognize any situation arising out of it.[375] Therefore, it follows that extinction or transformation of legal personality of a state which had happened as a consequence of sea level rise occurs in violation of self-determination which could be considered a serious breach, then there is an obligation not to recognize such a situation.[376] Here, a distinction should be made between the recognition of the right to self-determination and recognition of statehood or international legal personality of small island states. While self-determination is a right which belongs to the islanders insofar as they could be considered as peoples under international law, what this right exactly entails once relocation to a host state happens is rather more uncertain.

This leads to the second observation. Namely, all states have obligations to respect the right to self-determination, which creates a range on concrete negative and positive obligations alike. The question is, therefore, which are the concrete duties that states would have in the process of relocations due to sea level rise and endangered rights of populations. It does not

[373] *Ibid.*, p. 112.

[374] While listing prohibition of aggression, genocide, torture, slavery, racial discrimination, and right to self-determination as attested peremptory norms of international law, respectively, the International Law Commission stated that "The examples given here are thus without prejudice to existing or developing rules of international law which fulfil the criteria for peremptory norms" (*ibid*., p. 113).

[375] Article 41 Paragraph 2 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts. The International Law Commission has further explained that "The obligation applies to "situations" created by these breaches, such as, for example, attempted acquisition of sovereignty over territory through the denial of the right of self-determination of peoples. It not only refers to the formal recognition of these situations, but also prohibits acts which would imply such recognition." See also: Grote Stoutenburg, *op. cit.* (footnote 109), pp. 329-330.

[376] Compare: Grote Stoutenburg, *ibid*., p. 330.

only include their right to safeguard identity and culture, but also the right to respect the outcome of their external self-determination as exercised during the process of decolonization – namely, statehood of the small island states.

According to the Friendly Relations Declaration, "every state has the duty to refrain from any forcible action which deprives peoples… of their right to self-determination".[377] Moreover, the ICJ, in the Israeli Wall advisory opinion, made the following remark: "Given the character and the importance of the rights and obligations involved, the Court is of the view that all States are under an obligation not to recognize the illegal situation resulting from the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem. They are also under an obligation not to render aid or assistance in maintaining the situation created by such construction ".[378] From this, it can be deduced that the states have a duty not to recognize situations that are contrary to the right to self-determination or arise out of the breach of that right. This is, in essence, a negative duty.[379]

Apart from negative duties, it has been affirmed that the right to self-determination also creates positive duties for states. To quote the Friendly Relations Declaration: "Every state has the duty to promote, through joint and separate action, realization of the principle of equal rights and self-determination of peoples".[380] While this is clear insofar as to the existence of such an obligation, there are doubts as to the situations in which states have such duties. As Raič noted, while "individual states are under an obligation to *respect* the right of self-determination, of peoples both *within* and *outside* their jurisdiction (…) there is no, or at least insufficient, state practice to support the position that states are under an obligation to actively *promote* the realization of the right of self-determination of peoples living *outside* their borders ".[381] He continues to note that recognition of an entity claiming statehood on account

[377] Friendly Relations Declaration, The Principle of Equal Rights and Self-Determination of Peoples.
[378] Legal Consequences cf the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, *I. C. J. Reports*, 2004, p. 196.
[379] Compare: Ross, *op. cit.* (footnote 300), p. 99.
[380] Friendly Relations Declaration, The Principle of Equal Rights and Self-Determination of Peoples.
[381] Raič, *op. cit.* (footnote 293), p. 428. Moreover, this is a logical consequence of self-determination being regarded as a principle of erga omnes character in the first place. Compare also: Soete, Anemoon, *The*

of self-determination, even of the entity seeking recognition has met all the criteria required for statehood, is not an obligation of state under the right to self-determination.[382] Contrary to that, Ross is of a view that "third-party states have a duty to refrain from removing recognition of low-lying states' statehood"[383], which he considers as an act contrary to the right to self-determination of islanders.[384]

Except in cases of remedial secession, which is in itself a controversial concept far from universal acceptance in international law,[385] self-determination of peoples living on a territory of a sovereign state can, consequentially, as a rule, only be obtained in the political, economic and social development towards the autonomy. This prompted the dichotomy between the external and internal self-determination, one that is, in our opinion, crucial for islanders as they are both in a situation of imperilment of the statehood of small island states, which was created as an outcome of external self-determination in the process of decolonization and potential internal self-determination that will come in the form of autonomy within the host state, once relocation is completed.

As it has already been pointed out, self-determination as it has been conceptualized after the World War II, is a multi-layered concept. From a point of view of different ways of how the right to self-determination can be exercised, it includes both external and internal dimension and concepts integrating these two models.[386] At different points in time, one or another has been more emphasized, but they are interconnected and full realization of one dimension often depends on another in specific circumstances.[387] Generally speaking, external

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International Legal Personality of Island States Permanently Submerged Due to Climate Change Effects, Antwerp-Apeldoorn, 2021, p. 81-82.

[382] Raič, *ibid.*, p. 429.

[383] Ross, *op. cit.* (footnote 300), p. 99.

[384] *Ibid.*, compare also: *ibid.*, p. 165.

[385] Vidmar, *op. cit.* (footnote 331), p. 50.

[386] As explained by Raič: "notions 'internal' and 'external' self-determination in not meant to refer to different rights of self determination. The main object of their use, is to refer to different modes of implementation of the right to self-determination. Thus, insofar as reference it made to a 'right' of internal (or external) self-determination, this refers to a right to implement self-determination 'internally' (or 'externally', respectively)." (Raič, *op. cit.* (footnote 293), p. 227).

[387] At this point, it is interesting that, due to the interconnection of the two concepts under this traditional dichotomy, some authors have tried to propose different models of self-determination typology. Thus, for

dimension of self-determination entitles peoples to realize their political, social and cultural development by establishing a newly independent state, thus creating a new legal person in international law.[388] On the other hand, internal self-determination is centred around people's right to freely establish themselves in deciding on questions of their political, economic, social and cultural development, not involving a creation of a newly independent state. The Supreme Court of Canada neatly defined internal self-determination as "a people's pursuit of its political, economic and cultural development within the framework of an existing state".[389] External self-determination, in a way, thus became the concept providing legitimacy of statehood, especially in the post-colonial world.[390] On the other hand, internal self-determination became the option for accommodating self-determination of peoples outside of decolonization context by granting them an access to government or, in particular cases, degree of autonomy.[391]

Sea level rise brings about a change in this paradigm. Legitimacy of statehood, based on the exercise of the human right to self-determination in its external form remains, however the basis for it, the territorial statehood, could disappear. Therefore, we shall start with the external dimension of self-determination. The following subchapters are devoted to various models of accommodating external self-determination in a form of international legal models to safeguard the international legal personality of small island states facing deterritorialization caused by sea level rise effects.

3.2. **External dimension of self-determination – reconstructing the legal personality of small island states**

example, Sparks proposes that all cases of self-determination can be divided into four categories in addition to external and internal self-determination, which he names polity-based, secessionary, remedial, and colonial self-determination, respectively. See: Sparks, *op. cit.* (footnote 367), p. 19.

[388] See: *ibid.*, p. 17.

[389] Reference re secession of Quebec, Supreme Court of Canada, Supreme Court Review, vol. 2, 1998, paragraph 126.

[390] Torres Camprubí, *op. cit.* (footnote 35), p. 31. At the same time, this prompted some authors to conclude that self-determination relaxed traditional criteria for statehood, especially the criterion of independent government: Raič, *op. cit.* (footnote 293), p. 220, Kreijen, Gerard, State Failure, Sovereignty and Effectiveness, Leiden/Boston, 2004, p. 149.

[391] Raič, *ibid*., p. 227.

The United Nations General Assembly pronounced famously in the Declaration on the Granting of Independence to Colonial Countries and Peoples that "all peoples have the right to self-determination" in the process of decolonization, reffering to it poignantly as "subjection of peoples to alien subjugation, domination and explotation", which "constitutes a denial of fundamental human rights".[392] Small island states have all emerged as independent in the process of decolonization, by exercising the right to self-determination in its external dimension. Before achieving independence, the Maldives were a protectorate with a home rule and authonomy in internal affairs, but with strong British military presence often playing a significant role, while the British also handled defence and external affairs. On the other hand, Tuvalu and Kiribati were part of the same crown colony, Gilbert and Ellice Islands, which was dissolved shortly before they gained independence – Tuvalu as a Commonwealth realm and Kiribati as a republic. Marshall Islands, in turn, being formerly part of the trust territory under the administration of the United States, achieved independence while agreeing at the same time to the Compact of Free Association with the former trustee. Self-determination played a crucial role in all of this cases, acting as a legitimizing factor in ultimately successful claims of peoples of small island states for achieving independence in the form of statehood, often against voices that questioned the actual independence of small states and their capacity to fulfil the requirements for membership in the United Nations.[393]

This same statehood is in peril due to sea level rise. When inundation reaches such a level that elements of statehood indeed become imperilled, this would lead to a questionable continuity of statehood of small island states and the question emerges whether this external dimension of self-determination is to be terminated. In turn, this is connected to a broader question whether external self-determination is an ongoing or a right that could be exercised only once, ceasing to exist once its outcome is achieved. For example, Cassese accepts the latter view.[394] However, the adopted text of Article 1 of the ICCPR ("All peoples have the

[392] Declaration on the Granting of Independence to Colonial Countries and Peoples, Articles 1 and 2.
[393] See, generally: Harris, William L., Microstates in the United Nations: A Broader Purpose, *Columbia Journal of Transnational Law*, vol. 9, no. 1, Spring 1970, pp. 23-53.
[394] In Cassese's view external self-determination for colonial peoples "ceases to exist under customary international law once it is implemented" (Cassese, *op. cit.* (footnote 293), p. 101).

right to self-determination.") considers the right to self-determination, whether external or internal, as a continuous right.[395] This allowed Nowak to observe that "the permanent character of the right to self-determination was emphasized, principally by the use of the present tense ('have' instead of 'shall have').[396] This, in turn, allows Ross to conclude that "To prevent exogenous forces from being competent to terminate a state and undermining a people's right to self-determination, continuity of low-lying states must be presumed, even in unprecedented circumstances."[397] However, outside decolonization contexts, external self-determination must always be balanced against the principle of territorial integrity of states.[398] In case where a small island state's population is relocated to a host state, any claim for continuation of statehood based on the human right to self-determination should be balanced against a right to territorial integrity of a host state.

Thus, all this creates an interesting paradox. Statehood was once perceived as a realization of collective human right of peoples to self-determination, which could be enjoyed in perpetuity. Due to exogenous factors, which are out of the control of the islanders forming the population which exercised and continues to exercise self-determination via living in an independent state, this becomes impossible as a result of inundation. In that regard, doing nothing and leaving islanders to their fate clearly leads to a situation of human rights violations, as denying self-determination, including its outcomes, to a people would certainly lead into such a violation.

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[395] Initial proposal of the Working Party that drafted the ICCPR was slightly different. In the *traveaux préparatoires* for the ICCPR, Article 1 had slightly different wording ("All peoples and all nations shall have the right of self-determination, namely, the right freely to determine their political, economic, social and cultural status"). See: Draft International Covenant on Human Rights: Annotation prepared by the United Nations Secretary-general, A/2929, 1955, p. 38.

[396] Nowak, *op. cit.* (footnote 307), p. 12.

[397] Ross, *op. cit.* (footnote 300), p. 141

[398] The most prominent expression of the principle of territorial integrity of states is still the one contained in the Paragraph 7 of the Friendly Relations Declaration, which stipulates that self-determination "shall not be construed as authorizing or encouraging any action which would dismemeber or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States" (Friendly Relations Declaration, Paragaph 7). For a detailed analysis of the relation between self-determination and the principle of territorial integrity of states, see: Raič, *op. cit.* (footnote 293), pp. 294-295, 316-324.

As already noted, right to self-determination belongs to peoples, not territories and peoples continue to enjoy it as a perpetual right, which does not end once decolonization is completed. Another characteristic of the right to self-determination that is likely to be highly relevant in the context of continuation of enjoyment of this right by islanders during and after the relocation process, is that it imposes obligations *erga omnes*. In Barcelona Traction Case, while drawing a distinction between "the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection", the ICJ defined norms imposing *erga omnes* obligations as "the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*."[399] Indeed, that self-determination is of such quality has been reiterated by the United Nations Security Council and the ICJ on multiple occasions.

In reaction to the unilateral declaration of independence of Southern Rhodesia, the United Nations Security Council called upon all states "not to recognize this illegal racist minority régime in Southern Rhodesia and to refrain from rendering any assistance to this illegal regime".[400] In the Namibia advisory opinion, the ICJ pointed out, reffering to non-recognition of acts contrary to the right of self-determination of peoples of Namibia, that: "all States should bear in mind that the injured entity is a people which must look to the international community for assistance it its progress towards the goals for which the sacred trust was instituted".[401] In line with that, the ICJ, in Israeli Wall advisory opinion explicitly mentioned the erga omes obligation to protect the right of the Palestinian people to self-determination as *erga omnes* obligation.[402] In East Timor Case, the ICJ, citing its previous practice, stated that: "In the Court's view, Portugal's assertion that the right of peoples to self-determination, as it evolved from the Charter and from United Nations practice, has an *erga omnes* character,

[399] Barcelona Traction, Light and Power Company, Limited, Judgment, *I.C.J. Reports*, 1970., p. 32. On the concept of *erga omnes* obligation generally, see also: Shaw, *op. cit.* (footnote 300), pp. 124-125.
[400] Resolution 216 (1965), United Nations Security Council, S/RES/216, 1965, Paragraph 2.
[401] Legal Consequences for States of the Contitiued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Adrisory Opinion, *I.C.J. Reports*, 1971, p. 56.
[402] Legal Consequences cf the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, *I. C. J. Reports*, 2004, p. 199.

is irreproachable."[403] Finally, in Chagos Archipelago advisory opinion, the same Court specified that "since respect for the right to self-determination is an obligation *erga omnes*, all States have a legal interest in protecting that right".[404] From this, it can be deduced that, as a right imposing *erga omnes* obligations, self-determination creates duties not only for the state of nationality on whose territory a population lives, but also for other states.

The HRComm in its General Comment no. 12 on the right to self-determination further clarified that: "The obligations exist irrespective of whether a people entitled to self-determination depends on a State party to the Covenant or not. It follows that all States parties to the Covenant should take positive action to facilitate realization of and respect for the right of peoples to self-determination. Such positive action must be consistent with the States' obligations under the Charter of the United Nations and under international law: in particular, States must refrain from interfering in the internal affairs of other States and thereby adversely affecting the exercise of the right to self-determination."[405] In the context of sea level rise induced relocations, this is especially relevant, as it means that self-determination remains relevant as a right not only in the context of relation between the small island state and its population, but also in the discharge of duties that the host state owns to the resettled islanders, including the continuity of legal personality, as it embodies the self-determination as a paramount human right of islanders.[406]

What is, however, not clear, is to what these duties will amount. Even outside the specific case of small island states, there exists a significant lack of consensus among both states' practice and international legal scholarship as to what the claims for self-determination outside decolonization should entail. While it is generally assumed that it does mean internal self-determination and not the right of peoples to secession,[407] as this would be contrary to

[403] East Timor (Portugal v. Australia), Judgment, *I. C.J. Reports*, 1995, p. 102.
[404] Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, *I.C.J. Reports*, 2019, p. 139.
[405] General Comment no. 12: Article 1 (Right to Self-determination) The Right to Self-determination of Peoples, Human Rights Committee, 1984, Paragraph 6.
[406] Compare: Ross, *op. cit.* (footnote 300), p. 156.
[407] Except in cases of remedial succession, when this would be allowed, provided that the doctrine itself is accepted. See: Vidmar, *op. cit.* (footnote 331), *passim*.

the principle of territorial integrity of states,[408] the actual modalities of how self-determination outside colonial context is achieved is highly diverse and resolved on a case-by-case basis. While granting autonomy (either combined with federalization or without it) has been the most common approach,[409] non-decolonization self-determination has degrees and variations based on the combination of various factors which either affirm or reject the claim for a particular way of exercise of this paramount right of peoples.[410] This can create uncertainties even in situations involving a comparable precedent, while in unprecedented situations, along with the general cautiousness that states exhibit in situations which involve self-determination claims, could generate unwillingness of host states to accommodate for the claims based on self-determination of resettled islanders.[411] On the other hand, this shows that self-determination involves significant flexibility, which in turn enables the situation to also be treated that way, while understanding that, as Ross concludes, "the law can develop for their purposes without necessarily affecting its meanings elsewhere".[412]

Notwithstanding that the solutions for accommodating self-determination of resettled islanders is indeed based against a unique factual background, we shall turn to the modalities in which right to self-determination could be safeguarded once relocation becomes a reality. Currently, however, external self-determination is still expressed in the form of *in situ* statehood, which must be examined first as a model against which other models are postulated.

3.2.1. **Statehood**

State is arguably one of the most complex concepts in international law. Many classical authors of international law and philosophy of law have tried to define it in more or less

[408] Raič, *op. cit.* (footnote 293), p. 294.
[409] See, generally: Wheeler, Marc, *Escaping the Self-Determination Trap*, Leiden/Boston, 2008, p. 78.; McWhinney, *op. cit.* (footnote 295), pp. 236-238.
[410] As observed by Kirigis, advancing this argument: "Dismemberment is at the end of a scale of claims, ranging from modest to extremely destabilizing (…) Moreover, as there are degrees of claim, there are degrees of representative government, with absolute dictatorship and all-inclusive democracy at the opposite extremes." (Kirigis, *op. cit.* (footnote 321), p. 308).
[411] Ross, *op. cit.* (footnote 300), p. 62.
[412] *Ibid.*

practical definitions.[413] However, customary international law has been quite clear cut in creating the well-known criteria for an entity to become a state. These can be found in every textbook on international law and are universally known.[414] For a state to be regarded as such, it has to have a territory, permanent population and independent government. Codified in an otherwise not very prominent Montevideo Convention of 1933,[415] which adds capacity to enter into relations with other states as fourth criterion, these criteria still make an entity a state, thus classifying it as a member of this class of most prominent legal persons of international law.

With state being such a central concept for international law, it is interesting to note the scarcity of attempts to define it in binding legal documents. As a regional instrument from the period before the Second World War, the Montevideo Convention has never been intendent by its state paties' to become a major codification of the objective criteria for statehood.[416] However, as it has been built upon the earlier theoretical conceptualizations of classic international legal scholarship, specifically the so-called "Drei-Elementen Lehre" evisoned by Georg Jellinek in the late 19th Century, it came to be the only binding instrument to contain a definition of statehood based on objective criteria.[417] Thus, Article 1 of the Montevideo Convention reads: "the state as a person of international law should possess the

[413] For example, Grotius defined a state as "a complete association of free men, joined together for the enjoyment of rights and for their common interest", while Pufendorf calls it "a compound moral person, whose will, intertwined and united, by the pacts of a number of men, is considered the will of all, so that it is able to make use of the strength and faculties of the individual members for the common peace and security." It is interesting to note how both of them emphasize not the territorial, but the personal, societal component of the state. See: Grotius, Hugo, *De iure belli ac pacis*, book I, chapter I, §xiv; Pufendorf, Samuel von, *De iure naturae et gentium libri octo*, book VII, chapter 2, section 13, §672.

[414] For example, see Brownlie, Ian, *Principles of Public International Law*, Oxford, 1973, pp. 74-81.

[415] For the text of Montevideo Convention, see Convention on Rights and Duties of States adopted by the Seventh International Conference of American States, 1933, *League of Nations Treaty Series*, vol. 165, no. 3802, 1936, pp. 19-44. For the relevance of Montevideo criteria in general international law despite the regional character of the Montevideo Convention: Grant, Thomas D., Defining Statehood: The Montevideo Convention and its Discontents, *Columbia Journal of Transnational Law*, vol. 37, no. 2, 1999, pp. 435-436.

[416] Montevideo Convention on the Rights and Duties of States, enacted in 1933 was a regional international agreement without pretensions to become a codification of international customary law in such an important matter as statehood. For the relevance of Montevideo criteria in general international law despite the regional character of the Montevideo Convention: Grant, *ibid.*, pp. 435-436.

[417] *Ibid.*, p. 416.

following qualifications: (a) a permanent population; (b) a defined territory; (c) government; (d) capacity to enter into relations with other states".[418]

These elements are indeed commonly used in assessing whether an entity has become a state. However, the question whether Montevideo indicia, as they came to be called, could also be used as criteria for extinguishment of statehood is much more controversial. Arguments have been made, based on the analysis of the circumstances of the adoption of Montevideo Convention and the intentions of its creators, that Montevideo criteria are in fact devised only for assessing the question whether an entity became a state, and not the contrary, whether it ceased to exist as a state.[419] If that was so, small island states could rely on the assumption of continuity of statehood regardless of them not fulfilling some of the criteria due to inundation and relocation caused by the sea level rise. There are, however, contrary opinions, requiring the existence of all three elements not only for creation, but also for continuity of states.[420] Therefore, it seems that small island states would have to rely on the *opinio juris* and practice of other states if and when it comes to the questioning of one of the elements.

In the next chapters, all these elements will be examined against the new realities that sea level rise arises for small island states.

3.2.1.1. **Territory**

Criterion of a state being in possession of a territory might seem simple and self-explanatory from the outset, but they still require some definitions and clarifications. It is well established in theory and practice of international law that territory means land territory,[421] a terrestrial landmass of natural origin.[422] However, there is no requirement for a territory to be of a

[418] For the text of the Montevideo Convention, see: Convention on Rights and Duties of States adopted by the Seventh International Conference of American States, 1933, *League of Nations Treaty Series*, vol. 165, no. 3802, 1936, pp. 19-44.
[419] *Ibid.*, p. 435, Yamamoto and Esteban, *op. cit.* (footnote 114), p. 128.
[420] Vukas, *op. cit.* (footnote 303), pp. 282-283.
[421] This is indicated in the first place by the usage of the word territory (from Latin terra, meaning dry land, as opposed to watery parts of the Earth).
[422] This can be substantiated by the distinction between territory as a terrestrial landmass and its adjacent parts of the sea that are under sovereignty of a coastal state is clear from the UNCLOS. While they are considered sovereign territory, the Article 2 Paragraph 1 of the United Nations Convention on the Law of the Sea reads:

certain size or shape, to be continuous or made out of certain type of lands.[423] Even the smallest territory suffices, as examples of microstates, especially in Europe, clearly show.[424] However, some territory has to exist in order for an entity to be classified as a state.[425] Otherwise, it can either be a legal person of some other type recognized under international law[426] or possess no legal personality at all. This territory does not have to be defined by the precise borders,[427] but at least some of it should be able to host government institutions and a permanent population, or at least be of a quality to sustain human habitation, therefore allowing the state to have a permanent basis to exercise government functions, both internally and externally.[428] Territory is, therefore, a requirement for all other functions of a state to be established.[429] Moreover, the defined territory also has a function to serve as delimitation of national legal systems between themselves and from the global commons.[430] Without it, state cannot function neither as a social or as a political construct nor protect the rights and interests of its citizens in the effective way. In that regard, territory must be able to host population,

"The sovereignty of a coastal State extends, beyond its land territory and internal waters and, in the case of an archipelagic State, its archipelagic waters, to an adjacent belt of sea, described as the territorial sea." (United Nations Convention on the Law of the Sea, 1982, *United Nations Treaty Series*, vol. 1833, no. 31363, pp. 397-581, Article 2, Paragraph 1). This provision has been consistently interpreted to understand these parts of the sea as "natural appurtenance" of the state's territory. See: Grote Stoutenburg, *op. cit.* (footnote 109), p. 253. For the discussion of natural origin as a condition for the landmass to be considered territory under international law, especially in case of artificial islands, see *infra* in 3.2.6.5.

[423] Crawford, *op. cit.* (footnote 301), pp. 46-47.

[424] Duursma, Jorri C., *Fragmentation and the International Relations of Micro-States*, Cambridge, 1996, p. 117.

[425] Soete, *op. cit.* (footnote 381), pp. 110-111.

[426] Listing legal persons in international law is a complex matter with more than one possible answer to the question on their number and types. For example, Shaw distinguishes "participants" in contemporary international law, of which not all will actually be accorded legal personality, naming the following: states, international organizations, regional organizations, non-governmental organizations, public companies, private companies, individuals, groups engaging in international terrorism (Shaw, *op. cit.* (footnote 300), pp. 196-197). However, that a state is a legal person of a specific nature and still occupy foremost position in the architecture of international law is also widely acknowledged (*Ibid.*, p. 197).

[427] This has been confirmed by the ICJ in the North Sea Continental Shelf Cases, where the ICJ stated that: "there is for instance no rule that the land frontiers of a state must be fully delimited and defined ". See: North Continental Shelf, Judgement, *I.C.J. Reports*, 1969, p. 32.

[428] Compare: Oliver, Selma, A New Challenge to International Law: The Disappearance of the Entire Territory of a State, *International Journal on Minority and Group Rights*, vol. 16, no. 2, 2009, p. 212.

[429] For the arguments for a similar conclusion specifically for small island states faced with sea level rise see: Soete, *op. cit.* (footnote 381), pp. 144-145.

[430] Grote Stoutenburg, *op. cit.* (footnote 109), p. 254.

as without this characteristic, it becomes ineffective.[431] To traditional international legal scholarship, this relation seemed axiomatic. Jessup, for example, in his capacity of a high-ranking United States' diplomat to the United Nations, while discussing the statehood of Israel in the context of its application for membership in the United Nations, lamented on the floor of the Security Council that "one cannot contemplate a state as a kind of disembodied spirit (…) there must be some portion of the Earth's surface which its people inhabit and over which its government exercises authority".[432] Similarly, Oppenheim has categorically claimed that "a State without territory is not possible".[433] Shaw, commenting on the Oppenheim's statement, observed that "statehood is inconceivable in absence of a reasonably defined territorial base. This does not mean that territoriality is a criterion of personality in international law, but statehood is inconceivable in the absence of a reasonalbly defined territorial base".[434]

Legal persons not constructed around a territory do exist as a well-established fact in international law, but their function and ways how they operate are quite different from those of states. The most common type of this is the ever-growing body of international organizations,[435] but there are also other types of entities constructed around facts other than territory to which international law has accorded legal personality.[436] Moreover, specific position in international law is more and more accorded to individuals in the far-reaching progressive development of international law of human rights.[437]

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[431] Compare: Crawford, *op. cit.* (footnote 301), p. 60.

[432] Security Council Official Records, 3rd Year, 383rd Meeting, 2nd December 1948, United Nations Security Council, S/PV.383, 1948, p. 11.

[433] Oppenheim, Lassa*, International Law: A Treatise*, 8th Edition, vol. 1, 1955, p. 451.

[434] Shaw, Malcom N., *Title to Territory in Africa*, Oxford, 1986, p. 1.

[435] It is universally accepted in contemporary international law doctrine and state practice that the legal personality of international organizations is distinct from that of their member states. See: Lapaš, Davorin, *Pravo međunarodnih organizacija*, Zagreb, 2008, p. 26.

[436] Examples include sui generis legal persons (Holy See, Sovereign Military Order of Malta), non-governmental organizations and companies (if their legal personality *in statu nascendi* under international law was accepted).

[437] For a general, but thorough overview of how human rights change the position of individual under international law, see: Meron, Theodore, International Law in the Age of Human Rights, *Collected Courses of the Hague Academy of International Law*, vol. 301, 2003., pp. 68-72.

However, one peculiar category of international legal persons are the states that have lost control over their previously held territory. Examples can be found in Czechoslovakia or Poland during the Second World War, but also in more recent cases of Kuwait during the Gulf War, Baltic states during the break-up of the USSR or Federal Republic of Yugoslavia during the break up of former Socialist Federal Republic of Yugoslavia. All of these were states whose identity and continuity were questioned based on, *inter alia*, loss of control of their territory or significant changes in their territorial span. In the first two examples, those of Czechoslovakia and Poland, state's respective governments lost control of the territory, but were able to continue operating in exile and, at least to some extent, control resistance movements operating on the occupied territory.[438] After the war the governments were able to re-establish themselves on the territory of the state and their continuity was recognized by the international community.[439] On the other hand, Baltic states were annexed to the USSR in the year 1940 and stayed part of it util the collapse of the Communist state. Their continuity was not so firmly accepted by the international community.[440] These historic examples show that continuity of states depends of the circumstances and that no firmly established rule on continuity of states that lose control of their territory exists in international law.[441] Another peculiarity that should be mentioned regarding the states that lost control over their territory is the way how they actually lost it. In all previous examples, whether continuity was affirmed

[438] Although Czechoslovakia was broken by the Nazi Germany during the Second World War, formally being dismembered into Sudetenland which were directly annexed, formally independent Slovak State and the Protectorate of Bohemia and Moravia, while the Government went to exile, the Allied Powers declared by the Moscow Declaration of 1943 that they consider Czechoslovakia, which is to be reinstated after the war, to be in continuity with the previous state. See: Marek, Krystina, *Identity and Continuity of States in Public International Law*, Genève, 1968, p. 283.

[439] *Ibid*., p. 306.

[440] Crawford views the problem of continuation of identity of the Baltic states after the dissolution of the USSR with independent republics existent between two World Wars as a complex phenomenon characterized by tacit consent of other states for their absorption into the USSR, but also recognizing them some continuity, at least regarding identity and right to self-determination after they regained independence in 1990. See Crawford, *op. cit.* (footnote 301), pp. 689-690.

[441] On how small island states might benefit from analogies to continuity of states after situation of occupation or annexation of their territory by the foreign power ceased to exist: Grote Stoutenburg, *op. cit.* (footnote 109), p. 265.

by the subsequent practice of states or not, the loss of territory had happened as a result of an armed conflict or political situation to which international law afforded its effects.

With the case of small island states faced with sea level rise, this becomes different, because continuity of their territory is not endangered by the military operations or political negotiations, but by the natural, although anthropogenic process of rising of mean sea level. A gradual, rather slow onset phenomenon such as sea level rise creates a legal situation similar to those mentioned earlier, however with significant factual differences. Given the uncertainty and different practices that has been shown in examples of aforementioned states, it can hardly be presumed that any of previously known examples of either affirming or negating continuity of states that lost control of their territory can be with any certainty used in a chronologically next case.

Another issue that differs small island states from all previous cases of loss of territory by the states is that with sea level rise state territory becomes physically submerged, it disappears and it is not possible for a state to re-establish itself on the same land once legal and political circumstances change. When this is all (habitable) land out of which a state consists, this state will, once submergence becomes complete or at least at such a scale that territory becomes unable to hold any population or even government institutions, indeed become a deterritorialized state.[442] This is a step further from any other example of possible state extinction previously envisaged under international law. All of the aforementioned states whose continuity was questioned because of temporary loss of control over their respective territories had been able to restore their sovereignty over the said territory or, at least, part of it. In the case of small island states this will not be possible as the territory will be physically submerged. Therefore, a problem of continuity of state's identity arises.[443] The contrary,

[442] While international law traditionally understands state as a firmly territorial concept, which would make a "deterritorialized state" a legal oxymoron, different theoretical concepts were deceived around the idea of progressive development of international law that would accept such states under different names (governments-in-exile or even nations-ex-situ) in international legal order. For an overview of these ideas, see: Torres Camprubí, *op. cit.* (footnote 35), pp. 112-114.

[443] As Krystina Marek defines it, state continuity is a "dynamic predicate of state identity", which, in turn, is "the identity of the sum total of its rights and obligations under both customary and conventional international law" See: Marek, *op. cit.* (footnote 438), p. 5.

however, seems to remain possible. A legal person that still has some territory capable of hosting its population could remain sovereign over its remaining territorial possessions which are not capable of hosting human population.[444]

All that brings to the very basics of statehood, precisely the reasons for a state to exist at all. Throughout the history of international law, reasons for this were conceptualized differently, from a state being a personal possession of a ruler[445], being a religious or national community[446] to modern ideas of a state being a democratic community of its citizens[447] and a guarantee, a safeguard of human rights for all.[448] Explaining these in depth goes beyond the scope of this work, but it can be stated that, arguably, in contemporary international legal order the latter conception is the most prominent one regardless of all the different conceptualizations of what the role of the state in protection of human rights should actually mean in practice.[449] Summarily stated, this conception stands on the position that a state exists on a given territory as a result of a will of its citizens and for the protection of the its population in accordance with the universal character of human rights. From the theoretical

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[444] Stoutenburg substantiates this conclusion based on the example of governments in exile, which remain sovereign over unoccupied parts of its territory, extending this by analogy to "remnants of its former territory" in case of a small island state which would be inundated to a point of losing statehood indicia. See: Grote Stoutenburg, *op. cit.* (footnote 109), p. 377.

[445] Stemming from feudal conception of a state following the personal allegiance of its ruler to a suzerain, the idea of a state being intrinsically linked with the person of its ruler especially gained prominence during the times of absolutism that dominated European nations in the 17th and 18th Centuries. Compare: Nussbaum, Arthur, *Concise history of the Law of Nations*, p. 22, 71-72. During the time, attitude towards territory changed from it being rather loosely understood as prerequisite for legal personality to being key of a state's identity Compare: Torres Camprubí, *op. cit.* (footnote 35), pp. 18-23.

[446] Nussbaum, *ibid.*, p. 66-67.

[447] Boutros-Gali, Boutros, Pour un droit international de la démocratie, in: Makarczyk, Jerzy (ed.), *Theory of International Law at the Threshold of the 21st Century: Essays in honor of Krzystof Skubiszewski*, The Hague, London, Boston, 1996, pp. 105-106.

[448] This concept of a state being less a sovereign entity taking account of its own interest, and more a guarantee of human rights and other common interest is a concept long desired, but often faced with disappointments. On future prospects on how human rights should shape common interests of states and help them to overcome focus on bilateralism, thus innovating a role of a state in international law: Paulus, Andreas, Whether Universal Values Can Prevail over Bilateralism and Reciprocity, in: Cassese, Antonio (ed.), *Realizing Utopia: The Future of International Law*, Oxford, 2012, p. 100.

[449] On an approach to state as a human right guarantees and possibilities for future enhancement of such a role of states in evolving international legal order see: Trachtman, Joel P., *The Future of International Law: Global Government*, Cambridge, 2013, pp. 118 *et passim*.

point of view, this might be construed around the "legal concept of the state", which has been developed by Hans Kelsen.[450] In his work, Kelsen advocated for a state to be understood as "the coercive order which constitutes the political community",[451] adding that "what is usually called the legal order of the state, or the legal order set up by the state, is the state itself"[452]. While it might seem that such concstruct is indeed able to get away with the concept of territory, it is not in fact so. The legal order is indeed a substrate of a state, the territorial sovereignty still functions as a delimitation between legal orders. A political community that constructs the legal order, which is the main element of a state, is delimited from other political communities by the state borders, which are limits of territorial soveregnity. While territory is not a criterion in its own right, it still serves as an enabling ground for a political community to form and delimit itself from other states. In that case, the territory might be superseded, however population still must exist in order to form a political community which would than be able to create a legal order, which is a state.[453] From this, it follows that a state without a population, even if a territory exists, loses one of its basic functions and it is difficult to think of such an entity being in possession of analogous rights and duties under international law.[454] Therefore, even if a small island state, in a hypothetic case, finds itself able to preserve some portion of its territory, but of such a nature that renders it practically uninhabitable, the problem of its continuity is brought into question based on the principle of effectiveness.[455]

3.2.1.2. **Permanent Population as a Criterion for Statehood**

[450] See: Kelsen, Hans, The Pure Theory of Law and Analytical Jurisprudence, *Harvard Law Review*, vol. 55, no. 44, p. 64.
[451] *Ibid.*
[452] *Ibid.*
[453] Salmond, for example, contemplated this in case of a nomadic tribe that forms a society which is capable of fulfilling functions of a government. He wrote that: "a state without a fixed territory – a nomadic tribe for example – is perfectly possible. A non-territorial society may be organized for the fulfilment of the essential functions of government, and if so, it will be true state". See: Salmond, John William, *Jurisprudence*, 7th edition, London, 1924, p. 145.
[454] It is interesting to note here that, as Torres Camprubí rightly assumes, total depopulation leads to extinction of statehood, which in turn renders population stateless. The two questions are thus inextricably linked. See: Torres Camprubí, op. cit. (footnote 35), p. 203.
[455] Grote Stoutenburg, *op. cit.* (footnote 109), p. 254.

This in turn brings the spotlight on the second traditional criterion of statehood, namely permanent population. Regarding the nature of the population required to fulfil the criterion, it is well established that the population does not have to be of a certain number[456] or of certain characteristics[457], but the notion of permanence is required.[458] By this, the permanent population criterion as defined in the Montevideo Convention and accepted under customary international law, follows a concept of "state nation" originating from the French revolution, and which constitutes a nation as a community of peoples living on a defined territory and accepting the association with the nation, rather than a community based on common origins or descent.[459] In practice, examples show that the permanence of population is sometimes interpreted rather broad. The Vatican City State is not only the smallest sovereign state in the world in land area and population numbers, but the nature of its population is rather peculiar as it consist of persons whose link with the state stems out of their office, for which they are allowed to reside in the state.[460] Moreover, there are other microstates with very small permanent populations which independence is universally recognized by the contemporary international law as being of a same legal quality as those of some of the largest states.[461] Indeed, the small island states mostly affected by sea level rise are among them, with the population of, for example, Tuvalu, being the smallest of the four states identified as the most

[456] In the case of the Pitcairn Island, which is inhabited by a population totalling some 50 persons, the United Nations General Assembly clearly stated that the population of Pitcairn has a right to self-determination which includes a right to form a sovereing state. See: Question of American Samoa, Bahamas, Bermuda, British Virgin Islands, Brunei, Cayman Islands, Cocos (Keeling) Islands, Gilbert and Ellice Islands, Guam, Montserrat, New Hebrides, Pitcairn, St. Helena, Seychelles, Solomon Islands, Turks and Caicos Islands and the United States Virgin Islands, United Nations General Assembly, A/RES/2869, 1971.

[457] The population is not required to answer criteria of, e. g., cultural, ethnic, or linguistic honogenity. See: Duursma, *op. cit.* (footnote 424), p. 117, Crawford, *op. cit.* (footnote 301), p. 167.

[458] Crawford, *ibid*., p. 52; Grote Stoutenburg, *op. cit.* (footnote 109), p. 267.

[459] Compare: von Bogdandy, Armin, Häußler, Stephan, Nations, in: Wolfrum, Rüdiger (ed.), *Max Planck Encyclopedia of Public International Law*, vol. IX, Oxford, 2012, p. 519, also: Vukas*, op. cit.* (footnote 303), p. 314.

[460] As Morss notes: "The population is transient, comprising the main papal officials and employees, who are allowed to reside." (Morss, John R., The International Legal Status of the Vatican/Holy See Complex, *European Journal of International Law*, vol. 26, no. 4, 2016, p. 931). For a similar conclusion stemming out of an overview of peculiar nature of population of the Vatican City State and its territory see: Duursma, *op. cit*. (footnote 424), p. 374.

[461] Duursma classifies and analyzes the following "classic" examples of (European) microstates: Liechtenstein, San Marino, Monaco, Andorra, Vatican City State. For criteria on what is a microstate, see Duursma, *ibid.*, p. 1-3.

vulnerable to sea level rise, numbering a little over ten thousand persons, which makes it the (along Nauru), the second smallest independent state in the world. The minimum number of inhabitants which must reside on a territory has never been prescribed in general international law.[462]

In an effort to delineate criteria of who constitutes the population of a (small island) state two basic approaches could be followed. First one is to include all persons that have some kind of formal link (first and foremost, citizenship, but also other forms of legal ties) to the small island state. Second one is just the opposite, including only those persons that are actually resident on a ground that is under risk of being submerged. Both of these approaches somewhat miss the whole picture, showing themselves as either too formal or too restrictive. First approach misses those who are not formally connected to the small island state, but are factually living in a part of it, making them vulnerable to sea level rise. Second approach misses those peoples that, although they are not living in or near the area that could be submerged, are nationals of small island states and any discontinuation of statehood of such states would make them effectively stateless, regardless of them not being physically at risk. Consequently, a combination of the two must be found.

Regarding the characteristics that the populations have to possess, it is firmly established in the doctrine and practice of states that population consist of nationals and foreigners permanently residing on a state's territory.[463] It stems from this that population cannot be equated with nationality.[464] In fact, population can consist of members of many nationalities and be very diverse in terms of ethnic, cultural and other traits.[465] However, it seems that international law requests from the members of a population, however small it may be, to exibit some degree of communal life through which they can demonstrate that there indeed

[462] Indeed, small island states are among the smallest and most isolated communities in contemporary world, which does not predlude them to continue with "demographic viability", even though that might be, and usually is, under "unfavorable conditions". See: Doumenge, François, The Viability of Small Intertropical Islands, in, Dommen, Edward, Hein, Philippe, *States, Microstates and Islands*, London/Sydney/Dover, 1985, p. 84.
[463] Crawford, *op. cit.* (footnote 301), p. 53.
[464] On the difference between concepts of a "nation" and "population": Vukas, *op. cit.* (footnote 303), pp. 316-317.
[465] *Ibid*.

exist a will to permanently organize their lives on the territory of a state. This reasoning was reflected in the judgmement of the Administrative Court of Cologne in the case concerning the purpoted "Principality of Sealand". In the case, the court decided that "Principality of Sealand" is not a state based on the lack of evidence that its "population" has ever led a "communal life". Instead, only a few of them ever resided on the platform which was designated as "territory" of Sealand, and even that only for maintenance purposes, never intending to create a community. Others aquired "citizenship" of Sealand only for purposes of economic and customs interests, without ever living or, indeed, intending to live there.[466]

However, the problem for the populations of small island states in regard of population as a criterion for statehood in not in defining who is a member of population of a state. On the contrary, populations of small island states faced with disastrous effects of submergence of territory due to sea level rise face other issues, out of which one is indeed unprecedented. It has been mentioned that a population consists of those persons permanently residing on a territory of a state. With the territory being rendered uninhabitable, the population will be forced to relocate and the state left without any population residing on a sovereign territory. From this, it is clear how disappearance of one criterion leads to disappearance of an another one, thereby making them intrinsically linked. There is no state without a territory, nor the territory that is uninhabitable suffices for a state.[467] This raises a question on when exactly the territory becomes unihabitable – is it in the moment the last inhabitant was uncapable to continue living on the islands, or when, concerning the criterion of communal life, in the moment when the communal life has ceased to effectively exist?[468] Indeed, what is unprecedented in this unfolding of events is that the whole of a population is forced to

[466] "Die sog. "Staatsangehörigen" haben die "Staatsangehörigkeit" nicht erworben, um mintainander zu leben und damit alle Bereiche des Lebens gemainsam zu bewältigen, sondern sie gehen nach wie von auȥerhalb des sog. "Fürstentums Sealand" ihren eigenen Interessen nach. Der gemeinsame Zweck ihres Zusammenschlusses beschränkt sich nur auf einen kleinen Teilbereich ihres Lebens, nämlich ihre wirtschafts- und steuerpolitischen Interessen" (Judgement 9 K 2565/77, Verwaltungsgericht Köln, *Deutsches Verwaltungsblatt*, no. 13, 1978, p. 512).

[467] A territory which would not be sufficient to hold population and/or government institutions could not, to the current state of understanding of the criterion, be understood as fulfilling for a state to be in possession of a territory. For the same conclusion, see: Grote Stoutenburg, *op. cit.* (footnote 109), p. 252.

[468] For example, Stoutenburg considers that such a "carteaker population" would not suffice See: *ibid*., pp. 273-274.

relocate due to effects of sea level rise, which are natural but anthropogenic. Moreover, they have to relocate somewhere and, as there is no free *terra nullius* in contemporary world, that will necessarily mean that they will settle on a foreign land.[469] In turn, this might affect many of their basic human rights.

3.2.1.3. **Independent Government**

Thrid and final traditional element of statehood under the "Drei-Elementen-Lehre" is independent government.[470] This third criterion traditionally was the most contested one. Indeed, it is the one criterion that can be the most problematic in defining what exactly amounts to fulfilment of the standard of independent government.[471] Moreover, independent government is a complex legal standard, composed of (at least) two components – namely, government and independence.[472] Government means that an entity which aims at being considered a state under international law has to be in possession of a government, however not only nominally extant, but of a certain quality. This quality, which is generally needed for a government is independence, meaning that the government has to be independent in order to be considered a government. Independence in itself consist of two facets, namely whether the government is at all able to establish actual control of territory and population (actual independence) and the right title to exercise that authority (formal or legal independence).[473] What actually constitutes minimum conditions for a government to be considered in possession of actual control is determined on a case-by-case basis. The Austro-

[469] As Torres Camprubí finds, the discontinuity between population and territory created by relocation "is geographical, in so far as the population no longer inhabits the territory of the State; but is also functional, to the extent that the primary role of the State as a form of organisation of a community of people becomes prima facie meaningless once such people fall outside its jurisdiction and control". See: Torres Camprubí, *op. cit.* (footnote 35), p. 202.

[470] For the "Drei-Elementen-Lehre" concept of statehood, see *supra* in 3.2.1.

[471] Crawford holds that government is "evidently a basis for the other central criterion of independence", linking "government" and "independence" as "closely related as criteria – in fact they may be regarded as different aspects of the requirement of effective separate control" See: Crawford, *op. cit.* (footnote 301), p. 55.

[472] Independence is, actually, the centerpiece of this criterion. A state might possess a government, but if one is not independent from any other state, statehood can hardly be established. In that regard, Charles Rousseau made a well-known observation that "la perte de l'indépendence coincide nécessairment avec la disparition de l'état" See: Rousseau, Charles, *Droit International Public*, *Tome III: Les Compétences*, Paris, 1977, p. 330. Compare also: Crawford, *op. cit.* (footnote 301), p. 63.

[473] Crawford, *ibid.*, p. 66.

German customs union case is often cited as the classic example of the limits of independence of states being put to the test of an international judiciary. In that case, the Permanent Court of International Justice (hereinafter PCIJ) found in its Advisory Opinion that the proposed customs union between Austria and Germany would constitute a violation of the Austria's independence, which was proclaimed by the Treaty of Saint-Germain as "inalienable otherwise than with the consent of the Council of the League of Nations"[474], as it, in the words of the PCIJ's majority "it is difficult to maintain that this régime is not calculated to threaten the economic independence of Austria".[475] In other cases, especially those of newly independent states that emerged as a result of exercise of right to self-determination during the process of decolonization, there have been governments that were not at all factually independent, only possessing a title to authority, with in fact being controlled by either the former colonial metropole or with no functioning government at all. In fact, in the wake of decolonization, the colonial status of a particular colony became almost a substitute for effectiveness in the establishment of statehood.[476] Basically, what had been happening is that a state was constituted under international law, but government had started to function only nominally and without almost any actual control over the territory and population. However, according to views adopted both by the majority of states and international legal scholarship at the time, the fact that governments were not actually in control over the territory and population of these states did not compromise their statehood.[477] For example, the former Belgian Congo, now the Democratic Republic of Congo achieved independence and was recognized as independent almost immediately by the vast majority of states, however its

[474] "L'independence de l'Autriche est inaliénable, si ce n'est du consentement du Conseil de la Société des Nations." See: Treaty of Peace concluded at Saint-Germain-en-Laye, Staatsgesetzblatt, no. 303, 1919, p. 1052, Article 88.

[475] Customs Regime between Germany and Austria, Advisory Opinion, *Judgements, Orders and Opinions of the Permanent Court of International Justice, Series A/B*, no. 41, p. 52.

[476] Thus, Kreijen concludes that "Any arguments that sought to delay independence on grounds of circumstance, such as inadequate preparation for independence, were now not only morally but also legally inferior to universal claims of self-determination. Consequently, the primary requirement for becoming independent State was colonial dependency: sovereignty came to rest on subject of colonial status. Additionally, the legal view of (most of) the Member States required that sovereignty be granted instantaneously." See: Kreijen, *op. cit.* (footnote 390), p. 133.

[477] For the analysis of stances of major colonial governments at the time on the claims made by the developing states in the United Nations regarding perciptation of swift decolonization, see: *ibid.*, pp. 134-141.

governmental institutions were almost inexistent and the newly independent state immediately plunged into the civil war.[478]

Legal or formal independence, as the name suggests consists of the right title to exercise the authority under international law and is traditionally understood somewhat stricter. It means that a legal title under which a government of a state claims the constitution of statehood is not rightfully opposed by another state.[479] As neatly defined by Judge Azilotti in his individual dissenting opinion in the Austro-German Customs Union case, "the legal conception of independence has nothing to do with a State's subordination to international law or with the numerous and constantly increasing States of de facto dependence which characterize the relation of one country to other countries".[480] To take the position to the extreme, there have been authors, like Hans Kelsen, who claimed legality should supersede any effective actual independence, becoming a criterion in its own right. Kelsen thus overcame the question of effective, actually independent government (whether a government is able to establish itself as independent) with the question of legality (whether government has established itself lawfully or not).[481] Again, borderline cases can happen where either legal of factual quality of independence exists, while the other dimension is notably lacking. This is especially prominent in creation of states via secession or dissolution, or conflicting claims of different governments regarding the same territory.

Independence of the aforementioned government is in turn intrinsically linked with the concept of sovereignty. In fact, in what Crawford calls "classic statement", Judge Anzilotti in the Austro-German Customs Union Case defined independence as a quality of a state to be "a separate state and not subject to the authority of any other state or group of states".[482] He adds that: "Independence as thus understood is really no more than the normal condition of states according to international law: it may also be described as sovereignty (suprema

[478] See: Crawford, *op. cit.* (footnote 301), pp. 56-57.
[479] *Ibid*., p. 58.
[480] Customs Regime between Germany and Austria, Individual Opinion by M. Anzilotti, *Judgements, Orders and Opinions of the Permanent Court of International Justice, Series A/B*, no. 41, 1931, p. 58.
[481] Kelsen, *Hans, Principles of International Law*, New York, 1966, pp. 430-431.
[482] Customs Regime between Germany and Austria, Individual Opinion by M. Anzilotti, *Judgements, Orders and Opinions of the Permanent Court of International Justice, Series A/B*, no. 41, 1931, p. 57.

potestas), or external sovereignty".[483] On the other hand, Rousseau famously rejected the equation between sovereignty and independence, treating the two notions as separate concepts. He therefore devised a peculiar theory of independence, which is based on three premises – that the state, in order to be independent, has to possess three distinct qualities – the exclusivity of competences, the autonomy in exercising them, and the plenitude of the competences.[484] In any case, however, these competences are neither absolute nor do interfere with other states. Therefore, such a definition of independence must be distinguished from exercise of sovereignty. Much later, Salmon summarized this approach by stating that: "La souveraineté est un concept juridique distinct de l'indépendance ou du pouvoir politique et économique. C'est un concept qui s'applique de maniere égale á tous les Etats á partir du moment où ils accèdent au statut étatique, quelle que soit la superficie de leur territoire, l'importance de leur population, la forme et la nature de leur gouvernement, leur richesse ou leur pauvreté, leur puissance ou leur impuissance, leur autonomie ou leur dépendance économique ou politique à l'égard d'Etats tiers."[485]

Regarding the exercise of sovereignty, it was noted that "a state may continue to be sovereign even though important governmental functions are carried out on its behalf by another state or international organizations".[486] To the point, historically there were many cases of states which independence was not questioned by the international community, but they had not been able to exercise such a level of control over territory and population. Examples can especially be found among the newly independent states which gained independence during decolonization processes. Often, immediately after independence, governments of these states were not able to establish effective control over parts of the territory of a state, specific groups of population or indeed to stay in power without foreign support, sometimes by the sustain of the former colonial metropole. The classic example is that of the Belgian Congo, which effectively had no government and no institutions at the time of its independence from

[483] *Ibid.*

[484] Rousseau, Charles, L'Indépendence de l'État dans l'Ordre International, *Collected Courses of the Hague Academy of International Law*, vol. 73, 1948, pp. 220-249.

[485] Salmon, Jean, Quel Place pour l'État dans le Droit International d'Ajourd'hui, *Collected Courses of the Hague Academy of International Law*, vol. 347, 2010., p. 55.

[486] *Ibid*., p. 33.

Belgium,[487] which however did not affect its status as a state and recognitions of other states that swiftly followed the establishment of the new independent state.[488] This did not stop them from being accepted as states by formal recognition and practice of states, thereby making the fulfilment of the criterion of effectiveness of independent government being applied rather loosely in the process of decolonization.[489] Indeed, the ICJ in its Western Sahara Advisory Opinion referred to the "common institutions or organs, even of a quite minimal character", as a precondition for establishing statehood as a result of exercise of the right to self-determination in the decolonization process.[490] However, even that has been lacking in some instances, such as the often-cited case of Kongo immediately after it gained independence from the Kingdom of Begium by its peoples exercising the right to self-determination.[491] This prompted Gerard Kreijen to observe: "For, while traditional legal doctrine essentially conceived of internal sovereignty as a necessary pre-condition for the establishment of external sovereignty or independence, modern doctrine does not seem to insist on such a link."[492] In some other cases of establishment of states, this, however, has not been the case, with the criterion being in turn applied more strictly. Broadly stated, these are

[487] Historically, status of the Belgian Congo was rather peculiar, as it was formally recognized as a state and considered independent under the name Congo Free State, which is a view espoused also in contemporary international legal doctrine. However, in reality, Congo was a personal posession of the King of the Belgians. He exercised his authority through the International Association of the Congo, of which he was formally the patron. The Berlin Conference of 1884 and 1885, however, by widespread support of participating European governments confirmed that Congo Free State indeed was an independent state. In 1907 and 1908, the Belgian Goverment formally annexed Congo and the Congo Free State ceased to exist. Thereafter, Congo continued to exist as Belgian colony. In 1960, Congo gained independence after only minimum preparation. For the contemporary view on status of Congo Free State under international law prior to its annexation by the Kingdom of Belgium, see: Nys, Ernest, *The Independent State of the Congo and International Law*, Brussels, 1903, p. 62. For the restrospective interpretation of the status of the Congo prior to decolonization, see: Crawford, *op. cit.* (footnote 301), pp. 56-57, 276-277.

[488] Kreijen, *op. cit.* (footnote 390), pp. 136-137.

[489] On the international *opinio iuris*, especially in the General Assembly of the United Nations regarding independence of non-self-governing territories during the height of decolonization processes: Vukas, *op. cit*. (footnote 303), pp. 380-387.

[490] Western Sahara, Advisoty Opinion, *I.C.J. Reports*, 1975, p. 55.

[491] Immediately after Belgium granted independence to Congo, the newly formed Republic of the Congo found itself in a state of war between rival political parties. At the same time, Congo had virtually no institutions, nor the capacity to build them due to the policies of Belgian colonial administration which denied Congloese access to higher education and assuming any kind of political and administrative responsibility. See: Raič, *op. cit.* (footnote 293), pp. 64-65.

[492] Kreijen, *op. cit.* (footnote 390), p. 33.

all the cases in which a state is being created as a result of secession from another state or dissolution of a predecessor state, therefore creating a situation opposed by another state under title afforded to it by the international law. In these cases, as example of former SFRY clearly point out, [493] the standard is applied somewhat stricter, meaning that the control of a territory and support of population must be stronger and more demonstrative.[494]

External sovereignty, on the contrary, is intrinsically linked to the position of a state in relations with other states. It comprises not only the capacity of the government to decide about external affairs without interference from any other state, but also that other states do not have such powers that derogate the capacity of a government to govern independently. Of course, these standards are quite broad and not always clear in different practical situations. Often cited is the example of the so-called microstates, especially those which have some kind of contractual relation with (usually) larger neighbouring state stipulating that the latter will assume some kind of responsibility for foreign or defence policy of a microstate, or even have an influence on some of the government functions usually considered strictly part of *domaine réservé*.[495] Historical relations between the Principality of Monaco and the French Republic can serve as a foremost example of a state whose independence has been heavily influenced by a larger neighbour.[496] By virtue of history of long close relations, legal core of which is written into treaty and exchange of letters between the Principality and the Republic dating back to 1918, French government got extensive influence over Monegasque internal affairs, to the point that the Minister of State and the

[493] In case of dissolution of SFRY, the Federal Republic of Yugoslavia claimed to be the only successor state to the SFRY. However, this was not accepted by the majority in international community. One of the arguments was that the Federal Republic of Yugoslavia did not have effective control over majority of population or territory of the former SFRY. Therefore, *a contrario*, other states that arose in the process of dissolution of SFRY could claim to be its successor (and by that, also independent states) based, *inter alia*, on effective independent control over significant parts of the dissolved state's territory and population. Compare: Crawford, *op. cit.* (footnote 301), p 708.

[494] Lack of such control enabled, among other arguments, fo the United Nations Security Council to conclude that SFRY "has ceased to exist". See: Resolution 1022 (1995), United Nations Security Council, S/RES/1995, 1995, Preamble. Compare also: *Ibid*.

[495] On how tight relations and cooperation between microstates and their neighboring states affects independence as criterion for statehood see, in general: Duursma, *op. cit.* (footnote 424), pp. 125-126.

[496] *Ibid*., p. 261.

Government Counsellor for the Interior had to be French citizens.[497] Moreover, the French Republic was responsible for defence of the Principality of Monaco and the foreign policy of Monaco is in practice closely coordinated and aligned with that of France.[498] Finally, and possibly most controversially from the viewpoint of statehood, was the right of France to establish a protectorate over Monaco in case there is no heir to the throne from the ruling Grimaldi family.[499] This has changed by the stipulations of a subsequent agreement concluded in 2002,[500] but even before that Monegasque independence was not questioned on the basis of the aforementioned contractual rights of France into internal affairs and constitutional relations of the Principality.[501]

Another distinction that should be emphasized is one between formal and actual independence. Formal independence can be defined as a situation "where the powers of government of a territory are vested in the separate governmental authorities of the putative state".[502] In other words, the independent authority over territory is what makes a state independent. The states are independent primarily with regard to their territory on which they act as supreme powers, with cases of extraterritoriality being an exception to the rule. As arbitratior Huber has concisely remarked in his judgment in the Islands of Palmas case, summarizing this view, "Sovereignty in the relations between States signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State. The development of the national organisation of States during the last few centuries and, as a corollary, the development of international law, have established this principle of the exclusive competence of the State in regard to its own territory in such a way as to make it the point of departure in settling most

[497] *Ibid*., pp. 283-285.
[498] *Ibid*., p. 274.
[499] *Ibid*., p. 281-282.
[500] Traité destiné à adapter et à confirmer les rapports d'amitié et de coopération entre la République française et la Principauté de Monaco, 2002, accessible at: https://mjp.univ-perp.fr/constit/mon2002.htm (accessed: 18th July 2022).
[501] On the reasons why this conclusion could be reached even before the 2002 Agreement was reached, see: Duursma, *op. cit.* (footnote 424), pp. 281-282.
[502] Crawford, *op. cit.* (footnote 301), p. 67.

questions that concern international relations.".[503] Thus, independence is again, *in ultima linea*, a territorial concept.

In international legal relations, the capacity to conclude treaties and enter into associations with other states, even if that included loss of significant parts of actual independence, signifies at least formal, and in cases where such decision is not influenced by other states, also actual independence. The PCIJ held this view already in its very first decision, which concerened the position of Germany in relation to the Treaty of Versailles. In the Wimbledon case, the majority confirmed that exercise of treaties into which the state entered freely are not a diminishment, but rather an exercise of its sovereignty.[504] The same line of judicial reasoning was followed and further developed in Austro-German Customs Union case by judge Anzilotti, who asserted that entering into treaty obligations, however onerous or restricting to independence of a treaty party they may be, do no compromise its formal independence as long as it is able to freely and volunarily make those commitments.[505] Observing this, the situation becomes paradoxical. States are indeed free to enter international agreements, including those establishing intra-state relations that significantly curb their actual independence in exercising sovereign powers over their territory. The classical example of the process are various forms of integration that have evolved on the European continent form the end of the Second World War on, culminating in the European Union and the Council of Europe, which both have significant direct influence on the exercise

[503] Island of Palmas (Netherlands, USA), Award of 4th April 1928, Reports of International Arbitral Awards, vol. II, 1928, p. 838.

[504] In the words of the PCIJ "The Court declines to see in the conclusion of any Treaty by which a State undertakes to perform or refrain from performing a particular act an abandonment of its sovereignty. No doubt any convention creating an obligation of this kind places a restriction upon the exercise of the sovereign rights of the State, in the sense that it requires them to be exercised in a certain way. But the right of entering into international engagements is an attribute of State sovereignty." (Case of the S.S. Wimbledon, *P.C.J.I. Reports, Series A*, no. 1, 1923, p. 25).

[505] In judge Anzilotti's words in the Austro-German Customs Union case: "a legal conception of independence has nothing to do with a State's subordination to international law or with the numerous and constantly increasing states of de facto dependence which characterize the relation of one country to other countries. It also follows that the restrictions upon a State's liberty, whether arising out of ordinary law or contractual engagements; do not as such in the least affect its independence. As long as these restrictions do not place the State under the legal authority of another State, the former remains an independent State however extensive and burdensome those obligations may be. " (Individual Opinion of Judge Anzilotti, Austro-German Customs Union Case, Advisory Opinion, *PCJI Reports*, *Series A/B*, no. 41, 1931, pp. 57-58).

of sovereignty in their member states. However, "even in cases of close economic cooperation, or integration, sovereignty is presumed to remain with each State. Though conditioned or even limited, in certain domains like foreign policy, economics or defence, it remains an essential element of decision-making."[506] Actual independence, in turn, is the minimum degree of real governmental power at the disposal of the putative state that is necessary for it to be qualified as "independent".[507] As the ICJ held in the Nicaragua judgement, "Every state possesses a fundamental right to choose and implement its own political, economic and social systems."[508] In that regard, this quality of independence equates with the Rousseau's idea of "plénitude de compétences" that a state should possess in order to be independent.[509] At the same time, however, the ICJ, in Nicaragua dictum continued by observing that "However, the assertion of a commitment raises the question of the possibility of a State binding itself by agreement in relation to a question of domestic policy, such as that relating to the holding of free elections on its territory. The Court cannot discover, within the range of subjects open to international agreement, any obstacle or provision to hinder a State from making a commitment of this kind. A State, which is free to decide upon the principle and methods of popular consultation within its domestic order, is sovereign for the purpose of accepting a limitation of its sovereignty in this field."[510] Therefore, one can only conclude that in cases where a state freely disposes with limitations to its independence through international agreements it concludes, this neither eradicates its formal nor actual independence, provided that the decision to enter into such agreements is indeed an act of free will of the contracting state.

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[506] Lachs, Manfred, The Development and General Trends of International Law in Our Times, *Collected Courses of The Hague Academy of International Law*, vol. 169, 1984, p. 39.

[507] Crawford, *op. cit.* (footnote 301), p. 72.

[508] Military and Puramilitary Activities in and against Nicaragua (Nicaragua v. United States of America). Merits, Judgment, *I.C.J. Reports*, 1986, p. 131.

[509] Rousseau held that "la compétence de l'Etat est par définition une competence plénière. Alors que les compétences des autres collectivités publiques sont des compétences d'attribution, nécessairement limitées quant à leur objet, la compétence étatique reste indéterminée ratione materiae — ou plutôt l'Etat est entièrement libre de déterminer l'étendue de sa competence ratione materiae" See: Rousseau, *op. cit.* (footnote 484), pp. 248-249.

[510] Military and Puramilitary Activities in and against Nicaragua (Nicaragua v. United States of America). Merits, Judgment, *I.C.J. Reports*, 1986, p. 131.

Crawford lists the existence of a special claim of right to exercise of governmental authority over the putative state and discretionary authority to intervene in the internal affairs of the putative state as situations regarded as derogating from formal independence.[511] There are different situations in which it can be said that a state is formally independent, but lacks actual independence. Crawford, again, cites particular types of them, listing substantial illegality of origin, entities formed under belligerent occupation, substantial external control of the state.[512] However, diminutive size and scarce resources present on the territory of a state are consistently interpreted in a way that they do not deprive a state from actual independence.[513] Formal and actual independence are not mutually exclusive, in fact, for a state to function ideally, they shoud coexist at any given point in time. Cases of entities which were able to claim formal independence without actually being independent in any way have existed. For example, the Principality of Lichtenstein has at different points in its history delegated responsibility for conduct of its foreign relations to Switzerland, however the fact that it did that never came to compromise its statehood.[514] In extreme cases, lack of any actual independence can result in a state ceasing to exist. As neatly summerized by the Mixed Tribunal of Cairo in the case Achikian v. Bank of Athens, "It is universally admitted that the changes occurring in the institution and form of government of a people do not affect the identity of the State from the point of view either of its internal sovereignty or of its international relations. This principle, however, is only true with regard to changes which leave the State the power of preserving its character of an independent political body."[515] In

[511] Crawford, *op. cit.* (footnote 301), pp. 71-72.

[512] *Ibid*., pp. 74-88.

[513] *Ibid*, p. 125. Moreover, the debate on the admission of so-called microstates into the membership of the United Nations, and its final outcome in favour of their membership, which allowed some of the small island states now most endangered by the sea level rise to become full members of the United Nations, offers a strong argument in favour of such a conclusion. While many states, including some permanent members of the Security Council, questioned the ability of microstates to functionally participate in the United Nations framework, their independent statehood as such has not been problematized. See, generally: Harris, *op. cit.* (footnote 393), pp. 23-53; Orlow, Daniel, Of Nations Small: The Small State on International Law, *Temple International and Comparative Law Journal*, vol. 9, no. 1, 1995, pp. 115-140.

[514] Duursma, *op. cit.* (footnote 424), p. 202.

[515] The case concerned the return of the money deposited with the Bank of Athens as subscription to a loan issued by the Armenian Republic, which ceased to exist between 1918, when the loan was issued and 1923, when Mr Achikian, an Armenian resident in Egypt, requested the return of the money from the Bank. Quoted

the opposite case, Somaliland is an entity which, although not in possession of formal independence recognized by any state, nevertheless enjoys a high level of actual independence.[516]

Independent government traditionally was the most contested criterion around which states were confirmed as extant or their existence was denied. With small island states faced with sea level rise all changes somewhat in a sense that their statehood already suffers from lack of (submerged) territory and (resettled) population. On the first glance, it could be, in consistence with the traditional doctrine, argued that without any of these aforementioned criteria (territory and population), there can be no independent government.[517] Indeed, as shown above, independent government is in many ways defined through sovereignty over territory and population. This is not without contradicting precedents of governments losing control over territory or population for a certain time, but still enjoying continuing recognition as representing their states. This has always happened due to consequences that were of temporary nature and reversable such as war, belligerent occupation, treaties concluded in violation of international law. Sea level rise changes this, as it is human induced, anthropogenic, bus still a natural process. Moreover, it is irreversible, meaning that independent government over submerged territory cannot be re-established once circumstances allow. All the situations in which independent government loses control over territory, however, have in common that their continuity becomes heavily, if not decisively, reliant on recognition of them as states by other states.[518]

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in: Achikian v. Bank of Athens, in: Williams, John Fischer, Lauterpact, Hersch (eds.), *Annual Digest of Public International Law Cases*, vol. 2/1923-1924, 1933, p. 18.

[516] Crawford, *op. cit.* (footnote 301), p. 414.

[517] As Rousseau faimously declaired: "la perte de l'indépendence coincide nécessairement avec le disparition de l'État". See: Rousseau, *op. cit.* (footnote 472), p. 330. He, of course, deliberated on a traditional case of a loss of independence of a government. However, in a case where there is no population or territory left, or the population and governmental institutions are resettled to an area under sovereignty of another state, independence is again lost.

[518] For the discussion of the arguments on the nature of recognition in cases of independent governments in exile, see *infra* in 3.2.7.2.

Therefore, next chapter will deal with the question of possibilities for deterritorialized small island states to base their continuity of international legal personality on such a recognition with reconceptualized notion of territorial sovereignty.

3.2.2. **Solutions for accomodating self-determination when statehood becomes imperiled due to sea level rise**

State is a legal concept with the defined meaning and scope through criteria well-established in customary international law and codified by the Montevideo Convention.[519] Legal logic would allude to the conclusion that if Montevideo criteria had been used for a state to come into being, the same criteria should have been used in case of state extinction. This, however, does not seem to actually correspond with practice of states, which showed ability to recognize statehood of entities which have not been able to demonstrate effective fulfilment of the Montevideo criteria.[520] There had been instances of states which either lost or indeed were never able to demonstrate fulfilment of Motevideo criteria, but nevertheless have been able to successfully claim statehood, such as governments in exile or newly independent states in the process of decolonization.[521]

Moreover, even in the cases where extinction of state had been contemplated on the basis of Montevideo criteria, complete loss of territory has historically not been considered as a realistic way of extinguishing a state. This is even more true in case of population criterion, as there is virtually no precedent in international law where loss of statehood was attributed to disappearance of a permanent population. Traditional theoretical considerations approached the problem axiomatically, considering that the hypotetical loss of material elements of state certainly leads to extinction of legal personality. For example, Marek wrote that "With regard to the material elements of a State, the argument is so obvious as to be

[519] For the discussion on statehood in general, see *supra* in 3.2.1.

[520] This prompted Grant to assert that: "the Montevideo Convention was concerned with whether an entity became a state, not with how an entity might cease to be a state" (Grant, *op. cit.* (footnote 415), p. 435).

[521] This has mainly been done on a basis of being able to sucessfully claim legitimacy over effectiveness, which allowed such states to be recognized as states while lacking effective government control over territory and population. For a similar argument being maid in the context of exercise of the right to self-determination during the process of decolonization, see: Kreijen, *op. cit.* (footnote 390), p. 102 who names those states "juridical". For furher discussion see *supra* in 3.2.1.3. and *infra* in 3.2.7.2.

unnecessary. That a state would cease to exist if for instance the whole of its population were to perish or to emigrate, or if its territory were to disappear (e.g., island which would become submerged) can be taken for granted".[522]

What had been considered was loss of independent and effective government over territory and population, usually as a consequence of an armed conflict.[523] In those cases, states were able to claim legitimacy and statehood without effectively fulfilling the criteria based on right to self-preservation, which is considered one of the fundamental rights of states enshrined in customary international law[524] or even overencompassing it and forming the international legal order as a precedent to international law itself.[525] In its more modern iteration, this right came to be defined by the ICJ as "fundamental right to state survival".[526] In cases of threat of climate change, the question of whether the same logic might apply does not only become contested over legal arguments,[527] but indeed represents a crucial problem of what will become of the substratum of the outcome of self-determination, namely the legal personality of small island state once it becomes deterritorialized, with population at the same time

[522] Marek, *op. cit.* (footnote 438), p. 7.

[523] This was often connected with creation of governments in exile. Czechoslovakia during the Second World War provide an insightful example, as discussed *supra*, in the previous chapter. For an overview of criteria what constitutes a legitimate government in exile and criteria that were used to recognise such governments, see: Talmon, Stefan, Who is a Legitimate Government in Exile? Towards Normative Criteria for Governmental Legitimacy in International Law, in: Goodwin-Gill Guy S., Talmon Stefan (eds.), *The Reality of International Law, Essays in Honour of Ian Brownlie*, Oxford, 1999, p. 78; Talmon, Stefan, *Recognition of Governments in International Law: With Particular Reference to Governments in Exile*, Oxford University Press, Oxford, 2001, p. 500.

[524] Historically, as noted by Kokott, the principle of sovereign equality "protected smaller republics against powerful, established monarchies, notably France. It was a useful counter-norm to potential instincts of the most powerful kingdoms to stamp out republics for fear that their example might lead to republican movements within their own borders." (Kokott, Juliane, States, Sovereign Equality of, in: Wolfrum, Rüdiger (ed.), *Max Planck Encyclopedia of Public International Law*, vol. IX, Oxford, 2012, pp. 572-573).

[525] For an autoritative discussion on the topic, see: 8th Meeting, Draft Declaration on the Rights and Duties of States (A/CN.4/2), *Yearbook of the International Law Commission*, vol. 1, 1949, p. 63.

[526] In its Nuclear Weapons advisory opinion, the ICJ famously proclaimed that "the Court cannot lose sight of the fundamental right of every State to survival, and thus its right to resort to self-defence, in accordance with Article 51 of the Charter, when its survival is at stake" See: Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, *I.C.J. Reports*, 1996, p. 263.

[527] Stoutenburg, writing on the question whether small island states endangered by sea level rise are able to benefit from the right to existence concludes that: "it is hard to see how this general right to existence could establish obligations for other states that go beyond the recognized prohibition of the threat or use of force and the duty of non intervention" See: Grote Stoutenburg, *op. cit.* (footnote 109), p. 358.

relocates to other states. Therefore, sea level rise brings the concept of loss of statehood to an unprecedented level by creating a situation in which very criteria of territory and permanent population are those that will likely be gradually lost. This transforms factual difference between the situation caused by sea level rise from other known, traditional situations of loss of statehood into a conceptual difference, consequently creating legal effects and making it a clear novelty which requires answers from international law and international community of states as its primary creator.[528]

Before looking into the very heart of the issue, which involves small island state losing territory and permanent population inhabiting it, we will briefly consider also a scenario in which some submergence of territory occurs, but such a territory remains capable of holding a population and a government. As a gradual and slow-onset process, it is likely that sea level rise will first inundate parts of small island states, while still allowing parts of islands, capable of holding some population and government, to remain above watermark. It is certain that small island states will have to adapt to these new realities even before complete inundation happens. [529]

[528] As d'Aspremont explained: "It is in this sense that the law of statehood can be seen as conveying a territorialization of the world that, in turn, enhanced the explanatory appeal of the law of statehood. Territorialization facilitates understanding of the world and that of international law, which it makes more intelligible and operable." With sea level rise deterritorializing small island states, this eventually has to change if international law is to embrace reality. See: D'Aspremont, Jean, The International Law on Statehood: Craftsmanship for the Elucidation and Regulation of Births and Deaths in the International Society, *Connecticut Journal of International Law*, vol. 29, no. 2, 2014, p. 215.

[529] The Intergovernmental Panel on Climate Change has defined adaptation as "the process of adjustment to actual or expected *climate* and its effects, in order to moderate harm or exploit beneficial opportunities" (Adaptation, in: *IPCC Special Report on the Ocean and Cryosphere in a Changing Climate*, Annex I: Glossary, 2019).

3.2.3. **Temporal aspect of deterritorialization**

States' loss of habitable territory due to any reason is often subsumed under the notion of "deterritorialization". What it exactly means is, however, less clear. There are at least two dichotomies that can be established.[530] Firstly, at which point state indeed becomes deterritorialized? Is it the moment when states' sovereign territory becomes totally inundated or rather the moment when it is partially covered by the sea so that it becomes inhospitable to both population and government institutions? Secondly, there is a question of legal consequences of both those situations – namely, does the state lose or transform its legal personality under these scenarios? And if it does, at which point that happens?

Turning first to the partial submergence of a state's territory, particular situation in which statehood becomes questionable is the one in which territory still above water becomes so small or inhospitable[531] that it can hardly support the population and functional government institutions. This is notable as it is likely that migrations of population due to uninhabitability will start happening much before total inundation of territory becomes a reality.

While it is clear that a territory without any permanent population cannot constitute a state, a peculiar question is what will happen if some permanent population, however small, would be able to remain on the islands.[532] Formally, thus, all the customary international law criteria for statehood remain fulfilled.[533] There is some territory remaining, population, however small, also remains, and there is also a government. It has been discussed how smallness of

[530] Compare Torres Camprubí, *op. cit.* (footnote 35), p. 46, accepting the similar understanding of the notion of deterritorialization.

[531] Due to, *inter alia*, processes like salinization of freshwater sources, crops or inundation of parts of territory capable of holding human habitation, which are happening on a much faster scale than inundation itself.

[532] Basically, a population which would be able to live permanently on the island, no matter how small it is. Grote Stotenburg calls it population nucleus, see: Grote Stotenburg, *op. cit.* (footnote 109), p. 273. However, as emphasized in the previous sentence, the population should actually permanently live on the island(s), maintaining them as permanent basis of their living, otherwise the notion of permanence would be lost.

[533] International law does not prescribe any particular criteria for extent of territory or numbers of population. Therefore, it is not important how big a territory is, or how many people actually inhabit it. What is crucial, however, is that the territory is under sovereignty of an independent government, which also exercises sovereignty over a population permanently inhabiting it.

territory or population is not affecting the claim for statehood.[534] Therefore, in the partial submergence scenario, as long as there is some territory above water and population permanently living on it, the territory requirement is thus fulfilled. In case only governmental outpost remains (even if staffed with a few care-taking officials), without permanent population, the continuation of statehood remains less certain.[535]

Regarding population criterion, there is a requirement of permanence. It could be argued that it remains fulfilled as long as the remaining population intends to live on the islands while that remains physically possible.

The third criterion, that of a state being in possession of a government, again could be viewed unproblematic if government stays on the remaining territory.[536] Under conditions that it governs it independently and effectively, basically in the same fashion as before partial submergence started to occur, there should be no problem envisaged.[537] On the contrary, problem might emerge in the situation of government being forced to relocate itself due to scarcity of remaining territory. It is the following peculiar situation: territory still suffices for

[534] For the elaboration of this, see *supra* in 3.2.1.1. and 3.2.1.2.

[535] Soete argues that the continuation of such a state, with only government remaining on the ground, is conditioned upon constitutive recognition of other states. See: Soete, *op. cit.* (footnote 381), p. 146.

[536] Although it will not be the case with deterritorialized small island states, indeed the criterion of government is the one usually contested when a borderline case happens to appear. Within it, there are known situations of two or more „governments" claiming to be in power in a state at the same time. Issues as such often appear in front of the Credentials Committee of the United Nations General Assembly. For example, at the seventy-sixth session of the Credentials Committee it had before it two set of credentials of delegations aspiring to represent Afghanistan and Myanmar, respectively. See: Report of the Credentials Committee, Seventy-sixth Session, United Nations General Assembly, A/76/550, 2021, p. 2.

[537] Stotenburg similarly claims that „Although possession of a defined territory is generally identified as a fundamental prerequisite of statehood, international law does not prescribe a minimum area necessary for a State to exist on. Sea level rise could render the already minute territory of low-lying atoll States such as the Marshall Islands, the Maldives, Tuvalu, or Kiribati uninhabitable, reduce it to the dimensions of a rock in the sense of Article 121(3) of the UN Law of the Sea Convention (LOSC) turn it into a low-tide elevation in the sense of LOSC Article 13(1), or even submerge it completely. In the first two scenarios, the territorial effectiveness criterion would per se remain fulfilled, because uninhabitable islands and even rocks qualify as land. The case would be different if only a low-tide elevation remained of the original island." See: Grote Stoutenburg, Jenny, When do states disappear?, in: Gerrard, Michael B., Wannier, Gregory E. (eds.), *Threatened Island Nations: Legal Implications of Rising Seas and A Changing Climate*, Cambridge, 2013, p. 60. However, a problem remains if such a landmass is not able to hold either any permanent population or government institutions.

at least some population to remain living on it, however much of the population and government institutions already relocated themselves.

Partial deterritorialization seems, therefore, as a scenario, which can, arguably, fit into the existing framework of international law of statehood, at least until there is some population capable and willing to permanently inhabit the islands. We will now turn to total submergence of habitable territory of a state, which is, as it will be shown, much more complex issue in the context of continuation of legal personality.

Indeed, total deterritorialization (and depopulation) due to natural, but humanly induced process of sea level rise is a novelty in international law. However, concept of a legal person for which territory did not constitute a prerequisite of is legal personality is not. At the same time, such a legal person could had been, and often was in possession of a territory. On the contrary, idea of territory being an object of possession of a legal person, rather than its constitutive element, predated the opposite conception. In early feudal times, international legal personality came to be vested into the person of a feudal lord.[538] The most vivid examples of that were loose kingdoms and empires spanning over vast territories which were under actual dominion of another feudal lord positioning lower in hierarchy.[539] Gradually, this changed over time and the territory was more and more regarded as constitutive element of legal personality rather than an object on possession of an international legal person. However, in some monarchies, the theory survived much longer, with the concept being applied well into the modern times. For example, in the United Kingdom, state was in the 20th Century still often equated with the king's person, which is the one embodying state's legal personality. In the words of the eminent English jurist John Salmond: "The Crown is

[538] As Nussbaum puts it, describing feudal relations and political situation in the Holy Roman Empire during the High Middle Ages: "Princes and municipalities of the Empire concluded conventions primarily among themselves; but, as imperial power steadily declined, they entered agreements also with outside rulers.", thereby, one could add, clearly conceptualizing themselves as legal persons separate from the Empire. See: Nussbaum, *op. cit.* (footnote 445), 1954, p. 23.

[539] For more details on an example of Holy Roman Empire, once encompassing most of Western Continental Europe, see *ibid.*, pp. 21-22.

not itself a person in the law. The only legal person is the body corporate constituted by the series of persons by whom the crown is worn".[540]

For the most of the world, however, a turning point in understanding territory as a prerequisite to international legal personality of a state is most commonly positioned in 1648, when the Peace Treaty of Westphalia was concluded in form of two concurrent treaties concluded in Münster and Osnabrück, respectively.[541] In it, states were defined territorially, rulers being in possession of a defined territory rather than legal persons independent of territory. The Peace of Westphalia was, of course, a product of its time, a result of devastating Thirty Years War which left many parts of Europe ruined.[542] In its text, it does not deal directly with the concept of statehood, but it does provide a significant argument for its reconceptualization. Members of Holy Roman Empire are treated as independents which can create their own agreements for their territory, independent of imperial guidance.[543] Their position is, therefore, not anymore only feudal allegiance to the emperor, relation between a suzerain and

[540] Salmond, John W, *Jurisprudence*, 11th Edition, London, 1957, p. 374.

[541] The Peace of Westphalia, which after long negotiations following an already long and devastating war, formed a legal order which, in Nussbaum's words: "For at least a century (…) remained the framework of Europe's political organization". He adds that: "Characteristically, important publications on the history of international law have taken the Peace of Westphalia as a starting point." Only to conclude with: "(…) the Peace is a landmark in the development of international law". Cited according to Nussbaum, *op. cit.* (footnote 445), p. 115.

[542] Thirty Years War was fought between 1618 and 1648, primarily as a continuation of religious wars which plunged Europe after the protestant reformation.

[543] The Emperor of the Holy Roman Empire is, in the text of the Treaty, not even formally treated as a party with different obligations and positions from any other ruler involved in the making of the treaty. A vivid example in support of this is found in the very beginning of the text of the Treaty, namely the Article I, which reads, in part: "That there shall be a Christian and Universal Peace, and a perpetual, true, and sincere Amity, between his Sacred Imperial Majesty, and his most Christian Majesty; as also, between all and each of the Allies, and Adherents of his said Imperial Majesty, the House of Austria, and its Heirs, and Successors; but chiefly between the Electors, Princes, and States of the Empire on the one side; and all and each of the Allies of his said Christian Majesty, and all their Heirs and Successors, chiefly between the most Serene Queen and Kingdom of Swedeland, the Electors respectively, the Princes and States of the Empire, on the other part." (Peace Treaty between the Holy Roman Emperor and the King of France and their respective Allies (The Treaty of Westphalia), 1648, available at: https://avalon.law.yale.edu/17th_century/westphal.asp (accessed: 28th November 2022). This wording shows that the peace is concluded between ("chiefly") those rulers which rule components of the Empire and the Kingdom of Sweden, which was never a constituent state of the Empire. Thus, components of the empire are treated as possessing *ius contrahendi* with a foreign power which is separate from the emperor.

a vassal, but also a relation between equals.[544] Feudal structure is not abolished, it might even seem strengthened after the war, however fact that rulers are in possession of a territory allows no ruler to dominate the others,[545] at the same time making all of them able to create international law.[546]

Paradigmatical shift that Peace of Westphalia brought to conceptualization of a state became a defining point up to modern times, when state is still viewed as primary legal person of international law.[547] States created centuries after the Westphalian system had been established were still understood as territorial legal persons. It is, of course, theoretically possible to conceive different ideas of rethinking Westphalian system of international law.[548] However, it is clear from the outset that this could not be done without states willingly redefining themselves, as they are still primary creators of international legal norms. Be that as it may, historical examples have important relevance in showing that legal personality of

[544] For a detailed explanation of changes in conceptualizations of feudal relations after The Peace of Westphalia, see: Croxton, Derek, *Westphalia: The Last Christian Peace*, 2013, especially chapter Innovations, pp. 363-387, also, specifically on the issues of questioning sovereignty under Westphalian system: Croxton, Derek, The Peace of Westphalia and the Origins of Sovereignty, *The International History Law Review*, vol. 21, no. 3, 1999, pp. 569-592.

[545] The Peace of Westphalia included the so-called "mutual guarantee clauses" which, according to the views of eminent writers of the time, prevented any single power to establish dominance over German rulers. See: Milton, Patrick, Guarantee and Intervention: The Assessment of the Peace of Westphalia in International Law and Politics by Authors of Natural Law and of Public Law, c. 1650–1806, in: Zurbuchen, Simone (ed.), *The Law of Nations and Natural Law 1625–1800*, 2019, p. 209, citing Samuel Pufendorf's views on the peace treaties constituting the Peace of Westphalia.

[546] In that regard, it is interesting to note that the two treaties contituting the Peace of Westphalia were in fact declared valid by their respective preambles due to the fact that they had been voted on by the Imperial colleges, that is, representatives of all German estates. See: Croxton, Derek, Tischer, Anuschka, *The Peace of Westphalia: A Historical Dictionary*, Westport/London, 2002, p. 143.

[547] For an elaboration of how Westphalian system of nation states is influencing today's international law and relations, see: Alvarez, José E., State Sovereignty Is Not Withering Away: A Few Lesions for the Future, in: Cassese (ed.), *op. cit.* (footnote 448), pp. 26-30 *et passim.* As Alvarez concludes: "the Westphalian system of nation-states – admittedly a blink of an eye in the scope of human history – remains the system that we have".

[548] See an overview of concepts "reshaping the notion of territory in international law" as introduced by Kuijer and Werner (Kuijer, Marin, Werner, Wouter, The Paradoxical Place of Territory in International Law, *Netherlands Yearbook of International Law*, vol. 47, 2016, pp. 6-9). For small island states devoid of territory due to sea level rise, implications of such reconceptualization might prove crucial for keeping their legal personality in place, as will be further elaborated *infra* in 3.2.11.

primary legal persons of international law (once these were rulers, nowadays are, of course, states) had not always been centred around territory.

Therefore, theoretical nature of relation between state and territory deserves more attention than it might seem at the first glance. Thus, theories explaining relation between a state and its territory are explained in the next chapters.

3.2.4. **Theoretical considerations on nature of relation between state and territory**

In general, there are three theories explaining legal relation between a state and its territory. Named by the most characteristic element of their conceptualization of this peculiar relation, those are the, in order of their historical prominence, patrimonial, constitutive, competence theory. Every one of them deserves explanation, at least in brief, because of their possible relevance for reconceptualizing of the idea of relation between a state and its territory in circumstances of sea level rise. Before going into explaining the theories and their possible relevance for small island states faced with sea level rise, it must be noted that they are originally formed around specificities of relations between a state and its territory,[549] but open also some dilemmas revolving around substance of a state as a legal person. In addition to these theories, *uti possidetis juris* principle provided theoretical ground for delimiting the relation between peoples and territories in the exercise of self-determination during the process of decolonization. As small island states emerged as independent by exercising the self-determination in the decolonization, *uti possidetis juris* provides a complementary addition to the picture.

3.2.4.1. **Patrimonial theory**

Patrimonial theory, as the name alludes, is based on the roman law concept of property rights. Drawing from the relation between property and its owner grounded in roman law, it conceptualizes rulers, equated at the time with states, as an owner of its territory. Highly popular in medieval times, patrimonial theory was not completely abandoned even in the 20th

[549] As Torres Camprubí noted: "Rather than considering the legal nature of territory as such, international legal theories sought to deal with the nature of State sovereignty in respect of territory (Torres Camprubí, *op. cit.* (footnote 35), p. 25).

Century, albeit with a very different understanding of what territory as patrimony of state means.[550] According to the classical concept under the patrimonial theory dating in the Middle Ages, a ruler is regarded as having rights (*dominium eminens*) over territory similar to those rights that a private person has over an object it owns. This analogy can be further facilitated by the conditions international law is imposing on states for acquisition of territory, those being the requirement of "corpus" and "animus" for acquisition and maintenance of sovereignty over territory, which are concepts clearly borrowed form roman private law.[551] Furthermore, this theory is akin to historical relations between a lord and its dominion in early feudal times, when legal personality was indeed vested into a lord's person rather than a territory forming his property.[552] However, patrimonial theory came under heavy criticism soon after its conceptualization. Criticism came by the argument that the patrimonial theory supports itself way too much on the analogies with private law.[553] Therefore, it disregards almost completely that there exists a crucial difference between

[550] The theory, which thus borrows heavily from analogies with (roman) private law, was theoretically developed by Italian Donato Donati in its work Stato e territorio. Later, it was notably accepted and used in explaining the legal relation between the state and its territory by Paul Fauchille in his classical system Traité de droit international public. In affirming the theory, Fauchille writes, for example: "Le droit de propriété sur une certaine partie du globe est donc pour tous les Etats un droit primordial. Chaque Etat est, dans ses relations avec les autres Etats, propriétaire d'un territoire." (Fauchille, Paul, *Traité de droit international Public*, Tome I, Paris, 1925, p. 450). See also: Torres Camprubí, *ibid.*, pp. 25-26.

[551] Writing on private law analogies in international law, Lauterpacht clearly states that "The part of international lsw upon which private law has engrafted itself with the greatest force and durability is that relating to acquisition of territorial sovereignty over land, sea and territorial waters." Lauterpacht goes on to show that: "The second principle, dominating the theory and practice to-day not less than a hundred or two hundred years ago is that based on the Homan law rules of possession, on the connection of animus with corpus, of the bodily act with the mental attitude." (Lauterpact, Hersch, *Private Law Analogies in International Law*, PhD Thesis, London School of Economics and Political Science, 1926, especially Chapter IV and pp. 109-111).

[552] As Nussbaum explains, "Feudal ties cut across national frontiers. The King of England was for a time a vassal of the King of France with respect to the Duchy of Normandy; and the Count of Champagne, a French peer and a vassal to the King of France, held fiefs from the Emperor and the Duke of Burgundy. This aspect of feudalism, which might be called its 'transnational' effect, appeared most significantly in the overlordship of the pope" (Nussbaum, *op. cit.* (footnote 445), p. 22). Torres Camprubí thus concludes that: "Such a viewpoint can be seen as resulting from an anachronistic understanding of statehood, reluctant to dissociate the personality of the State from that of the Head of State." (Torres Camprubí, *op. cit.* (footnote 35), p. 26).

[553] This argument was clearly articulated by Westlake stating that "each State has a sovereignty in and over its territory which presents some points of resemblance to property in land, but more important points of difference". Cited according to: Torres Camprubí, *ibid.*

dominium in private law and imperium, which is a true nature of state sovereignty, especially when population comes into the interplay.

In the 20th Century, some of the authors which advocated patrimonial theory, among which the most notable was Italian international legal scholar Donato Donati, conceptualized it differently. Drawing on the assumed inconguency of understanding of territory as constitutive element of a state due to the fact that the identity of a state's soveregnity over territory can change due to leases, cessions, international servitudes, and condominiums Donati concluded that territory is not the constitutive element of a state, but rather object of its sovereignty which other states should respect.[554] While this led Donati to argue that the right of state over territory represents "un diritto di dominio in senso stretto",[555] he still distinguished it clearly from private ownership by maintaining a distinction between dominium based in international law (which is the one that state has) from the one based in private law, which is not international, but rather municipal law of the very state that has dominium over a particular territory.[556] In that regard, the patrimonial theory as understood by the modern doctrine significantly differs from its origins. However, this does not in itself emancipate the state form territory. While territory is not a constitutive element of a state, it is still understood, along with population, as indispensable object of state's sovereignty, thereby being one of the very reasons for its existence. However, state's very legal personality is not dependent on defined territory. Donati accepts that territory is an object of state's sovereignty just like population, which is not understood only as those living on the territory of a state, but also as nationals living abroad.[557] Territory and population, however, are not criteria for legal personality. Rather, they are separate objects of state's *imperium*.

At the first glance, patrimonial theory might seem to include an idea of state being in possession of a legal personality which is not connected, or based upon, a territory. Just like, within the realm of private law, legal personality is vested into the owner's person, and not

[554] Donati, Donato, *Stato e territorio*, Macerata, 2023, pp. 73-75, 102-107. Donati's book was originally published in 1914.
[555] *Ibid.*, p. 113.
[556] *Ibid*., pp. 114-116.
[557] *Ibid.*, p. 100.

the property, same could be argued for patrimonial understanding of relation between a state and its territory.[558] This remains the same with the more modern understanding of patrimonial theory as conceptualized by Donati in the 20th Century who, while emancipating himself from straight private law analogies, nevertheless maintained that territory is the object of state's sovereignty, and not its constitutive element. For small island states that will become deterritorialized due to sea level rise, this might seem as a chance to continue their legal personality. However, this view can hardly be sustained. At first, there is a diachronic argument. Patrimonial theory clearly draws from concepts that are hardly in line with contemporary understanding of relation between a state and population living on its territory. More importantly, this theory, might seem to support a state as a legal person existing not because of being in possession of a territory, but for possession of it. In other words, sovereignty over territory is not treated as one of the conditions for existence of a state, but rather as one of the modalities how a state exercises its sovereignty. Therefore, if a state's personality existed before a territory, some might argue, it could also be sustained after its loss. There is, however, no other substance that this theory might provide such a state with. Population itself cannot form that substance, as in traditional understanding, it was territorially defined as well (only nationals living abroad do not constitute population).[559] Legal personality of a feudal lord, unlike that of contemporary states, was vested in its person, while the legal personality of a state, an abstract concept, can hardly be explained in that way, leaving patrimonial theory short of explaining what might come out of changed legal personality of deterritorialized states.

3.2.4.2. **Constitutive theory**

Constitutive theory, as its name again suggests, takes an opposite path in explaining the relation between a state and its territory. It views territory as an element forming a state, rather than being an object of state's dominium.[560] Known also under the names of object theory or property theory, this line of thught tried to overcome private law analogies by

[558] See: Torres Camprubí, *op. cit.* (footnote 35), pp. 26, 28.
[559] Compare the concept of population as explained *supra* in 3.2.1.2.
[560] See: Torres Camprubí, *ibid.*, p. 27, with literature cited there.

postulating the state's territory as "constitutional property".[561] Territory is, according to this theory, viewed as the vital object of the state, the property that makes a state and defines its legal personality. In explanation of this theory, the metaphor of corporality of state's territory has often been used, leading to a conclusion that any change in state's territory, apart from minor border adjustments and modifications, is akin to body mutilation.[562] Although not a proponent of constitutive theory as such, the importance of territory for constitution of a state as *differentia specifica* has been lucidly summarized by Henry Wheaton in the 19th Century, who wrote that: "The legal idea of a State necessarily implies that of the habitual obedience of its members to those persons in whome the superiority is vested, and of a fixed abode, and territory belonging to the people by whom it is occupied".[563] Although this theory sparked much debate[564] and was both heavily affirmed and contested, its position regarding small island states faced with sea level rise is quite clear. Under the constitutive theory, their legal personality can be sustained only if they manage to find another territory or a way to continue to be true territorial legal persons.[565]

3.2.4.3. **Competence theory**

Third theory is the competence theory, which views the relation between a state and its territory as territory being a space over which a state exercises competence in accordance with the very state's legal order. In other words, territory is not viewed as an object in possession of a state (patrimonial theory) nor as a constitutive element of a state (constitutive theory), but as an object on which a state imposes its legal order. The competence theory was especially developed by Hans Kelsen,[566] who equated the state with its legal order[567] thereby

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[561] von Paepcke, *op. cit.* (footnote 113), p. 35, with literature cited there.
[562] *Ibid.*, p. 36.
[563] Wheaton, *Elements of International Law*, London, 1880, p. 27, cited according to: Grote Stoutenburg, *op. cit.* (footnote 109) p. 258, footnote 85.
[564] *Ibid.*
[565] This conclusion is an inevitable consequence of the idea that the territory indeed presents a constitutive element of statehood, meaning that a state without territory ceases to be a state and therefore loses its legal personality under international law.
[566] The constitutive theory was extensively developed and commented upon by Kelsen in his work Pure Theory of Law. See: Kelsen, Hans, *Pure Theory of Law*, Berkley, 1970.
[567] See: Kelsen, *op. cit.* (footnote 481), pp. 430-431.

minimizing the importance of territory in defining a state, although not getting away with it completely. In that sense, competence theory can provide some ideas that might be considered useful for small island states after their possible deterritorialization. To be more precise, if a state is regarded as a legal person imposing its legal order over a territory (and, of course, population inhabiting it), it could be as well regarded as one imposing its legal order over a community of nationals living on some other territory or even scattered around different territories. In Kelsen's words: "if a power is established anywhere, in any manner, which is able to ensure permanent obedience to its coercive order among the individuals whose behavior this order regulates, then the community constituted by this coercive order is a state in the sense of international law".[568] This view is, however, connected to many practical dilemmas around its possible implementation in case of relocations since it encroaches around territorially defined sovereignty of other states, which still dominates international legal discourse.

On the other hand, however useful this approach might be to understanding the relation between a state and legal order established under its sovereignty, it falls short of explaining the actual role territory plays for a state.[569] Patrimonial and constitutive theory focus exactly on that question, and the question is crucial also for the idea of a state retaining its legal personality after its territory becomes physically submerged due to sea level rise. Competence theory somehow circumvents it, leaving it unanswered, focusing instead on the nature of competences of state over its territory.[570] It thus falls short of explaining the crucial dilemma of this chapter.

While these theoretical consideration of nature of sovereignty over territory were relevant in shaping international legal theories on state-territory relation, as one author remarked "None of the authors of these concepts, however, ever considered that state territory – and thereby

[568] Kelsen, *op. cit.* (footnote 450), pp. 69-70.

[569] Compare: Torres Camprubí, *op. cit.* (footnote 35), pp. 28-29.

[570] The main reason for that is that the competence theory focuses on the nature of sovereignty over territory and not the territory as such. As Torres Camprubí concludes: "The competence theory operates after the title or right to territorial sovereignty over a specific portion of the earth has been established, and instead focuses on explaining what are the consequences of the existence of a right to territorial sovereignty for the validity of the legal order of the State. See: *Ibid.*, p. 29.

territorial sovereignty – may be lost in any other than 'conventional' ways of occupation, annexation, cession, adjuration or usucaption, and instead by sea level rise".[571] Therefore, other aspects of this relation that emerged in international legal practice and doctrine must not be overlooked. Arguably, among the most important of these is the principle of *uti possidetis juris*, which defined borders of newly independent states in the process of decolonization, while at the same time confirming the crucial role that territory played in the process of establishment of these states.

3.2.4.4. ***Uti possidetis*** **principle**

All of the aforementioned theories were conceived in a specific environment of European (or, at least, western) views on issues of statehood. Moreover, they predate the era of decolonization and the role territory played in it and in choices peoples of newly independent states were able to make as realization of their right to self-determination. For newly independent states, having a territory over which they can independently exercise their sovereignty was a crucial point of self-defining themselves as states.[572]

Similarly, the United Nations at the time facilitated such a view in its documents, specifically those created under the auspices of the General Assembly. Arguably the most important in the long line of United Nations General Assembly resolutions on facilitating the decolonization process, the Declaration on the Granting of Independence to Colonial Countries and Peoples thus speaks of respect for "integrity of their national territory" while referring to obligations that other states should have towards colonial countries and peoples.[573] Such wording clearly points to the idea of newly independent states being defined

[571] von Paepcke, *op. cit.* (footnote 113), p. 37.

[572] Charter of the Organization of African Unity, regional international organization of African states, established in 1963 by the states that have recently gone through the process of decolonization to become newly independent states can provide an example. In Article II (b) of the Charter, one of the primary purposes of the Organization is, for its member states, to „defend their sovereignty, their territorial integrity and independence ". This shows that territory (and its integrity) was indeed viewed as one of the key values and assets through which newly independent states defined themselves. See: Charter of the Organization of African Unity, United Nations Treaty Series, 1963, vol. 479, no. 6947, 1963, pp. 69-88, Article II (b).

[573] See, for example, Principle IV from Declaration on the Granting of Independence to Colonial Countries and Peoples on the principles which should guide UN member states in determining whether or not an obligation exists to transmit the information called for under Article 73 e of the Charter of the United Nations. In

through their territory. To the point, not only that territory is their constitutive element, one without which they could not be accepted as full members of international community, or, legally speaking, juridical persons, but territory was even understood as one of primary arguments put forward in debates about granting independence. The argument continues in that peoples have special bond and specific rights to govern upon the territory they inhabit.[574] Therefore, the decisions about it must be left to them. *In extremis,* it could even be argued that without territory, the whole concept of decolonization becomes at least partially empty, devoid of one of its most important elements of substance. Full realization of decolonization process culminates in free decision of colonial peoples about their future, as further defined and embodied in the concept of self-determination. This can mean that colonial peoples, as they often did, could decide on creation of newly independent state.[575] And this is where the circle closes, because to do that, according to traditional understanding of international law, territory is needed. Understood this way, territory becomes really a constitutive element of creation of newly independent state. Some territory with which peoples have special bond must exist in order to have a state created in the process of decolonization.

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determining which non self-governing territory is under duty of reporting, Principle IV proclaims „Prima facie there is an obligation to transmit information in respect of a territory which is geographically separate and is distinct ethnically and/or culturally from the country administering it.“ Thus, the primary obligation of colonial states, that of reporting about the administration of process of decolonization of their respective colonies to the UN organs, is also conceptualized territorially. The obligation primarily exists if a territory is geographically distinct, which also implies that, once the newly independent state is created and the obligation to transmit information ceases, it ceases in respect to that territorially understood legal person. See the Declaration on the Granting of Independence to Colonial Countries and Peoples. For a summary of Declaration's legal and political implications, see, in brief: McWhinney, Edward, *Declaration on the Granting of Independence to Colonial Countries and Peoples*, available at: https://legal.un.org/avl/pdf/ha/dicc/dicc_e.pdf (accessed: 3rd December 2022).

[574] Illustrative example of this are the findings presented in an article based on a series of interviews with islanders, both those living on the Maldives islands and those relocated to the United States of America, see: Bordner, Autmn Skye, Climate Migration and Self-Determination, *Columbia Human Rights Law Review*, vol. 51, no. 1, 2019, pp. 183-252, especially see pages 194-198.

[575] The General Assembly, concurrent with the adoption of the Declaration on the Granting of Independence to Colonial Countries and Peoples, adopted its Annex containing principles which should guide members in determining whether or not an obligation exists to transmit information called for under Article 73e of the Charter. Principle VI of the Annex reads as follows: “A Non-Self-Governing Territory can be said to have reached a full measure of self-government by: (a) Emergence as a sovereign independent State; (b) Free association with an independent state; (c) Integration with an independent State”. See: Principles which should guide Members in determining whether or not an obligation exists to transmit the information called for under Article 73e of the Charter, United Nations General Assembly, A/RES/1541(XV), Annex, 1961.

To the point, when colonized peoples decide on independence, they are bound by set of legal principles which have to be respected in the process. Arguably the most important of these is the principle of *uti possidetis* as confirmed by both practice of states and jurisprudence of the ICJ.[576] In the context of creation of newly independent states through decolonization it was first used in Latin America in the 19th Century.[577] In that case, administrative borders of Spanish and Portuguese colonies were taken over as borders of newly independent states. There was even a temporal component attached to this rule, with specific years being given as those determining the state of borders which became relevant for new states.[578]

In more recent examples, ICJ has confirmed *uti possidetis* rule as relevant for decolonization processes in Africa. In its judgement in the Frontier Dispute case between Burkina Faso and Mali, the ICJ, while recalling its first use in Latin America, called it a "general principle, which is logically connected with the phenomenon of the obtaining of independence, wherever it occurs".[579] The ICJ continued with stating that: "Its obvious purpose is to prevent the independence and stability of new States being endangered by fratricidal struggles

[576] See, as especially relevant, the following judgments: Frontier Dispute (Burkina Faso/Mali), Judgment, *I.C.J. Reports*, 1986, pp. 554-651, Arbitral Award of 31 July 1989 (Guinea-Bisau/Senegal), Judgment, *I.C.J. Reports,* 1991, pp. 53-76, Land, Island and Maritime Frontier Dispute (El Salvador/Honduras, Nicaragua intervening), Judgement, *I.C.J. Reports*, 1992, pp. 351-618.

[577] Here, it might be useful to note that, historically, the uti possidetis principle had two interpretations. The first one, *uti possidetis de facto*, limited sovereignty of new states on the territory that they factually possessed at the time of independence. The second one, *uti possidetis juris*, connected limits of territorial sovereignty with legal title to territory. As noted by Seršić, the two interpretations are not distinct, as legal title acts as a additional quality that is required along factual possession in certain cases. For the historical overview of the *uti possidetis* as a legal principle, see: Seršić, Maja, Načelo *uti possidetis* u međunarodnom pravu, *Zbornik Pravnog fakulteta u Zagrebu*, vol. 53, no. 2, 2003, pp. 309-323, also Torres Bernárdez, Santiago, The "Uti possidetis Juris Principle" in: Ginther, Konrad, Hafner, Gerhard, Lang, Winfied, Neuhold, Hanspeter, Sucharipa-Behrmann, Lilly, *Völkerrecht zwischen normativem Anspruch und politischer Realität: Festschrift für Karl Zemanek*, Berlin, 1994, pp. 421-426. On the other hand, McWhinney disputes that *uti possidetis*, as it was conceptualized and used in Latin America, is indeed basis of integrity of colonial borders of newly independent states after decolonization, arguing that it is rather a political than a legal principle (see: McWhinney, *op. cit.* (footnote 295), 2007, p. 56). Whatever the foundation of the principle might be, it is clear that it governed decolonization, a process in which small island states were actively participating.

[578] Administrative borders of former colonial possessions as they had been standing in 1810 (South America) and 1821 (Central America) were used as basis for state borders of newly independent states. See: Kohen, Marcelo, *Possession contestée et souveraineté territorial*, Paris, 1997, pp. 404-405.

[579] See: Frontier Dispute (Burkina Faso/Mali), Judgment, *I.C.J. Reports*, 1986, p. 565.

provoked by the challenging of frontiers following the withdrawal of administering power."[580]

The main significance of the *uti possidetis* priciple, as clearly emphasized by the ICJ,[581] is to counterbalance claims for self-determination of peoples under colonial domination, which could otherwise lead to wars revolving around overlapping territories on which such a process should happen. The principle of *uti possidetis* was further affirmed outside of colonial context by the Arbitration Commission on Yugoslavia[582] and in jurisprudence involving disputes regarding maritime borders[583]. On the other hand, there have been cases where the principle of *uti possidetis* has not been followed due to specific circumstances around the case. For example, in the process of decolonization, the former colony of Ruanda-Urundi, then under trusteeship of Belgium, was split into two states which both became independent as sovereign nations, respecting the requests of representatives of both Ruanda and Urundi.[584] What is more, the very small island states of Kiribati and Tuvalu, one of those most endangered by sea level rise, once formed a single British crown colony under the name Gilbert and Ellice Islands, which split after the referendum on the issue had been held by the colonial administration, with two parts soon gaining independence as Kiribati and Tuvalu, respectively.[585]

For small island states faced with sea level rise that is bringing them in peril of being deterritorialized, its relevance can be reconsidered in two ways. First, it adds to the argument of territoriality of claims put forward in the decolonization process. Idea of realization of

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[580] *Ibid.*

[581] *Ibid.*

[582] See Opinion No. 3 of the Arbitration Commission of the Peace Conference on Yugoslavia, in which the Commission stated "Uti possidetis, though initially applied in settling decolonization issues in America and Africa, is today recognized as a general principle, as stated by the International Court of Justice" (Conference on Yugoslavia Arbitration Commission: Opinions on Questions arising from the Dissolution of Yugoslavia**,** *International Legal Materials*, vol. 31, no. 6, p. 1500).

[583] See judgments of the ICJ in cases: Arbitral Award of 31 July 1989 (Guinea Bissau v. Senegal), *I.C.J. Reports*, 1991, p. 53, Land, Island and Maritime Frontiers Dispute (El Salvador v. Honduras, Nicaragua intervening), *I.C.J. Reports*, 1992, p. 351.

[584] See the resolution of the United Nations General Assembly The future of Ruanda-Urundi, United Nations General Assembly, A/RES/1746 (XVI), 1962.

[585] McIntyre, *op. cit.* (footnote 161), p. 144.

self-determination of colonial peoples, including islanders of small island states now in peril, was an idea of, *in ulitma linea*, creating a territorial legal person, an independent state. International jurisprudence reacted to such claims by upholding the *uti possidetis* principle in effort to prevent these claims to become instigators of armed conflicts between newly independent states. It thus acknowledged that territoriality is one of the main elements of legal persons resulting from decolonization. Second, *uti possidetis* principle prevents newly independent states from claiming territories that were under effective control of other states.[586] This brings to a point that any claims for territory that might replace the submerged one can hardly be justified on any argument besides assent of states to which territories in question belong.[587]

However, what most certainly will not disappear are the sea areas that constitute maritime entitlements of small island states. The principle of *uti possidetis* has traditionally been considered by eminent jurists to apply only to land territory and not to the adjacent sea areas,[588] though more recent judicial pronuncements held the opposite, allowing for the *uti possidetis* doctrine to be applied to maritime delimitations as well based on the argument that stability of borderes on the sea.[589] In the context of small island states, the question of application of *uti possidetis* doctrine on delimitation of maritime boundaries is, however, transformed due to the expected loss of territory to which they have been so far adjacent. The

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[586] This logically follows *a contrario* from the statement of the ICJ in the Frontiers judgement that the *uti possidetis* principle's purpose is to prevent "fratricidal struggles provoked by the challenging of frontiers following the withdrawal of administering power". See: Frontier Dispute (Burkina Faso/Mali), Judgment, *I.C.J. Reports*, 1986, p. 565.

[587] For further arguments on this, see *infra* in 3.2.11.

[588] In the case concerning the delimitation of maritime boundary between Guinea-Bissau and Honduras the arbitrator Mohammed Bedjaoui held in his dissenting opinion that "En conséquence il ne me paraît pas douteux que les limites maritimes sont des frontières, mais d'une nature ou d'une catégorie différente. Elles connaissent, et doivent connaître de ce seul fait, un statut et un régime juridiques que cette différence a déjà imposés pour ce qui concerne les procédures de conclusion des accords qui les créent. De ce seul fait aussi elles n'appellent pas *nécessairement* l'application du principe de *uti possidetis.*" (Case Concerning the Delimitation of Maritime Boundary between Guinea-Bissau and Honduras, Arbitral Award of 31st July 1989, Dissenting opinion of Judge Mohammed Bedjaoui, *Reports of International Arbitral Awards*, vol. XX, 1989, p. 168).

[589] The ICJ held in its El Salvador/Honduras: Nicaragua intervening and Nicaragua v. Honduras judgements that uti possidetis "may, in principle, apply to offshore posessions and maritime spaces" See: El Salvador/Honduras: Nicaragua intervening, Judgment, *I.C.J. Reports*, 1992, pp. 558, 589; Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras), Judgment, *I.C.J. Reports*, 2007, p. 707.

question that logically poses itself than is: whether, based on the principle of *uti possidetis*, these maritime entitlements, which are currently under soveregnity of small island states, can remain under soveregnity of respective states and act as their material substratum instead of *terra firma*, a land territory? The answer of the traditional theory would very likely be in the negative. Under traditional conceptualizations of the relation between maritime entitlements and territory to which they are adjacent, matitime entitlements do not exist separately from territory.[590] Rather, states exercise sovereignty and sovereign rights over their maritime entitlements only as an extension of their sovereignty over the coastal territory. Maritime entitlements are thus considered "'natural appurtenance' to the land domain and as such cannot be separated from it".[591] Therefore, the only possibility for this to change is to create new rules of international law that would replace older rules in accordance with the *lex posterior derogat legi priori* maxim. In relation to sea level rise, it seems that such a process might be happening. In 2021 Pacific Islands Forum adopted the Declaration on Preserving Maritime Zones in the Face of Climate Change-related Sea-level Rise, in which Pacific Islands Forum member states declared that "once having, in accordance with the Convention, established and notified our maritime zones to the Secretary-General of the United Nations, we intend to maintain these zones without reduction, notwithstanding climate change-related sea-level rise".[592] The Co-Chairs of the ILC Study Group on Sea Level Rise in Relation to International Law in their Final Report, published in 2025, were able to conclude that there exists "widespread and consistent support, with regard to the preservation of baselines and maritime zones notwithstanding sea level rise".[593] However, it would be a logical fallacy (based on an *argumentum a minori ad maius*) to conclude that statehood could continue based only on preserved maritime entitlements or application of *uti possidetis* on them. It is rather the other way around, preservation of legal personality of small island states presupposes

[590] For the conceptualization of this traditional argument in the context of territorial sea and archipelagic waters, see: Grote Stoutenburg, *op. cit.* (footnote 109), p. 253.
[591] See: *ibid*.
[592] For the text of the Declaration see: Declaration on Preserving Maritime Zones in the Face of Climate Change-related Sea-Level Rise, Pacific Islands Forum, 2021, available at: https://www.forumsec.org/2021/08/11/declaration-on-preserving-maritime-zones-in-the-face-of-climate-change-related-sea-level-rise/ (accessed: 18th December 2022).
[593] Galvão Teles, Ruda Santolaria, *op. cit.* (footnote 17), 2025, p. 97.

their right to continue exercising sovereignty and sovereign rights over maritime entitlements. Moreover, in the context of this work, preservation of maritime entitlements alone is not able to resolve the problem of protection, respect and fulfilment of human rights of populations of small island states. It is, however, useful to think about preservation of maritime entitlements as support for economies of small island states and free disposal of their natural resources, which are important components of self-determination.[594] That, however, does not resolve the main dilemmas of this work, those of statehood of small island states as main outcome of self-determination of their peoples, or the protection of other human rights of their populations.

All the states aforementioned as those in peril of deterritorialization emerged as states during the decolonization process.[595] Moreover, even without territory being lost due to sea level rise, all of them are very small both in terms of landmass and resources available beyond maritime ones.[596] Even at the time of their creation and subsequent applications for membership in the United Nations, their statehood and ability to fulfil membership obligations was questioned based, *inter alia*, on smallness of their territory.[597] The fact that happened can only add to highlighting how crucial territory was for states as creators of international law in understanding what a state is. Although dilemma was finally overcome by result in favour of accepting the applications and admitting them into the United Nations,[598] it can serve as insightful guidance into how *opinio juris* is firm when it comes to understanding a state as a territorial entity.

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[594] For the arguments supporting the link between free disposal of natural resources and self-determination, see *supra* in 3.1.

[595] Maldives might be the only exception. However, they were for centuries under effective colonial administration as protectorate of various European powers, of which British presence was by far the longest. See: Rothermund, Dietmar, *The Routledge Companion to Decolonization*, 2008, pp. 119-120.

[596] For an overview of particular small island state's geography, see supra in 1.2.2.

[597] The Charter of the United Nations envisages participation of all member states in collective action, which involves military capabilities. As very small states often lack meaningful military, it was argued that they could not fulfil their obligations as member states of the UN. See: United Nations Secretary-General, Introduction to the Annual Report of the Secretary-general on the Work of the Organization, A/6701/Add.1, 1967, p. 20.

[598] Eventually, all small island states which are in focus of this work have become member states of the UN. The Maldives became a member in 1965, Micronesia became a member in 1991, Kiribati in 1999 and Tuvalu in 2000. See: Growth in United Nations Membership, available at: https://www.un.org/en/about-us/growth-in-un-membership (accessed: 4th December 2022).

We will now turn to recognition of states, which is an instrument of existing states' acquiescence to the creation of new states. With statehood being questioned, recognition, despite its declaratory nature for the creation of states, might be a crucial tool for its continuation of legal personality, and thereby deserves a deeper insight.

3.2.5. **Recognition as a tool for continuty of legal personality**

The idea of continuation of states which lost control over territory is not new or unprecedented. There were cases, mostly resolving around armed conflicts, in which continuation of states was affirmed against loss of control over territory. Czechoslovakia and Yugoslavia during the Second World War can serve as primary examples of states whose continuity was recognized notwithstanding that they lost control over most, or even whole, of their respective territories. Their continuity was held as unbroken by the Allied states after the war and regaining of control over respective territories.[599] It is, however, the time in between loss and regaining of territory that requires interpretation beyond effectivity principle and declaratory recognition, as otherwise those could not be considered as states under international law. In fact, continuity of statehood during the time when governments of those states were not able to effectively control their territories (those being under belligerent occupation) was reliant completely on the expressed will of Allied states to continue recognising them as legal persons under international law. Without this will of other states, those states would be extinguished. Example of Baltic states after the dissolution of the Soviet Union, which tried to claim continuity with pre-World War II independent Baltic republics, only to find themselves rejected by overwhelming majority in international community, adds to this argument. Existence of legal personality of states which are devoid of traditional elements of statehood is reliant on the recognition of such legal personality by other states. And this could be done through constitutive recognition,[600] because it is a concept not reliant on elements of statehood as such, but allows statehood to be founded solely upon legal concept of recognition.

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[599] For the discussion of these examples and how the substantially differ from the situation that sea level rise creates for small island states, see *supra* in 3.2.1.1.

[600] For the concept of constitutive recognition see *infra* in 3.2.5.2.

This view can be generally accepted and constitutes primary reason why constitutive recognition becomes a feasible way for states devoid of some of the elements of statehood to continue their legal personality in international law. Historical precedents only add support to such claims, allowing constitutive recognition to be used as a tool for borderline situations despite declaratory recognition rightfully winning predominant support in theory and practice of contemporary international law.[601] Going back to small island state, a question arises whether constitutive recognition can be of help for them to continue their legal personality once they lose inhabitable territory due to sea level rise. In line with other (historical) cases of states that lost control over their territory and, sometimes, population as well, situation of small island states faced with sea level rise might seem analogue and, therefore, constitutive recognition seems to represent a good solution for continuation of statehood of small island states faced with sea level rise.[602] However, there are significant and important differences between small island states and these historical examples.

First difference that should be pointed out is the nature of loss of elements of statehood. In the aforementioned examples of Czechoslovakia and Yugoslavia during the Second World War, loss of elements of statehood had never been viewed as permanent. Indeed, it was viewed as temporary aberration in the international legal order, being a direct consequence of war.[603] From the beginning, it was assumed that these states would, once the war finishes, restore their sovereignty over territory and population and thus regain all three elements of statehood.[604] Moreover, examples of Baltic states after the dissolution of the Soviet Union show that temporal component, being the time that elapsed between the loss and regaining of elements of statehood is also considered to contribute to the *opinio juris* on the continuation of such states. Therefore, it can be considered that only those states which loss of elements of statehood had been considered temporary and limited in duration were able to

[601] For further arguments supporting this claim see *infra* in 3.2.11.
[602] For a similar view, see: Soete, *op. cit.* (footnote 381), pp. 140-141.
[603] Crawford, *op. cit.* (footnote 301), p. 688.
[604] *Ibid.*

benefit from constitutive recognition during the time when they lacked one or more of the elements to be considered as a basis for their continuation.[605]

Constitutive recognition was thus only a tool to uphold statehood during what was considered as temporary anomaly of regular situation in relations between states. On the contrary, small island states are experiencing loss of elements of statehood which can neither be considered temporary, limited in duration or caused by some identifiable anomaly of international legal order such as war. Loss of territory due to sea level rise will be of permanent nature, the territory will be submerged and, as a consequence, inexistent in the legal sense as a terrestrial mass. Having that in mind, constitutive recognition of small island states should not serve as a temporary solution for time of irregularities, but as a basis for a permanent solution. This distincts small island states from historical cases of governments in exile, whose existence was as well conditioned upon recognition of other states.[606] Governments in exile, however, are temporary organs of their respective states, which are only temporarily unable to exercise their jurisdiction over the territory of their state. They have no legal personality of their own.[607] Small island states which lost territory due to sea level rise lost it permanently and there is no possibility for the sovereignty to be re-established over the same territory. Adding to that, situation of loss of territory is not a result of a process which can be considered as irregular state of affairs, but of a gradual natural phenomenon, albeit of anthropogenic origin.

Constitutive recognition is not dependent on facts or characteristics that an entity that is subject to such recognition should possess. While such a recognition should not be in conflict with some other norm of international law or result of an illegal act,[608] it remains a matter of free will of recognizing state. This, in turn, leads to a question whether extinction of legal

[605] Compare Soete, *op. cit.* (footnote 381), p. 159, concluding that "there exists no historical precedent of constitutive recognition correcting for a total lack of habitable territory".
[606] For further discussion on missed paralelism between governments in exile and small island states, see *infra* in 3.2.7.2.
[607] Thus, Talmon correctly observed that that "a government, as the organ of a State, by definition requires the existence of a State". See: Talmon, *op. cit.* (footnote 523), 2001, p. 15.
[608] On a more general plan, this is consistent with the duty of states not to recognize illegal situations, naimely those that arose out of a breach of the peremptory norm of international law. The general duty of non-recognition has been affirmed by the ICJ in its Israeli Wall advisory opinion. See: Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, *I.C.J. Reports*, 2004, p. 200.

personality of small island states as a result of inundation can be subsumed under the breach of a *jus cogens* norm of international law. Specifically, whether right to self-determination as *jus cogens* norms of international law[609] that are clearly endangered by the effects of sea level rise on small island states, could create an obligation to continue recognizing legal personality of small island states on a basis of constitutive recognition once their territory is inundated and population resettled? In doing that, one must not forget that there was indeed no precedent to date for a recognition of an entity that is *de facto* dispossessed of all traditional elements of statehood.[610] If that was indeed possible, then states, in accordance with the Israeli Wall dictum, would be under an obligation not to recognize such situations.

From this, it can be resolved that states could hardly recognize continuation of legal personality of small island states without previous significant changes of one of the fundamental concepts of international law, the statehood. However, this in turn leads to a broader question – is there any other possibility for small island states to safeguard their legal personality?

As a state becomes devoid of traditional elements of statehood, namely permanent population and territory, effectiveness of such statehood comes into question. Therefore, recognition of such a state might be questioned as well.

The most important way of states' acquiescence to entity's claim for statehood is recognition.[611] There are two classical theories that explain the effects of recognition on the legal personality of a state. One is the declaratory theory, while the other is constitutive theory. Although by far most prominent, the distinction between declaratory and constitutive recognition is not the only one developed in international legal theory. Kelsen, for example, distinguished between political and legal recognition, which is another distinction that could

[609] On the jus cogens status of the right to self-determination see *supra* in 3.1.

[610] Compare Soete, *op. cit.* (footnote 381), p. 141.

[611] Clear expression of this can be found in the Charter of the Organization of American States (Bogotá Charter). Article 10 of Bogotá Charter prescribes that: "Recognition implies that the State granting it accepts the personality of the new State, with all the rights and duties that international law prescribes for the two States." (Charter of the Organization of American States, Signed at Bogotá, 1948, United Nations Treaty Series, vol. 48, no. 1609, 1952, pp. 47-92, Article 10).

be relevant for the unprecedented situation of small island states deterritorialized due to sea level rise. Political recognition, as defined by Kelsen, is a free, discretionary act of a recognizing state, which has only practical nature of establishing relations between a recognizing and a recognized state.[612] Consequently, it does not have legal, but rather only political significance.[613] On the contrary, legal recognition, as defined by Kelsen, is an act of cognition rather than the act of recognition, insomuch as it is not the expression of the free will of a state, but the expression of a legal fact that a state has indeed came into being, which is done by other states as creative organs of international legal system.[614] The significance of Kelsen's distinction for small island states is in that any act of recognition which will come after deterritorialization and resettlement of population would be constitutive in the sense of Kelsen's legal recognition. This is because it would create, by the expression of will of recognizing states, a new understanding of legal personality of small island states, as we will further explain.[615] Before that, however, we must dive back into the classical distinction between declaratory and constitutive recognition in order to explain why declaratory recognition is not suitable for continuation of deterritorialized legal personality of small island states.

3.2.5.1. **Declaratory theory**

An unprecedented situation opens variety of questions regarding statehood of states faced with extinction of territory due to sea level rise. One and, arguably, primary, is the continuation of them being recognized as states by other states.[616] In contemporary

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[612] Kelsen, Hans, Recognition in International Law: Theoretical Observations, *The American Journal of International Law*, vol. 35, no. 4, pp. 605-606.

[613] Kelsen continues with describing political recognition as "declaratory" in nature, but this must not be confused with the traditional notion of declaratory recognition, insomuch as "declaratory" in Kelsen's understanding means devoid of any legal significance. See: *ibid.*, p. 606.

[614] *Ibid.*, pp. 606-607. As the legal consequences of such a determination are, in Kelsen's view, determinative for the state to come into existence, he determines legal recognition to be constitutive in character. See: *Ibid.*, p. 609.

[615] For the analysis, see *infra* in 3.2.9. and 3.2.10.

[616] The key question, apart from mode of such recognition, is also whether there is a legal or moral basis for states to continue recognizing small island states after they have lost territory and/or population due to sea level rise. Grote Stoutenburg is of opinion that, at least in contemporary international law, there is no legal duty of states to continue recognizing small island states which have lost effectiveness of traditional elements of

international law doctrine, the concept of declaratory recognition is almost universally accepted for the, conditionally stated, regular situations of creation of states, that is creation of states as entities in possession of all three elements of statehood.[617] Declaratory recognition theory perceives recognition as declaratory, voluntary act of state recognizing another state that has effects of only recognizing what already exists as a fact in international law.[618] Therefore, it follows the principle *ex factis jus oritur*, being an act of recognizing state that mostly has only political significance of recognizing the fact that a state came into being under international law.[619]

When there is a generally clear-cut situation regarding the elements of statehood, especially territory and population, but also independent government, theory of declaratory recognition functions very well and does not produce much uncertainty. As such, it has been accepted by the practice of international (quasi)judicial bodies, namely in the famous Deutsche Continental Gasgesellschaft[620] and Tinoco cases[621] and affirmed in the Åland Islands case,[622]

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statehood arising from liability for climate change. However, she concludes that: "However, moral restraints might prevent the other members of the "international community" from sanctioning the death of one of their own that has disappeared as a result of their collective action." See: Grote Stoutenburg, *op. cit.* (footnote 109), especially p. 86.

[617] See, among others, Grant, *op. cit.* (footnote 415), p. 446, Shaw, *op. cit.* (footnote 300), pp. 446-447.

[618] Shaw, *ibid.*, p. 446.

[619] On principle *ex factis jus oritur*, see: Soete, *op. cit.* (footnote 381), p. 108; also: Chen, Ti-Chiang, *The International Law of Recognition*, New York, pp. 420-422.

[620] In this case, the German-Polish Mixed Arbitral Tribunal stated: "According to the opinion rightly admitted by the great majority of writers on international law, the recognition of a state is not constitutive but merely declaratory. The State exists by itself and recognition is nothing else than a declaration of this existence, recognized by the States from which it emanates." Cited according to: Chen, *ibid.*, p. 92.

[621] "The non-recognition by other nations of a government claiming to be a national personality, is usually appropriate evidence that it has not attained the independence and control entitling it by international law to be classed as such. But when recognition *vel non* of a government is by such nations determined by inquiry, not into its *de facto* sovereignty and complete governmental control, but into its illegitimacy or irregularity of origin, their non-recognition loses something of evidential weight on the issue with which those applying the rules of international law are alone concerned. What is true of the non-recognition of the United States in its bearing upon the existence of a *de facto* government under Tinoco for thirty months is probably in a measure true of the non-recognition by her Allies in the European War. Such non-recognition for any reason, however, cannot outweigh the evidence disclosed by this record before me as to the de facto character of Tinoco's government, according to the standard set by international law." See: Aguilar-Amory and Royal Bank of Canada claims (Great Britain v. Costa Rica), *Reports of International Arbitral Awards*, vol. I, 1923, p. 381.

[622] Committee of Jurists, Report on the Aaland Islands Question, *League of Nations Official Journal*, Special Supplement no. 3, 1920.

all of which comprise today classical examples of sanctioning doctrine of declaratory recognition. Moreover, declaratory nature of recognition requires from the act of recognition to be retroactive to the point in time when a state first gained all three elements of statehood.[623] Recognition therefore only serves as legal form to acknowledge that an entity is in possession of a territory, population and independent government. The recognizing state only confirms that from its point of view the three elements exist for the recognized state.[624]

Nevertheless, already in the Åland Islands case, one specific characteristic of recognition, even as a declaratory act, had been emphasized. That is that the recognition can serve, and indeed serves, as suggestive evidence of statehood, albeit falling short of conclusive evidence, these being only the concrete facts.[625] Therefore, it could be stated that declaratory recognition can be useful when looking into the problem of a state being in possession of one of the elements of statehood.[626] Usefulness of this aspect of declaratory theory, however, is mostly limited in scope to situations where there are conflicting claims made about one of

[623] Andrassy *et al.*, *op. cit.* (footnote 103), p. 96. Lauterpacht, while notably criticizing the declaratory theory of recognition, nevertheless observed that "When we assert that a state exists as a normal subject of international law by virtue of the fact of its existence, we must necessarily have in mind a state fulfilling the conditions of statehood laid down in international law" (Lauterpacht, Hersch, *Recognition in International Law*, Cambridge, 1947, p. 45).

[624] This was clearly expressed by the Institut de Droit International in its Resolution on Recgonitition of New States and Governments by stating that: "L'existence de l'Etat nouveau avec tous les effets juridiques qui s'attachent il cette existence n'est pas affectée par le refus de reconnaissance d'un ou plusieurs Etats". See: La Reconnaissance des Nouveaux Etats et des Nouveaux Gouvernements, *Annuare de L'Institut de Droit International*, vol. 39, 1936, p. 209; see also: Shaw, *op. cit.* (footnote 300), p. 448.

[625] In this case, the Commission of Jurists appointed by the League of Nations accepted recognition of Finland by various governments as important, but not "conclusive" evidence of state's existence. This was due to the unstable and chaotic situation of internal affairs in Finland after the Russian revolution and dissolution of the Russian Empire, which Finland in turn used to proclaim its independence. The Commission of Jurists, while noting numerous acts of recognition by diffesent states which recognized Finland, nevertheless stated that: "the same legal value cannot be attached to recognition of new States in war-time, especially to that accorded by belligerent powers, as in normal times", and went on to determine that "In addition to these facts which bear upon the external relations of Finland, the very abnormal character of her internal situation must be brought out." For the text of the Commission's report, see: Committee of Jurists, Report on the Aaland Islands Question, *League of Nations Official Journal*, Special Supplement no. 3, 1920, p. 8. See also the commentary in: Crawford, *op. cit.* (footnote 301), p. 24.

[626] As Crawford observes: "That an entity is recognized as a State is evidence of its status; where recognition is general, it may be practically conclusive". See: Crawford, *ibid.*, p. 27.

the elements of statehood.[627] In that case, (declaratory) recognition of an entity as a state by many other states can indeed serve as a very strong suggestive evidence *post festum*, a signal that states as primary creators of international law accept that a new legal person has been previously created under international law in accordance with the principle of effectivity. This was confirmed in the aforementioned Deutsche Contintental Gasgeselschaft, Tinoco and Åaland cases and is widely accepted. However, even that has been chaninging in the more recent developments of international law defined by the process of decolonization. There have been situations of newly independent states which emerged out of decolonization lacking any effectiveness in the sense of a functioning, independent government, such as in the case of Congo (Zaire) immediately after after termination of Belgian colonial rule.[628] Similarly enough, states that were not being created or extinguished as such, but where the conflict of claims resolves around continuation of statehood seem favour a strong presumption in favour of their continuity.[629] Practically stated, where a state claims itself to be a state, however, one (or more) of the elements of statehood are strongly contested or obviously lost. This is where the opposite, constitutive theory must be considered, as it, at least theoretically, positions recognition as an act that determines the existence of a state.

3.2.5.2. **Constitutive theory**

Under constitutive theory, recognition of an entity as a state becomes a crucial point for its statehood. The essence of constitutive recognition theory is the idea that a state's existence depends on a recognition of other states or legal persons.[630] The constitutive theory is grounded in an old argument lying in the heart of approach to international law as a juridical system in which a rule, or in this case, a legal person can be created only by acts of already

[627] Therefore, as Soete observes, declaratory recognition starts to resemble some aspects of constitutive recognition, see: Soete, *op. cit.* (footnote 381), p. 130.
[628] Congo (Zaire) lacked a functioning central government and plunged into civil war immediately after Belgian colonial administration ceased to operate. Nevertheless, this did not preclude states to recognize it as an independent state, which was immediately admitted to the United Nations membership. See: Raič, *op. cit.* (footnote 293), pp. 64-67 and *supra* in 3.2.1.3.
[629] Kreijen, *op. cit.* (footnote 390), pp. 37-38.
[630] Shaw, *op. cit.* (footnote 300), p. 445.

existing legal persons.[631] In the case of creation of a state, this would mean that it becomes a legal person only on recognition of other states.[632] Already existing states therefore have a right to determine which entity indeed deserves to be considered as such. In turn, this also allows states to recognize as states entities that do not fulfil criteria for statehood based on effectiveness.[633] Whether that is their free act completely reliant on the will of recognizing states or there are cases where entities should (not) be recognized if they fulfil some criteria, is a matter of dispute.[634] It has been argued that if the view of recognition as a completely free act of recognizing state was accepted, it would have resorted recognition to a mere intervention thereby bringing it into conflict with the doctrine of the principle of non-intervention.[635] The view which considers constitutive recognition as obligatory under certain criteria acknowledges that there are cases where a constitutive recognition can be considered illegal or devoid of legal effects, which again brings to the aforementioned statehood criteria and their effectivity as the only criteria left that are not based on states' voluntarism.[636] An interesting case in point has been made by Hersch Lauterpacht, who argued that the states have a legal duty to recognize other states in case those met the criteria for statehood under international law.[637] By doing this, he tried to affirm constitutive recognition while at the same time doing away with its inherent voluntarism. However, this brought his position very close to the declaratory theory, as remarked by Marek.[638] Moreover, it seems logically sound to conclude that, if constitutive recognition was accepted, recognizing states only create recognized state bilaterally, for the purposes of their bilateral relations.[639] Be that as it may, accepting the constitutive theory in "classical" cases of creation of states opens many practical problems and is not consistent with the effectivity principle, which makes the

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[631] *Ibid.*, p. 446.

[632] In essence, this position is "positivist in outlook", as emphasized by Crawford, *op. cit.* (footnote 301), p. 19. However, see: *Ibid*.

[633] Grote Stoutenburg, *op. cit.* (footnote 109), p. 240.

[634] For a thorough analysis of whether there exists a duty to recognize under specific circumstances, see Chen, *op. cit.* (footnote 619), pp. 50-54.

[635] Compare views adopted in Åland islands case, as mentioned *supra* in 3.2.5.1.

[636] *Ibid.*

[637] Lauterpacht, *op. cit.* (footnote 632), pp. 74-75.

[638] Marek, *op. cit.* (footnote 438), p. 137

[639] Chen, *op. cit.* (footnote 619), pp. 39-41.

doctrine of constitutive recognition quite unfeasible if the effectivity principle is considered relevant.

However, small island states which lose territory will indeed lose one of the elements of statehood with it, which in turn means they could no longer rely on the principle of effectivity. This is because under the principle of effectivity it is not only required that all the elements of statehood are present at the moment of creation of a state but also at any other given moment in which a state is regarded as such by international law.[640]

In following, it is argued that small island states, once they lose their (inhabitable) territory due to sea level rise, will be subjected to constitutive recognition as a prerequisite for continuation of legal personality.[641] For small island states, situation is indeed very different from any case of creation of state under the effectiveness principle. They will lose population, which will be forced to move and resettle to other states around the globe, and also territory, which will be submerged or, at least, made unable to hold any governmental institutions. Even the state being in possession of an independent government becomes doubtful because the government itself will be forced to relocate in order to continue with its activities. What remains unresolved is the problem of whether such constitutive recognition means recognition of a new form of legal personality that could replace the statehood of small island state or the mere continuation on the basis of constitutive, rather than declaratory recognition.

As we have seen, effectiveness becomes a principle on which small island states are unable to count in any case of their territory being in peril of total submergence or becoming useless for any organized permanent governmental or societal activity. As explained by the arbitral tribunal in the Las Palmas arbitration case, in the classical understanding of the principle, effectiveness must continue after the states is formed, therefore being applicable not only to

[640] This stems from the principle of effectivity which governs creation of states, but also its continuity. See: Crawford, *op. cit.* (footnote 301), p. 671.

[641] As observed by Soete, "From the moment significant doubts arise as to effectiveness of an entity, it appears the Gordian knot of statehood can only be unravelled by the constitutive acts of recognition of third States based on a myriad of reasons deemed legitimate". See: Soete, *op. cit.* (footnote 381), p. 145.

the creation, but also to the problem of continuity of states.[642] Indeed, without effectiveness, there is no declaratory recognition or such a recognition can exist, but will be devoid of substance because a state already ceased to exist (or never came into being, if creation of a new state is considered).[643] Therefore, for a possibility of a state which lost one of the elements of statehood for any reason to continue its statehood and legal personality, other modes of legal conceptualizations of that personality must be found.[644] Exactly this is the point where constitutive recognition takes its place as a possible alternative and a way of continuation of legal personality. In international legal theory, there are opinions which consequently (albeit, of course, with different set of circumstances in mind), argued that recognition could be both constitutive and declaratory. Salmon, for example, held the view that recognition has both declaratory and constitutive effects, with the latter being an exceptional case, used in extraordinary situations.[645] In the case of small island states, this is important as their continuation after elements of statehood became dubious will inevitably rest on the will of other states, thereby creating a case of constitutive recognition. This is why it seems that the expression of will of other states is nedded to continue legal personality of small island states. While this might not be in the traditional form or recognition, the will to recognize new deterritorialized legal personality must be expressed by the states and continuation will rest on the will of other states as well, both strictly legally and practically.[646]

This is consistent with the strong presumption for continuity of states' legal personality which exists under international law. Gerard Kreijen observed: "The following should therefore be accepted as an axiom of international law: *States may have a complicated birth, but they do*

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[642] In the words of the arbitral tribunal: "It seems therefore natural that an element which is essential for the constitution of sovereignty should not be lacking in its continuation." (Island of Palmas (Netherlands, USA), Award of 4th April 1928, Reports of International Arbitral Awards, vol. II, 1928, p. 839).

[643] Compare: Soete, *op. cit.* (footnote 381), p. 144.

[644] For a similar conclusion on declaratory recognition, while criticizing also constitutive recognition as a solution, albeit without proposing an elaborated alternative, see: Noto, Jessica L., Creating a Modern Atlantis: Recognizing Submerging States and Their People, *Buffalo Law Review*, vol. 63, no. 5, 2014, p. 764-770.

[645] Salmon, Jean, *La reconnaissance d'état, quatre cas: Mandchoukouo, Katanga, Biafra, Rhodésie du Sud*, Paris, 1971, pp. 19-23.

[646] Yamamoto and Esteban have argued for re-recognition to have "reparative effect" in addition to its constitutive nature, as it would reassure small island states of support of other states for the continuation of their legal personality. See: Yamamoto and Esteban, *op. cit.* (footnote 114), p. 183.

not die easily. It may also be inferred from the presumption in favour of the continuity of the State that the principle of effectiveness, though it will normally be relevant for the creation of a State, may acquire rather modest significance in relation to problems concerning the continuity of the State."[647] The principle has been historically affirmed multiple times and in different circumstance, with the first mentioning of it arguably dating to the Tinoco Claims Arbitration arbitral award, delivered in 1923. In it, the arbiter, William H. Taft, explicitly recognized the "principle of continuity of states", albeit not in the context of preserving the legal personality of the state, but rather as a rationale behind principles of state sucession.[648] Historically, another important moment of the affirmation of principle of continuity of states came with the recognition of continuation of legal personality of states represented by governments in exile which had no control over territory and population for the time of belligerent occupation, however once these circumstances ended, was able to claim continuity of legal personality with the pre-war state.[649] Another group of cases in which the principle of continuity of states has found its application is the case of so-called "failed states". The term, often used interchaingeably with "collapsed" states, indicates states where government, if extant at all, is manifestly unable to perform its sovereign functions with regard to the state's population and territory, with the tipical and often cited case being

[647] Kreijen, *op. cit.* (footnote 390), p. 37.

[648] Aguilar-Amory and Royal Bank of Canada claims (Great Britain v. Costa Rica), *Reports of International Arbitral Awards*, vol. I, 1923, pp. 377 and 380.

[649] During the Second World War, governments of various European states (Yugoslavia, The Netherlands, Greece, Luxemburg, Norway) settled in the United Kingdom and were considered to embody unbroken continuity of statehood of their respective states, while the local authorities set up by the occupying powers were viewed as enjoying no sovereignty. See: Oppenheimer, F. E., Governments and Authorities in Exile, *American Journal of International Law*, vol. 36, no. 4, 1942, p. 569. Somewhat more complicated was the case of Czechoslovak government during the Second World War. The Government of the United Kingdom, in which the Czechoslovak National Committee had functioned during the war years was very careful in deciding on recognition of it as a respesentative government of Czechoslovakia due to the question of whether it could claim legal continuity of statehood for the Czechoslovak Republic during the war years and after it. This was due to rivalry between it and the Provisional Czechoslovak Government, another exiled organization claiming to be a representative of Czech and Slovak people in exile. While the Czechoslovak National Committee was eventually indeed recognized as government representing the Czechoslovak Republich with an unbroken continuity during which its sovereign territory and population were under effective foreign occupation, this came only after "differences in form" were settled and the Czechoslovak ambassador accredited as an envoy of the Czechoslovak Republic. See: Talmon, Stefan, *Recognition of Governments in International Law*, Oxford, 1998, pp. 27-28.

Somalia.[650] While the cases might seem instructive, there is a clear distinction between them and small island states. Principle of continuity had historically been applied in cases of states which were able to restore their statehood relying on traditional criteria for statehood and in those cases only as a presumption favouring continuity over state's extinction, which however remains possible.[651] In the case of small island states, this is not the case, so their situation remains unprecedented. In fact, its affirmation as a standalone positive rule or principle of international law might, as warned by members of the ILC, lead to "unintended collateral consequences" in "contexts which had nothing to do with those States that were actually facing a possible loss of statehood".[652] However, there is a growing opinion of states that favours continuity of small island states to be presumed while they are facing with consequences of sea level rise.[653] Here, however, three problems can be envisaged. Namely,

[650] On the concept of "failed" states, see, generally: Gros, Jean-Germain, Towards a taxonomy of failed states in the New World Order: Decaying Somalia, Liberia, Rwanda and Haiti, *Third World Quarterly*, vol. 17, no. 3, 1996, pp. 455-471; Wallace-Bruce, Nii Lante, Of Collapsed, Dysfunctional and Disoriented States: Challenges to International Law, *Netherlands International Law Review*, vol. 47, no. 1, pp. 53-73; Thürer, Daniel, The "failed State" and International Law, *International Review of Red Cross*, vol. 81, no. 836, 1999, pp. 731-762. Somalia is often listed as a typical example of *par exellence* "failed" state (see: Menkhaus, Ken, State Collapse in Somalia: Second Thoughts, *Review of African Political Economy*, vol. 30, no. 97, 2003, p. 407, who calls Somalia "a failure among failed states"). However, while the governmental institutions were virtually non-existent and certainly non-functioning, Somalia never had its legal personality contested by states, as evidenced by the opinion of the United Nations Security Council, which clearly stated that it beared in mind "respect for the sovereignty and territorial integrity of Somalia" (see: Resolution 897 (1994), United Nations Security Council, S/RES/897(1994), 1994).

[651] Zimmerman, Andreas, Continuity of States, in: Wolfrum, Rüdiger (ed.), *Max Planck Encyclopaedia of Public International Law*, vol. II, Oxford, 2012, pp. 742-745.

[652] Report of the International Law Commission, Seventy-fifth Session, in: General Assembly, Official Records, Supplement No. 10, A/79/10, 2024, p. 100.

[653] In the Sixth Committee of the United Nations General Assembly, a number of states claimed that principle of continuity applies with regard to small island states' statehood in situations of sea level rise-induced loss of traditional elements of statehood. See statements by, inter alia, Liechtenstein, Brazil, the Netherlands, Samoa (on behalf of Pacific Island States group), and Antigua and Barbuda (speaking on behalf of Alliance of Small Island States) in: Summary record of the 27th meeting, 6th Committee, United Nations General Assembly, A/C.6/77/SR.27, 2022, Summary record of the 28th meeting, 6th Committee, United Nations General Assembly, A/C.6/77/SR.28, 2022, Summary record of the 29th meeting, 6th Committee, United Nations General Assembly, A/C.6/77/SR.29, 2022. After this, similar statements have been echoed at the following sessions of the Sixth Committee. See statements of Slovenia and Brazil, at: Sixth Committee (Legal) – 79th Session, available at: https://www.un.org/en/ga/sixth/79/summaries.shtml#20mtg (accessed: 26th November 2024). While overall sentiment arising out of these statements favours continuity as a principle that should govern the status of small island states in facing the challenges sea level rise poses to their statehood in the traditional sense, views of states varied subtly as to how the principle should be interpreted. See: Galvão Teles, Ruda Santolaria, *op. cit.* (footnote 16), pp. 8-9.

such an opinion promotes continuity ot standalone criterion. The principle simply does not operate that way under positive international law. Traditional understanding of continuity of statehood linked it to identity of states rather than to situations of lack of statehood indicia.[654] The principle of continuity thus allowed for identity of state's legal personality to remain safeguarded even when state has foregone changes to its structure, territory, government, population and other charachteristics, preventing the application of rules of international law pertaining to state secession.[655] Therefore, it seems that presenting principle of continuity as it stands *de lege lata* as a standalone argument in favour of legal personality of small island states would be a "bridge too far",[656] which however has not precluded states from repetedly emphasizing it, thereby possibly creating a case for progressive development of international law in that regard. However, even if this evolutive interpretation of continuity was accepted, it is unclear as to what such continuity, would exactly amount to in terms of legal capacity of small island states once they become deterritorialized and population resettles to different states. This conclusion is evident from state's comments as well. In the Sixth Committee of the United Nations General Assembly, states have been expressing various opinions as to what form of legal personality small island states would take once deterritorialization happens, including cession of part of another state's territory, association with another state by forming a federation or confederation, *sui generis* legal regimes, and international oversight.[657] Finally, there is a problem of effective fulfilment of governmental functions for governments of deterritorialized small island states and doubts on its ability to protect its nationals.[658]

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[654] Craven, Matthew C. R., The Problem of State Sucession and the Identity of States under International Law, *European Journal of International Law*, vol. 9, no. 1, 1998, pp. 152-153.

[655] *Ibid.* Compare also: Soete, *op. cit.* (footnote 381), p. 141.

[656] *Ibid.*, p. 144.

[657] Galvão Teles, Ruda Santolaria, *op. cit.* (footnote 16), p. 10.

[658] Therefore, Soete expresses a view that constitutive recognition might appear to function only if a state was endowed with a territory on which governmental institutions could continue functioning effectively, while the sam territory might not be big enough to hold permanent population. See: Soete, *op. cit.* (footnote 381)., p. 141. It seems to us, however, that this, while theoretically being a good solution for continuity of small island state's legal personality, is nevertheless engulfed with practical problems, specifically finiding such territory in case of total inundation and, even more importantly, capabilities of such a government to fulfill governmental functions in safeguarding human rights of nationals of small island state.

The claim for continuity is often substantiated with arguments involving concepts like legitimacy, stability and feasibility, basically arguing that it would be unjust to terminate the statehood of small island states due to sea level rise that they have not contributed or have contributed only in a minimal way.[659] While these must not be discarded easily, especially if considered as emergin *opinio juris* of states, one could, it seems, agree with Derek Wong, who named them "vague notions", devoid of concrete legal rationale behind them, therefore being insufficient for the doctrine of continuity to apply.[660] On the other hand, the claims for continuity based on legitimacy and human rights (specifically, right to self-determination) seem to be more plausible. Regarding legitimacy, small island states have a legitimate claim to continue governing their territory, notwithstanding its physical changes.[661] This is likely to influence the standard of effectiveness applied to their cases,[662] especially if considered that there are no competing claims to sovereignty of their territory by other states.[663] However, as warned by McAdam, this reasoning can only apply until states are indeed willing to recognize small island states as states. Once they cease to do so, claim based on legitimacy will eventually fail due to lack of effectivity.[664] In turn, this leads to the problem of possible obligation of other states to continue recognizing small island states once additional statehood criteria lapse. Under general international law, states have the obligation not to recognize situations arising out of the breach of a peremptory norm of international law (*jus cogens*).[665] This means that, if such a breach was established in case of inundation

[659] See: Comments by governments submitted to the International Law Commission in response to the topic "Sea Level Rise and International Law", available at: https://legal.un.org/ilc/guide/8_9.shtml (accessed 23rd July 2024).

[660] Wong, Derek, The Position of 'Sinking States' in International Law, *Melbourne Journal of International Law*, vol. 14, no. 2, 2013, p. 378.

[661] Grote Stoutenburg, *op. cit.* (footnote 109), p. 279.

[662] *Ibid.*

[663] McAdam, Jane,'Disappearing States', Statelessness and the Boundaries of International Law, in: McAdam, Jane (ed.), *Climate Change and Displacement: Multidisciplinary Perspectives*, Oxford/Portland, 2010, p. 114.

[664] *Ibid.*

[665] Article 41 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts stipulates that "no state shall recognize as lawful a situation created by a serious breach within the meaning of Article 40, which, in turn, defines serious breach as "an obligation arising under a peremptory norm of international law" (Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries, Yearbook of the International Law Commission, vol. II, Part II, 2001, pp. 26-143, Article 40).

of small island states, other states would be obliged to continue recognizing small island states after deterritorialization and resettlement of populations. It was already mentioned how right to self-determination was key to establishing small island state's statehood during the process of decolonization in the first place.[666] The right to self-determination is generally considered to be part of the *jus cogens*, at least in the context of creation of states in the process of decolonization as a result of exercise of right to self-determination by peoples of (former) colonial territories.[667] Therefore, if a breach of self-determination was established, then states, following the rule of non-recognition of situations arising out of the serious breaches of peremptory norms of international law, would be under the obligation to continue recognizing small island states based on constitutive recognition once traditional statehood indicia were lost.[668] Similarly, an argument has been made with regard to the obligation of states arising from the international climate change law to continue recognizing small island states in order to comply with duties on mitigation of and adaptation to climate change.[669] While it might sound tempting to construct such a case, it is difficult to understand what the remedy will be.[670]

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[666] For the discussion of the role of self-determination in the process of estabishment of statehood of small island states see *supra* in 3.2.

[667] See: Raič, *op. cit.* (footnote 293), pp. 144-150 and literature cited there, Cassesse, *op. cit.* (footnote 293), pp. 133-140 and opinions of states cited there. In addition, the International Law Commission has included right to self-determination on its tentative list of norms of general international law (*jus cogens*) as adopted in 2022 (see: Draft Conclusions on Identification and Legal Consequences of Peremptory Norms of General International Law (*jus cogens*), in: Draft Report of the International Law Commission on the Work of its Seventy-fourth Session, A/CN.4/L.976, 2023). Moreover, in its Commentary to the Draft Articles on State Responsibility, the International Law Commission explicitly mentioned "denial of right to self-determination of peoples" as one of the serious breaches of peremptory norms of international law that requires states not to recognize situations arising out of them (see: Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries, *Yearbook of the International Law Commission*, vol. II, Part II, 2001, pp. 26-143).

[668] Ross, *op. cit.* (footnote 300), p. 159.

[669] See, for example: Written Statement of the Commission of Small Island States on Climate Change and International Law, Obligation of States in Respect of Climate Change, Request for Advisory Opinion, vol. 1, 2024, p. 73, Paragraph 196.

[670] Grote Stoutenburg compares possible obligation to continue recognizing small island states after they lose effective statehood indicia to countermeasures, only to conclude that the two situations are not comparable due to no adverse claim by another state, and the fact that such recognition "would not aim to ensure the cessation of the breach, but rather seek to neutralize its consequences" (Grote Stoutenburg, *op. cit.* (footnote 109), pp. 361-362).

Having considered two theoretical approaches to the role of recognition in creation of states, the focus now turns to the question whether continuity of statehood could be affirmed through recognition of states without territory.

3.2.6. **Options for safeguarding territorial legal personality**

From the prespective of both small island states and the international legal theory, the options not involving relocation, but rather adaptation *in situ* or reterritorialization seem to be the least problematic, as they avoid both the issues of continuation of legal personality of small island states, which is in turn intrinsically connected to self-determination of peoples of small island states and the uncertainties of legal status of islanders in the process of relocation and once the arrive in the host states, which rases a series of human rights issues. On the other hand, such measures could have significant drawbacks to both the environment and human rights of persons, in addition to being very costly and technicaly difficult.[671] Next subchapters are discussing possibilities of reterritorialization by either acquisition of a replacement territory, reinforcing existing islands or creating artificial ones.

3.2.6.1. **Acquisition of territory**

It is a well-known fact that in contemporary world there is no free territory, a landmass that would amount to being *terra nullius*, therefore suitable for occupation.[672] For that reason, there is effectively no possibility for a state in peril to occupy another territory unilaterally in accordance with international law.[673]

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[671] Galvão Teles, Ruda Santolaria, *op. cit.* (footnote 16), p. 44; Allen, Emma, Climate Change and Disappearing Island States: Pursuing Remedial Territory, *Brill Open Law*, 2018, pp. 5-6.

[672] There have been proposals in literature involving occupation of islands emerging due to meliting of the ice at the Arctic (see: Colard-Fabregoule, Changement Climatiques et Perspectives de Disparition Physique du Territoire de l'État, *Annuaire Français de Relation Internationales*, vol. XII, 2011, p. 95). However one could only agree with Grote Stoutenburg, who calls them "unlikely both from a legal and a practical point of view" (Stoutenburg, *op. cit.* (footnote 109), p. 176, footnote 423).

[673] Any such acquisition would necessarily involve occupation of territory under sovereignty of another state, which would, in turn, be unlawful as contrary to principle of territorial integrity of states. The only exception would be a hypothetical new natural island that emerged in the areas beyond national jurisdiction, a scenario that is, however, extremely unlikely to happen.

Any solution involving new territory being found as a replacement for territory previously existing and in future lost to submergence would require involvement of another state. Such a state would have to be willing to provide a small island state with territory by means of cession, thus transferring sovereignty over a piece of land to a small island state. Cession of territory, though often politicized, is a well-established institute under international law.[674] However, usually cession was not done in order to replace a territory, but to change sovereignty over a portion of cedent state's territory. A classic example of cession, interesting because it happened outside of context of armed conflict is the American purchase of Alaska, which happened in 1867, when the United States of America purchased Alaska from the Russian Emperor.[675] In the Pacific region, there are also examples of cession of parts of territory dating to the colonial times. In 1898 the German Empire, for example, purchased Mariana and Caroline Islands, which had until then been administerd by the Kingdom of Spain.[676]

In the case of small island states, any cession would be different from historical examples, as their only territory, once the islands become submerged, would be the one acquired by cession. The mere fact that the territory acquired by cession would be the only one does not present a problem from a legal point of view. A requirement for a state to have a territory in order to be a state does not include in itself further requirement for identity of such a territory.[677] On the other hand, timeframe of cession would be of utmost importance for small

[674] Fauchille thus mentions "Les cessions volontaires de territoires, opérées par les souverains des Etats, étaient conformes au droit public de l'ancien regime" See: Fauchille, *op. cit.* (footnote 550), pp. 753-754.

[675] Two parties concluded a treaty which stipulated that "In the cession of territory and dominion are included the right of property in all public lots and squares, vacant lands, and all public buildings, fortifications, barracks, and other edifices which are not private property" (Article II.). See: Treaty Concerning the Cession of the Russian Possessions in North America by His Majesty the Emperor of all the Russians to the United States of America, available at: https://memory.loc.gov/cgi-bin/ampage?collId=llsl&fileName=015/llsl015.db&recNum=572 (accessed: 10th December 2022). From the quoted article, it is clear that cession is followed by tradition of land. Similarly, among examples of voluntary cessions of territory are counted the so-called United States Louisiana Purchase from France in 1803 and sell of Danish West Indies to the United States in 1917.

[676] Torres Camprubí, however, correctly warns that the „examples of purchase of land in the region took place in the overall context of colonial exploitation of natural resources and preceded the intependence of the relevant political entities" See: Torres Camprubí, *op. cit.* (footnote 35), pp. 105-106.

[677] On territorial continuity of states see: Crawford, *op. cit.* (footnote 301), pp. 672-695. Crawford, however, mainly discusses situations in which some part of the territory that was under sovereignty of a state before

island states engaging in it as a way of preservation of territory. This is due to the understanding of the principle of effectivity, which is a basic rule governing creation and extinction of states.

As already mentioned, under classic law of statehood, a state must be in possession of a territory at any given time in which it wants to be considered as state by the international law.[678] Once a territory is lost, except under special and very limited circumstances, a state has lost one of its constitutive elements and no longer can be considered a state.[679] Therefore, in order to be able to continue its statehood without interruption, a small island state would have to acquire a piece of land from another state before its previous territory becomes either physically submerged or uninhabitable.[680] Otherwise, there would likely be an interruption in statehood of a small island state, which would lose its legal personality for the time between loss of one and acquisition of another territory.[681]

It is interesting to note that the idea of purchase of land in order to accommodate persons who have to relocate is not unprecedented in the Pacific region. In 1942, the British administration of Gilbert and Ellice Island colony purchased the Rabi Island from a private owner in order to resettle the population of Banaba (Ocean) Island there, while at the same time making Banaba uninhabited and therefore suitable for phosphate mining operations to

territorial changes happened, continues to be under the same sovereignty. Some doubts remain whether that could be held true also in situations of whole territory being replaced by another one, as it would eventually happen with territories of small island states. Marek provides an insightful solution by presenting an argument that continuity should not be based primarily on identity of territory, but on identity of international rights and obligations, albeit with a significant restraint as to when that continuity must be affirmed, see: Marek, *op. cit.* (footnote 438), p. 14.

[678] For the discussion on territory as a necessary condition for statehood, see *supra* in 3.2.1.1.

[679] Special circumstances include governments in exile and *sui generis* entities, however, as discussed *supra* and *infra* it is hardly possible to make analogies with peculiar situation of small island states faced with sea level rise.

[680] On a "defined territory" criterion interpreted as territory that is inhabitable, Grote Stoutenburg observed that "A functional or teleological interpretation of the statehood definition, however, suggests that uninhabitable land does not qualify as State territory." (Grote Stoutenburg, *op. cit.* (footnote 109), p. 61).

[681] Marek, *op. cit.* (footnote 438), p. 5-6, discussing how identity of states is interrupted by loss of elements of statehood and cannot be "resurrected" afterwards.

proceed.[682] Another example involved migration from Vaitapu Island in what is now Tuvalu to the Kioa Island, which is under the sovereignty of Fiji.[683] The move was not motivated by environmental concerns or uninihability of Vaitapu, but rather by its overpopulation and land scarcity.[684] In 1946, the land on Kioa island was purchased by the peoples of Vaitapu from the colonial administration and series of individual relocations followed.[685] In both cases, however, purchases have not included the transfer of sovereignty, but rather were private law transactions.

Negotiations on acquisition of land between small island states and nearby states which might be willing to provide territory for relocation in case of inundation rendering territory of small island states uninhabitable are indeed ongoing from at least the turn of the 21st century. the Maldives, Tuvalu, and Kiribati were, or still are, contemplating the idea of buying land in another state with the very aim in mind to be able to have some territory under their governance once their original territory becomes submerged. In 2012, Maldives inquired about the possibility of purchase of land in Australia or New Zealand in order to relocate the population, however negative reactions of both of the inquired states, along with the change of political situation in Maldives, put an end to the endevour.[686] In 2014, Kiribati purchased a piece of land in Fiji from the local Anglican Church.[687] However, this was a purchase from

[682] For the detailed account of the process of purchase of Banaba Island, see: McAdam, Jane, Historical Cross-Border Relocations in the Pacific: Lessons for Planned Relocations in the Context of Climate Change, *The Journal of Pacific History*, vol. 49, no. 3, 2014, pp. 306-314, especially p. 310.
[683] *Ibid.*, pp. 314-317.
[684] *Ibid.*
[685] *Ibid.*
[686] In 2012, the then-president of Maldives, Mohammed Nasheed, publicly spoke on the idea of using sovereign funds of Maldives to purchase land in Australia or New Zealand and relocate the population of Maldives there once the Maldives sovereign territory becomes uninhabitable. While New Zealand declined such an idea, Australia remained silent. It is not known that the idea ever proceeded any further. See: Dolla, Simran, International Legal Protection for Climate Refugees: Where Lies the Haven for the Maldivian People, *Journal of Sustainable Development Law and Policy*, vol. 6, no. 1, 2015, pp. 24-25.
[687] The land purchased consisted of a forested parcel located on the Viti Levu, the main island of Fiji. See: Hermann, Elfriede, Kempf, Wolfgang, Climate Change and the Imagining of Migration: Emerging Discourses on Kiribati's Land Purchase in Fiji, *The Contemporary Pacific*, vol. 29, no. 2. 2017, pp. 237-238; Final Report, ILA Committee on International Law and Sea Level Rise, submitted to the Athens Conference of the ILA, 2024, p. 21.

a private owner, not involving a treaty between the two sovereign states,[688] and clearly does not constitute a cession involving full transfer of sovereignty.[689] In a separate move, Tuvalu has been looking for a similar arrangement by buying land for its displaced populations in either New Zealand or Australia.[690]

From the outset, it might seem that this solution is feasible and, indeed, if a small island state would be able to acquire portion of territory in another state before its territory becomes submerged, it could formally claim continuation of statehood and thus safeguard the outcomes of self-determination on a defined territory. However, problems of different kind are likely to arise, mostly related to willingness of both the cedent and the cessionary state to engage in such a transaction. Regarding the cedent state, its willingness to actually transfer sovereignty via the treaty which would be concluded with the cessionary is crucial for the question of continuance of statehood of cessionary. Restrained, at best, reactions of Government of Australia to the idea of the Government of Maldives which, at the time, contemplated purchase of land in those states can serve as a case in point.[691]

In any other case, where treaty would transfer any kind of right over a territory short of full sovereignty that would not be enough for the cessionary, a small island state, to keep its territorial statehood intact. This would be the case of servitude or exterritorial rights. Outside of sea level rise context, extraterritorial rights are sometimes stipulated in an international treaty in order to provide special treatment of specific possessions of one contracting state that are located on territory of another state. Lateran Treaty of 1929, which stipulated that with regard to various immovable properties, located on Italian territory, the Holy See enjoys

[688] While the purchase was a transaction between the Church of England and the Government of Kiribati, thereby clearly governed by private law, the Government of Fiji indeed gave its consent to the transaction. See: Committee on International Law and Sea Level Rise, *ibid*.

[689] Hioureas, Christina, Torres Camprubí, Alejandra, Legal and Political Considerations on the Disappearance of States due to Sea Level Rise, in: Heidar, Thomas (ed.), *New Knowledge and Changing Circumstances in the Law of the Sea*, Leiden, 2020, p. 421.

[690] See: Tuvalu looking at buying NZ and Aust land for displaced, available at: https://www.rnz.co.nz/international/pacific-news/282241/tuvalu-looking-at-buying-nz-and-aust-land-for-displaced (accessed: 18th December 2022).

[691] Compare: Dolla, *op. cit.* (footnote 686), p. 25.

extraterritorial rights.[692] The extraterritorial status in this case operationalizes in recognizing broader scope of rights from the immunities and privileges of ordinary diplomatic premises.[693] While the privileges that these premises enjoy are indeed very broad, which makes them virtually completely outside Italian jurisdiction, they nevertheless remain part of Italian territory and do not form exlaves of the Vatican City State (formed at the same time) within Italy, which clearly makes these premises incapable of forming territory of any state except Italy.[694]

International leases of land provide, at least at the first glance, a more nuanced option. Not unknown to international practice, leases of land, depending on the terms of the treaty on which they are based, might provide lessee states with significant rights, they do not amount to full sovereignty, as there is still some, even if merely theoretical, claim on it from a lessor state.[695] Panama Canal lease provides an example. Although by 1903 Convention Between the United States and the Republic of Panama the lease was conceived "in perpetuity" and the United States were given rights "if it were the sovereign of the territory within which said lands and waters are located to the entire exclusion of the exercise by the Republic of Panama of any such sovereign rights, power or authority", from the conditional language it can be inferred that Panama still retained final claim to the Canal Zone, even if the right had no

[692] Lateran Treaty of 1929 (see: Trattato fra la Santa Sede e l'Italia, available at: https://www.vatican.va/roman_curia/secretariat_state/archivio/documents/rc_seg-st_19290211_patti-lateranensi_it.html#TRATTATO_FRA_LA_SANTA_SEDE_E_L%E2%80%99ITALIA, accessed 11th December 2022), Articles 13-16.

[693] Article 15 of the Lateran Treaty recognizes diplomatic privileges and immunities that are otherwise accorded to the premises of diplomatic missions to certain properties of the Holy See located on Italian territory, which were listed in Articles 13, 14, 15 of the Lateran Treaty. Those are, the four papal basilicas (Saint John Lateran, Saint Peter, Saint Mary Major, Saint Paul Outside the Walls) and some other buildings used for official functions of the Holy See (for example, Palace of the Apostolic Chancery, Palace of the Holy Office and certain other buildings). Moreover, Article 16 stipulates that, in addition to privileges and immunities *al pari* to those of diplomatic missions, these premises and some additional buildings and seats of institutions of the Catholic Church cannot be subject to expropriation except by prior explicit arrangement with the Holy See. In addition, they are exempt of paying all taxes.

[694] Article 15 of the Lateran Treaty stipulates explicity that these premises remain Italian territory ("facenti parte del territorio dello Stato italiano").

[695] Strauss, Michael J., Territorial Leases, in: Nollkaemper, André, Plakokefalos, Ilias (eds.), *The Practice of Shared Responsibility in International Law*, Cambridge, 2017, p. 65.

practical content.[696] Therefore, a view that lease could serve as a solution for reestablishment of territorial nature of small island states can hardly be sustained.[697]

In any case, willingness of population of cessionary, a small island state to actually relocate to territory acquired this way should be also considered. Not only from the point of view of protection of their human rights, some of which are intrinsically linked to the island territory, but also from the point of law of statehood. In order to fulfil criteria for statehood, which are cumulative, an entity must not only be sovereign over a territory, but also over a permanent population. In case of acquiring a territory previously under sovereignty of another state as a replacement for submerged territory, that replacement territory would have to also be able to host population. Moreover, the population of a small island state, or at least a part of it, should be willing to move to the newly acquired territory and permanently reside there.

This scenario seems quite unproblematic from the standpoint of traditional law of statehood. Small island state acquires new territory which is lawfully ceded to it by the previous sovereign via bilateral treaty between them. Population of a small island state, which in any case has to relocate due to sea level rise, relocates to newly acquired territory intending to remain there and form a community, thereby fulfilling criterion of permanent population. Criterion of independent government is, finally, fulfilled by the cession being a transfer of full sovereignty, so that a small island state is actually able to establish itself on a new territory as independent from previous sovereign.

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[696] This was eventually affirmed by the Carter-Torrijos treaties (The Treaty Concerning the Permanent Neutrality and Operation of the Panama Canal; The Panama Canal Treaty), which settled a framework for return of the Canal Zone to control of Panama. The Panama Canal Treaty of 1977 in its preamble even explicitly noted that it is concluded "acknowledging the Republic of Panama's sovereignty over its territory". At the same time, by Article I Paragraph 2 the United States was granted rights "necessary to regulate the transit of ships through the Panama Canal, and to manage, operate, maintain, improve, protect and defend the Canal". However, the Panama Canal Treaty of 1977 in Article II Paragraph 2 stipulated that it "shall terminate at noon, Panama time, December 31, 1999". From that moment on, Panama exercised its sovereign rights over the Panama Canal Zone and it continues to do so. See: Convention between the United States and the Republic of Panama, 1903, in: Eliot, Charles W. (ed.), American Historical Documents: 1000-1904, *The Harvard Classics*, vol. 43, 1909-1914; Panama Canal Treaty, 1977, in: *United Nations Treaty Series*, vol. 1280, no. 21086, 1982, pp. 4-51.

[697] For example, see arguments in: Jain, Abhimanyu George, The 21st Century Atlantis: The International Law of Statehood and Climate Change-Induced Loss of Territory, *Stanford Journal of International Law*, vol. 50, no. 1, 2014 p. 48.

In practice, however, this solution is much less feasible than it might seem from purely theoretical point of view. Problems are numerous and can be identified on both sides of the process. For the cedent state, firstly, the problem of justifying the cession would arise. While there have been scholarly proposals which try to postulate the claim of small island states to new territory on the basis of concepts of due diligence and the no harm principle arising from the international environmental law,[698] the practice does not seem to be going into that direction. This can be illustrated by the decisions of the Conference of the Parties to the UNFCCC which, despite establishing funding mechansims for adaptation to loss and damages from slow onset events, including sea level rise, did not postulate the obligation of states to make new territory available to small island states once their original territory becomes uninhabitable among the possible solutions for adaptation.[699] Moreover, regarding the cedent state, there would in all likelihood arise a problem of public opinion, regularly unsympathetic towards any loss of territory, which such a cession, *in ultima linea*, would be. Even if public opinion would accept an idea of cession, it would most likely be for some territory that is rather remote or of poor quality for human habitation, let alone of economic value.[700]

Regarding the cessionary, a small island state, a core question resolves not so much around territory, but around permanent population and independent government. It is doubtful whether population would relocate to a portion of land on which to establish would require significant adaptations in their lifestyle, or they would rather be more willing to accept relocation to another more liveable location, notwithstanding that it is under sovereignty of another state. Effectivity of independence of government established on this replacement

[698] For example, von Paepcke expressed a view that "a violation of (more or less) fundamental principles of international law could indicate that, in case of total land loss, a breach of the criterion 'due diligence' of the no harm rule can be affirmed. This would then trigger liability, e.g., by way of claim to a new state territory" See: von Paepcke, *op. cit.* (footnote 113), pp. 99-100).

[699] See: Report of the Conference of the Parties on its twenty-eighth session, held in the United Arab Emirates from 30 November to 13 December 2023, FCCC/CP/2023/11/Add.1, 2023, p. 2-18.

[700] As observed by Rayfuse, it would not be feasible to find a state "which would agree to cede part of its territory unless the territory is uninhabited, uninhabitable, not subject to any property, personal, cultural or other claims, and devoid of all resources and any value whatsoever to the ceding state". See: Rayfuse, *op. cit.* (footnote 110), p. 8.

territory could also be doubtful due to financial, geographical and political constrains. This could lead to such a state being effectively dependent on the will of the previous sovereign, the cedent, to tolerate and support it.[701] Whether that would amount to government not being considered as independent is a question that could only be resolved by subsequent *opinio juris* and practice of how other states will look upon newly established state. However, the doubt would likely be cast upon fulfilment of this criterion by the relocated state. To be more precise, recognition of a state that managed to re-establish itself as independent on the territory ceded to it by another state should not present a problem from a legal point of view. In a case where a small island state manages to establish sovereignty over a new piece of territory even before its previous territory becomes submerged or uninhabitable, recognition, in fact, would not at all be necessary. This state only continues its statehood under changed circumstances, but it continues to fulfil all the criteria for statehood. In accordance with the declaratory theory of recognition, it thus never ceased to be a state and there is no point in recognizing the same legal person a second time.[702] Somewhat more complicated is a situation of a state which already lost its territory and existed as a deterritorialized entity for a while. This state would likely have to seek recognition for itself once it manages to start operating as a state from a new territory. [703] Again, any recognition that would arrive would be a declaratory act, as the state established itself by fulfilling all criteria for statehood.

Therefore, in a hypothetical case of a small island state that found new territory, there exists a divide between two possible scenarios. The first one is cession that has been completed before a small island state had lost its territory. That scenario is quite unproblematic from the standpoint of the international law concerning statehood, provided that new territory is capable of holding population and independent government. The second scenario involves population and government of a formerly existing small island state that had lost its territory due to inundation. In this scenario, there should be a state that would be willing to transfer

[701] Compare Torres Camprubí, *op. cit.* (footnote 35), p. 108.

[702] Soete, *op. cit.* (footnote 381), p. 149.

[703] In turn, as pointed out by Park, this would require other states "to agree that it is the same State establishing itself in a new territory" most likely again employing institute of (constitutive) recognition in a case where independence of such state is questionable, see: Park, Susin, Climate Change and the Risk of Statelessness: The Situation of Low-Lying Island States, *UNHCR Legal and Protection Policy Research Series*, 2011, p. 18.

sovereignty over a portion of its territory to an entity consisting of population and government of former small island state. This scenario thus deviates from traditional notion of cession as transfer of sovereignty over territory between two states.

To conclude, these solutions seem feasible from theoretical point of view. They do not divert from classic theory of statehood, as small island states remain territorial legal persons. Problems with this solution thus do not arise on theoretical, but on practical level. As summarized by one commentator "Legally, we may be able to come up with a workable framework; however, the crucial issue will be finding physical land to relocate people and set up a 'state'."[704] Actual willingness of both the cedent and cessionary state to engage in cession remains doubtful, just as doubts can be cast on willingness of population to relocate to such a replacement territory and independence of government formed on it.

Therefore, other solutions for small island states must also be considered which would provide them a possibility to keep legal personality even if a replacement territory is not to be found. The following subchapters will discuss multiple options for small island states to remain territorial by artificially making their territory more resilient to sea level rise. One of these is engaging into works to preserve existing islands from flooding or building artificial islands.

3.2.6.2. **Artificial creation of land**

Small island states that have contemplated engeneering models for preserving island land endangered by inundation, often relied on the fact that they provide them with a possibility to remain on their artificially created or reinforced ancestral lands, thereby avoiding relocation and possibly preserving maritime entitlements as well.[705] However, such initiatives are cupled with multiple problems, including funding and technological difficulties. Idea to artificially create land out of the sea is not a new one. In general, this could be achieved

[704] Atapattu, Sumudu, Climate Change: Disappearing States, Migration, and Challenges for International Law, *Washington Journal of Environmental Law and Policy*, vol. 4, no. 1, 2014, p. 28.

[705] As pointed out by Yamamoto and Esteban, engeneering works would enable to preserve coral communities, which would be "by far the most adequate mean of ensuring the sustainable existence of coral islands and the baselines derived form them" (Yamamoto, Esteban, *op. cit.* (footnote 114), p. 166).

through two somewhat similar, albeit different technological solutions. First, there is a possibility of reinforcing existing natural islands by artificially creating dams, dykes and other structures aimed at preventing inundation of the island. Second, there is a possibility of engaging into a process of artificially raising the existing natural islands in order to make them more resilient to effects of sea level rise. Third, and final option is building purely artificial islands, either in the form of stable landmasses or in the form of platforms.

3.2.6.3. **Reinforcements of existing landmasses**

First option, which can be summarized as artificially protecting existing natural islands from inundation, should not be viewed as problematic from the law of statehood standpoint. In theory of international law, the dominant view is that equipping an island with such a protection does not render it artificial.[706] This was confirmed in the case of Japanese activities regarding the islands of Okintoroishima.[707] In that case, while the island was at risk of disappearance due to sea level rise, Japan engaged into extensive works building concrete and steel coastal defence installations to keep the island above water.[708] While there were protest regarding capability of Okintorishima to generate maritime entitlements (particularly exclusive economic zone), mainly centred around the qualification of Okintorishima as a rock instead of an island and Japanese title to sovereignty over the it,[709] the very issue of it being a territory was not significantly questioned by other states, thereby, arguably, confirming that such an artificially protected area can become and remain part of the territory of a state.[710]

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[706] See, among others: Rothwell, Donald R, *Islands and International Law*, Oxford/New York/Dublin, 2022, p. 11; Oude Elferink, Alex G, Artificial Islands, Installations and Structures, in: Wolfrum, Rüdiger (ed.), *Max Planck Encyclopaedia of International Law*, 2012, p. 662; Soons, Alfred, The Effects of a Rising Sea Level on Maritime Limits and Boundaries, *Netherlands International Law Review*, vol. 37, no. 2, 1990, p. 222.

[707] For a comprehensive insight into the case of Okintorishima islands, see: Silverstein, A.L., Okintorishima: Artificial Preservation of a Speck of Sovereignty, *Brooklyn Journal of International Law*, vol. 16, no. 2, 1990, pp. 409-432.

[708] *Ibid.*, pp. 409-410.

[709] The criticism mainly comes from China. See: Xue, Guifang, How Much Can a Rock Get?: A Reflection from the Okintoroishima Rocks, *China Oceans Law Review*, vol. 13, no. 1, 2011, p. 18-30.

[710] Silverstein, *op. cit.* (footnote 707), p. 429.

Similarly, if small island states engage into the process of building coastal defence installations for protection of existing natural islands, this should not be viewed as problematic solution for their continuation of statehood. They could still claim being territorial legal persons, and if such works would have permitted for a population to remain on an island with a degree of permanency, the criterion of population would also remain fulfilled.

Engeneering options for such efforts are multiple and can include both hard and soft engeneering procedures. Typical hard procedure would be building sea walls or coastal defences that will prevent higher seas from inundating the islands. Problems with this solution, however, could be not of legal, but economic nature.[711] Works on structures as described in this paragraph are very expensive and technologically difficult. Moreover, they are known to cause disruptions in ecosystems, including sediment flows, coral structures, and biodiversity.[712] Finally, it is highly uncertain whether such structures are able to generate maritime zones. In case they are not, this would place significant strains on their economy.[713] Engeneering works to protect existing islands are ongoing in the Maldives, where government already spends significant sums of money in order to protect existing islands against rising sea levels and coastal erosion.[714] This shed yet another light to the fact that states are, generally, more willing to contemplate ideas which do not include relocation of the peoples and enable them to stay on the ground, thus keeping traditional forms of international legal personality intact.[715]

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[711] Indeed, Maldives have already engaged in projects to create artificial barriers, specifically a seawall, which would protect the state's capital, Malé from floods.

[712] Schofield, Clive, Shifting Limits? Sea Level Rise and Options to Secure Maritime Jurisdictional Claims, *Carbon and Climate Law Review*, no. 4, 2009, p. 411.

[713] Grote Stoutenburg, *op. cit.* (footnote 109), pp. 164-165.

[714] Gunia, Ami, Can humans grow new islands in the world's lowest-lying country?, available at: https://edition.cnn.com/science/mit-invena-maldives-growing-islands-hnk-spc/index.html (accessed: 27th October 2024).

[715] For example, in 2008 and 2009, then Prime Minister of Tuvalu explicitly stated that "Tuvaluans will remain in Tuvalu.", adding "We are not considering any migration schemes." (for the statements, see: McAdam, *op. cit.* (112, p. 35). While this has since changed to include relocation as a realistic option (thus, for example, Falepili Union Treaty of 2023, concluded between Tuvalu and Australia explicitly provides for migration schemes in its Article 3) the narrative has since resurfaced.

Soft engeneering procedures, on the other hand, include options involving manipulation of sediment flowsand coastal vegetation, especially mangroves, which are known to protect coastal areas from inundation.[716] While these options are significantly less invasive to the ecosystem, they require time and careful monitoring. In addition, in case of mangroves, it is highly doubtful how suitable they are for islands that migh become completely inundated, as they have been mostly used in coastal areas (such as Bangladesh) and not in areas which are characterised by small stretches of land scattered around vast ocean spaces, as is the case with small island states.[717]

3.2.6.4. **Elevation of existing landmasses**

Moving to a second option, there is a possibility to have already existing ground elevated so to produce new dry land that would be based upon previously existing natural land. This process thus creates new higher ground immediately above previously existing landmass. In essence, this means that an artificial ground is established as a result of works over, or immediately adjacent to, naturally formed islands, possibly those that would, without such works, be covered by the sea during the hight tide, which would in turn reclassify them as low tide elevations according to the international law of the sea. These projects would share much characteristics with land reclamation, which is a process going on for centuries in different parts of the world.

A colorful example of a project that tried to create a new state by engaiging into artificial elevation of natural low-tide elevations was the so-called Republic of Minerva. In 1971, a group of enthusiasts from the United States of America proclaimed Republic of Minerva by publishing its Declaration of Sovereignty and announcing an ambitious programme of works in order to elevate the Minerva reefs, which are natural low-tide elevations on the high seas, thereby, they argued, capable of appropriation as *terra nullius*.[718] The nearest sovereign state,

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[716] Final Report, ILA Committee on International Law and Sea Level Rise, submitted to the Athens Conference of the ILA, 2024, pp. 18-19.
[717] *Ibid.*
[718] For a detailed chronology and assessment of the case of the so-called Republic of Minerva, see: Horn, Lawrence A, To Be or Not to Be: The Republic of Minerva – Nation Founding by Individuals, *Columbia Journal of Transnational Law*, vol. 12, no. 3, 1973, pp. 520-528.

the Kingdom of Tonga, reacted by claiming the Minerva reefs to be part of its sovereign territory.[719] Reactions from other states have similarly been negative, with the Republic of Minerva receiving no recognitions nor managed to establish diplomatic relations with any state.[720] Finally, this, coupled with financial and organizational problems which followed the project from the bery beginning, led to the final collapse of the Republic of Minerva the next year.[721] While at the time it was unclear whether states are able to claime low-tide elevations as parts of their territory which is able to generate maritime entitlements,[722] what is indeed indicative from this example is that projects of natural low-tide elevations which are artificially raised as to provide habitable land are both technically and financially difficult, while the state which had claimed to be territorially based solely on them was viewed with much suspicion by other states.

Next opportunity to discuss the status of the low-tide elevations as parts of territory of sovereign states came with the dispute between Bahrain and Qatar regarding maritime delimitations, which the two states submitted to the ICJ. In its judgment, the ICJ concluded that low-tide elevations cannot be appropriated as land territory.[723]

Finally, a similar issue arose in the much-publicised South China Sea Arbitration. In this case, the court had to determine whether Chinese projects of building upon low-tide elevations and rocks, which resulted in permanently raising them above high tide, have also

[719] *Ibid.*

[720] Song, Lily, The Curious History of the Minerva Reefs: Tracing the Origin of Tongan and Fijian Claims Over the Minerva Reefs, *The Journal of Pacific History*, vol. 54, no. 3, 2019, pp. 421-422.

[721] *Ibid.*

[722] Compare: *ibid.*, p. 425.

[723] The ICJ wrote that: "It is thus not established that in the absence of other rules and legal principles, low-tide elevations can, from the viewpoint of the acquisition of sovereignty, be fully assimilated with islands or other land territory." (Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Merits, Judgement, *I.C.J. Reports*, 2001, p. 102). In his separate opinion, judge Oda criticized the majority for reaching this conclusion, raising the point of possible technological advancements which would enable states to "develop small islets and low-tide elevations as bases for structures, such as recreational or industrial facilities" and claiming that the ICJ should have been "more circumspect in handling down its decision in this respect" (Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Separate Opinion of Judge Oda, *I.C.J. Reports*, 2001, p. 125).

affected their legal status, transforming them into islands.[724] If the answer had been positive, they would be transformed into pieces of land capable of appropriation. The Arbitral Tribunal decided on holding a firm, rather conservative view that "as a matter of law, human modification cannot change the seabed into a low-tide elevation or a low-tide elevation into an island. A low-tide elevation will remain a low-tide elevation under the Convention, regardless of the scale of the island or installation built atop it",[725] maintaining the same position for rocks which cannot sustain human habitation or economic activity. While this view could be validly criticized,[726] it confirms that, by applying the same criterion *a contrario*, if something was a natural island in the first place, land reclamation works that elevate it do not make it artificial.

Moreover, United Nations Convention on the Law of the Sea (hereinafter UNCLOS), according to some views, prescribes that baselines are ambulatory.[727] It means that with the changes in coastal topography, baselines will also change. Applied to the case of land

[724] The situation is rather different than in case of Okintorishima, where at least some part of the island (however tiny) remains above water even at high tide.

[725] In court's words: "China's activities at Mischief Reef have since evolved into the creation of an artificial island. China has elevated what was originally a reef platform that submerged at high tide into an island that is permanently exposed. Such an island is undoubtedly "artificial" for the purposes of Article 60." However, the court continues in stating that: "low-tide elevations "do not form part of the land territory of a State in the legal sense." Rather, such features form part of the submerged landmass of a State and, in the case of Mischief Reef, fall within the legal regime for the continental shelf. In consequence, low-tide elevations, as distinct from land territory, cannot be appropriated. As the Tribunal has now found, Mischief Reef is a low-tide elevation; it follows from this that it is incapable of appropriation, by occupation or otherwise." (See: In the Matter of the South China Sea Arbitration (Philippines v. China), Award, Permanent Court of Arbitration, case no. 2013-19, 2016., pp. 414 and 416.)

[726] Thus, for example, Saunders noted that this view includes somewhat of a contradiction between claiming that a reef is indeed transformed into an artificial island, but is still uncapable of appropriation, although it is based upon natural piece of land (a low tide elevation). In Saunders's words: "There is an unresolved contradiction in the tribunal's judgment: on the one hand, Mischief Reef is enough an artificial island to fall afoul of Article 60 of UNCLOS. On the other, it remains an LTE such that the previous jurisprudence of ICJ relating solely to LTEs and not to artificial islands renders it incapable of appropriation." (Saunders, Imogen, Artificial Islands and Territory in International Law, *Vanderbilt Journal of Transnational Law*, vol. 52, no. 3, p. 666).

[727] After the conclusion on ambulatory character of baselines was reached by the Baselines Committee of the ILA, the Sea Level Rise Committee continued discussing such character of baselines and its effects on possibility to maintain maritime entitlements after islands to which they were adjacent become submerged due to sea level rise (see: International Law and Sea Level Rise Committee, International Law Association, Sydney Conference, Report, 2018). For the text of the UNCLOS, see: United Nations Convention on the Law of the Sea, *United Nations Treaty Series*, vol. 1833, no. 31363, 1994, pp. 397-581.

reclamation, it would mean that with reclamation creating new dry land where sea once stood, baselines will change to adjust to the newly created coastline. From that, it follows that land created during reclamation works is accorded similar legal status as naturally formed land. This could lead to the conclusion that in a case of artificial land being created by works enhancing existing natural islands, there would be less problems with recognizing it as territory belonging to a small island state. Although it might seem that land created as a result of such a project would be treated the same way as land reclaimed from the sea at mainland coastal areas, this is far from clear. Naturally formed land would gradually become submerged if works had not been done, which renders the artificial creation or keeping above water the only way of preserving the islands. It could be argued that such an island is thus finally again rendered artificial, which would make its territoriality problematic in the same way as it already is for islands created as artificial outright.

However, this would miss a key difference. In cases of small island states engaging into works to artificially elevate the islands, previously existing state only makes additions to its already existing territory by reclaiming land that was previously covered by the sea forming its own internal waters and territorial sea.[728] Therefore, this would not make an island artificial and influence territoriality of it.[729] Finally, however, it must be pointed out that, while seemingly possible from the theoretical point of view, any such island, as noted by

[728] This is confirmed by the state practice, which does not note negative reactions or international disputes regarding land reclamation projects undertaken in the maritime zones under sovereignty of coastal states. For example, when in 2003 Malaysia challenged Singapore's land reclamation projects in the Straits of Johor in front of the International Tribunal for the Law of the Sea, this was not done based on the argument of disputed sovereignty, but issues pertaining to protection of marine environment and freedom of navigation (see: Request for Provisional Measures in the Dispute Concerning Land Reclamation Activities by Singapore Impinging Upon Malaysia's Rights In and Around the Straits of Johor Inclusive of the Areas Around Point 20, 4 September 2003, also the order of the Court: Land Reclamation in and around the Land Reclamation in and around the Straits of Johor (Malaysia v. Singapore), Provisional Measures, Order of 8th October 2003, ITLOS Reports, 2003, p. 10). Indeed, when a part of the sea area which is under sovereignty of a costal state is transformed into land, the costal state only changes the physical nature of it, not its legal status. The position is confirmed also by the doctrinal opinions, notably Shaw, Malcom N., Territory in International Law, *Netherlands Yearbook of International Law*, vol. 13, no. 61, 1982, pp. 80 *et passim*. On the other hand, a question whether such reclamation changes baselines by moving them seawards is much more complicated and the UNCLOS does not provide a definitive answer. However, this question goes beyond the scope of this chapter.

[729] For a similar conclusion, see: Papadakis, Nikos, *The International Legal Regime of Artificial Islands*, Leiden, 1977, pp. 93-94, Grote Stoutenburg, *op. cit.* (footnote 109), p. 167.

commentators, would hardly be sustainable due to issues with constant flooding and threats of inundation due to sea under it, which is likely to require constant pumping to keep it abowe the sea level and prevent inundation.[730] In turn, this makes any such project both very costly and unsustainable.[731]

3.2.6.5. **Building purely artificial islands**

Finally, the most radical engeneering option is creation of artificial islands, where new land is not created by adding to already existing coastline, but by artificially building an island. Whitin this option, there are two possibilities. One is creating artificial island that is fixed on the seabed, while the other is creating platforms that are movable. The two scenarios, although both include artificial, men-made structures, are distinct as to the effects which they have on the territoriality of small island states.

UNCLOS provides that an artificial island is not considered an island in the sense that it generates maritime entitlements. Article 121 of the UNCLOS makes it clear that, in order for a landmass to be considered an island which is able to generate maritime entitlements, it must be a "naturally formed area of land, surrounded by water, which is above water at high tide". Despite discussions and different proposals on how an island should be legally defined in the long process that brought about the UNCLOS, states were mostly consistent in excluding artificial islands from the scope of the definition.[732]

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[730] Yamamoto, Esteban, *op. cit.* (footnote 114), pp. 153-154.

[731] *Ibid.*

[732] It should be noted that proposals of different states during the long process which led to the adoption of UNCLOS 1982 mainly differentiated on issues of size, habitability and economic sustainability of life on islands. The idea that an island should be legally defined as a "naturally formed area of land" was already settled and was not reopened. A definition of an island as "naturally formed" was first explicated in a submission of the delegation of the United States of America to the UNCLOS I conference in 1958. It was thereafter included in the Paragraph 1 of the Article 10 of the 1958 Convention on the Territorial Sea and Contiguous Zone, which was essentially the same as the Paragraph 1 of the Article 121 of 1982 Law of the Sea Convention. Thereby, after the adoption of the 1958 Convention on the Territorial Sea and Contiguous Zone, artificial islands were outright excluded from the discussion on generation of maritime entitlements, which has not changed until the adoption of 1982 Convention. For a chronological overview of the issue, see: Nordquist, Myron, *United Nations Law of the Sea Convention 1982: A Commentary*, vol. V, Leiden/Boston, 2002, pp. 324-339, especially p. 327.

At first glance, it might seem that these UNCLOS provisions have nothing to do with statehood issues. This is, however, not completely true, as they provide with an insight into what can be regarded as territory qualifying an entity possessing it for statehood. For a terrestrial mass to fulfil the territory criterion of statehood, a state must exercise sovereignty over it. However, artificial islands are not necessarily placed under sovereignty of a state which built them. The status of an artificial island will depend upon where it has been built. More precisely, if an artificial island is built within internal waters or territorial sea, maritime entitlements over which a coastal or archipelagic state exercises sovereignty, it comes under the sovereignty of that state as well. On the contrary, if an artificial island is built within the exclusive economic zone or on the high seas, the state can only claim jurisdiction over it which is restricted by various rights of other states and does not amount to full sovereignty.[733] Such an interpretation is consistent with the wider structure of the UNCLOS, as otherwise states would be able to gain sovereignty over portions of the see which belonged to the high seas or the exclusive economic zone, neither of which can be placed under sovereignty of any state.[734] In line with that, Article 60 of the UNCLOS explicitly prohibits artificial islands built by states within their exclusive economic zone to generate maritime entitlements.[735]

[733] This follows from the wording of Article 60 Paragraph 2 of the UNCLOS which maintains that the coastal state will have "exclusive jurisdiction" regarding specific areas of competence over artificial islands, installations and structures in the exclusive economic zone. Exclusive jurisdiction does not amount to sovereignty, but is reflection of rights of states over exclusive economic zone over which such an artificial structure is being built. Moreover, Paragraph 3 makes explicit that a state must give "due notice" to "construction of such artificial islands, installations or structures, and permanent means for giving warning of their presence must be maintained". Finally, Paragraph 7 reads "Artificial islands, installations and structures and the safety zones around them may not be established where interference may be caused to the use of recognized sea lanes essential to international navigation.". All this points out to restrictions regarding such artificial structures, which could hardly be imposed upon them if they would have been placed under sovereignty in the first place.

[734] For an analysis of the relation of artificial islands with the wider structure of UNCLOS, see: Rothwell, *op. cit.* (footnote 706), 2022, pp. 25-26.

[735] Paragraph 8 of Article 60 („Artificial islands, installations and structures do not possess the status of islands. They have no territorial sea of their own, and their presence does not affect the delimitation of the territorial sea, the exclusive economic zone or the continental shelf"). There are different other limitations as to nature of rights of coastal states regarding such artificial islands which protect rights of other states. For example, artificial islands must be built with "navigation as a priority consideration". Moreover, coastal state's jurisdiction over artificial islands is restricted to "customs, fiscal, health, safety and immigration laws and regulations", thereby making nature of power of costal state over such artificial creation far short of what is

Coming back to the core issue, the statehood, it is clear from previously mentioned UNCLOS provisions that artificial islands are not able to generate maritime entitlements of their own, at least according to *lex lata*. When erected within a sea area that is part of internal, territorial or archipelagic waters of a state, they come under state's sovereignty, but if erected in the exclusive economic zone or on the high seas, a state can only clam jurisdiction over them for specific purposes.[736] Therefore, status of state's rights over an artificial island is linked to the regime of the sea area in which it is placed. In turn, any artificial island being built within the maritime entitlement of a small island state would inevitably follow the legal status of such an entitlement. Thus, the circle closes, as maritime entitlements are governed by the land dominates the sea principle, unless some changes happen either in interpretation or very substance of customary law as codified in UNCLOS provisions. In practical terms, this means that maritime entitlements can only be generated by being adjacent to the territory of a state which claims them. Territory, in turn, means naturally formed piece of land, as artificial islands are not considered territory.

Although presenting arguments for freezing maritime entitlements in-depth would go beyond the scope of this work, a notice should be given as to how this would affect the artificial islands built within them. Freezing maritime entitlements in essence means emancipating them from the island territory around which they were previously accorded. In other words, when an island no longer, due to sea level rise and subsequent submergence, qualifies as one, maritime zones around it remain in place and their legal regime is maintained.

Such a proposal would allow for small island states to keep their maritime entitlements intact, which is very important having considered the economic importance of those areas for many of them. At least some of these would stay under sovereignty (the territorial sea and archipelagic waters). As it is presently the case with maritime entitlements under sovereignty, state to which the entitlements belong is free to build artificial islands and installations within them. Therefore, any artificial land area built within such an entitlement is placed under

required for sovereignty. See: Nordquist, Miron, *United Nations Law of the Sea Convention 1982: A Commentary*, vol. II, Leiden/Boston, 2002, pp. 585-588.

[736] Rothwell, *op. cit.* (footnote 706), p. 26.

sovereignty of a state to which the entitlement belongs. It could be argued that an artificial piece of dry land within such a frizzed entitlement could be used to hold population and government institutions in place, maintaining them within the area under sovereignty of a small island state. If the argument is to be followed, artificial island could be conceptualized as dry land capable of holding population and government in place within an area already under sovereignty of a state. In turn, this fulfils the territory criterion and maintains statehood of a small island state to which the frizzed maritime entitlement (and artificial island within it) belong to.[737] However, there are at least two significant flows of such a reasoning. First, this would require a change of paradigm on one of the foremost principles of law of the sea, namely that the land dominates the sea. Although significant number of proposals for such an interpretation exist in scholarly literature[738] and are heavily debated, it is far from clear as to whether they will be accepted by the practice of states and *opinio juris*.[739] Second, artificial islands would still be short of being naturally formed piece of dry land, requiring thus yet another progressive development of international law which is far from incoming.[740]

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[737] Compare: Dolla, *op. cit.* (footnote 686), p. 24.

[738] See: Report of the International Law and Sea Level Rise Committee, International Law Association Johannesburg Conference, 2016, pp. 853-860. Some of the proposals even go as far as to postulate the very maritime entitlements as substitute territory (see, for example, proposals by Lavorel and Joyau as cited in: Grote Stoutenburg, *op. cit.* (footnote 109), p. 253, footnote 61).

[739] Freezing of maritime entitlements, which would mean leaving them in place despite submergence of territories to which they were adjacent, is an idea stemming directly from contemplation of legal solutions for sea level rise. The idea was thoroughly examined by two expert bodies of the ILA, namely the Committee on Baselines under the International Law of the Sea and the Committee on International Law and Sea Level Rise. The Committee on Baselines, which finished its work in 2018, reached a conclusion that "the normal baseline is ambulatory, moving seaward to reflect changes to the coast caused by accretion, land rise, and the construction of human-made structures associated with harbour systems, coastal protection and land reclamation projects, and also landward to reflect changes caused by erosion and sea level rise. Under extreme circumstances the latter category of change could result in total territorial loss and the consequent total loss of baselines and of the maritime zones measured from those baselines. The existing law of the normal baseline does not offer an adequate solution to this potentially serious problem." Subsequently, the Committee on Baselines recommended for a new expert body to be established, which will specifically address the issue of sea level rise. See: Report of the Baselines under the International Law of the Sea Committee, International Law Association, Sofia Conference, Report, 2012, p. 31.

[740] The idea of creating a whole new body of law on artificial islands, ideally in a form of a new convention devoted to them, was proposed as early as 1977 by Papadakis in his monograph The International Legal Regime of Artificial Islands (see: Papadakis, *op. cit.* (footnote 729), pp. 103-115). More recently, similar proposal was also considered in scholarly literature. For example, see: Gagain, Michael, Climate Change, Sea Level Rise, and Artificial Islands: Saving the Maldives' Statehood and Maritime Claims through the Constitution of the

While the aforementioned logic has relevance as to the wider relationship between artificial islands and maritime entitlements, what is the core issue here is the problem of territoriality. In other words, whether artificial islands or artificial structures could fulfil the role of territory in the sense of the law of statehood, thereby enabling small islands states to continue their legal personality once their original, natural land territory becomes uninhabitable due to inundation. James Crawford stated that "artificial islands cannot form the basis for territorial states any more than can ships",[741] while discussing the case of the so-called Republic of Minerva.[742] However convincing that might sound, it must be noted that there are opinions which contemplate that artificially created islands could indeed serve as a basis for maintenance of territorial legal personality of small island states. These opinions resolve around the distinction between the two issues – naimely the one of artificial islands' territorial status and their capability to generate maritime entitlements. While UNCLOS provides with the negative answer to the latter, these commentators argue that territorial basis of small island states could be safeguarded even in the extreme case where they would provide the only territory capable of holding population in place left.[743]

Although at least some room for recognition of artificial landmasses as territory in order to fulfil the criterion for statehood exists both in *lege lata* and *lege ferenda* proposals, such projects are difficult to accomplish in practice. An example of Hulhumalé, an artificial island project initiated by the Government of Maldives is an illustrative one.[744] In this project, the

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Oceans, *Colorado Journal of International Environmental Law and Policy*, vol. 23, no. 1, 2012, p. 77-120, also: Tsaltas, Grigoris, Bourtzis, Tilemachos, Rodotheatos, Gerasimos, *Artificial Islands and Structures as a Means of Safeguarding State Sovereignty Against Sea Level Rise. A Law of the Sea Perspective*, conference paper, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2409890 (last access: 18th January 2023).

[741] Crawford, James, Islands as Sovereign Nations, *International and Comparative Law Quaterly*, vol. 38, no. 2, 1989., p. 279. See also: Dommen, Edward, What is a Microstate?, in: Dommen, Edward, Hein, Philippe, *States, Microstates and Islands*, London/Sydney/Dover, 1985, p. 4.

[742] For a detailed explanation of the case of the so-called Republic of Minerva see *supra* in 3.2.6.4.

[743] See: Papadakis, *op. cit.* (footnote 729), p. 6, 104-107; Grote Stoutenburg, *op. cit.* (footnote 109), pp. 171-12; Soete, *op. cit.* (footnote 381), p. 113. Similar position seems to be taken by both the ILA's Committee on International Law and Sea Level Rise, which in its Final Report included "new artificial islands" among the measures to safeguard the effectiveness of international legal personality of the affected states (see: Final Report, ILA Committee on International Law and Sea Level Rise, submitted to the Athens Conference of the ILA, 2024, pp. 19-20).

[744] On the arguments, positions and facts about Hulhumalé project see Gagain, *op. cit.* (footnote 740), pp. 86-87.

Maldives built an artificial island connected to Hulhulé part of North Malé Atoll on which an international airport is located. It is conveniently located just south of the capital Malé and is intendent to provide higher ground for relocation of population of Maldives affected by sea level rise.[745] The project succeeded in creating artificial land more resistant to rising of sea levels and indeed, even before completion, hosts a sizable population. However, costs were very high[746] and financing remains a serious issue for further similar projects, especially for lesser developed states, along with the aforementioned doubts regarding legal status of such structures. Moreover, willingness of population to relocate to artificially created ground, along with its environmental sustainability, water and sanitation issues present another set of problems.[747] All this makes them, as already stated, difficult to materialize and serve as a solution for problems of deterritorialization.

Artificial platforms or even floating instalations seem to have less chances to be considered as a replacement for the natural territory lost to inundation. Instructive example is that of the Principality of Sealand, an artificial abandoned World War II era military coastal defence platform that has been proclaimed a state by the UK businessman and started to perform many functions reserved to states, including the conferral of nationality. The German national court, Administrative Court of Cologne, in 1978 decided a case on the purpoted loss of German citizenship due to aquiring the citizenship of Sealand.[748] In its judgement, the Court analysed the statehood of Sealand and came to the conclusion that it did not possess a defined territory, as territory must be "segment of earth's surface", and not the man-made, artificial platform standing on towers anchored in the sea ground.[749] Arguably, similar logic could be followed in case of floating islands fixed to the seabed, as in an another project initiated by the Maldives, which would house a population of 20000 persons and by fixed by the seabed

[745] It is claimed that Hulhumalé has capacity to house population of around 60,000 at a time, see: *ibid.*, p. 86.
[746] The overall cost to build the Hulhumalé island was around 63 million of US dollars, *ibid.*, p. 119.
[747] For example, presence of Hulhumalé has contributed to coastal erosion of nearby islands, see *ibid.*
[748] Judgement 9 K 2565/77, Verwaltungsgericht Köln, *Deutsches Verwaltungsblatt*, no. 13, 1978, pp. 510-512.
[749] The Court observed that: "Eine von Menschenhand geschaffene, künstliche Platform, wie die des sog. "Fürstentums Sealand" kann weder als "Erdoberfläche" noch als "Landgebiet" bezeichnet werden, da sie ihren Ursprung nicht in der Erdkugel hat, also kein Kegelausschnitt aus der Erde ist". (*Ibid.*, p. 511).

by a functional flexible grid acting as a stabilizer for the artificial structure.[750] This is because, again, the structure, just like more traditional platforms, remains completely artificial.

Finally, even if projects of building of artificial islands and thus creating artificially made territory on which population and independent government can be hosted, living conditions in such a state will inevitably significantly change due to loss of ecosystems of natural islands. This will affect a range of human rights of islanders and might finally even lead to choosing emigration over an opportunity to relocate to artificially created land. Thus, the problem is not avoided, even though territory is preserved, as population's way of life will be changed significantly.[751] On the other hand, land reclamation (as opposed to creating artificial islands outright) indeed might provide an option to preserve land capable of hosting some population and government institutions on a piece of land that could be regarded as territory even after rest of the former territory becomes submerged.[752] At least, this can be true for states that can afford themselves the luxury to engage into costly and technically difficult projects of land reclamation.[753]

Having presented possible options for preserving legal personality of small island states, both those involving moving away from territorial concept of statehood and those centred around replacement of territory, we must now consider the last and worst option for small island states. Namely, that their legal personality will be extinguished by sea level rise.

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[750] On the project, see: Maldives Floating City, available at: https://maldivesfloatingcity.com/ (accessed 6th August 2024).

[751] As Caron has warned, states might be "committed to preserve a physical aspect of the world, not because that aspect itself is valuable, but rather because the entitlements are valuable", referring to maritime entitlements that islands possessed (see: Caron, David D., When Law Makes Climate Change Worse: Rethinking the Law of Baselines in Light of a Rising Sea Level, *Ecology Law Quarterly*, vol. 17, no. 4, 1990, p. 639).

[752] However, it must be noted that, while from a perspective of fulfilling criterion of territory as essential for statehood land reclamation might be an unproblematic option, it is still an "environmentally challenging endavour", thereby raising sustainability and, eventually, human rights issues (see: Blue, Rachel, Turning the Tide: Atoll Nations during the Era of Climate Change Emergency, *Denver Journal of International Law and Policy*, vol. 48, no. 1, 2020, p. 88).

[753] For example, Tuvalu would need approximately 54 km of sea walls to defend 2.5 m^2 of territory, while the cost of sea walls project considered by the Marshall Islands exceeds its annual gross domestic product. See: Lal, Kya Raina, Legal Measures to Address the Impacts of Climate Change-Induced Sea Level Rise on Pacific Statehood, Sovereignty and Exclusive Economic Zones, *Auckland University Law Review*, vol 23, 2017, p. 253.

3.2.7. **Ideas for overcoming state-territory nexus**

Theoretical concepts, *opinio juris* and practice of states mentioned in previous paragraphs clearly point to the idea of territory as one of the most important prerequisites for creation and existence of state as a legal person. However, there are concepts, at least in legal theory, that try to overcome these limitations and conceive an idea of a state without a territory as a possible legal person of international law. Some of these are based on analogies with existing international law concepts, while others were presented with the very idea of small island states in peril of deterritorialization in mind. We shall first consider the former, then the latter.

3.2.7.1. **Analogies with international organizations**

First set of ideas can be traced to analogies with international organizations and other non-territorial entities to which international law accords legal personality. International organizations, for example, exercise a range of functions in many different parts of the world not needing a territory to justify their existence.[754] The idea continues in that a state could, by analogy, also be able to exercise its functions without a territory. Territory thus becomes only a condition of creation of a state, not a necessary element of it being able to function. From this, it is possible to conceive a non-territorial state or, at least, state-like entity. However, it is relatively easy to present a counterargument to this theory. International organizations are legal persons which differ strongly from states in both nature of their legal personality and nature of their functions.[755] They do not exercise sovereignty and do not represent highest authority (*suprema potestas*) over any other legal person.[756] That makes them entirely different legal persons from states.

3.2.7.2. **Analogies with governments in exile**

Another idea revolves around the parallel with governments in exile. The argument presented is basically that the governments of small island states could continue claiming statehood

[754] Lapaš, *op. cit.* (footnote 435), p. 27.
[755] *Ibid.*
[756] *Ibid.*

after relocation similarly to governments in exile which were able to maintain continuity of being recognized as states even though they lost control over their respective territories, usually due to belligerent occupation arising out of an international armed conflict. Government in exile is an old concept of international law which has seen its use highly contextually divergent situations of the transitory nature, with a common characteristic being that they are temporary, with the final goal of returning to the territory of a state they claimed to represent and end their exiled status.[757]

Even though they lost effective control over whole of the state's territory, in some situations governments in exile were able to claim continuity of statehood after regaining control over territory. Recognition of such government in exile by other states as representing a state is crucial in the aforementioned situation of loss of control over territory, thereby making it a case of constitutive recognition.[758] With small island states whose government has to flee the territory due to rising sea levels and managed to establish itself operating from a host state, this solution seems plausible at the first glance.[759]

The argument basically goes as follows: if constitutive recognition of states had been possible in situations where government had not controlled territory due to different other reasons, government that loses control over territory due to sea level rise could be recognized. Such governments, forced to relocate and operate from territory of another, host state, were present

[757] McConnell, Fiona, Governments in Exile: Statehood, Statelessness and the Reconfiguration of Territory and Sovereignty, *Geography Compass*, vol. 3, no. 5, 2009, pp. 1096, 1915.
[758] Soete thus, after analysing cases of constitutive recognition concludes: "Firstly, constitutive recognition is a reality for borderline cases of statehood not fulfilling effectiveness which is not due to a breach of jus cogens", Soete, *op. cit.* (footnote 381), p. 140.
[759] For example, Burkett recognizes governments in exile as one of the three categories of international actors that "provide clear precedent for deterritoralized states". See: Burkett, Maxine, The Nation Ex-situ, in: Gerrard, Michael B., Wannier, Gregory E. (eds.), *Threatened Island Nations: Legal Implications of Rising Seas and A Changing Climate*, Cambridge, 2013, p. 97.

in history of international law, mostly in wartime situations.[760] Sometimes, they were not only tolerated by other states, but indeed recognized as representatives of their respective states.[761]

There are, however, important conceptual differences. Governments of small island state, while physically "in exile" will not be exiled because of a competing power exercising jurisdiction over the territory, but because of territory itself being incapable of hosting them.[762] Moreover, an important difference is in what will eventually happen with the territory, which will be permanently lost, unlike that of other cases of recognition of states represented by governments in exile. In classical examples of governments in exile, they were formed as a transitory arrangement, claiming not the separate legal personality, but rather the legal personality of states they represented. This promted Talmon to conclude that "The hypernated expression 'governments-in-exile' found both in the press and in the recent literature is thus misleading, giving the impression of a body with a legal status distinct of that of a 'government'".[763] The situation of small island states with a permanently submerged or uninhabitable territory is distinctively different from that, as their "exiled" status would

[760] Examples include Belgium during the First World War, Ethiopia after Italian occupation in 1936, Netherlands, Poland, Czechoslovakia, Yugoslavia, Greece etc. during the Second World War. In post-1945 world order, governments in exile continue to be recognized as holders of their respective state's sovereignty under special circumstances. Examples include Cambodia during the time when the armed forces of Viet Nam held effective control over territory of Democratic Kampuchea, as the state had been called. Similarly, government of Kuwait was recognized as a legitimate representative of sovereign Kuwait, although it relocated itself to Saudi Arabia while territory of Kuwait was under occupation of Iraq and an active military operations theatre. For a detailed analysis of examples of recognition of governments in exile mentioned in this footnote, see: Galvão Teles, Ruda Santolaria, *op. cit.* (footnote 16) pp. 35-39.

[761] This happened in the cases of Netherlands, Norway and Poland, when their governments in exile were residing in London, recognized by the Allies as a legitimate representative of their respective states whose territory and population was under occupation. Moreover, they were recognized as being sovereign over their populations living outside of occupied territories. Thus, in judgment In the Matter of Skewrys case, the US court held that: "Although Poland is occupied by the enemy, its sovereignty remains unimpaired, and existing mutual treaty obligations, including consular rights, are accorded full recognition by the United States of America. The terms of the treaty between the Republic of Poland and the United States of America (Treaty of Friendship, Commerce and Consular Rights, dated June 15, 1931, ratified and confirmed July 10, 1933; 48 U.S. Stat. 1507) are therefore binding and subject to enforcement in all courts of this State." See also judgments in cases In re Amand, Lorentzen v. Lydden, all cited according to: *ibid.*, pp. 36-37.

[762] Torres Camprubí thus suggests: "Therefore, as no competition of authority will take place, it seems more appropriate to refer to Pacific Islands' governments abroad as 'ex situ governments', rather than as 'governments in exile'." See: Torres Camprubí, *op. cit.* (footnote 35), pp. 220-221.

[763] Talmon, *op. cit.* (footnote 523), 2001, p. 16.

not base its legitimacy on the temporary inability to govern the territory, but rather on a permanent deterritorialized status distinct from the previous territorial state.[764] If a state indeed ceased to exist once the territory becomes uninhabitable or submerged, the government in exile could not claim legal personality based only on the fact that it continues to operate from exile, as "According to the predominant view in the legal literature a 'government in exile' is not a subject of international law but the 'representative organ of the international legal person 'State' and, a such, the depository of its sovereignty. There can thus logically be no 'government' either in exile or in situ, without the legal existence of a State which the government represents."[765]

It seems to us that in the situation of partial submergence, recognition of government in exile, while there is still some population permanently residing on the territory of small island state, could provide a viable solution for a state to temporarily remain in existence. If and when a state's territory becomes completely uninhabitable, its population will most likely already be relocated to different host states. Gradually, the integration of populations in the host state's legal order will inevitably happen, which might culminate in them acquiring nationality of host states. With this process, functions of government in exile will begin to wain in relation to the populations, further weakening their basis for claiming continuation of legal personality.[766] Finally, independence is another quality government should possess. With government being situated and operating from another state's territory, its independence could only be legal, as it will be factually dependent on the host state.[767] Therefore, host state's willingness to tolerate such government operating from its territory will be crucial.[768]

To conclude, treating possible governments of small island states formed in exile as a definitive solution for continuation of legal personality seems misplaced. Governments in

[764] Compare: von Paepcke, *op. cit.* (footnote 113), p. 42.
[765] Talmon, Stefan, *op. cit.* (footnote 593), 2001, p. 501.
[766] See: McAdam, *op. cit.* (footnote 663), p. 117; Grote Stoutenburg, *op. cit.* (footnote 109), p. 385-387.
[767] Factual dependence will be, of course, visible in such government in exile using premises under foreign sovereign control etc.
[768] Historical cases occurring during the Second World War, exactly the support of host states was the crucial factor underlining legal opinions which favoured continuation of recognition of governments in exile as holders of legal personality of occupied states.

exile which were able to maintain being recognized as representatives of states were viewed as temporary, existing only during the time territory of their respective states was under belligerent occupation.[769] Moreover, and crucially, in this situation territoriality of a state is not negated, territory remains a constitutive element of statehood, only control over it is temporary lost due to the unlawful situation which cannot bring about acquisition of territory by the occupying power.[770] Therefore, governments in exile in partial inundation scenario, where at least some population remains living on an islands, could claim legitimacy and, consequentially, legal personality based on an identity with the legal personality of a small island state.[771] On the other hand, governments in exile representing deterritorialized states would need to see the concept being reconfigured, as the international law as it stands today bases the recognition of governments in exile on the existence of the (territorial) legal personality of states they represent and the temporariness of the exile, two important characteristic that would be lacking in dettorritorialized legal personality scenario.

3.2.7.3. **Analogies with trusteeship system**

Second set of ideas is somewhat more complex and is created with small island states specifically in mind. First of all, trusteeship as established by the United Nations Charter was firmly territorial.[772] A defined territory was considered an object of trusteeship, or, more

[769] The same view is taken by, among others, Bílková and Lapaš. Thus, Bílková argues that "Temporary control of the territory by another State is not identical to the disappearance of this territory. And the very fact that with the end of the occupation or annexation, the statehood has to be restored, suggests that full statehood is conditioned on the possession of, and control over, territory." See: Bílková, Veronika, A State Without Territory?, *Netherlands Yearbook of International Law*, vol. 47, 2016, pp. 30-31. Similarly, Lapaš states that "In addition, one should not overlook the fact that belligerent occupation, or a government operating "in exile," are legally per definitionem just temporary situations, no matter how long they might last." See: Lapaš, Davorin, Climate Change and International Legal Personality: "Climate Deterritorialized Nations" as Emerging Subjects of International Law?, *The Canadian Yearbook of International Law*, vol. 59, 2021, p. 12.

[770] Compare: Bílková, *ibid.*, pp. 30-31

[771] Compare: Taylor, Celia A, The Modest Proposal: Statehood and Sovereignty in a Global Age, *University of Pennsylvania Journal of International Economic Law*, vol. 18, no. 3, 1997, p. 758, cocluding that: "Even when those seeking statehood do so from outside the defined physical territory, as with governments in exile, they depend on the existence of a definable territory as a foundation of their legitimacy. Control over a physical territory thus defines an entity entitled to seek statehood."

[772] This clearly stems from the very first article of the Chapter XII of the Charter of the United Nations. Article 75 thus reads: "The United Nations shall establish under its authority an international trusteeship system for the

precisely, sovereignty over such territory.[773] Additionally, trusteeship was conceived as a tripartite relation between trustee, population of trust territory and trusteeship council.[774]

However, what is suggested by some writers[775] is not mechanically applying this trusteeship to small island states, but rather that both of these basic characteristics of trusteeship should be changed in order to accommodate deterritorialized small island states.[776] Such reconceptualized trusteeship would represent a move away from territoriality of statehood by creating an entity that would, while operating from territory of another state, provide for both administration of remaining natural resources (primarily maritime ones) and nationality for displaced islanders. The idea is that a government of small island state, having its physical basis on territory of a host state, should be able to keep its legal personality and serve as a trustee for maritime resources of deterritorialized state.[777] Furthermore, this government

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administration and supervision of such territories as may be placed thereunder by subsequent individual agreements. These territories are hereinafter referred to as trust territories."

[773] *Ibid.*

[774] That Trusteeship Council was indeed conceived as such is confirmed by Articles 86 and 87 of the UN Charter. Article 86 establishes composition of the Trusteeship Council which includes both states administering trust territories and those which do not. Article 87, in turn, provides that Trusteeship Council may "accept petitions and examine them in consultation with the administering authority ", thus giving voice to population of trust territory.

[775] A proposal for trusteeship-like system based on nationhood is presented by Burkett. See: Burkett, Maxine, *op. cit.* (footnote 759), pp. 108-114. A similar proposal is presented as one of the options (among creating new bilateral and multilateral agreements), by Juvelier. See: Juvelier, Ben, When the Levee Breaks: Climate Change, Rising Seas, and the Loss of Island Nation Statehood, *Denver Journal of International Law and Policy*, vol. 46, no. 1, 2017, pp. 42-43.

[776] Trusteeship system as conceptualized by the Charter became obsolete after the last trust territory became independent (which happened in 1994 with the independence of Palau), it was never abolished, as its abolition would require amending the UN Charter. Therefore, somewhat similar to this proposal, from time to time there were proposals for reactivation of Trusteeship Council by giving it a new role, for example overseeing UN-mandated regimes in Bosnia and Herzegovina or Kosovo. See: Melnyk, Andriy, United Nations Trusteeship System, in: Wolfrum, Rüdiger (ed.), *Max Planck Encyclopaedia of International Law*, 2012, pp. 531-535.

[777] Although the topic of preservation of maritime entitlements after sea level rise falls outside of scope of this work, here it should be noted that 18 Pacific states, including Kiribati, Tuvalu, and the Marshall Islands have themselves adopted a Declaration on Preserving Maritime Zones in the Face of Climate Change-related Sea-Level Rise. In it, they "Declare that once having, in accordance with the Convention, established and notified our maritime zones to the Secretary-General of the United Nations, we intend to maintain these zones without reduction, notwithstanding climate change-related sea-level rise". See: Declaration on Preserving Maritime Zones in the Face of Climate Change-related Sea-Level Rise, available at: https://www.forumsec.org/2021/08/11/declaration-on-preserving-maritime-zones-in-the-face-of-climate-change-related-sea-level-rise/ (accessed: 18th December 2022). Also see: Freestone, David, Schofield, Clive,

functioning as a trustee should take care about issues of nationality, cultural identity and sense of community of resettled islanders.[778]

While theoretically interesting, such an idea is faced with several problems. Firstly, it seems that this proposal misses the critical difference between nationhood and statehood.[779] Sense of nationhood and identity of islanders should and could be preserved, *inter alia*, through institutional framework existing in states where the islanders will be resettled. This could include government and other institutions being established and recognized by the host states. However, conceptualizing these institutions as trustees of statehood as abstract concept and natural resources contained in maritime entitlements of submerged islands seems far-fetched.

At least if trusteeship as written into the Charter of the United Nations is taken into consideration, it seems that its territoriality and tripartite character prevent from making analogies, although the consideration leaves room to concept of some form of entity that will, *de lege ferenda*, be able to claim legal personality in addition to being an institution of deterritorialized nation.

Another specific issue that should be considered as an obstacle in any effort to resurrect trusteeship as a viable option for maintaining legal personality of small island states is its connection to colonialism. Indeed, among very small island states, Marshall Islands were administered as a trust territory by the United States before emerging as independent nation. Small island states would, arguably, not be willing to be (again) subsumed under a system

Pacific Islands Countries Declare Permanent Maritime Baselines, Limits and Boundaries, *The International Journal of Marine and Coastal Law*, vol. 36, 2021, pp. 685-695.

[778] An idea in that regard comes in Rayfuse's proposal for an "authority" or "government" as she calls the organ which would be elected by voters (members of population) of small island states. Its tasks would be to "act as a trustee of the assets of the state for the benefit of its citizens wherever they might now be located". This would, *inter alia*, include, "the right to maintain their original personal, property, cultural, linguistic and nationality rights for themselves and their descendants". See: Rayfuse, *op. cit.* (footnote 110), p. 11.

[779] As Vukas observes: "In our view, "nation" is a fiction used for political purposes, such as the struggle for an independent State of the inhabitants of a dependent territory or the efforts to maintain the unity of the population of an existing State. For the time being there is more probability of the preservation of a State's integrity if ethnic, religious and cultural unity of the majority of the population exists." See: Vukas, *op. cit.* (footnote 303), p. 317.

that envisages an international (political) oversight, as this would directly and formally undermine their independence.[780]

Somewhat similarly to these suggestions, there are proposals of considering fusion with another state (of course, the one whose statehood is not endangered by sea level rise) as a solution for small island states.

3.2.7.4. **Fusion or federal type of association with another state**

Fusion of two or more states is a process not unknown to international law.[781] In the case of small island states, it would mean formally coming to an agreement with another state (the one not in danger of extinction of its statehood due to sea level rise) to merge, thereby creating a unified international legal personality and avoiding risk of loss of international legal personality of a small island state. Fusion with another states, if based on a decision reached through the expression of the free will of peoples of small island state, would indeed be an act of self-determination, [782] an exercise of the right.[783] While it might sound tempting, the

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[780] Compare Yamamoto, Esteban, *op. cit.* (footnote 114), pp. 207-208 making a similar argument. Similarly, Stoutenburg points out that "adequate governance models for the administration of 'deterritorialized' island states must therefore be developed by these states themselves" (Grote Stoutenburg, *op. cit.* (footnote 109), p. 383.

[781] For example, Egypt and Syria merged in 1958 to form United Arab Republic. According to the Provisional Constitution of the United Arab Republic, separate legal personalities of Egypt and Syria ceased to exist and the new legal personality of the United Arab Republic was created instead. See: Cotran, Eugene, Some Legal Aspects of the Formation of the United Arab Republic and the United Arab States, *The International and Comparative Law Quarterly*, vol. 8, no. 2, 1959, p. 348. Somewhat similarly, in 1990, the states of North and South Yemen concluded an Agreement on the Establishment of the Republic of Yemen. It created a unified Yemen, not through a process of annexation, but rather as a creation of new, unified legal personality. See: Goy, Raymond, La reunification du Yémen, *Annuaire français de droit international*, vol. XXXVI, 1990, p. 263.

[782] That duly expressed free will of peoples is needed in order for a fusion or integration to be considered as a valid act of self-determination is confirmed by the Annex to the General Assembly's Declaration on Granting the Independence to Colonial Countries and Peoples. The Annex, titled Principles which should guide Members in determining whether or not an obligation exists to transmit the information called for under Article 73e of the Charter contains the Principle IX, which, inter alia, prescribes that "The integration should be the result of the freely expressed wishes of the terrttory's peoples acting with full knowledge of the change in their status, their wishes haying been expressed through informed and democratic processes, impartially conducted and based on universal adult suffrage. The United Nations could, when it deems it necessary, supervise these processes." (Principles which should guide Members in determining whether or not an obligation exists to transmit the information called for under Article 73 e of the Charter, United Nations General Assembly, A/RES/1541(XV), 1961).

[783] Grote Stoutenburg, *op. cit.* (footnote 109), p. 337.

key problem with considering fusion as a solution is that it is not an adequate response to the very problem of continuation of legal personality of small island states.[784] This is because fusion involves extinction of separate statehood of the two states merging together.[785] With the small island state being the one that will lose territory and thereby part of its identity, it is likely that the state with which the small island state merged will dominate such a newly created arrangement. Therefore, fusion proposals miss the key component of the solution sought after by the small island states, that is the continuation of their distinct legal personality.

Some proposals which view fusion favourably consider that the small island state should be able to keep a degree of autonomy in a newly created community.[786] This could happen in case of a federation or confederation between the host state and the small island state. While it is worth noting that such a solution is indeed a possibility for population to keep parts of its identity, especially in cases of group relocation, it will not give an answer to the pressing issue of continuation of legal personality of small island states and external self-determination of islanders.[787]

Fusion beween states or establishment of a confederation or federation is likely to be based on a treaty between the small island state and the state willing to enter into such an arrangement. There are numerous examples of these associations between states in the history of international law.[788] Traditionally, the distinction between confederation and federation had been in the existence of international legal personality of member states. In confederal system, states that compose the confederation remain distinct legal persons under international law.[789] A treaty that established a confederation governs legal relations between states, which otherwise remain independent from each other.[790] In federation, units that

[784] For a similar conclusion, compare: Allen, Emma, *op. cit.* (footnote 671), p. 9.
[785] Shaw, *op. cit.* (footnote 300), pp. 208-209.
[786] See, for example: Yamamoto, Esteban, *op. cit.* (footnote 114), p. 201.
[787] *Ibid.*
[788] Compare: Galvão Teles and Ruda Santolaria, *op. cit.* (footnote 16), pp. 50-52.
[789] Andrassy et al., *op. cit.* (footnote 103), p. 126-127.
[790] *Ibid.*

compose a federative state are not international legal persons.[791] Rather, domestic law of the state they form part of govern the extent of their legal personality and powers.[792] Therefore, the question whether the model of confederation or federation with another state is to be followed could, based on this distinction, have significant consequences for the legal personality of small island states. As confederations are treaty-based communities of states, only states can form part of them. For federations, this is not so, as federal units are not states.

In more contemporary times, the distinction between confederative and federative models has been more in degree of their ability to participate in international relations, including the conclusion of agreements.[793] States that formed a confederation are, generally, able to conclude treaties, albeit there might be matters reserved for confederation in the treaty establishing it.[794] In federative type of association, in some cases federal units are able to enter into international relations and conclude agreements with independent states outside federation as well.[795] Legal basis for such practices is found in domestic constitutions, not international law.[796] What is, however, a matter of international law is how to qualify agreements concluded between federal units and independent states.[797] If qualified as treaties, that would have ment that federal units indeed posess international legal personality (not necessarily statehood). If not, then these agreements can hardly be treaties in the full sense of the term.

In any case, small island states would be entering into a community with another state on a different standing than what has historically been the case. This is because they are not bringing any territory into the newly formed complex state, but rather only its legal

[791] *Ibid.*
[792] Shaw, *op. cit.* (footnote 300), p. 218.
[793] *Ibid*., p. 217.
[794] Andrassy, *op. cit.* (footnote 103), p. 127.
[795] Shaw, *op. cit.* (footnote 300), p. 219.
[796] For example, Article 32 of the Basic Law of the Federal Republic of Germany allows for federal states (the "Länder") to "conclude treaties with foreign states with the consent of federal government" ("mit Zustimmung der Bundesregierung mit auswärtigen Staaten Verträge abschließen") in matters that are within the legislative power of federal states. For the text of the Basic Law, see: Grundgesetz, 2025, available at: https://www.bundestag.de/parlament/aufgaben/rechtsgrundlagen/grundgesetz (accessed: 29th December 2025).
[797] The question of qualification of agreements between federal units and states remains disputed in international law. See: Shaw, *op. cit.* (footnote 300), pp. 218-219.

personality and peoples. They would eventually have to settle on a territory of a host state. These facts might function as a significant disincentive for any state to enter into such a community with the small island state. The Falepili Union Treaty between Tuvalu and Australia could serve as a case in point. This treaty acknowledges the Australia's support for statehood and sovereignty of Tuvalu,[798] while at the same time envisages for a human moblility pathway for Tuvaluan immigration in Australia,[799] however it does not establish the right of Tuvaluans to any degree of autonomy once they settle in Australia, a migration that is very likely to happen due to effect of sea level rise. Moreover, the same logic would apply to the hypotetical clause, either in the treaty itself or in the constitution of a newly formed state, providing for the right of secession to the small island state forming a unit of a newly created (federal state).[800] Without such a clause, the self-determination of peoples of a small island state entering the arragment for fusion or federation would be significantly narrowed.

We will now turn to another line of proposals, which is present in literature, and tries to theoretically overcome the state-territory nexus by conceptualizing small island states as *sui generis* entities in parallel with the Holy See and the Sovereign Military Order of Malta.

3.2.7.5. **Holy See and the Order of Malta – small island states as *sui generis* entities**

Recognition of legal personality of *sui generis* entities is not at all an unknown concept in international law. The foremost example of such recognition is the legal personality of the Holy See after 1870. After the Papal States were incorporated in the newly established unified Kingdom of Italy, the legal personality of the Holy See ceased to be connected to any territory.[801] From that point on, the so-called Roman question had been open regarding conflicting claims of Italy and the Papacy on the sovereignty over the city of Rome.[802] The

[798] Article 2 of the Falepili Union Treaty.

[799] Article 3 of the Falepili Union Treaty.

[800] Such clauses are not unkown to the history of (mostly) constitutional arrangements of federal states. For example, the constitution of the Socialist Federal Republic of Yugoslavia for a right of secession for federal units. See: Thürer, Daniel, Burri, Thomas, Secession, in: Wolfrum, Rüdiger (ed.), *Max Planck Encyclopaedia of United Nations Law*, vol. IX, 2012, p. 62.

[801] Duursma, *op. cit.* (footnote 424), pp. 375-376.

[802] *Ibid.*

pope proclaimed himself "prisoner of the Vatican", refusing to leave the Vatican walls and at first even ordered Catholics not to participate in elections and governmental affairs of the Kingdom of Italy.[803] Italy responded with the Law of Guarantees,[804] however the Roman question was left basically unresolved until 1929 and conclusion of the Lateran Treaty.[805]

From the standpoint of territoriality of legal persons in international law, exactly the period between 1870 and 1929 is thus crucial. During the time, pope exercised no sovereignty over territory. All territory of the previously existing Papal State had been incorporated in the Kingdom of Italy. Following the established criteria for creation and extinction of states, it would follow that pope, as ruler of such a state would also lose international legal personality. It is well known that this was not the case and that the Holy See retained its international legal personality, visible in many aspects of its relationship with other states, for example concluding treaties and sending and receiving diplomatic envoys.[806]

Majority of writers therefore concluded that Holy See retained legal personality *sui generis*, clearly separating it from a state as a firmly territorial concept.[807] Even after the Lateran Treaty, the dominant opinion in the international law doctrine is that the legal personality of

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[803] *Ibid.*

[804] Law of Guarantees was part of Italian legislation, not an international legal instrument. Consequentially, as it could be repealed by Italy at any time, Holy See refused to accept is, so it basically remained a dead letter. However, the Law of Guarantees gave the Holy See and the Pope protection similar to one that the foreign sovereign would have enjoyed. Moreover, it recognised active and passive right of diplomatic representation, thereby recognising the special status of the Holy See and confirming *opinio juris* on it. See: Graham, Robert A., *The Rise of the Double Diplomatic Corps in Rome: A Study in International Practice (1870-1875)*, Dordrecht, 1952, pp. 81-82.

[805] The Lateran Treaty of 1929, as is the common name of an international agreement between the Holy See and the then-extant Kingdom of Italy, is in fact composed of three "pacts", as they were called. Those are the Conciliation Treaty, the Financial Convention and the Concordat. By the Conciliation treaty, the Vatican City State was established, with its legal personality remaining distinct from that of the Holy See. On the topic, see, among others: Martens, Kurt, The Position of the Holy See and Vatican City State in International Relations, *University of Detroit Mercy Law Review*, vol. 83, no. 5, 2006, pp. 729-760.

[806] The Holy See has diplomatic relations established with 183 states and the Sovereign Military Order of Malta. See the list at: Diplomatic Relations of The Holy See, available at: https://holyseemission.org/contents/mission/diplomatic-relations-of-the-holy-see.php (accessed: 20th December 2022).

[807] See, among others: Araujo, Robert J., The International Personality and Sovereignty of the Holy See, *Catholic University Law Review*, vol. 50, no. 2, 2001, pp. 291-360.; Martens, *op. cit.* (footnote 805), p. 755; Crawford, op. cit. (footnote 301), pp. 225-231.; Duursma, *op. cit.* (footnote 424), pp. 413-414.

the Holy See continues to be distinct from that of the Vatican City and that any discontinuation in the legal personality of the latter would not mean the extinction of the separate *sui generis* legal personality of the Holy See.[808] In practice, however, it is often difficult to distinguish which are the actions of the Holy See, and which are those of the Vatican City in conducting the international relations of the two legal persons.[809]

From this, two general conclusions can be drawn. First, a state continues to be understood as a territorial legal person. It stems from *a contrario* reasoning from the post-1870 status of the Holy See. Although the Holy See has not been devoid of legal personality by the fact of losing territorial sovereignty over what had been the Papal State, it lost personality amounting to statehood.[810] Only its special status in international community as the collective head of the Catholic Church enabled it to continue to be recognized by other states as a legal person.[811] Second, non-territorial *sui generis* legal personality of a former state can, under special circumstances, be established under international law. These circumstances are, however, very limited. There are very few examples of former states that were able to continue their legal personality in some other *sui generis* form under international law after they lost one of elements of statehood. The only example apart from the Holy See is the Sovereign Military Order of Malta.

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[808] Compare Duursma, *ibid.*, p. 417. As noted by Donati, formal relation between the Holy See and the Vatican City State is a consequence of the understanding of sovereign territory being in function of fulfilling the mission of the Holy See, an argument that underlined the conclusion of the Lateran Treaty. See: Donati, Donato, *La Città del Vaticano nella teoria generale dello stato*, Padova, 1930, p. 48.

[809] For an attempt to distinguish the various acts of the two legal persons in international law, see: Ryngaert, Cedric, The Legal Status of the Holy See, *Goettingen Journal of International Law*, vol. 3, no. 3, 2011, pp. 829-849.

[810] This is a majority view. However, there are voices that put even such *sui generis* legal personality into question. See: Morss, John R., The International Legal Status of the Vatican/Holy See Complex, *European Journal of International Law*, vol. 26, no. 4, 2016, pp. 927-946. Further engagement into the debate would go beyond the topic of this work. However, what is certain is that there are almost no authors that consider the legal personality of the Holy See amounting to statehood.

[811] See: Bathon, Matthiew N., The Atypical International Status of the Holy See, *Vanderbilt Journal of Transnational Law*, vol. 34, no. 1, 2001, p. 603. Compare also: Maluwa, Tiyanjana, The Holy See and the Concept of International Legal Personality: Some Reflections, *The Comparative and International Law Journal of Southern Africa*, vol. 19, no. 1, 2006, p. 15.

Sovereign Military Hospitaller Order of Saint John of Jerusalem, of Rhodes and of Malta was formally established as a religious military order in 1113 by the papal bull issued by pope Pascal III to the first group of members of the order.[812] It thus gained a formal recognition under canon law and subsequently its members engaged in a wide spectrum of activities facilitating crusades and Christian pilgrims to the Holy Land, where the order was based.[813] Afterwards, the order first established itself on Cyprus, moving than to Rhodes and finally to Malta.[814] While at Rhodes, order's rights over the island were first recognized as being held independently from the Catholic Church and the pope.[815] Similarly, for approximately three centuries, Order ruled Malta as an effectively independent sovereign and this enabled it to be treated as international legal person even at a time when territorial states were practically the only entities whose legal personality was recognized under international law.[816]

However, in 1798 the order's rule over Malta ended with the changing political landscape of Europe due to Napoleon's conquests.[817] The order thus lost sovereignty over any territory

[812] Fischer, Béat de, L'Ordre Suverain de Malte, *Collected Courses of the Hague Academy of International Law*, vol. 163, 1979, p. 11.

[813] Pope Pascal III recognised the Order by its bull issued in 1113, which granted the Order many privileges, most notably the privilege to elect its head (grand master) free of any influence. Whether this constituted a recognition of international legal personality of the order is debatable, but surely points out to a special position of the Order in the feudal structure, where legal personality was not restricted to states as territorial legal persons. See: *ibid.*

[814] The Order was established to help pilgrims traveling throughout Europe on their pilgrimage to Holy Land. However, soon it established itself as an organization helping the efforts of the crusades and the states established across the Holy Land as a result of it. After these states collapsed, the Order moved first to Cyprus, then to Rhodes and finally to Malta. At these islands, especially the latter two, the Order was able to establish itself as sovereign, thereby fulfilling all the criteria for statehood (territory, population, independent government) even by modern standards. See: *ibid*.

[815] The Order established its own political and judicial system, a situation recognized by the Holy See in 1448. Fischer argues that this fact made it formally independent form the Church, see: *ibid.*, p. 16, 29.

[816] During the time when the Order ruled Malta, it fulfilled all criteria for statehood. It had sovereignty over a defined territory (island of Malta and surrounding islands), permanent population residing on them and independent government headed by the grand master of the Order. However, the Order remained under the patronage of the Catholic Church and functioned simultaneously as *sui generis* religious legal entity and a territorial sovereign. The Order itself had, therefore, never been a state, but rather a *sui generis* entity that, at some points of its history, espoused sovereignty over territory. Compare: Breycha-Vauthier, Arthur C., Potulicki, Michael, The Order of St. John in International Law: A Forerunner of the Red Cross, *American Journal of International Law*, vol. 48, no. 4, 1954, pp. 555-557.

[817] Fischer, *op. cit.* (footnote 812), p. 29.

and became a non-territorial entity. In a post-Napoleonic world, the order's legal status at first became uncertain and the leadership tried to re-establish it as a territorial legal person at Congresses of Vienna and Aachen, but to no avail.[818] Importance of their participation at the Congresses is, however, of relevance not because of what they achieved, but because of the very fact of their participation. Other states willingness to include representatives of the order to the Congresses shows, arguably, *opinio juris* being present at a time as affirming order's ability to continue claiming legal personality despite loss of territory.[819]

Throughout the 19th and 20th centuries the order more and more began to reconceptualize itself as a humanitarian and aid-providing organization, which influenced understanding of its legal personality.[820] To the point, legal personality of the order was increasingly understood in parallel to then emerging concepts of legal personality of international organizations, especially those operating in similar fields such as the International Committee of the Red Cross.[821] However, the legal position of the order remains somewhat different to those of international organizations.[822] The order maintains diplomatic relations with states across the world and observer status in different international organizations, including the United Nations.[823] Of particular relevance to the topic of this chapter is, however, another

[818] Different states offered the Order various islands as a possible new territory to replace lost Malta. For example, Sweden offered Gotland, and the Habsburg Empire offered island of Vis in the Adriatic. See: *ibid.*, pp. 20-21. All this points out to the firmly territorial concept of statehood being dominant in the views of states at the time. However, the Order soon established itself in a different way, as a non-territorial, primarily humanitarian organization.

[819] This is evidenced by the extra-territorial status and immunity that the Order's headquarters and its head, the Grand Master, enjoy. See judgments of national courts cited in *ibid.*, pp. 30-31, also: Farran, C. d'Oliver, The Sovereign Order of Malta in International Law, *International & Comparative Law Quarterly*, vol. 3, no. 2, 1954, 224-225.

[820] Fischer, *ibid.*, pp. 25-27.

[821] This view was summarized by Breycha-Vauthier and Potulicki, who, back in 1954, wrote that the Order "can be regarded as the oldest-after the Holy See- international organization recorded in history". See: Breycha-Vauthier, Potulicki, *op. cit.* (footnote 816), p. 554.

[822] Karski, Karol, The International Legal Status of the Sovereign Military Hospitaller Order of St. John of Jerusalem of Rhodes and of Malta, *International Community Law Review*, vol. 14, 2012, p. 32.

[823] The list of states the Order maintains diplomatic relations with can be found at: Bilateral Relations, available at: https://www.orderofmalta.int/diplomatic-activities/bilateral-relations/ (accessed: 11th January 2023). Similarly, list of international organizations the Order established relations with can be found at: Multilateral Relations, available at: https://www.orderofmalta.int/diplomatic-activities/multilateral-relations/ (accessed: 11th January 2023).

peculiarity of both the Holy See and the Sovereign Military Order of Malta, namely their relation to population criterion.

Without territory, aforementioned *sui generis* legal persons also cannot have permanent population in a territorial sense, which is a well-established way of defining it as a criterion for statehood. Simply, there is no possibility for a population to permanently inhabit a piece of land if such a piece does not exist.[824] Both the Holy See and the Sovereign Military Order of Malta do, however, have nationals holding their passports. In fact, they regularly issue travel documents which are recognized by almost all states around the world. The key issue becomes the relation between these entities and their nationals. What are the actual qualities of nationality of one of the entities? It seems that being a national of one of them is quite different from being a national of a territorial, classic state in the effects such a status produces for its holder.

The data on nationals of the Holy See and the Sovereign Military Order of Malta shows some insight into the composition of peoples which form populations of these entities. In 2018, Holy See had 618 citizens, holders of its passports, out of which 246 lived inside its territorial possession, the Vatican City State.[825] Most, if not all of them were dual nationals, concurrently holding nationality of another state. From this, it can be easily understood that ways of acquiring citizenship of The Holy See are not similar to most other states, nor the peoples who acquire it do that for reasons which are common for acquiring other states' nationalities. Nationality of the Holy See is not acquired by being born on the territory of it (*ius soli* principle), neither by being born to parents or having some ancestors which are nationals of the Holy See (*ius sanguinis* principle). Rather, the nationality of the Holy See is acquired by the person's official capacity being that of the specific category of the Holy See official (*ius officii* principle).[826] Nationality can be revoked the same way, as it is sometimes

[824] While nationals of the Holy See, partially reside in the Vatican City State, their formal bond of nationality is not established with the Vatican, but with the Holy See itself.
[825] The Vatican City State, although possessing a legal personality distinct from that of the Holy See, does not confer citizenship nor issues passports, only the Holy See does. For the data, see: Popolazione, available at: https://www.vaticanstate.va/it/stato-governo/note-generali/popolazione.html (accessed 14th January 2023).
[826] Bathon, *op. cit.* (footnote 811), p. 610.

done at the end of the person's service to the Holy See or the expiration of office in connection with which the nationality was granted.

The Sovereign Military Order of Malta is even more restrictive in its granting of what would amount to nationality. The Order has about 500 passports in circulation and they are given only to certain officeholders high in the Order's hierarchy, only to be revoked on the expiration of their office.[827] In addition, the holders of such passports are concurrently nationals of other states, namely those of which they were nationals beforehand. Therefore, it is clear that the Order, similarly to the Holy See, follows the *ius oficii* principle in awarding its passports.

In both cases, persons being nationals of one of the entities are not enjoying traditional relation between a state and a national. This becomes increasingly true when perspective of a state as a guarantee of different rights of its nationals is considered. Neither the Holy See, nor the Sovereign Military Order of Malta, due to constrains of their size, available resources and structure of institutions cannot act as guarantees of rights for their nationals. Indeed, it could be argued that in the contemporary world, where legal personality of states is at least to some extent conceptualized as that of subject of international law being able to guarantee basic rights to all its citizens, these entities are distanced from states in yet another regard. They are not able to do that, but are neither supposed to do it. Nationals of both entities are granted such protection by states whose nationality they hold concurrently to nationality of the entities.

Three preliminary conclusions could be made in relation to a claim to establish continuity of statehood of small island states by way of analogy with legal personality of *sui generis* entities, namely the Holy See and the Sovereign Military Order of Malta. Firstly, claims for legal personality after deterritorialization will depend on the willingness of other states to

[827] See: Passports, available at: https://www.orderofmalta.int/government/passports/ (accessed 14th January 2023).

acknowledge them. Therefore, legal personality of small island states might be approaching relative, rather than objective nature.[828]

Secondly and, arguably, more importantly, if and when *opinio juris* of states came to a stage where such conceptions will be considered possible, it would not be feasible to simply build upon the precedents of existing *sui generis* entities.[829] Legal personality of the Holy See and the Sovereign Military Order of Malta was constructed around specific set of facts and with specific aims in mind. It was not for the continuation of their statehood that was at stake at the point of history when they lost previously held territory, but rather for the specific role that they continued to play in international community that other states were, in their *opinio iuris*, willing to recognize by according them the continuation of legal personality.[830] On the contrary, small island states want to achieve just the opposite, continuation of their statehood or, at least, status most similar to that of statehood. Therefore, any such claim will, if accepted by international community, bring about a new category of *sui generis* entities. The *sui*

[828] Indeed, the legal personality of existing sui generis entities is, in view of some authors, of relative nature. As Crawford observed, writing on the Order of Malta: "It may be doubted whether the international personality of the Order is general rather than particular to recognizing states". See: Crawford, *op. cit.* (footnote 301), p. 233. To that, Grote Stoutenburg adds, while claiming that the sui generis legal personality of the Order is not derived from its previous status as a territorial sovereign: "However, the fact that the Order was reduced to its present atypical status with only relative international legal personality after the loss of its territory seems to disapprove any assumption of continuity". See: Grote Stoutenburg, *op. cit.* (footnote 109), p. 381. Distinction between relative and objective international legal personality is here used in a meaning accorded to these concepts by the ICJ in the Reparations for Injuries advisory opinion (see: Reparations for Injuries Suffered in the Service of United Nations, Advisory Opinion, *I.C.J. Reports*, 1949, p. 185).

[829] Therefore it could be agreed with Lapaš that arguments for such analogies made by, among others, Rayfuse (Rayfuse, Rosemary, International Law and Dissapearing States: Maritime Zones and Criteria for Statehood*, Environmental Policy and Law*, vol. 41, no. 6, 2011, p. 285), Ödalen (see: Ödalen, Jorg, Underwater Self-determination: Sea-level Rise and Deterritorialized Small Island States, *Ethics, Policy and Environment*, vol. 17, no. 2, 2014, pp. 356-358), Jiménez Pineda (see: Jiménez Pineda, Eduardo, The Disappearing Island State Phenomenon: A Challenge to the Universality of the International Law of the Sea, *European Society of International Law Conference Paper Series*, 2018, p. 13) and Yamamoto and Esteban (see: Yamamoto, Esteban, *op. cit.* (footnote 114), p. 205) are „oversimplified" (see: Lapaš, *op. cit.* (footnote 769), p. 13).

[830] In Torres Camprubì' s words: "To be sure, their peculiar status in today's international legal and political system is undoubtedly the result of the special bond of both institutions with the long process of formation of the modern State and of the early European Law of Nations." See: Torres Camprubì, *op. cit.* (footnote 35), p. 113). Similarly, Allen and Prost conclude that: "the Order of Malta and the Holy See are not precedents of deterritorialized States but of landless non-State sovereign entities, a distinction that is not merely doctrinal but matters greatly when it comes to the legal standing of these international persons". See: Allen, Emma, Prost, Mario, Ceci n'est pas un État: The Order of Malta and the Holy See as precedents for deterritorialized statehood?, *Review of European, Comparative & International Environmental Law*, vol. 31, no. 2, 2022, p. 180.

generis entity is not the same as a state and the quality of it's the legal personality they enjoy, together with the legal capacity international law accords to the two distinct types of legal personality, is not the same.[831] As correctly pointed out by Marek, this means that legal continuity between variying degrees of international legal personality cannot be presumed to exist.[832]

A question of relation between nationals of a deterritorialized former state and the entity that would accommodate the legal personality of the former state becomes a pressing issue. Examples of existing *sui generis* entities show how their nationals are accorded nationality in a very different manner to how nationality is understood in other states. Relation between the entities and their nationals arising from such a relation is very different to the one arising between a state and its national. Having a nationality of the entities thus functions more as an addition to the previously held nationality rather than a basic relation between a state and its citizen. Nationality of the entity provides a more elaborate protection of the passport holder, enabling him to enjoy protection of other states as representative of an entity. In a way, this shows how the position of persons holding entity's passport is more similar to position of functionaries of international organizations than of citizens of states when it comes to the question of how other states treat those persons.[833]

Basing the claim of continuation of legal personality of small island states only on parallels with the status enjoyed by the Holy See of Order of Malta is flawed due to aforementioned dissimilarities between their situation and those in which small island states are to find themselves. However, idea of re-establishing deteritorialized island states as entities *sui generis* should not be completely discarded. The very notion of entities *sui generis* does not

[831] See, generally, the opinion of the ICJ, in its Repartions for Injuries Suffered in the Service of United Nations advisory opinion on different legal capacities of various forms of international legal personality: Repartions for Injuries Suffered in the Service of United Nations, Advisory Opinion, *I.C.J. Reports*, 1949, p. 178.

[832] Marek, *op. cit.* (footnote 438), p. 187.

[833] Similarly, based on observations that relation between Holy See/Sovereign Military Order of Malta and persons holding their nationality differs from that between states and their nationals, Kułaga notes "Nonetheless, these entities differ from states and are rather similar to international organisations, which do not have citizens and only exercise limited legal authority predominantly with respect to labour issues of their personnel." (Kułaga, Łukasz, The Impact of Climate Change on States: The Territorial Aspect, *International Community Law Review*, vol. 23, 2021, pp. 130-131).

imply *numerus clausus*, quite the contrary. It just means that entities fall into the category for the very reason they cannot be subsumed under any other category of legal persons extant in international law. This is due to some peculiarities in nature of their legal personality. Therefore, it is possible to imagine a new category of legal persons which would not be subsumed under the existing frames, therefore falling into the *sui generis* category.[834] Before that, however, a bief conclusion for this part is given in the next subchapter.

3.2.8. **Conclusion on the options for continuation of legal personality based on traditional international law**

Loss of any of the three elements of statehood (territory, permanent population, independent government) is indeed the worst scenario a state can face. According to traditional interpretations of international law, such a loss brings statehood and with it this aspect of self-determination to an immediate end. In line with declaratory theory of recognition and principle of effectivity, mere fact that any of the three elements is lost amounts to a state losing its legal personality under international law.[835] Such a strict interpretation is, however, mitigated in practice by a strong presumption in favour of continuation of states.[836] This means that if some doubts are cast upon one of the elements, or it is clearly not present at a given point in time, a state can still claim legal personality and succeed with this claim if other states are willing to recognize it.[837] In turn, it brings recognition of such states nearer to

[834] Similarly, Bílková claims that "Most scholars support the view that the Holy See/Vatican and the Order of Malta are legal persons under international law but cannot be considered as States. In the absence of any historical precedents, a deterritorialized State, were it to exist, would need to be a rather recent phenomenon." See: Bílková, *op. cit.* (footnote 769), p. 33. For further discussion see *infra* in 3.2.9. and 3.2.11.

[835] In line with this, the Arbitration Commission on Yugoslavia in its Opinion no. 8 concluded that: "the existence or disappearance of a state is, in any case, a matter of fact". Cited according to: Conference on Yugoslavia Arbitration Commission: Opinions on Questions arising from the Dissolution of Yugoslavia**,** *International Legal Materials*, vol. 31, no. 6, p. 1522. However, Shaw warns that: "it is a matter of fact that is legally conditioned in that it is international law that will apportion particular legal consequences to particular factual situations and the appreciation of these facts will take place within a certain legal framework" See: Shaw, *op. cit.* (footnote 300), p. 208.

[836] As Crawford pointed out in conclusion of his thorough analysis of states' practice on continuation of statehood: "there is a strong presumption against the extinction of states once firmly established" See: Crawford, *op. cit.* (footnote 301), p. 715.

[837] However, Soete, in our view, rightly, warns that: "It is clear that principle is applied in a context wherein it is never questioned whether statehood will be impossible once existing state is deemed demised. It appears to

the concept of constitutive recognition, as they are much more dependent on willing of other states to still consider them legal persons of the same kind. What is more, other states decision to withdraw recognition of small island states would carry much more weight, approaching constitutive instead of declaratory recognition.[838] Examples are numerous. They include both governments in exile being able to continue functioning as representatives of states without actually controlling territory or large portions of populations on one hand,[839] while on the other there are historic cases of states with territory and population, which however had virtually no functioning governmental institutions still functioning as states.[840]

It was noted how analogies with governments in exile and *sui generis* entities seem misplaced, even though they can provide some comparison, at least from a basic point of view that, under very specific circumstances, states that once controlled a territory were able to continue claiming legal personality.[841] On the other hand, that legal personality was either viewed as transitionary, serving a temporary purpose of continuation of statehood through irregular, wartime situations when territory and population were under belligerent occupation, as in case of governments in exile. They were thus viewed not as legal persons without a territory, but legal persons whose territory, or territorial claim recognized by states which recognize such a government, is temporarily outside of their control due to circumstances which states that recognize such governments consider illegal.[842] From this, it follows that governments in exile are not distinct legal persons and cannot exist without the continued existence of the states they represent.[843] They are only a way how to, if other states

be a bridge too far just to assume that the principle may prevent the loss of statehood in a context where there is no successor state available" See: Soete, *op.cit.* (footnote 381), p. 142.

[838] Compare: Grote Stoutenburg, *op. cit.* (footnote 109), pp. 300-301.

[839] For example, this was the case with Czechoslovakia and Poland during the Second World War, as mentioned *supra* in 3.2.1.1.

[840] Somalia provides an example. Being effectively without a government for nearly ten years, it was completely unrepresented in international affairs. Continuity of Somalia as a state during and after that period has, however, not been questioned by the international community. See: Kreijen, *op. cit.* (footnote 390), pp. 160-161.

[841] For discussion of these topics see *supra* in 3.2.7.

[842] In fact, as Wong notes: "In the case of the government in exile, the purported government is still linked (albeit tenuously) to the territory of the state it purports to govern." See: Wong, Derek, The Position of 'Sinking States in International Law, *Melbourne Journal of International Law*, vol. 14, 2013, p. 367.

[843] Talmon, *op. cit.* (footnote 523), pp. 15-16; Marek, *op. cit.* (footnote 438), p. 89.

are willing to recognize it, temporarily retain legal personality, while territory and population are under foreign *de facto* governance.

Similarly, *sui generis* entities of the Holy See and Sovereign Military Order of Malta, were able to continue claiming sovereignty even after they lost control over territory. However, entities *sui generis* are recognized as legal persons not because of their previous status of territorial legal persons, but rather because of some specificities in their position in international community, which makes other states willing to continue recognizing them as legal persons. Moreover, their legal personality is different from that of states both conceptually and in its implications. History of both the Holy See and the Sovereign Military Order of Malta enabled them to continue claims for legal personality and for those claims to be recognized by other states. Their legal personality is not established to be state-like, to exercise sovereignty over population in same way other states do. That means that their legal personality was not based on continuity between entities sui generis and territorial possessions they once exercised sovereignty over, but rather on their specific position in international relations.

Therefore, it is hard to simply draw analogies to either of those specific situations where international law accords legal personality to entities which are not controlling territory. Their continuity was a result of a specific set of circumstances, which cannot be simply replicated in situations involving different sets of circumstances.

This brings us to the conclusion of this part. In the next part, another peculiar suggestion for continuation of legal personality is considered. Namely, the idea that the legal personality of peoples in international law could serve as a basis for a claim for continuation after relocation and deterritorialization become realities.

3.2.9. **Legal personality of nations and peoples in international law – accomodating self-determination in a deterritorialized reality**

With the aforementioned *sui generis* entities, it was, and still is, their special position in international affairs which allowed for other states to be willing to recognize their existence even after they lost sovereignty over any territory. With small island states this is, arguably,

not the case, as they do not represent either a worldwide religious community (like the Holy See) nor the group of individuals engaged in a historically attested long practice of humanitarian work (like the Order of Malta). However, small island states do constitute a nation, and this is where the basis for the claim for continuation of legal personality might be sought, however carefully.

In contemporary international law, there is a profound connection between the concept of a nation and that of peoples. It is at this place, therefore, difficult to avoid a peculiar question of legal personality of peoples in international law, another highly contested and difficult matter that is subject to an, it might seem, ever-going academic debate. In international law, peoples are addressees of norms of international law and therefore enjoy limited legal personality and legal capacity.[844] Sea level rise makes this position quite peculiar, because, as we had already argued, the right to self-determination is the only human right held by peoples as collectives, not by individuals.[845] In turn, right to self-determination provided the basis for a claim to legal personality of small island states during the process of decolonization, while remaining a perpetual right. When this is combined with the problem that arises from still incoherent treatment of climate change induced migration in the overall picture of international law and, even more, state practice governing migrations, inclusion of peoples as a separate, special category that could provide for continuation of legal personality becomes even more evident.[846]

Therefore, before proceeding to the topic of legal personality of peoples in international law, we will first make some remarks on the concept of nations.

3.2.9.1. **Nations**

Views on how nation is understood and what constitutes a nation changed remarkably through history. These conceptions of what should be elements of a nation were subsumed

[844] Compare: Lapaš, *op. cit.* (footnote 769), p. 28.
[845] For the detailed discussion, see *supra* in 3.1.
[846] In this context, it is interesting to note how some authors point out that in more recent times, international community also began to request respect for human rights as a prerequisite for recognition of states. See: Casesse, Antonio, *International Law*, Oxford-New York, 2001, p. 50.

under two prevalent, mutually opposing, theories – subjective and objective theory of a nation. Subjective theory developed in French legal and political thought, while the objective one is predominantly of German origin.[847] As the name indicates, the basic principle of subjective theory is that some kind of psychological element of peoples' will to consider themselves a part of a designated nation is involved.[848] On the contrary, objective theory hold that there are some objective criteria under which a nation is constituted, e. g. common language, religion, ethnicity.[849] The objective theory, in turn, allowed for the construction of the theory of cultural nation, a nation based on common ethnicity and culture, [850] which has than, especially in German legal scholarship, even been posited as a prerequisite for statehood.[851]

As a proponent of a theoretically intriguing concept of nationhood as a basis for international legal personality, Mancini went even further and proclaimed nation as a basic subject of international law. In doing that, he integrated both conceptions by defining a nation as a "natural community of men who are led to a community of life and a social consciousness by the unity of territory, origin, customs and language".[852] The underlying idea of all these conceptions is that there are some common characteristics of peoples who form a nation. Such a common ground had been found in the unity of territory, which indeed came to play a crucial role in creation of the national identity of European nation-states, with it being not only the source of power in the Weberian sense of "monopoly of legitimate use of physical force",[853] but also as a place to which people who consider themselves part of the nation feel

[847] Vukas, *op. cit.* (footnote 303), p. 314.
[848] *Ibid.*
[849] *Ibid.*
[850] Utz, Raphael, Nations, Nation-Building, and Cultural Intervention: A Social Science Perspective, in: Wolfrum, Rüdiger (ed.), *Max Planck Yearbook of United Nations Law*, vol. 9, 2005, p. 618.
[851] See, for example: Darsow, Thomas*, Zum Wandel des Staatsbegriffs: Unter besonderer Berücksichtigung der Lehre und Praxis internationaler Organisationen, der Mikrostaaten und der PLO*, Frankfurt am Main, 1984, pp. 127 *et passim*.
[852] Mancini, Pasquale Stanislao, Della Nazionalità comme fondamento del Diritto delle genti, in: *Diritto internazionale – Prelezioni*, Naples, 1873, p. 42. Compare also: Redslob, Robert*, Les principes du droit des gens modern*, Paris, 1937, p. 216.
[853] Max Weber defined state as "a human community that (successfully) claims the monopoly of the legitimate use of physical force within a given territory" (Weber, Max Politics as Vocation, in: Gerth, Hans H., Mills, Charles Wright (eds. and trans.), *From Max Weber: Essays in Sociology*, New York, 1974, p. 78).

emotional connection and affection. Thus, territory came to be understood as the "body of the nation itself".[854] Koskenniemi synthesized these debates in an elegant manner by distinguished between the classical, Hobbesian and the romantic, Rousseauesque concepts of a nation. In the classical concept, nation is defined as "artificial communities, collections of individuals who are linked principally by the existence of a statal decision-procedure which makes it possible for them to participate in the conduct of their common affairs within the State".[855] Romantic concept, in turn, for Kuskenniemi, "tries to look deeper into nationhood as something more basic, more fundamental than mere decision-processes. For this view, the crucial question is less how popular will is exercised, more to what end it is exercised, whether it participates in the natural life-form appropriate for each nation as an authentic (and not artificial) community."[856]

Notwithstanding these discussions, it is relatively simple to conclude that islanders indeed do fit under the notion of nation, unlike populations of some other states around the world. Their identity is indeed distinct and sense of cultural, territorial and ethnic unity is present. Basis of such an identity is not necessarily found in connection to territory of the atols only, but also to the ocean surrounding them.[857] However, this is hardly enough to base a claim for legal personality on, as there are at least two significant challenges for such a claim.

First of all, nation is a highly fluid concept when conceived without ether a territorial or a citizenship basis. As noted by Dienstein, "A nation is easy to define inasmuch as it consists of the entire citizen body of a state".[858] Vukas adds that "it is futile to try to identify a notion

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[854] Bartelson, Jens, *The Critique of the State*, Cambridge, 2001, p. 45.

[855] Koskenniemi, Maarti, National Self-Determination Today: Problems of Legal Theory and Practice, *International and Comparative Law Quarterly*, vol. 43, no. 2, 1994, p. 249.

[856] *Ibid.*, p. 250.

[857] In 2017, leaders of the Pacific Islands Forum at their 48th meeting held in Samoa formally endorsed the Blue Pacific identity as "new narrative" that should "reinforce the potential of our shared stewardship of the Pacific Ocean and reaffirm the connections of Pacific peoples with their natural resources, environment, culture and livelihoods". See: Forty-Eighth Pacific Islands Forum, Communiqué, 2017, available at: https://forumsec.org/publications/forty-eighth-pacific-islands-forum-apia-samoa-5-8-september-2017 (accessed 25th September 2023), Paragraph 6.

[858] Dinstein, Yoram, Collective Human Rights of Peoples and Minorities, *International Community Law Review*, vol. 25, 1976, pp. 103-104.

of 'nation' separate from that of the 'population' of a state".[859] In the process of drafting the United Nations, the notions of "peoples", "nation" and "state" have indeed sparked a debate on the issue of distinguishing between them. The members of the Coordination Committee of San Francisco Conference noted that the notion of "nation" is in some parts of the world used interchangeably with the notion of "peoples" (specifically citing England and the United States of America as examples), while in other parts there is a sharp distinction between them (Continental Europe).[860] In response to these concerns, the Secretariat of the San Francisco Conference explained that, in its views, the distinction was to be found in that "state" was "to indicate a definite political entity", while "nation" includes "colonies, mandates, protactorates and quasi-states as well as states". "Peoples" in turn, should mean "all mankind" or "all human beings" and peoples "may, or may not, comprise states or nations".[861] Thus, though the notions of "state" and "nation" are intrinsically connected, a look at the drafting history of the Charter of the United Nations shows how the debates resolved around the distinction of the two.[862]

Even the concept of cultural nation is not traditionally posited as personal, but rather territorial, albeit independent of direct link to statehood as embodiment of nation, as explained by, for example, Guibernau, who defines "nations without states" as: "nations which, in spite of having their territories included within the boundaries of one or more States, by and large do not identify with them",[863] citing examples of Catalonia or Scotland as examples of political autonomus units formed out of the need to recognize and provide cultural nations with a degree of autonomy.[864] The islanders of small island states would, arguably, find themselves exactly in that gap, with neither of the concept readily available to

[859] Vukas, *op. cit.* (footnote 303), p. 316.
[860] See: Summary Report of Twenty-Second Meeting of Coordination Committee, WD 410, CO/170, in: *Documents of the United Nations Conference on Internal Organization*, vol. XVII, 1954, pp. 141-143.
[861] List of Certain Repetitive Words and Phrases in the Charther, Memorandum of the Secretary, WD 381, CO/156, in: *Documents of the United Nations Conference on Internal Organization*, vol. XVIII, 1954, pp. 657-658.
[862] Sureda, *op. cit.* (footnote 339), pp. 97-101.
[863] Guibernau, Montserrat, Nations without States: Political Communities in a Global Age, *Michigan Journal of International Law*, vol. 25, no. 4, 2004, p. 1254.
[864] *Ibid.*, pp. 1261-1264.

apply to their situation. With the pressing need to relocate, they will most likely be living on a territory of another state. Under the traditional concept of statehood, their state will lose its legal personality, which would also mean its citizenship becomes obsolete. What remains of nationhood is then indeed a set of common characteristics. This, however, should not be overlooked, as nationhood should not be conceptualized only through Western understandings of the notion. For various indigenous communities, islanders of small island states being among them, various researchers have pointed out to a different understanding of what constitutes a nation. It has been observed that nation is perceived less as a political or nationalistic community, and more as a community of "distinctive cultures, historical heritages and processes: place, culture, kinship, collective narratives, sovereignty, and self-governing power".[865] Indeed, this is not new to indigenous peoples. Various indigenous groups have been evicted from their ancestral territories during the process of colonization, nevertheless retaining the distinct identity based on culture and heritage, often related to the ancestral territory of which, however, they have been dispossessed long ago.[866]

Second problem is even more relevant as to claim for continuation of legal personality as an expression of external dimension of self-determination. It revolves around the very existence of a legal concept of nationhood. The notion of nation is used in international legal discourse, but in a rather dependent meaning. The Charter of the United Nations, for example, uses it, however it is clear from the drafting history of the Charter that it was intended to be used as a broad concept which would allow for both state and non-state territorial entities (protectorates, trust territories) to be subsumed under it, but not in a meaning of a non-territorial ethnic, cultural or linguistic community.[867] Similarly, during the drafting process

[865] Ross, *op. cit.* (footnote 300), p. 14. See also: Corell, Stephen, Process of Native Nationhood: The Indigenous Politics of Self-Government, *The International Indigenous Policy Journal*, vol. 6, no. 4, 2015, pp. 4-5. Moreover, it should be noted that such characteristics could be, and in the case of islanders, indeed are, deeply rooted in connection to specific territory, which does not prevent them to be highly mobile at the same time. See an insightful review in: Lixsinski, Lucas, McAdam, Jane, Tupou, Patricia, Ocean Cultures, The Anthropocene and International Law: Cultural Heritage and Mobility Laws as Imaginative Gateways, *Melbourne Journal of International Law*, vol. 23, 2022, pp. 1-22.

[866] Kingsbury, Benedict, Self-Determination and Indigenous Peoples, *Proceedings of the American Society of International Law*, vol. 86, 1992, p. 386.

[867] As observed by the Coordination Committee of the 1945 San Francisco Conference: "The word 'nation' is used only seven times in the Technical Committee texts, for the most part in a broad and non-political sense,

of the ICCPR, the term "nation" was omitted, as the predominat opinion became that it is encompassed by the concept of peoples,[868] which were in turn understood teritorially.[869] As Vukas observed, this does not mean that the concept of "nation" has become independent of various territorial entities possessing some degree of legal personality, "whatever the ethnic, cultural, linguistic or religious composition of the population of these territories of the level of their political ambitions or achievements".[870] This allows Vukas to conclude that in international law "'nation' has no meaning of its own".[871]

With this conclusion as to the concept of nation, we can proceed to another concept known to international law which tries to define persons as a group with a set of common features, possessing legal rights and obligations. Namely, peoples.

viz. 'friendly relations among nations'. In this non-political usage, 'nation' would seem preferable to 'state' since the word 'nation' is broad and general enough to include colonies, mandates, protectorates, and quasi-states as well as states. It also has a political flavour that is lacking the word 'state'". See: List of Certain Repetitive Words and Phrases in the Charther, Memorandum of the Secretary, WD 381, CO/156, in: *Documents of the United Nations Conference on Trade and Development*, vol. XVIII, 1945, p. 657.

[868] Cristescu, *op. cit.* (footnote 320), p. 8

[869] While noting that peoples "should be understood in its most general terms" and that "no definition was necessary", the United Nations Secretary-General in its annotations to the Draft International Covenant on Human Rights nevertheless found that "The word "peoples" was understood to mean peoples in all countries and territories (…)", see: Draft International Covenant on Human Rights: Annotation prepared by the United Nations Secretary-general, A/2929, 1955, p. 42.

[870] Vukas, *op. cit.* (footnote 303), p. 313.

[871] *Ibid.*

3.2.9.2. **Peoples**

Peoples are not an abstract category, but a community of human beings. However, the peoples must be clearly distinguished from other similar concepts such as population or nation, which have another meaning under international law. Contrary to the concept of nation, the peoples are a state-of-the-art legal term in international legal discourse.[872] It is used in variety of documents, from the preamble of the Charter of the United Nations to protection of key human right to self-determination as embodied in both the ICCPR and the ICESCR.[873] It is, however, interesting that international law does not provide a legally binding definition of peoples.[874] It was argued that this is because defining peoples straightforwardly would be impossible as it would certainly have missed a wide variety of communities forming "peoples" using different sets of criteria.[875] It seems from the outset that one could agree with the account of Schacter who, writing in 1963, remarked that peoples is a concept that is impossible to explain and define in general, but it rather depends on circumstances and context.[876]

In international legal scholarship, it has been debated whether the notion of "peoples" should be based on the concept of *demos* (δῆμος) or *ethnos* (ἔθνος). The distinction between *demos*

[872] As an early, classical insight into the debate, before development of human rights law gave it a new momentum see: Anzilotti, Dionisio, *Course de droit international*, Paris, 1929, pp. 132-136 and literature listed there.

[873] The common Article 1 of the ICCPR and the ICESCR specifically presribes that the right to self-determination belongs to the peoples ("All peoples have the right to self-determination").

[874] Aureliu Cristescu, Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities had to conclude that: "it will be found that there is no accepted definition of the word "people" and no way of defining it with certainty. The Charter is of little help on this point because it gives no details or explanations of the concept of "peoples". There is no text or recognized definition from which to determine what is a "people" possessing the right in question." See: Cristescu, *op. cit.* (footnote 320), p. 39.

[875] As Special Rapporteur Cristescu observed: "In some instances a people is easy to identify from objective factors, but that is not always the case. Furthermore, even if a people has a clear-cut identity, historical circumstances may create a close link between two or more separate communities. In such a case, the exercise of its rights by one of those communities, whether it constitutes the majority or a minority, cannot easily take place without harm to the rights of others.", which led him to conclude that for his Study: "It would therefore be premature and even presumptuous to try to lay down here and now a definition which could be used in all parts of the world and which would cover all situations.". See: *Ibid.*, pp. 40 and 41.

[876] Schacter, Oscar, The Relation of Law, Politics and Action at the United Nations, *Collected Courses of the Hague Academy of International Law*, vol. 109, 1963, pp. 193-194.

and *ethnos* stems from a long line of European political thought, and could be summarized in the idea that demos is a community based on political criteria, while ethnos is based on common language and culture.[877] On the other hand, in the context of decolonization, according to Knop, neither of these models could be used, as colonies were neither demos nor ethnos, but "au fond a community of fate"[878], with their peoples being "the inhabitants of a territory defined by forces beyond their control"[879].

On the other hand, in 1989 the UNESCO meeting of experts tried to overcome uncertainty that such an often used but ill-conceptualized notion of peoples carries. In doing that, the meeting of experts expressly noted that they are not trying to provide a definition, but rather to find "universal features" of the concept. In line with that, they concluded that those features are:

"a group of individual human beings who enjoy some or all of the following common features: (a) a common historical tradition; (b) racial or ethnic identity; (c) cultural homogeneity; (d) linguistic unity; (e) religious or ideological affinity; (f) territorial connection; (g) common economic life; 2. the group must be of a certain number which need not be large (e.g. the people of micro States) but which must be more than a mere association of individuals within a State; 3. the group as a whole must have the will to be identified as a people or the consciousness of being a people - allowing that groups or some members of such grows, though sharing the foregoing characteristics, may not have that will or consciousness; and possibly; 4. the group must have institutions or other means of expressing its common characteristics and will for identity".[880]

These overarching set of criteria do provide a guidance as to who the peoples are. From them, two key characteristics can be extracted – identity and connection. Identity can be grounded

[877] For a review of the history of the two concepts, see: Cobban, Alfred, *The Nation State and National Self-Determination*, New York, 1969, pp. 118-125.
[878] Knop, Karen, *Diversity and Self-Determination in International Law*, Cambridge, 2002, p. 57.
[879] *Ibid.*
[880] International Meeting of Experts on Further Study of the Concept of the Rights of Peoples: Final Report and Reccomendations, United Nations Educational, Scientific and Cultural Organization, SHS-89/CONF.602/7, 1990, pp. 7-8.

in various concepts, as outlined in notions of ethnicity, culture, religion, territory, historical tradition, even common economic life. Connection, arguably, can be further divided in subjective an objective element. Subjective is expressed through will of the peoples for identity or their "collective consciousness" of being peoples,[881] while objective is grounded in institutions or other means of expressing these common characteristics. This definition fits well into what Raič defined as an "ethnic definition of 'peoplehood"[882], meaning "a people in the social and cultural or anthropological sense"[883].

There is, however, also another meaning accorded to peoples by international law. First sentence of the Preamble to the Charter of the United Nations begins with the famous expression "we, the peoples of United Nations". Here, the notion of peoples adopts a rather different meaning. It means all persons within the state that are entitled to participate in public, political, societal life and in whom, at least in democratic conception, ultimately lies all sovereignty.[884] In that regard, peoples serve as a concept that delineates democratic from earlier monarchical concepts of state. Unlike earlier times, when state had often been conceptualized through a person of a monarch as a holder of sovereignty, modern conceptions tend to represent peoples as the source of sovereignty. In other words, state is based upon its peoples, they form the community into which all sovereign powers are ultimately based.

What is, however, even more insightful is that peoples are accorded a legal personality under international law, albeit of a limited nature. By limited it is meant that the legal personality

[881] Anaya, James, *Indigenous Peoples in International Law*, Oxford, 2004, p. 103.
[882] Raič, *op. cit.* (footnote 293), p. 446.
[883] *Ibid.*
[884] Here, peoples are understood in a broad sense, which cannot be equated with citizenship, nor nationality, nor population. A person could be a member of the peoples while not a citizen of a state (for example, as an asylum seeker living in a state). At the same time, one could be resident in another state and still form part of peoples via the link of citizenship. Population, on the other hand, should be understood as all persons that reside on the sovereign territory of the state. Nation, finally, means a political concept that encompasses peoples in a democratic society and forms a basis for the state. Compare: Vukas, *op. cit.* (footnote 303), p. 319-320.

of peoples, unlike legal personality of states, is limited to specific areas of international law and specific set of rights and duties.[885]

Arguably the foremost and best-known concept in international law that is conceptualized as a right belonging to peoples is the right to self-determination. That means that peoples as a collective entity are right holders.[886] Although every member of the "peoples" is entitled to voice opinion on how the right to self-determination will be exercised, it can be exercised only collectively. The effects of sea level rise on the right to self-determination is examined throughout this work, but the key question in this subchapter is whether it can serve as an argument for according some independent legal personality to peoples as such.

In Article 1 of both the ICCPR and ICESCR there is an embodiment of self-determination principle. From the wording of these articles and their subsequent interpretation, [887] it is clear that peoples were envisaged as beneficiaries of the right contained in them. Similarly, regional human rights instruments[888] and documents protecting rights of indigenous peoples[889] contain references to substantive rights accorded to peoples. If some entity is entitled to be a right-holder, this, in turn, accords it with legal personality and capacity, at least to some degree.[890]

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[885] This enabled some authors to label peoples (among other non-state legal persons in international law) as "secondary subjects of international law" (see: Mosler, Herman, Subjects of International Law, *Encyclopaedia of Public International Law*, Instalment 7, 1984, pp. 449-450).

[886] Thürer, Burri, *op. cit.* (footnote 325), pp. 117-119.

[887] The HRComm explicitly interpreted the common Article 1 of the ICCPR and the ICESCR as a right enjoyed by "all peoples ". See: General Comment no. 12: The Right to Self-Determination, Human Rights Committee, 1984.

[888] African Charter on Humans and Peoples' Rights is notable because, unlike most other human rights instruments, it contains numerous rights which are expressly conceptualized as "peoples" rights, see: Articles 19-24 of the African Charter.

[889] UNDRIP explicitly provides for a range of rights enjoyed by indigenous peoples. Similarly, International Labour Organization Convention no. 169 on Indigenous and Tribal Peoples, adopted in 1969, ascribes a range of rights to indigenous peoples.

[890] Compare: Vukas, *op. cit.* (footnote 303), pp. 483-492, especially 491. This view is shared, by, among others, Capotorti, who stated "dire qu'une entité possède la personnalité pour l'ordre juridique international denote exactement la capacité du sujet à devenir titulaire des droits et des obligations prévus par cet ordre" (see: Capotorti, Francesco, Cours général de droit international public, *Collected Courses of the Academy of International Law*, vol. 248, 1994, p. 42.) and Giuliano, Scovazzi and Treves, who defined legal subjectivity as "a synonym for (…) legal personality or legal capacity" (see: Giuliano, Mario, Scovazzi, Tullio, Treves, Tullio,

Having a legal capacity is exactly what delineates entities that are considered legal person in a legal system from those that are not. Therefore, it should be considered whether people could be regarded as holders of continuation of legal personality once territory of small island states becomes uninhabitable or even completely inundated by the rising sea levels.

3.2.10. **Peoples as holders of continuation of legal personality of small island states**

In traditional international law, having a permanent population is just one of the criteria for statehood. Moreover, the notion of population is understood as meaning all peoples that permanently reside on a state's territory, notwithstanding their ethic, cultural or other differences. In that regard, the population cannot be equated with peoples. What holds a population together is, primarily, its territorial unity, a fact that they permanently reside on a territory of a state.[891] This is also reflected in the Montevideo Convention, which in Article 9 stipulates that "The jurisdiction of states within the limits of national territory applies to all the inhabitants", and goes on proclaiming that "Nationals and foreigners are under the same protection of the law", thus including both groups within the notion of "inhabitants". On the other hand, what holds peoples together is a unity of identity, ethnicity, culture, a set of common characteristics.[892] While that holds true as a general observation, it does not mean that territorial criterion can be totally avoided in establishing peoples. When examples of peoples scattered around different territories are compared to peoples with a defined territorial base, the case in point can be made. One of the well-known examples of scattered community which shares common characteristics, albeit generally fails to be recognized as peoples are the Roma peoples. While maintaining a degree of common identity in name and certain cultural practices, traditional nomadism being among them, the Roma peoples are in themselves diverse as to the language they speak, religion, social norms, creating what has

Diritto internazionale – parte generale, Milan, 1991, p. 79). In international legal doctrine, this observation was, for a long time, in minority, due to being strongly contested by positivist approach which held a firm view, as expressed in the Lotus judgment of the PCIJ, that "international law governs relations between independent states" (see: The Case of the S.S. Lotus, *Publications of the Permanent Court of International Justice*, *Series A*, no. 10, 1927, p. 18).

[891] Vukas, *op. cit.* (footnote 303), p. 284.

[892] For further discussion see *supra* in 3.2.9.

been termed as "multifaceted Roma universe" rather then a specific group with determined set of characteristics that would form the comprehensive common identity.[893] All this makes their recognition as peoples more difficult, with the minority status and application of general prohibition of discrimination under human rights law instead of self-determination a norm in states which have significant numbers of persons identifying as Roma in their population, a practice apparently approved by both the former Human Rights Council Special Rapporteur for minority rights Rita Iszàk[894] and the European Court of Human Rights, which even for a long time did not recognize discrimination based on the non-recognition of Roma cultural identity, but only applied general standards on non-discrimination stemming out of the European Convention for the Protection of Human Rights and Fundamental Freedoms Article 14.[895] While this approach is understandable considering that even the minority status and effective non-discrimination policies often fail to be recognized in the case of Roma, it shows how identity based on common cultural or linguistic or ethnic characteristics is indeed vital in recognizing a specific group both as a minority or as peoples once they find themselves on territory that is under the sovereignty of a state where they do not form the majority.

In case of small island states faced with sea level rise, unity of identity is the only thing they could rely on. Here, the unity of identity means, however, a broader concept that, while it might, does not necessarily include common cultural or linguistic or ethnic characteristics, but rather the very indentity of them as islanders, members of the peoples that had to migrate from the same place due to the same chain of events. There will to remain bounf by the unity

[893] Comprehensive study of the human rights situation of Roma worldwide, with a particular focus on the phenomenon of anti-Gypsyism, Report of the Special Rapporteur on minority issues, Rita Izsák, Human Rights Council, A/HRC/29/24, 2015, p. 3.

[894] In her Report concerning the worldwide situation of the Roma, issued in 2015, the Special Rapporteur Izsák, after espousing the "minority rights-based approach" made, among others, the following concluding observation and recommendation: "The Special Rapporteur thus urges all relevant stakeholders to think outside the "poverty paradigm" and incorporate all aspects of minority rights into strategies that address Roma disadvantage, including the protection and promotion of Roma identity, language and culture and the guarantee of dignity and equality." (*Ibid.*, p. 21).

[895] See: Barth, William K., Minority Rights, Multiculturalism and the Roma of Europe, *Nordic Journal of International Law*, vol. 76, no. 4, 2007, pp. 382, 392.

of identity is instead what enables continuation of recognition as peoples.[896] Even if migration happens in a manner that would allow most or all of populations of small island states to remain physically united, that would most likely be on territory under foreign sovereignty. Therefore, unity of identity is what remains as a common defining factor holding a population together. That, however, does not necessarily preclude them from retaining the right to be considered as peoles. While the example of the Roma peoples might show in the opposite direction, territorial unity does not seem to be the necessary to establish (or, indeed, maintain) peoples. In the Western Sahara Advisory Opinion, the ICJ, after analysing the situation of nomadic tribes inhabiting the territory of Western Sahara, deemed the following: "That the Sherifian State at the time of the Spanish colonization of Western Sahara was a State of a special character is certain. Its special character consisted in the fact that it was founded on the common religious bond of Islam existing among the peoples and on the allegiance of various tribes to the Sultan, through their caids or sheikhs, rather than on the notion of territory".[897] By doing that, it acknowledged territory and territorial bonds as, although a strong indicium of peoplehood, as just one of the possible criteria under which it could be maintained. What, however, has to be acknowledged is that the ICJ did not, by recognizing the inhabitants of Western Sahara as peoples and their special bond with the Sultan of Morocco, qualified this relationship as territorial sovereignty that would allow for claim to statehood to be established based on it.[898]

In that regard, the claim for legal personality after territory becomes uninhabitable or disappears altogether could be based on continuity of relation between peoples and

[896] Thus, Soete observes that "a strong will and collective consciousness to remain a people, it seems a fair possibility that an island people can remain a people even when removed from its island. This is not to say peoplehood cannot disappear, and a loss of territory may more easily lead to a loss of other elements of a unique identity. Yet, it is only when a unique identity is no longer discernible, without an identifiable wrongdoer accountable for it, that we will likely be able to speak of a disappearance of peoplehood and the right to self-determination". See: Soete, *op. cit.* (footnote 381), p. 75. Similarly, Lapaš proposes that "For this reason, the (re)appearance of "peoples" or "nations" (here, referred to as CDNs), provided with international legal capacity, could enable the population of states affected by sea level rise to retain (or succeed to) the international legal personality (but not the statehood) of their disappeared state, retaining at the same time some of its rights and entitlements". See: Lapaš, *op. cit.* (footnote 769), pp. 29-30.

[897] Western Sahara Advisory Opinion, *I.C.J. Reports*, 1975, p. 44.

[898] Grote Stoutenburg, *op. cit.* (footnote 109), pp. 263-264.

institutions (government) of small island state.[899] Specifically, this could be done based on the human rights approach, specifically interpretation of right to self-determination. Moreover, there are arguments made that this way of understanding the state-peoples relations suites cultures of islanders of small island states more that Westphalian-inspired, Eurocentric approach currently taken by international law.[900] Means of operationalizing of that relationship will most likely depend on acquiescence of other states, primarily those hosting government institutions and populations of small island states.[901] Notwithstanding that, in the next part we will provide conclusions on the external self-determination of peoples of small island states.

3.2.11. **Conclusions on external self-determination as an expression of legal personality of small island states**

While many of the discussed scenarios for maintaining legal personality of small island states once sea level rise renders them uninhabitable or completely deterritorialized under existing international law provide interesting insights, it is hard to draw a conclusion that any of them can provide a clear-cut answer. First of all, analogies with traditional international legal concepts for maintaining statehood and legal personality seem misplaced. Finding new territory, as there is no habitable *terra nullius* in contemporary world, would require cession of part of a territory of another state, an operation in which possible cedent states would hardly be willing to engage. Existing entities *sui generis*, although from the outset they might seem as a possible role model for small island states, are exactly what name alludes to – *sui generis* situations, which cannot, in our view, be replicated to different set of circumstances. Engaging into works to create artificial ground might, under specific set of circumstances, be regarded as a solution, albeit expensive and technically very difficult one, thus very uncertain. Finally, extinction of sovereignty over territory and relocation of population would

[899] As observed by Grote Stoutenburg: "As is the case with all states, the essence and raison d'être of the 'deterritorialized' island state would be its people". See: *ibid.*, p. 385.

[900] Compare, for example, position taken by Mitra and Sanghi. See: Mitra, Ryan, Sanghi, Sanskriti, The small island states in the Indo-Pacific: sovereignty lost?, *Asia Pacific Law Review*, vol. 31, no. 2, 2023, p. 441.

[901] "It is indeed so that a state without territory would be severely limited in its role as a state and the rights and duties it has, being heavily tied to the state hosting its population and potentially also its government." See: Soete, *op. cit.* (footnote 381)., p. 166.

lead to loss of legal personality. The question remains – if and when this happen, and it was shown that traditional solutions for maintenance of legal personality of states under international law are not applicable – would it really mean the end of legal personality of such (small island) states?

In our opinion, the answers are both yes and no. Yes, it would mean loss of statehood as it is conceptualized under traditional international law. Under it, state as a legal person is indeed a firmly territorial concept, and it will continue to be.[902] An affirmation of this classic position seems to be reflected in the statement of the United Kingdom delivered to the ILC in June 2023, in advance of its 75th session which mentions that: "the United Kingdom's general practice has been to consider whether a State has, and seems likely to continue to have, a clearly defined territory with a population, a Government who are able of themselves to exercise effective control of that territory, and independence in its external relations".[903] On the other hand, we have seen a growing number of statements, coming from the small island states endangered by the sea level rise, but also from other states, that have proclaimed support for continuation of "statehood" of small island states even after total inundation or uninhabitability becomes a reality. The Declaration on the Continuity of Statehood and the Protection of Persons in the Face of Climate Change Related Sea Level Rise, adopted by the member states of the PIF in 2023, explicitly declares that "statehood and sovereignty of Members of the Pacific Islands Forum will continue, and the rights and duties inherent thereto will be maintained, notwithstanding the impact of climate change-related sea-level rise",[904] basing it on the assumption that "international law supports a presumption of continuity of statehood and does not contemplate its demise in the context of climate change-related sea-level rise".[905] Regarding other states, the Australia-Tuvalu Falepili Union Treaty, concluded

[902] Crawford observed that "while statehood is a legal concept with a determinate, though flexible, content it is probably the only such concept in the field of legal personality". See:Crawford, *op. cit.* (footnote 301), p. 718.
[903] Sea-level rise in International Law, Submission of the United Kingdom of Great Britain and Northern Ireland, p. 1, available at: https://legal.un.org/docs/?path=../ilc/sessions/75/pdfs/english/slr_uk.pdf&lang=E (accessed: 10th October 2024).
[904] Declaration on the Continuity of Statehood and the Protection of Persons in the Face of Climate Change Related Sea Level Rise, 2023, available at: https://forumsec.org/publications/2023-declaration-continuity-statehood-and-protection-persons-face-climate-change (accessed: 10th October 2024), Paragraph 13.
[905] *Ibid.*, Paragraph 12.

in the same year of 2023, affirmed that "the statehood and sovereignty of Tuvalu will continue, and the rights and duties inherent thereto will be maintained, notwithstanding the impact of climate change-related sea-level rise".[906] Statements affirming the same position have also been submitted to the ILC by states and other international legal persons which commented upon the work of co-rapporteurs of regarding the issues of statehood and human rights under the topic Sea level rise in relation to international law. For example, the Submission of the Principality of Lichtenstein to the ILC on the topic Sea Level Rise in relation to international law, delivered to the ILC in October 2021 in anticipation of its 73rd session, contained the following observation: "Liechtenstein advocates an approach which acknowledges the novel nature of the challenge created by rising sea-levels, and emphasizes the continued existence of a people who retain their right to self- determination even in a situation of the inundation of their territory, including the expression of that right through continued statehood."[907] The submission of Antigua and Barbuda, delivered in June 2023 in anticipation of the ILC's 75th session reiterated this, containing the following words: "rising sea levels cannot be a justification for the erasure of a State and for denying the vulnerable State vital representation in the international legal order".[908] However, at the same time, some states submitted comments that were couched in more cautious terms. Thus, Germany observed the following concerning the issue of continuation of statehood of small island states once uninhabitability and, eventually, inundation, become a reality: "a clear answer cannot be derived presently from existing international law de lege lata",[909] adding that the

[906] Australia-Tuvalu Falepili Union Treaty, Article 2, Paragraph 2, Section b.

[907] Submission of the Principality of Lichtenstein to the International Law Commission on the topic "Sea Level Rise in relation to international law", available at: https://legal.un.org/docs/?path=../ilc/sessions/73/pdfs/english/slr_liechtenstein.pdf&lang=E (accessed: 10th October 2024), p. 2.

[908] Antigua and Barbuda: Response to the International Law Commission's Second Issues Paper on Sea Level Rise and the effect on Statehood and Protection of Persons, available at: https://legal.un.org/docs/?path=../ilc/sessions/75/pdfs/english/slr_antiguabarbuda.pdf&lang=E (accessed: 10th October 2024), p. 10.

[909] Sea level rise in relation to international law: German Submission to the International Law Commission in preparation of its 75th session (2023) – Answers to Questions posed in the Commission's report of the 73rd session (2022), available at: https://legal.un.org/docs/?path=../ilc/sessions/75/pdfs/english/slr_germany.pdf&lang=E (lasr accessed: 10th October 2024), Chapter III, p. 4.

solution can be achieved only "through the comprehensive examination and exploration of legal options". Finally, the first ever High-Level Meeting on Sea Level Rise, organized in the United Nations in September 2024 has seen a stream of declarative statements which affirmed continuation of statehood of small island states in case of deterritorialization happening as a consequence of sea level rise, but also recognized that other options for continuation of legal personality must be contemplated.[910]

In other words, for a small island state to continue its legal personality as a state under international law, a reconceptualization of what is a state should be done. Traditional concepts of statehood based on the criteria of a defined territory with a permanent population and independent government being the *differenta specifica* between statehood and other forms of legal personality would eventually fail to provide the basis for the continued legal personality, even if continuity of statehood extended beyond the point of effective fulfillment of them.[911] Statehood, as a concept "has its reasons – it is not a naturalistic *deus ex machina*. If and when those reasons do not exist, statehood can claim no particular protection".[912] As creation of different categories of legal persons in international law is dependent on existing legal persons, of which states still form primary and most important category, only through will of other states small island states which lost elements of statehood can still be considered legal persons under international law. As current state of *opinio juris* and practice of states does not show signs of a will to reconceptualize the legal concept of a state giving it a meaning that would go beyond territory as a prerequisite for existence of its legal personality, this could only be a solution *de lege ferenda*. Therefore, solutions which are based on trying to conceptualize states as non-territorial legal persons would require seminal changes of both practice of states and *opinio juris*.[913] At the same time, there is a growing movement among

[910] For the summary of statements delivered during the high-level meeting, see: https://www.un.org/pga/78/high-level-meeting-on-sea-level-rise/ (lasr accessed: 10th October 2024).
[911] Compare: Craven, *op. cit.* (footnote 654), pp. 158-159.
[912] Koskenniemi, Maarti, The Future of Statehood, *Harvard International Law Journal*, vol. 32, no. 2, p. 407-408.
[913] As Lee and Bautista note, while distinguishing statehood of other forms of legal personality: "International law, however, cannot fashion States from its own cloth; a State must possess the necessary characteristics of statehood." (Lee, Seokwoo, Bautista, Lowell, Climate Change and Sea Level Rise: Nature of the State and of

states which recognizes continuation of legal personality, or even statehood, of small island states, albeit without stating as to what this statehood will amount. It seems these solutions are going in the direction which will eventually develop according to the will of states themselves, as it will involve creation of new international legal rules applicable on the specific status of legal personality of small island states. Therefore, if the claim to continuation would have been affirmed, the international community will find itself in a situation of having to reach consensus on the form of legal personality of small island states.

The consequences would be much more far-reaching than providing possible solution for safeguarding statehood of small island states. The whole distinction between statehood and other forms of international legal personality might become unclear. As explained by numerous international legal scholars, what differs states from other forms of international legal personality is its sovereignty.[914] While there are numerous definitions of what sovereignty means and entails, territory is what delimits sovereignty between states, with extraterritoriality being the exception.[915] Nothwithstanding that, all nuances of definition of sovereignty can be subsumed under a common quality of the state having a legal right to freely establish a supreme power (*suprema potestas*) in form of a legal order imposed upon a designated territory and population inhabiting it.[916] Real economic, political, or, indeed, governmental ability to exercise that power might be limited, as in case of protectorates of accession of states to federations. Even, at times, as evidenced by cases of governments in exile or states born due to exercise of right to self-determination in the process of decolonization, exercise of sovereignty over territory and population of a state might be factually non existent. However, its legal title must not disappear. Debuting or reinventing (based on analogies with pre-Westfalian concepts of legal personality[917]) a non-territorial state into practice of international law would change it upside down. First, traditional lines of delimitation of jurisdiction would no longer function. As remarked by arbitrator Huber in

State Extinction, in: Barnes, Richard, Long, Ronán (eds.), *Frontiers in International Environmental Law: Oceans and Climate Challenges: Essays in Honour of David Freestone*, Leiden, 2021, p. 206)

[914] Salmon, *op. cit.* (footnote 643), p. 55.

[915] Milanović, *op. cit.* (footnote 256), pp. 59-60 *et passim*.

[916] Compare, for example: Salmon, *op. cit.* (footnote 485), pp. 21-23.

[917] For the dicussion of pre-Westfalian concepts of legal personality see *supra* in 3.2.4.

the Island of Palmas case, the territorial sovereignty "serves to divide between nations the space upon which human activities are employed". [918] While, with the advent of globalization and creation of supranational systems of governance, including legal systems (of which, one of the most notable indeed is the system of protection of human rights), there have been various predictions that statehood, as a concept of delimitation of power, will become outdated and eventually disappear alltogether, this has not happend.[919] Indeed, in the contemporary international legal order, statehood seems to continue to occupy a strong position among the fundamentals of international legal order. With the non-territorial statehood such delimitations would no longer be in place, prompting a situation where competences of non-territorial state would be difficult to delimit and define. Morevoer, this could potentially lead to proliferation of state-like subjects without neither doctrinal nor practical clarity that such a seminal concept should possess. Various non-state actors, especially minorities and indigenous communities could claim a quasi-state status based on such a precedent.[920] It is hard to imagine states to be willing to recognize as states entities that are non-territorial due to the consequences and effects this would entail.[921] Question of membership of such deterritorialized states in the United Nations can show how complicated that might by. The "microstate debate", which plundged the United Nations especially during the 1970s shows how states were reluctant to accept smaller states into the full membership of the United Nations, while these (quasi) states certainly fulfilled more of the traditional criteria for statehood than deterritorialized states could.[922] Therefore, statehood as a concept, should, in our opinion, for a time being remain reserved for territorial legal persons, as it is in the international *lex lata*.

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[918] The Island of Palmas (or Miangas), United States of America v. The Netherlands, PCJI, 1928, p. 9.

[919] See: Salmon, *op. cit.* (footnote 485), pp. 40-51, who lists humanity, civil society, global international organization, federal organization á la European Union, and good governance as "credible alternatives" proposed to replace statehood in contemporary international legal order.

[920] Compare: Soete, *op. cit.* (footnote 381), p. 167; Grote Stoutenburg, *op. cit.* (footnote 109), p. 304.

[921] Similarly, Soete observes that "it may open the door to other peoples without sovereign territory to demand a similar quasi-state status, a phenomenon which may dissuade states with indigenous communities to recognize a deterritorialized island state". See: Soete, *ibid.*, p. 167.

[922] Compare: Grote Stoutenburg, *op. cit.* (footnote 109), p. 378.

However, this does not mean that small island states should count on their disappearance as being certain once rising sea levels make their territory submerged and/or uninhabitable. Legal personality could, indeed, be safeguarded through other means than do not constitute statehood. The process is not unknown to international law. In its relatively recent past, during the 19th and 20th century, international legal theory and practice had gone through significant changes regarding the concept of legal personality.[923] It is enough to think about international organizations or an individual's legal personality, concepts developed and accepted as part of international law only during the modern times. Existing states, as primary creators of legal norms (along with other existing international legal persons that contribute to the process, primarily international organizations), do posess a capacity to recognize new, tailor-made forms of legal personality.[924] It seems to us that this avenue might be followed in an effort to provide small island states with legal personality that would substitute for statehood. In practice, this would mean that small island states' position under international law would not be correlated to some other existing concept of legal personality, but would rather be accorded a special status. This status would combine some of the elements of their previous sovereignty and sovereign rights they enjoyed as states, but would also recognize the changed reality of their existence under international law.

Small island states, could, arguably, be that category in a situation in which they lose territory, but remain a legal person under international law. The question is – what would be the basis for such an assumption? Can islanders indeed claim right to self-determination as a basis for making a claim to continuation of legal personality?[925]

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[923] As noted by Berezowski: "Les categories des sujets du droit international et leur nombre variant selon les relations internationals existantes et les règles juridiques de ces relations" (Berezowski, Cezary, Problèmes de la subjectivité internationale, in: Ibler, Vladimir (ed.), *Mélanges offerts à Juraj Andrassy*, Hague, 1968, p. 32).
[924] Worster, William Thomas, Relative International Legal Personality of Non-State Actors, *Brooklyn Journal of International Law*, vol. 42, no. 2, 2016, p. 221.
[925] According to Kirigis, self-determination claims in international law can have degrees of legitimacy. In a situation of small island state faced with deterritorialization due to sea level rise, continuation of legal personality in a changed form might be just the degree that would be considered legitimate (and, as such, acceptable) by the international community. See: Kirigis, *op. cit.* (footnote 321), pp. 308-309 and *supra* in 3.1. and 3.2.

This would require creation of a new category of legal persons under international law, for which various propositions are already been made in scholarly literature.[926] First common point observed is that such a legal person would not be sovereign over a territory, but rather permitted by another sovereign state to operate from its territory. Second, regarding population of such a legal person, core of it would be formed of relocated islanders. Here, it is possible for them either to be living as a group centred in one host state or to be scattered around different states. Finally, the government of such a state would be allowed to operate independently from the host state, thus preserving its independence and capacity to enter into relations with other states, international organizations and other subjects of international law. As such, formerly territorial states would be able to claim continuity, albeit in a non-territorial form, which would however not drift away completely from other two elements of statehood as understood under classical international law doctrine and practice. Population would be relocated and *de facto* living on territory over which another state wields sovereignty, however they would remain citizens of an entity which is a continuation of previous small island state. Similarly enough, other states, while acknowledging such an entity would also acknowledge its right to operate independently in international affairs and acknowledge their willingness to enter in diplomatic and other types of relations with it, thereby confirming that the third criterion remains fulfilled. Existence of such an entity will depend on will of other states, thereby being similar, but not equal, in nature to constitutive recognition of states. This is because of a very fact that such an entity is heavily reliant on other states willingness to allow it to operate on their territory. This is especially true for a state which is a host state to the government, however is not confined to that state only, as any state in which citizens

[926] Proposal for a new international legal personality, tailored specifically for small island states which will lose all habitable territory due to sea level rise have been made by, among others, Burkett, who proposes an insightful concept based on nationhood (see: Burkett, *op. cit.* (footnote 759), pp. 89-121), Lapaš, who proposes a wholly new *sui generis* entities which he calls the "climate deterritorialized nations (CDNs)" (see: Lapaš, *op. cit.* (footnote 769), pp. 1-35), Willcox, who builds upon the philosophical concept of "family resemblances" as understood by Wittgenstein (see: Willcox, Sussanah, Climate Change and Atoll Island States: Pursuing a 'Family Resemblance' Account of Statehood, *Leiden Journal of International Law*, vol. 30, no. 1, 2017, pp. 117-136) and Blanchard, who proposes a solution based on socio-legal theories of diasporas, cosmopolitanism, global governance, equity and morality (see: Blanchard, Catherine, Evolution or Revolution: Evaluating the Territorial State-Based Regime of International Law in the Context of the Physical Disappearance of Territory due to Climate Change and Sea-Level Rise, *Canadian Journal of International Law*, vol. 53, 2015, pp. 107-118).

of such an entity live would have to allow for such a relation between their residents and their former state to proceed.

To be more concrete, the changes that would inevitably happen are those intrinsically linked to territory and population previously living on it. First of all, such a legal person that would be a successor to small island state's legal personality would not be territorial nor have direct sovereignty over any population.[927] Before confinuing, a point of clarification must be made: labelling the new form of legal personality that would replace small island state as "successor" does not mean that traditional rules of state succession would apply automatically. Notoriously undercodified, the general law on state succession is based on two conventions, namely the Vienna Convention on Succession of States in respect of Treaties[928] and the Vienna Convention on Succession of States in respect of State Property, Archives and Debts.[929] Both conventions apply to, as determined in Article 2 of both of them, to succession understood as "replacement of one state by another".[930] As a new entity that would assume the legal personality of former small island state which lost its statehood due to sea level rise would not be a state, but rather a new, *sui generis* form of legal personality, the traditional rules of state succession do not apply. This, however, does not mean that the transfer of legal personality between the former small island state and a new form of legal personality would happen in a legal vacuum.

Coming into existence of such a form of legal personality would require consent of international community, which would be obtained through recognition of legal personality of such an entity by states.[931] Recognition of other states would thus not only be of

[927] That does not mean there would be no link between population and that entity. On the contrary, as explained *infra* in 3.3., these links are essential for safeguarding cultural rights of the islanders.

[928] Vienna Convention on Succession of States in respect of Treaties, 1978, *United Nations Treaty Series*, vol. 1946, no. 33356, 1996, pp. 3-188.

[929] Vienna Convention on Succession of States in respect of State Property, Archives and Debts, 1983, A/CONF.117/15, 1983.

[930] *Ibid.*, Article 2, Paragraph b.

[931] Compare Kułaga's assertion, who, while maintaining that territory is indispensable prerequisite of statehood, nevertheless states that "In a situation where it will continue to recognize the "government in exile" – despite its permanent loss of territory and with limited (if any) effectiveness, this recognition can have a consolidating impact speaking in favour of continuing statehood." (Kułaga, Łukasz, *op. cit.* (footnote 833), p. 131).

constitutive nature for coming into existence of these legal persons, but would also represent a progressive development of international law.[932] Progressive development not in a sense that states will be recognizing non-territorial entities as legal persons, which is not at all new or unprecedented to international law, but in a sense that such entities would replace legal personality of former states, deterritorialized due to sea level rise.[933] This new category of legal persons would thus be strictly specific in nature and restricted to cases of loss of statehood due to sea level rise. However, the question remains – what substantial rights and duties would these new legal persons have under international law?

First of all, any exercise of rights and duties of these new legal persons, as they will be *ex situ* (therefore for all practical purposes operating from a territory of another state), will be dependent on a consent of that state. Historical examples of governments in exile prove this assumption. During the Second World War, governments in exile of occupied European states operating from the soil of Allied States required consent of their host government (the United Kingdom's, for most of the cases) in order to perform functions reserved to states in relation to their nationals.[934] This consent was obtained through continued recognition by the United Kindgom of *de jure* sovereignty being vested in governments in exile, but nevertheless created numerous practical problems and cases of overlapping jurisdiction.[935] Here, the doctrine of fundamental rights and duties of states might be of some help.[936] Fundamental rights and duties of states have long been part of international law, culminating, arguably, with their codification in the famous Friendly Relations Declaration.[937] Their

[932] In a sense that it is creating new type of legal personality, but confined only to this case.

[933] As observed by Lapaš: "Thus, perhaps for the first time in history, a non-state entity would appear as a successor of its predecessor state." See: Lapaš, *op. cit.* (footnote 769), p. 31.

[934] Oppenheimer, *op. cit.* (footnote 649), p. 594.

[935] *Ibid.*, pp. 583 *et passim.*

[936] Before discussing specific rights and obligations, it must be noted that international law has, so far, accorded these rights in full only to states. Other established international legal persons (e. g. international organizations) have in practice been accorded some elements of these rights, however they formally remain confined to states. Therefore, with transformation of legal personality of small island states to a *sui generis* status, it remains to be seen how much of their content small island states will be able to retain. As Shaw notes: "The fundamental rights of states exist by virtue of the international legal order, which is able, as in the case of other legal orders, to define the characteristics of its subjects." See: Shaw, *op. cit*. (footnote 300), p. 211.

[937] Adopted by the United Nations General Assembly back in 1970, it is today widely considered part of customary international law (see: Accordance with International Law of the Unilateral Declaration of

classifications in international legal doctrine continue to differ. However, for the purposes of this work, three will be of particular importance, namely rights to independence[938], right to sovereign equality[939], right to communication.[940] Regarding independence, it is highly debatable to which extent independence of such legal persons will go. Inevitably, their institutions will be located on the territory which is under sovereignty of another state. That state might restrict independent handling of affairs of these institutions, which would present a significant obstacle to independence.[941] However, to address this uncertainty, previous arraignment with the host state, in a form of an international agreement, would be crucial.

Basing the legal personality on arrangements with the host state, which would logically take form of a treaty between the small island state and the host state, leads to the question of the ability of the legal person that will "succeed" the small island state to become part of international agreements. The question is two-folded. First, whether such legal person, which is not a sucessor in the traditional meaning of the term, but rather a new form of non-territorial legal personality, can remain party to the treaties that the small island state has previously been a party to? Second, whether that legal person can have a treaty-making capacity, or *jus contahendi*?

Regarding the first question the Vienna Convention on the Law of Treaties provides some guidance. Article 61 Paragraph 1 of the Vienna Convention on the Law of Treaties stipulates that "A party may invoke the impossibility of performing a treaty as a ground for terminating or withdrawing from it if the impossibility results from the permanent disappearance or destruction of an object indispensable for the execution of the treaty. If the impossibility is

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Independence in Respect of Kosovo, Advisory Opinion, I.C.J. Reports, 2010, p. 437). It must, however, be noted that any solution that would envisage extending iterations of these rights to new legal persons that would function as successors to small island states would, of course, be *de lege ferenda*.

[938] *Ibid*.

[939] On the conceptualization of right to sovereign equality in the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, see: Rosenstock, Robert, The Declaration of Principles of International Law Concerning Friendly Relations: A Survey, *American Journal of International Law*, vol. 65, no. 4, 1971, pp. 733-734.

[940] See: Andrassy, *op. cit.* (footnote 103), pp. 122-123.

[941] Compare: Wong, *op. cit.* (footnote 842), p. 373.

temporary, it may be invoked only as a ground for suspending the operation of the treaty."[942] The ILC in its commentary to the draft articles that provided the basis for the text of the Vienna Convention on the Law of Treaties explicitly named "submergence of an island" as a condition that would trigger the application of this provision in cases where the performance of the treaty is intrinsically linked to the island thus forming the object of the particular treaty obligation.[943] While the case that was envisaged by the ILC at the time of adoption was certainly not the submergence of the whole territory of a state, but rather only of an island forming its part, it seems plausible to follow the same logic. Impossibility of performance could indeed be invoked in case of treaties which were inextricably linked with the territory of a small island state that has become submerged and therefore permanently disappeared.

In turn, this gives the answer to the second question, that of *ius contrahendi* of legal persons that act as successors to small island states. In our opinion, the question whether they would possess the capacity to enter into international agreements should be answered in affirmative. Among the arguments supporting such a claim, it should be definitely noted that *ius contrahendi* is not in any case restricted to states under contemporary international law.[944] Moreover, these legal persons would be successors to states, which could potentially mean also succession as to international agreements.[945] However, even that cannot be taken for granted and will likely depend on the acquiescence of other states parties.[946] Similarly, *ius contrahendi* of such legal persons in regard to concluding future agreements would not be

[942] Vienna Convention on the Law of Treaties, 1969, United Nations Treaty Series, vol. 1155, no. 18232, 1980, Article 61 Paragraph 1.
[943] Draft Articles on the Law of Treaties, with Commentaries, *Yearbook of the International Law Commission*, vol. II, 1966, p. 256.
[944] The most important example of legal persons other than states possessing *ius contrahendi* in international law are international organizations. Already existing customary law confirming right of international organizations to conclude international agreements was codified in 1986 Vienna Convention on Law of Treaties between States and International Organizations or Between International Organizations. See: Lapaš, *op. cit.* (footnote 769), p. 30.
[945] It is, of course, clear that agreements "for which the presence of territory was an indispensable condition", would be terminated within the meaning of the Article 61 of the Vienna Convention on the Law of the Treaties. See: Grote Stoutenburg, *op. cit.* (footnote 109), p. 439.
[946] Allen and Prost, *op. cit.* (footnote 830), p. 179.

established under positive international law only by virtue of their existence. It would depend on will of other states to become a party agreements with the successor entity to the small island state.[947] On the other hand, for these legal persons to operate, as for any legal person under international law, it is of vital importance to be able to enter into international agreements.

Sovereign equality, another fundamental right accorded to states, is most clearly reflected in membership in international organizations. The most notable example, of course, is the UN General Assembly.[948] Some form of representation in such organizations should not present a difficult case to argue, however according them full membership is. Although states only are represented in them in full capacity, there are other legal persons which are accorded observer status.[949] The question, however, remains what status such legal persons will be accorded in international organizations. Whether they will be allowed to become full members or not? Their full membership would require significant changes, as under present constitutive acts of most universal international organizations, only states can become their members.[950] However, forms of legal personality that have been referred to as "states" by the General Assembly for purposes of their inclusion in the proceedings of this principal organ of the UN, and the organisation as a whole, did not always comply with the meaning of the term in general international law. Historcally, Ukraine and Belarus were, for political reasons of balance of voting power in the General Assembly, admitted to the full membership status in the UN at the San Francisco conference, becoming founding members of the United Nations.[951] In 1944, Article 18a was added to the Soviet Constitution of 1936, giving the 16 republics constituting the Union of Soviet Socialist Republics rights to "enter into direct relations with with foreign states, to conclude agreements with them, and to exchange

[947] Compare: Grote Stoutenburg, *op. cit.* (footnote 109), pp. 440-442.

[948] Membership of General Assembly consist of all United Nations member state with equal rights as to the participation in debate and voting rights. See: Rules of Procedure of the General Assembly, United Nations General Assembly, A/520/Rev.20, 2022.

[949] This is, in fact, already the case with *sui generis* entities, as both the Holy See and the Sovereign Military Order of Malta enjoy such status in the United Nations.

[950] For example, this is the case with the United Nations according to Article 4 of the United Nations Charter.

[951] See: Hazard, John N., Soviet Republics in International Law, in: Bernhardt, Rudolf (ed.), *Encyclopedia of Public International Law*, Amsterdam/New York, vol. X, 1987, pp. 418-423.

diplomatic and consular representatives".[952] Relying on this Article, the Soviet representatives at the Dumbarton Oakes Conference claimed membership in the future organization of United Nations for all 16 Soviet republics, based on an argument that Article 18a gave international legal personality to all the republics.[953] However, at the same time, the Article 14a of the Soviet Constitution required the "establishment of the general procedure for the mutual relations of Union Republics with foreign states" to be created on the federal level.[954] This article, which cast doubt on both the formal and actual independence of Soviet republics, was cited by western powers as a reason for opposing the Soviet proposal.[955] Finally, a compromise was reached at Yalta Conference, where it was decided that only Ukraine and Belarus will be accepted as members of the future United Nations.[956] While the Soviet international legal doctrine consistently, up until the dissolution of Soviet Union, maintained that the separate international legal personality of, at least, Ukraine and Belarus indeed existed under international law,[957] these republics never conducted international relations independently of central government of Soviet Union, maintained diplomatic presence abroad or participated in notable international conventions. This, along with the legal personality was claimed based on constitutional provisions rather than fulfilment of international law criteria (primarly independence) and recognition by other states has led Western scholars to conclude that their status as members of the Soviet Union clearly indicated that they were not "independent" states, but rather constituent units of the state that was concurrently member of the UN.[958]

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[952] See the english translation, as quoted in: *ibid.*, p. 420.

[953] *Ibid.*

[954] *Ibid.*

[955] *Ibid.*

[956] *Ibid.*

[957] Thus, one Soviet textbook of international law from 1961 included the following observation: "both the Soviet Union as a whole and each Union Republic separately are full subjects of international law". See the work quoted in: *ibid.*, p. 421.

[958] For example, Bernier, referring to the case of the two Soviet republics and comparing it to the Baltic republics, which at the same time were refused membership in international organizations due to their percieved loss of statehood, concluded that "it must be acknowledged that constitutional provisions are not enough to grant international status to member states of federations" (Bernier, Ivan, *International Legal Aspects of Federalism*, London, 1973, p. 81).

Moreover, during the microstate debate, there have been proposals for creating the form of membership that would accommodate for the small states in a form that would allow them to participate in the certain activites of the UN, albeit being short of full membership.[959] Somewhat different, but also similar category created at the time is that of a microstate. Defined in literature as "very small states",[960] debates on microstates mostly resolved around their ability to perform governmental functions, including those related to participation in international relations at the UN level. This involved their ability to participate in various UN's activities, including those related to collective measures, but also very representation of microstates in the United Nations, for which they were judged to be lacking "highly qualified manpower and money".[961] Moreover, the critique stressed the purpoted disbalance of the decision-making process in the General Assembly, which the admission of microstates would had created, as, due to the principle of sovereign equality implemented in the General Assembly, their votes could eventually form a significant contingent, highly disproportionate to their size, population, or economic power.[962] As balance of power and influence over newly admitted states dominated decisions of the matter during the Cold War, these concerns resulted in member states of the organization not easily accepting the membership of microstates. For example, San Marino became a UN member only in 1992,[963] while its earlier application lapsed due to inaction of principal organs of the UN.[964] Similarly, Principality of Monaco, the smallest European member state in the United Nations became a UN member state only in 1993.[965] Earlier, Monaco applied for membership, however later withdrew his

[959] As catalogued by Harris, five proposals for status of microstates participation in the works of the United Nations, in particular the General Assembly, were contemplated (observer status, limited participation in the United Nations Committees, regional membership, weighted voting, and technical assistance, respectively). See: Harris, *op. cit.* (footnote 363), p. 41.
[960] Dommen, *op. cit.* (footnote 741), p. 1.
[961] Security Council official records, 24th year, 1505th meeting, 27th August 1969, New York, S/PV.1505, 1972, p. 3.
[962] See: *ibid. et passim*, Duursma, *op. cit.* (footnote 424), p. 136.
[963] Admission of the Republic of San Marino to membership in the United Nations, United Nations General Assembly, A/46/L.66, 1992.
[964] Dommen, *op. cit.* (footnote 741), p. 4.
[965] For the chronology of events surrounding the admission of Monaco to the membership in the United Nations, see: Monaco and the UN, available at: https://mission-onu-ny.gouv.mc/en/monaco-and-the-un (accessed: 20th October 2024).

application, ostensibly after reciving negative signals from member states on the question.[966] Even membership of state as big as Iceland received the same fate, lapsing due to inaction of the principal organs.[967] No difference occurred with small island states. Marshall Islands became UN member state in 1991.[968] Kiribati waited for membership in the United Nations until 1999,[969] just like Tuvalu, which became a member state in 2000.[970] Only Maldives were able to advance their membership in the earlier phase, when their application was approved and they became member state in 1965,[971] on the height of decolonization process and subsequent enlargement of the UN based on applications of newly independent states emerging from the process of decolonization. The so-called "microstate problem" in the UN generated much debate on how to establish a relationship between the organization and microstates that would not amount to full membership, but would rather be of a different, "lesser" nature. First notable proposal came in 1967, when then UN Secretary General U Thant gave the following remarks in his Annual Report to the General Assembly: "I would suggest that it may be opportune for the competent organs to undertake a thorough and comprehensive study of the criteria for membership in the United Nations, with a view to laying down the necessary limitations on full membership while also defining other forms of association which would benefit both the "micro-States" and the United Nations. I fully realize that a suggestion of this nature involves considerable political difficulties, but if it can be successfully undertaken it will be very much in the interests both of the United Nations and of the "micro-States" themselves. There are already one or two cases where the States concerned have realized that their best interests, for the time being at least, rest in restricting themselves to membership in certain specialized agencies, so that they can benefit fully from the United Nations system in advancing their economic and social development without

[966] Dommen, *op. cit.* (footnote 741), p. 4.
[967] *Ibid.*
[968] Admission of the Republic of the Marshall Islands to membership in the United Nations, United Nations General Assembly, A/46/3, 1991.
[969] Admission of the Republic of Kiribati to membership in the United Nations, United Nations General Assembly, A/RES/54/1, 1999.
[970] Admission of Tuvalu to membership in the United Nations, United Nations General Assembly, A/RES/55/1, 2000.
[971] Admission of the Maldive Islands to membership in the United Nations, United Nations General Assembly, A/RES/2009(XX), 1965.

having to assume the heavy financial and other responsibilities involved in United Nations membership. The League of Nations had to face the same issue over the question of the admission of certain European States which were then referred to as "Lilliputian" States. Although the League of Nations was unable to define exact criteria, it prevented in due course the entry of the "Lilliputian" States."[972]

Indeed, at the time of League of Nations, San Marino, Monaco, and Liechtenstein applied for membership in the organization, respectively.[973] While the League of Nations never resolved on their applications, the matter was discussed at the committee level, which resulted in proposals for three distinct forms of membership: associated membership, limited participation membership, and represented membership, respectively.[974] The first system (associated membership), envisaged a form of association with the League of Nations insomuch as microstates would receive a right to participate in debates on all matters, thereby amounting to full representation, however without a vote.[975] Second system (limited participation membership) allowed microstates to become members with right to participate in debates, but also right to vote, albeit only in matters concerning their national interests.[976] Finally, the third system (represented membership) allowed only for representation of microstate by another member state, thereby denying microstates membership in the League of Nations proper, however providing for their interests to be heard and decided upon interventions of the representing state.[977] As the League of Nations never decided on the matter of possible membership of European microstates, the proposals remained theoretical speculations which were never implemented in practice. Similarly, during the process of decolonization, which initiated the microstate debate, proposals similar to one sketched in

[972] Introduction to the Annual Report of the Secretary-General on the Work of the Organization, 16 June 1966--15 June 1967, United Nations General Assembly, A/6701/Add.1, 1967, p. 29, Paragraph 165.
[973] For the text of applications of San Marino and Monaco submitted to the League of Nations in 1920, see: Request for Admission to the League, Monaco, San Marino, *League of Nations Official Journal*, vol. 1, no. 5, 1920, pp. 264-266. For the request of Liechtenstein, see: Request for Admission to the League of the Principality of Liechtenstein, League of Nations, Documents of the Assembly, 20/48/18, 1920.
[974] Report of the First Committee on the Position of Small States, League of Nations, Second Assembly, A/119(2), 1921, p. 3. See also: Duursma, *op. cit.* (footnote 424), p. 134.
[975] *Ibid.*
[976] *Ibid.*
[977] *Ibid.*

the words of U Thant cited in this chapter, emerged. The Security Council even established a Committee of Experts, providing it with a mandate to prepare a study on alternative membership which would allow for microstates that emerged out of the process of decolonization to become members of the UN.[978] While the Committee of Experts indeed met several times and produced one interim report in which it delinated its course of work, it also explicitly stated that it is, at that stage of its work, "not in a position to formulate specific recommendations and to submit them to the Security Council".[979] However, the interim report contained two annexes, which consisted of two proposals delivered to the Committee of Experts by the governments of the United States and the United Kingdom. Both proposals consisted of elaboration on the possible forms of alternative membership with similar final outcome: microstates would be allowed to join the UN, albeit in a lesser capacity than that of full members. The United States proposed a form named in the proposal "United Nations associate membership", which would allow microstates to "enjoy the rights of a Member in the General Assembly except to vote or to hold office".[980] In other organs (including Security Council and the Economic and Social Council), microstates would enjoy only "appropriate rights".[981] Concerning obligations of member states, associate members would "bear the obligations of a Member except the obligation to pay financial assessments".[982] United Kingdom's proposal involved slight modifications to the legal modalities of such membership, providing that it would be effectuated based on the voluntary renunciation of certain rights by microstates in a form of a declaration attached to its application for membership.[983] This would, in the opinion of the United Kingdom, safeguard the principle of sovereign equality (as renunciation of full membership rights would be made by the applicant

[978] The Committee of Experts, consisting of representatives of all members of the Security Concil, was established by that body in August 1969. See: Interim Report to the Security Council of the Committee of Experts Established by the Security Council at its 1506th Meeting, United Nations Security Council, S/9836, 1970, Paragraph 1.
[979] *Ibid.*, Paragraph 7.
[980] *Ibid.*, Annex I, Paragraph 3, Subparagraph a.
[981] *Ibid.*, Annex I, Paragraph 3, Subparagraphs b and c.
[982] *Ibid.*, Annex I, Paragraph 3, Subparagraph e.
[983] *Ibid.*, Annex II, Paragraph 3, which includes the model proposal of such a declaration.

state itself), thereby not requiring a formal amendment of the Charter of the United Nations.[984] Of course, such members would have their obligations reduced as well. However, nothing came out of the discussion. The microstate debate soon died out and no definite conclusions were ever reached. The Committee of Experts never produced a definition of microstates or associate membership, nor reached any conclusions, for that part.[985] The question definitely lost its practical relevance with the admission of even the smallest states to the UN which happened over the course of the last decade of the 20th Century.[986]

Finally, in 2004, while delineating the rights and priviledges of the Holy See, the General Assembly referred to the Holy See as "permanent observer state".[987] It seems that, at least for the purposes of membership in the UN, it can be agreed with Koskenniemi, who observed that: "The status of statehood can be associated with various sets of rights and duties. It carries no given, determinate, normative implications. (…) The construction of rights and duties-giving substance to statehood-remains a matter of political adjustment, and of finding a contextual equilibrium in particular circumstances."[988] The practice is also attested in regard of recognition of states and governments. Recognizing states have, especially in situations which they considered to be of a politically sensitive nature and therefore not suitable for straightforward recognition of an entity as a state, recognized provisional arrangements which did not conform to any traditional form of legal personality under international law. For example, in the concluding days of the First World War, Czecho-Slovak National Council was recognized by the French, Italian and British governments as "the supreme organ of the Czechoslovak movement in Allied countries", which is a form that neither conforms the idea of statehood nor government in exile in traditional sense.[989] Of course, this arrangement has been of transitory nature and had been treated as such by the recognizing

[984] *Ibid.*, Annex II, Paragraph 4.
[985] Duursma, *op. cit.* (footnote 424), pp. 136-137.
[986] Compare: *ibid.*, p. 138.
[987] Participation of the Holy See in the work of the United Nations, United Nations General Assembly, A/58/L.64, 2004, Preambular Paragraph 1.
[988] Koskenniemi, *op. cit.* (footnote 912), pp. 408, 409.
[989] For an account of the case of recognition of Czecho-Slovak National Council, see: Talmon, *op. cit.* (footnote 649), p. 25.

states, as soon Czechoslovakia was formed as an independent state. However, it shows that recognition of an entity under international law as "something",[990] with states treating that entity as having international legal personality of specific kind, is indeed not unprecedented, however different circumstances might be from those small island states are facing with. As noticed by Talmon, recognition as "something" is especially relevant for controversial and unclear cases, where there is a doubt on the question of exact nature of legal personality of a particular entity.[991] Similarly enough, doubts about statehood of a particular entity did not always prevent international organizations to provide these entities with observer status, or even contemplate other forms of association for them. The association without full membership is a known form of cooperation between international organizations and entities that do not fulfil the criteria for becoming full members. Perhaps the best known such association is the observer status, which has been granted by the UN to the Holy See,[992] the Sovereign Military Order of Malta[993] and various liberation movements.[994] The observer-like status, of course, does not amount to full membership and does not accord the full panoply of member state's rights and duties to the observer. But it does accord, as evidenced by these examples, the right to participate in debates and to raise points and co-sponsor resolutions relating to it in the General Assembly.[995]

Communication between these legal persons and other legal persons of international law also remains an issue, as it would significantly depend on resources made available by the host state that would physically host government institutions.[996]

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[990] *Ibid.*

[991] *Ibid.*, pp. 32-33.

[992] Holy See became a "permanent observer state" in 1964 and maintained that status ever since. See: *Ibid.*

[993] The Sovereign Military Order of Malta became an "observer" in the United Nations General Assembly in 1994. See: Observer Status for the Sovereign Military Order of Malta in the General Assembly, United Nations General Assembly, A/RES/48/265, 1994.

[994] Crawford, *op. cit.* (footnote 301), pp. 193-195.

[995] Participation of the Holy See in the work of the United Nations, United Nations General Assembly, A/58/L.64, 2004, Annex.

[996] It will likely depend on an agreement between the state hosting government institutions of a small island state and an entity which will succeed the small island state.

Another issue that would arise is the problem of state property and debts. Similar to the case of treaties, the process is likely to bear some similarities with the state succession, albeit with significant differences, as *sui generis* entity would not be considered a "successor state" for the purposes of the only international treaty governing the issue, the Vienna Convention on Succession of States in Respect of State Property, Archives and Debts. This Convention presupposes only situations where there is a successor state. The general priciples, as laid down in Articles 8, 21 and 34 of the Convention with regard to state property, archives, and debts, respectively, all have the same wording which includes the extinction of the rights or obligations of the state and arising of rights or obligations of a sucession state. As rightly pointed out by Stoutenburg, a situation where a small island state is "succeeded" by a *sui generis* legal person is not a case of state sucession, as there is no proper successor state.[997] Therefore, in order for the state property, assets, archives, and debts which will survive inundation to remain under the control of the *sui generis* entity and through it the peoples of the former small island state, an agreement with the states holding these will be needed.

Indeed, creation of a new, tailor-made category of legal persons under international law might be a solution for continuation of legal personality of small island states, as other existing legal avenues lack capacity to do so. However, a huge issue remains, and that is the nature of connection between them and peoples of previously existing small island states.

In case of continuation of recognition of legal personality of small island states, both positive and negative duties under the right to self-determination,[998] will be at stake. Regarding negative duties, there is a duty not to recognize a situation arising from sea level rise as a mere fact that brings about extinction of legal personality that is an expression of the right to self-determination. On the other hand, regarding positive duties, there is a duty to promote self-determination of all peoples, which includes islanders, if they would continue to be recognized as peoples after relocations. As to what this positive duty amounts remains an open question. The general duty to "promote, through joint and separate action, realization

[997] Grote Stoutenburg, *op. cit.* (footnote 109), p. 443.
[998] For the discussion of the dichotomy between positive and negative duties related to self-determination, see *supra* in 3.1.

of the principle of equal rights and self-determination of peoples" contained in the Friendly Relations Declaration,[999] is of rather general nature and does not go beyond mere call to cooperation. Some guidance has been provided by the Security Council and the ICJ, albeit only in the situations of decolonization. Thus, for example, the Security Council in its resolution regarding the situation in East Timor called upon all states to "co-operate fully with the with the United Nations to achieve a peaceful solution and to facilitate the decolonization of the Territory".[1000] Similarly, the ICJ in the Israeli Wall advisory opinion stated that: "It is for all States, while respecting the United Nations Charter and international law, to see that any impediment, resulting from the construction of the wall, to the exercise by the Palestinian people of its right to self-determination is brought to an end."[1001] More recently in the same overall context, the ICJ in its Occupied Palestinian Territories advisory opinion, stated that: "With regard to the right to self-determination, the Court considers that, while it is for the General Assembly and the Security Council to pronounce on the modalities required to ensure an end to Israel's illegal presence in the Occupied Palestinian Territory and the full realization of the right of the Palestinian people to self-determination, all States must co-operate with the United Nations to put those modalities into effect."[1002] Therefore, the exact scope of such cooperation remains to be concretized on a case by case basis. Applied to the concrete context of small island states, this means that, while there is an obligation of other states not to recognize a situation which would be contrary to the self-determination (negative obligation) and actively work, in cooperation with other states, to put an end to such a situation and its consequences (positive obligation), it would be an overstreching to state *in abstracto* whether this includes a corollary duty to recognize a transformed legal personality of small island states after they lose statehood indicia. However, in concrete case,

[999] Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, General Assembly, A/RES/2625(XXV), 1970, Annex.
[1000] The Situation in East Timor, United Nations Security Council, S/RES/289, 1976, Paragraph 5.
[1001] Legal Consequences cf the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, *I. C. J. Reports*, 2004, p. 159.
[1002] Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem, Advisory Opinion, International Court of Justice, General List no. 186, 2024, p. 74.

one can argue that exactly this is the concretization of a general duty arising from the right to self-determination of islanders.

What is more, it has been affirmed in the context of decolonization that the exercise of right to self-determination is related to the effective fulfilment of traditional statehood criteria. The typical example is that of the statehood of former Belgian Congo, which has emerged as an independent state after Belgian colonial administration withdraw, doing so under the constant pressure of the UN, which based its calls for swift decolonization on the Congolese's right to self-determination. The newly independent "state" had virtually no government, no institutions, and no effective control over its territory or population. This, however, did not preclude other states to recognize it as a state nor the United Nations to swiftly bestow the membership status unto it.[1003] The newly independent state plundged into chaotic civil war almost immediately, with the Belgian troops being soon reentered Congo to intervene and alledgedly restore order. When this happened, the UN called for the withdrawal of the Belgians.[1004] The case of Belgian Congo is often cited as an example of the so-called juridical statehood. Contrary to the effective statehood based on the fulfilment of traditional statehood criteria of territory, permanent population, and effective government, the juridical statehood is based not on these, but on some international legal norm giving "exclusive right or title to exercise authority", that, in turn, allows the entity to qualify for statehood and maintain it once achieved.[1005] Right to self-determination, as evidenced in the case of the UN's reasoning in the Congo situation, became the primary such norm invoked in the situations of newly independent states emerging out of the process of decolonization. Raič termed this feature of the right to self-determination the "compensatory force principle".[1006] What is more, self-determination, as meticolously analysed by Kreijen, tends to be invoked as a basis for continuation of statehood in situation where statehood based on effectivity becomes doubious of even manifestly lacking, as in the case of statehood of Congo or Somalia immediately after

[1003] See: Admission of thr Republic of the Congo (Leopoldville) to membership in the United Nations, General Assembly, A/RES/1480(XV), 1960. The Resolution was adopted without vote, unanimously.
[1004] For example, see: The situation in the Republic of the Congo, General Assembly, A/RES/1599(XV), 1961.
[1005] Raič, *op. cit.* (footnote 293), p. 104.
[1006] *Ibid.*

decolonization. The latter case is particularly elucidating, as Somalia has for years lacked both the effective government and the capacity to enter into relations with other states.[1007] The state has, however, continued to be treated by the international community as a state. There was no withdrawal of recognition, Somalia kept its seat in the UN, and the Security Council resolutions[1008] which dealt with the situation in Somalia clearly considered it a state whose continuity has not been questioned by the general disorganization and lack of capacity to exercise sovereignty either internally (having a government which is effectively governing the territory and population of a state) or externally (having a government that is capable of entering into relations with other states).

However, the situation in which small island states and their peoples are about to find themselves differs subtly from these cases. First, while small island states have indeed emerged as independent by invoking the external self-determination as a legitimizing right behind their independence in the process of decolonization, the peril that sea level rise poses to the statehood is not directly connected to it and, arguably, cannot be subsumed under colonial self-determination. Therefore, the question is whether the compensatory force principle as defined by Raič operates in non-colonial situations? The answer that the same author gives is positive.[1009] He bases his argument on the analysis of cases of four states, namely Bangladesh, Georgia, Moldova, and Croatia. In particular, his analysis of cases of Bangladesh and Croatia during the early years of independence of these states is especially relevant. In these cases, there was no effective government at all (with foreign troops effectively controlling most of the state's territory) as in case of Bangladesh,[1010] or an effective government controlled only a two-thirds of the state's territory (with the other third

[1007] Kreijen, *op. cit.* (footnote 390), p. 354.

[1008] For example, the Security Council Resolution 897 (1994), adopted as one of many which dealt with the crisis in Somalia, included in its preamble the phrase "respect for the sovereignty and territorial integrity of Somalia in accordance with the Charter of the United Nations". (Resolution 897 (1994), S/RES/897(1994), United Nations General Assembly, Preambular Paragraph 5).

[1009] See: Raič, *op. cit.* (footnote 293), pp. 408-413.

[1010] This holds true for the very beginning of the Bangladeshi struggle for independence. Chowdhury, otherwise sympathetic to the Bangladeshi independence movement, nevertheless recognizes that "During the first phase from 26 March to the end of May 1971, the resistance of the people to the onslaughts of the Pakistani Army was spontaneous but inevitably disorganized and uncoordinated." (Chowdhury, Subrata Roy, *The Genesis of Bangladesh*, New York, 1973, p. 158).

being under the control of the Serbian minority) as in the case of Croatia.[1011] In the latter case, such a conclusion can be contested, as Croatia had an effective government, which effectively exercised full sovereignty over the significant portion of the territory and population.[1012] Be that as it may, in both cases the international community based the granting of statehood on the recognition of outcome of exercise of the right to self-determination rather than on the effectivity as per traditional international law. Following that logic, states recognized both Croatia and Bangladesh as independent states and the UN to admit them as full members of the organization. For Raič, this is a clear sign that self-determination became a substitute for effective statehood also in the cases spanning beyond decolonization, with the "compensatory force" of juridical statehood overcoming the lack of empirical statehood based on effectivity.[1013]

To conclude, the continuation of legal personality of small island states is dependent on the recognition of such personality by the international community. Right to self-determination, in turn, is intrinsically linked to legal personality of small island states, and it is that legal personality that was understood as a realization of the external dimension of self-determination which shall be held in perpetuity. The PIF has emphasized this in its Declaration on Statehood and Protection of Persons in the Face of Climate Change-Related Sea-Level Rise, which recognizes that "continuity of statehood in the face of climate change-related sea-level rise is consistent with important principles and rights of international law, including the right of peoples to self-determination".[1014] Indeed, as confirmed by the ICJ in the Israeli Wall advisory opinion, there is a duty of states not to recognize a situation that would hamper the continued recognition of right to self-determination of the islanders. This duty, however, must not be overstated or applied by simple way of analogy on the case of small island states. The peoples of small island states will find themselves on the territory of

[1011] For an account of territorial claims over Croatian territory during the early phase of Homeland War in Croatia see, for example: Čović, Bože (ed.), *Croatia between War and Independence*, Zagreb, 1991, pp. 71-72.
[1012] Weller, Mark, The International Response to the Dissoultion of the Socialist Federal Republic of Yugoslavia, *American Journal of International Law*, vol. 86, no. 3, 1992, p. 604.
[1013] Raič, *op. cit.* (footnote 293), p. 364.
[1014] Declaration on Statehood and Protection of Persons in the Face of Climate Change-Related Sea-Level Rise, Pacific Island Forum, 2023, Principle 9.

the host state. Therefore, when an outcome of such a recognition would be granting them traditional statehood, an inevitable friction with the right to territorial integrity of states would emerge.[1015] This is due to the territorial nature of statehood contrasted with the fact that the islanders will inevitably find themselves on a territory which is under sovereignty of a host state. Therefore, the only way to maintain the self-determination of islanders is to recognize the small island states' legal personality in a non-territorial form, distinct from statehood. As this would be a new form of legal personality that is not derived from any existing legal person, the aquiescence of states as primary creators of legal norms will be crucial. This aquiescence could arise from the recognition of these new legal persons.

After considering the effects of the sea level rise on external self-determination expressed in the form of legal personality of small island states, we now move on the internal aspect of the self-determination. This aspect, as we shall see, is especially relevant for safeguarding the right to self-determination and human rights after relocation, as peoples of small island states will inevitably find themselves on the territory of another sovereign state.

3.3. **Internal Dimension of Self-Determination – Solutions for the Autonomy after Relocation**

Internal self-determination is usually conceptualized as a people's right to freely establish themselves in deciding on questions of their political, economic, social and cultural development, not necessarily involving a creation of a newly independent state.[1016] Internal self-determination is thus generally recognized as being implemented through granting autonomy to the peoples who are entitled to exercise it.[1017] However, what will be the content of such an autonomy varies greatly on a case by case basis, with different meaning being accorded to the concept which is lacking a precise and uniform legal definition.[1018]

Autonomy as realization of internal self-determination indeed takes numerous forms with countless variations adapted to local circumstances. However, a common divide between

[1015] This would be avoided only in an unlikely situation of cession of territory.
[1016] Raič, *op. cit.* (footnote 293), p. 237.
[1017] Soete, *op. cit.* (footnote 381), p. 170.
[1018] *Ibid*., p. 171.

those various forms comes along the following criterion – whether autonomy is territorially defined or not? For islanders of small island states, that divide is likely to have significant consequences, as the form of autonomy they will be able to claim is likely to depend on the form of relocation that is going to take place.

That it is indeed possible to realize internal self-determination as autonomy is affirmed both at an abstract level in international legal documents and in concrete examples of peoples which are enjoying such levels of autonomy that amount to self-determination. Regarding international legal documents, there is an express recognition of autonomy as a "default way of accommodating indigenous peoples"[1019] within the framework of protection of indigenous rights as established by the UNDRIP. Specifically, this is acknowledged by the article 4 of the UNDRIP, which states that: "Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions".[1020] In that regard, granting of autonomy has been used to prevent claims for independence that might trigger the secession,[1021] providing an alternative way to safeguard distinct identity and culture of indigenous peoples.[1022] This feature of autonomy has been described by Hannum as a need for a "balance to be found between territorial States as they are presently constituted and the legitimate expression of national or cultural identity upon which smaller groups will continue to insist".[1023] Autonomy can take different forms and

[1019] Wheeler, Marc, Self Determination of Indigenous Peoples: Articles 3, 4, 5, 18, 23, and 46(1), in: Hohmann, Jessie, Wheeler, Mark (eds.), *The UN Declaration on the Rights of Indigenous Peoples, A Commentary*, Oxford, 2018, p. 137. However, as noted by the same author: "focusing self-determination on the issue of autonomy and self-government does not in itself preclude secession. Rather, by implication it contextually reduces the application of the right to self-determination in this instance." (*ibid.*, p. 136.)

[1020] UNDRIP, Article 4.

[1021] Already in its preamble, the UNDRIP noted that any self-determination claim by indigenous peoples must be "exercised in conformity with international law" (16th Preambular Paragraph). As explained by Wheeler, "The reference to 'in accordance with international law' may be taken to read 'in accordance with international law as classically understood'. This provision may therefore reserve self-determination in the colonial context, exercised by colonial peoples, including secession. In so doing, it may indirectly remove this element of the right to self-determination in other circumstances, including in relation to indigenous peoples". See: Wheeler, *op. cit.* (footnote 1019), 2018, p. 136.

[1022] Compare: Soete, *op. cit.* (footnote 381), p. 172.

[1023] Hannum, Hurst, *Autonomy, Sovereignty, and Self-Determination*, Philadelphia, 1990, p. 475.

autonomous entities can have different competences, even within the same state.[1024] However, the common feature of all these examples is that autonomous units, whatever their degree of autonomy might be, do not posess a right to secession, except in extreme circumstances that would create a basis for remedial secession, a controversial topic in itself.[1025]

In case of minorities, legal status regarding self-determination is somewhat different. Consequentially, practice of states and international bodies varies as to when a minority should be provided with specific set of rights aimed at protecting identity of members of minority. However, that does not mean that minorities are devoid of any rights under international law. One should start from the very concept of minority. While international law lacks precise definition of the notion, generally some degree of ethnic, linguistic or cultural homogeneity is expected, coupled with the non-dominant position of minority in a society of a particular state.[1026] Already in 1920, PCIJ, delivering the advisory opinion in the Minority Schools in Albania case concluded that in relation between minority and majority there should be: "perfect equality between nationals belonging to the minority and other nationals; the grant to minorities of suitable means for the preservation of their racial peculiarities, their traditions and their characteristics".[1027] The PCIJ went on to say that: "These two principles are moreover interlocked, for there would be no true equality between a majority and a minority, if the latter were deprived of its own institutions and were consequently compelled to renounce that which constitutes the very essence of its being as a minority".[1028] Thus, the PCIJ effectively confirmed that the distinct identity is what makes the "very essence"[1029] of the minority, the defining characteristic that distincts it from the majority and is a very *rationale* behind any right deemed at protection of a particular

[1024] While territorial autonomy is the most traditional and most common form of autonomy, contemporary understandings of autonomy include, *inter alia*, cultural autonomy, functional autonomy, and personal autonomy. Indeed, autonomous entities can exist even in federal states in addition to federal units, a feature that is sometimes equated with asymmetric federalism. Compare: Suuksi, Markku, Autonomy, in: Wolfrum, Rüdiger (ed.), *Max Planck Encyclopedia of Public International Law*, vol. I, Oxford, 2012, pp. 755, 760.
[1025] For the note on the concept of remedial secession, see *supra* in 3.1.
[1026] Vukas, *op. cit.* (footnote 303), pp. 345, 356.
[1027] Minority Schools in Albania, Advisory Opinion of April 6th 1935, in: Eleventh Annual Report of the Permanent Court of International Justice, Series E, no. 11, Leiden, 1935, pp. 136-143.
[1028] *Ibid.*
[1029] *Ibid.*

minority. Moreover, safeguarding of identity, which leads to "effective genuine equality"[1030] between minority and majority is indeed what makes the essence of minority protection and minority rights.

The distinction between peoples and minorities is not only of theoretical nature, it has significant consequences as to the rights that international law accords to these distinct groups. Peoples enjoy the right to self-determination. Minorities, on the contrary, enjoy a rather different set of rights aimed at protecting their identity. The distinction is most evident in the ICCPR, in which Article 1 protects the peoples' right to self-determination, while Article 27 protects rights of persons belonging to ethnic, religious or linguistic minorities. Rights provided under the two articles are distinctively different. As noted by the HRComm in its General Comment no. 23, the right to self-determination of peoples must not be confused with the minorities' rights contained in Article 27 of the ICCPR.[1031] The clear divide between rights of peoples, which include the right to self-determination, and rights of minorities, which are confined to a set of linguistic, cultural, and religious rights is clear from the very systemic interpretation of the ICCPR, which separates them in different articles (Article 1 and Article 27, respectively). This links to a broader question of how relocated islanders will be treated by the host states – as peoples or minorities? The question becomes especially relevant in cases where numbers would be taken as determinative. Small island states have populations that are very small when compared to population of a large number of other states around the globe. Indeed, many states have minorities that are much larger in numbers than populations of small island states, even in an unlikely scenario of group relocation of the whole population to a one designated host states.

Right to self-determination is a composite right coupled with a range of obligations for states. Moreover, it is enjoyed by peoples as a collective entity, not by individuals.[1032] Contrary to that, minority rights as stipulated under Article 27 of the ICCPR are rights of "persons belonging to a minority". This, along with other regional minority protection arrangements,

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[1030] *Ibid.*

[1031] General Comment no. 23, Article 27 (Rights of Minorities), Human Rights Committee, CCPR/C/21/Rev.1/Add.5, 1994, Paragraph 3.1.

[1032] Albeit individuals do exercise it as noted by, *inter alia*, Vukas. Vukas, *op. cit.* (footnote 303), p. 447.

prompted Cassese to conclude that minority rights are enjoyed by individuals as members of a certain minority rather than by minority as a group entity.[1033] The HRComm affirmed this conclusion in its practice regarding individual communications. For example, in the case Lubicon Lake Band v. Canada, the Committee on Civil and Political Rights adopted a view that "the author, as an individual, could not claim under the Optional Protocol to be a victim of a violation of the right of self-determination enshrined in article 1 of the Covenant, which deals with rights conferred upon peoples, as such".[1034] Similarly, in its views adopted in the case Gillot *et al.* v. France, the HRComm, stated that it "does not have the competence under the Optional Protocol to consider a communication alleging violation of the right to self-determination protected in article 1 of the Covenant".[1035] This is due to the Optional Protocol recognizing the right of individuals "who claim to be victims of a violation" (Article 1 of the Optional Protocol 1) to "submit a written communication to the Committee for consideration" (Article 2 of the Optional Protocol). As right to self-determination is right of peoples as a collective entity, it would be difficult for an individual communication claiming the violation of the right to self-determination to succeed.[1036] *A contrario*, alledged violations of rights of minorities protected under Article 27 are admissible as individual communications under the Optional Protocol, as confirmed by the HRComm in, for example, case Kitok v. Sweden.[1037]

Therefore, one must contemplate also a situation in which resettled populations are accorded protection not as peoples, but rather as a minority. Right to self-determination under the ICCPR belongs to the peoples, while minority rights are considered as a separate concept. From that, one could assume that minorities do not possess the right to self-determination. However, such a conclusion would be oversimplified and short of understanding the broader picture of relevant sources of international law. In 1992, the General Assembly adopted the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and

[1033] Cassese, *op. cit.* (footnote 293), pp. 329-330.
[1034] Lubicon Lake Band v. Canada, Human Rights Committee, CCPR/C/38/D/167/1984, 1990, Paragraph 13.3.
[1035] Gillot *et al.* v. France, Human Rights Committee, CCPR/C/75/D/932/2000, 2002, Paragraph 13.4.
[1036] Nowak, *op. cit.* (footnote 307), pp. 17-18.
[1037] Kitok v. Sweden, Human Rights Committee, CCPR/C/33/D/197/1985, 1988, Paragraph 6.3.

Linguistic Minorities which functions as a complementary act to the already well-established protection of minorities rights under Article 27 of the ICCPR. By it, the General Assembly adopted the view that national minorities possess certain political rights[1038] in addition to protection of cultural, religious and linguistic identity as protected by the Article 27 of the ICCPR. This prompted some authors to conclude that the status of minorities in fact includes recognition of the right to internal self-determination, or at least some components of it.[1039] Be that as it may, autonomy can be a way of accomodating both the internal self-determination of peoples within the state under Article 1 of the ICCPR and the rights of minorities to protect their linguistic, religious, or ethnic characteristics which distinct them from the majority population under Article 27 of the same ICCPR.[1040]

While small island states most concerned with sea level rise having possible negative effects on their peoples exercise of right to self-determination have indeed become independent states during the process of decolonization, internal self-determination is likely to become increasingly relevant in the case of relocations. This is as to the balance between the two principles which always strikes in cases of self-determination – those of territorial integrity of states and those of legitimate claims for self-determination of peoples distinct from the majority in those states. As noted at various points in this work, relocation, whether being a collective, organized action (referred to as *en masse* relocation, as well) or a set of individual relocations, will eventually involve settling on a territory of another sovereign host state. In the host state, whether one or several of them, human rights of the islanders must be respected, notwithstanding their status.[1041] However, right to self-determination is specific

[1038] Thus Article 2, Paragraph 3 of the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities grants to the persons belonging to minorities "right to participate effectively in decisions on the national and, where appropriate, regional level concerning the minority to which they belong or the regionsin which they live, in a manner not incompatible with national legislation" (Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, United Nations General Assembly, A/RES/47/135, 1992, Article 2, Paragraph 3).

[1039] See, for example: Hannum, Hurst, Rethinikig Self-Determination, *Virginia Journal of International Law*, vol. 34, no. 1, 1993, pp. 7, 34 *et passim*. However, as rightly warned by Vukas, referring to this concept: "Once we accept the extensive interpretation of the right to self-determination, including "internal self-determination" (H. Hannum) many of the rights of minorities and their members can be attributed to the principle of self-determination" (Vukas, *op. cit.* (footnote 303), p. 442).

[1040] Compare: Soete, *op. cit.* (footnote 381), p. 174.

[1041] For the discussion of the universal nature of human rights, see *supra* in 2.2. and 2.3.

insomuch that it can be exercised only collectively, as peoples[1042] and that its exercise, in case of indigenous peoples is generally highly connected to the traditional territories and ways of life.[1043] Existing cases of autonomy as realization of internal self-determination show that geographic composition of particular peoples indeed has effect as to the type of autonomy they have been granted. Peoples which are geographically condensed on a certain definable territory are more likely to be gratnted territorial autonomy.[1044] On the other hand, peoples which are scattered around different territories are usually able to claim some form of non-territorial autonomy.[1045] In cases of small island states and relocations that are likely to happen, the nature of relocations are thus inextricably connected to the autonomy peoples are likely to be granted by the host states. In case of *en masse* relocation to a particular host state, the autonomy is more likely to take a territorial form. On the contrary, in case of individual relocations, peoples are likely to find themselves in different host states, or at least around different places in one host state, which is likely to result in non-territorial autonomy.

3.3.1. **Territorial autonomy**

The idea to accommodate for internal self-determination of peoples by granting the territorial form of autonomy is not a new one. A classic example of autonomy being granted to people within the state as a compensation for a denial of independence arose out of the Åland Islands case. In that case, the Commission of Jurists appointed by the League of Nations adopted the view that Swedish-speaking population of Åland islands, which were under sovereignty of Finland, did not possess the right to secede from Finland, however that they should enjoy territorial autonomy within the islands that should accommodate for safeguarding their identity and culture.[1046]

[1042] Vukas, *op. cit.* (footnote 303), p. 446.

[1043] Compare: Galvão Teles, Ruda Santolaria, *op. cit.* (footnote 16), p. 64.

[1044] Soete, *op. cit.* (footnote 381), pp. 181-182.

[1045] *Ibid.*

[1046] The International Commission of Rapporteurs wrote that "The Aaland Archipelago is only a small part of the Finnish territory, and the Aaland population a small fraction of the Finnish nation. Now, it is evident that one cannot treat a small minority, a small fraction of a people, in the same manner and on the same footing as a nation taken as a whole. (…) The idea of justice and of liberty, embodied in the formula of self-determination, must be applied in a reasonable manner to the relations between States and the minorities they include. It is just

Another enlightening historical example of territorial autonomy, especially as it concerned peoples moving after their homes became uninhabitable due to a natural disaster is that of the "republic" of New Iceland, as the entity came to be known. It concerned the inhabitants of Iceland whose homes were rendered uninhabitable due to the effects of a volcanic eruption that occurred in 1875 and prompted thousands of residents of Iceland to relocate.[1047] They settled in large numbers on a land that was previously allotted by the Canadian government to the settlers originating from Iceland, in accordance with the common practice of ethnic settlement that was used by Canada at the time.[1048] As the land allotted to the Islandic settlers was in a remote, unorganized area on the shores of Lake Winnipeg they, lacking any efficient government structures, soon organized themselves. The New Iceland got its own "constitution" and a government that managed the affairs of the settlement in an autonomous manner. [1049] This arrangement was respected by the Canadian authorities until 1887, when autonomy was abandoned, New Iceland merged into the Manitoba and the lands of New Iceland soon became open to settlers of different ethnicities.[1050]

Moving to the more recent examples, territorial autonomy is found in cases of historic relocations of island populations effectuated due to other causes. First such notable example is evacuation of inhabitants of Bikini Atoll in what was than the Trust Territory of Pacific Islands under administration of the United States of America (present-day Marshall Islands). In total, the United States of America conducted sixty-seven nuclear tests on the territory of present-day Marshall Islands between 1946 and 1958.[1051] This series of thest began in 1946,

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that the ethnical character and the ancient traditions of these minorities should be respected as much as possible, and that they should be specially authorised to practise freely their religion and to cultivate their language. (…) The separation of a minority from the State of which it forms a part and its incorporation in another State can only be considered as an altogether exceptional solution, a last resort when the State lacks either the will or the power to enact and apply just and effective guarantees." (Report Presented to the Council of the League of Nations by The Commission of Rapporteurs, League of Nations Council, Doc. B.7 21/68/106, 1921, pp. 27-28).

[1047] Vanderhill, Burke G., Christensen, David E., The Settlement of New Iceland, *Annals of the Association of American Geographers*, vol. 53, no. 3, 1963, pp. 355-356.

[1048] *Ibid.*, p. 350.

[1049] *Ibid.*, p. 356.

[1050] *Ibid.*, p. 360.

[1051] Pevec, Davor, The Marshall Islands Nuclear Claims Tribunal: The Claims of the Enewetak People, *Denver Journal of International Law and Policy*, vol. 35, no. 1, 2006, p. 221.

when the United States of America initiated Operation Crossroads, for which Bikini atoll was to function as a main testing ground. This was the reason for relocation scheme to be put in place, with the Bikini Island community informed that they have to leave their island, as it is needed for scientists to "learn how to use it for the good of mankind and to end all world wars".[1052] Faced with such an explanation, but also with the authority of the military governor of the Marshall Islands who visited the Bikini Island on occasion, the representatives of Islanders agreed to relocation.[1053] Islanders were thus first evacuated to Rongerik Atoll, which, despite lodging was constructed and community organized, has soon proved to be unable to support human habitation due to poor soils and poisonous fish that inhabited the island's lagoon.[1054] and eventually to Kili Island, where they were granted rights of land use only in 1956.[1055] While relocation was effectuated and they were granted use of land, no specific measures addressing their political organization or cultural and social arrangements were made. Although slight improvements were felt by the Bikinians, the living conditions on Kili soon proved to be similar to those on Rongerik, with destructive effects on culture, social organization and livelyhoods of Bikinians.[1056] While this relocation was considered as domestic, as all three islands belonged to the Trust Territory of Pacific Islands, or present-day Marshall Islands, relocation created significant social tensions due to the inadequacy of the islands to which residents of Bikini were resettled to sustain their traditional ways of living and social organization.[1057] Despite Bikinians were able to create a "limited *de facto* local self-government"[1058] on the Kili Island, it could indeed be observed that their internal self-determination in the form of Bikinians as people being able to decide on the form of autonomy needed for sustaining of their identity was disregarded by the United States government acting as a power managing the relocation. Bikinians were therefore eager to

[1052] Weisgall, Jonathan M., The Nuclear Nomads of Bikini, *Foreign Policy*, no. 39, 1980, p. 77.
[1053] *Ibid.*
[1054] Tabucaton, Gil Marvel P., Protection for Resettled Island Population: The Bikini Resettlement and its Implications for Environmental and Climate Change Migration, *Journal of International Humanitarian Legal Studies*, vol. 5, 2014, p. 19.
[1055] Soete, *op. cit.* (footnote 381), p. 183.
[1056] Tabucaton, *op. cit.* (footnote 1054), p. 20; Weisgall, *op. cit.* (footnote 1052), pp. 80-81.
[1057] Tabucaton, *ibid.*, p. 17.
[1058] Soete, *op. cit.* (footnote 381), p. 184.

return to their island, and some of them indeed did that beginning from 1969, only to be relocated again in 1978 due to the high levels of radiation, of which they were unaware at the time of their initial return.[1059] This time, the returnees were relocated to Ejit Island, which is in vicinity of Majuro, the capital of Marshall Islands.[1060]

Although the case of Bikinians might be better known, it is not the only case of relocation that happened within the Marshall Islands due to nuclear test conducted in the area. The Enewetak peoples inhabited the namesake atoll for centuries until 1947, when they were, just like the Bikinians a year before, evacuated in anticipation of the first thermonuclear detonation in history.[1061] The peoples of Enewetak were informed that they would be relocated to the atoll of Ujelang on a short notice and the relocation was soon completed. Just like the Bikinians on the Rongerik atoll, the Enewetaks found themselves in a dire situation, with hunger being widespread and healthcare inadequate.[1062] Between 1977 and 1980, the Enewetak atoll went through the programme of nuclear cleanup, which resulted in return of part of the islanders, however further tests again showed that the danger of radiation remained high.[1063]

Similar example, which generated significant international outcry among states pushing for decolonization and rectifying of decisions of colonial authorities[1064] that had eventually resulted in a request for advisory opinion being submitted to the ICJ, is separation of Chagos Archipelago.[1065] This archipelago was formally detached from the rest of Mauritius by the

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[1059] Weisgall, *op. cit.* (footnote 1052), pp. 86, 90.

[1060] Tabucaton, *op. cit.* (footnote 1054), p. 21.

[1061] Pevec, *op. cit.* (footnote 1051), pp. 224 *et passim*.

[1062] *Ibid.*, pp. 227-228.

[1063] *Ibid.*, pp. 228-229.

[1064] The Organization of African Unity has been particularly active in adopting resolutions condemning the conduct of the United Kingdom with regard to the Chagos Archipelago. See, for example: Resoultion on Chagos Archipelago, Organization of African Unity Assembly, EX.CL/994(XXX), 2017. The same has been echoed by the Non-Aligned Movement. For reference, see: Request for an advisory opinion of the International Court of Justice on the legal consequences of the separation of the Chagos Archipelago from Mauritius in 1965, A/RES/71/292, 2017, Paragraph 6.

[1065] The request, adopted by the General Assembly, laid two questions before the ICJ. These were: "(a) Was the process of decolonization of Mauritius lawfully completed when Mauritius was granted independence in 1968, following the separation of the Chagos Archipelago from Mauritius and having regard to international law,

United Kingdom's than colonial administration.[1066] Subsequently, relocation of all islanders was effectuated in order to make space for land on the archipelago to be leased to the United States to be used for erecting and maintaining of military installations on the island of Diego Garcia.[1067] As the ICJ observed, Chagos Archipelago, at the time of its detachment from the Mauritius and concurrent establishment of the British Indian Ocean Territory as a new crown colony, was administered as a non-self-governing territory.[1068] In the Advisory Opinion the majority of judges of the ICJ pronounced that this process was not conducted in accordance with the peoples' right to self-determination, as there was no possibility for "peoples concerned" to express their "free and genuine will".[1069] Neither the peoples of Mauritius nor, for that part, Chagossians were consulted on the matter. The goals of separation were not to accommodate for the will of Chagossians, but to cater to the interests of the United Kingdom and United States military interests. Therefore, the ICJ warned that "As regards the resettlement on the Chagos Archipelago of Mauritian nationals, including those of Chagossian origin, this is an issue relating to the protection of the human rights of those concerned, which should be addressed by the General Assembly during the completion of the

including obligations reflected in General Assembly resolutions 1514 (XV) of 14 December 1960, 2066 (XX) of 16 December 1965, 2232 (XXI) of 20 December 1966 and 2357 (XXII) of 19 December 1967?; (b) What are the consequences under international law, including obligations reflected in the above-mentioned resolutions, arising from the continued administration by the United Kingdom of Great Britain and Northern Ireland of the Chagos Archipelago, including with respect to the inability of Mauritius to implement a programme for the resettlement on the Chagos Archipelago of its nationals, in particular those of Chagossian origin?" (Request for an advisory opinion of the International Court of Justice on the legal consequences of the separation of the Chagos Archipelago from Mauritius in 1965, A/RES/71/292, 2017, Paragraph 8.

[1066] For the chronology of events leading to the separation of Chagos Islands from Mauritius, see: Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, *I.C.J. Reports*, 2019, pp. 119-128.

[1067] In 1964, the governments of the United Kingdom and the United States of America agreed on the different aspects of defence cooperation regarding the Chagos Islands. The agreement provided that the government of the United Kingdom would be responsible for the resettlement of islanders, while the government of the United States would bear the task and financial obligations arising out of the construction and maintenance of military facilities. See: *Ibid*.

[1068] *Ibid*., pp. 136-137.

[1069] *Ibid*., p. 137.

decolonization of Mauritius."[1070] The example of Chagos Islands, while not the case of territorial autonomy proper, shows that before separations and relocations are done and autonomies granted, especially in decolonization context, one must always have in mind the framework of self-determination and human rights.

Finally, among relevant examples, there are cases of relocation of islanders from islands that form present-day Kiribati, one of the small island states most vulnerable to the negative effects of sea level rise. Two distinct cases of relocation happening due to different reasons can be identified.

One case involved relocations from the Phoenix Islands in what is now Kiribati to the previously uninhabited islands of Gizo and Wagina, situated in present day Solomon Islands. These relocations were gradually effectuated from 1955 to 1964.[1071] The reasons given by the United Kingdom's colonial administration as a justification for this measure were that relocations are necessary because of droughts that made life on the Phoenix Islands increasingly difficult to sustain.[1072] However, neither during relocation nor after its completion, no attention was given to the problems of the political organization of the islanders, their cultural identity or land ownership, which created significant problems once decolonization has completed and Kiribati and Solomon Islands became two distinct independent states.[1073]

Contrary to the aforementioned examples, relocation of Banabans, forming the entire population of Banaba Island (also referred to in older writings as Ocean Island), which is part

[1070] *Ibid*., p. 139. In light of this observation, it would be interesting to see how the agreement on the sovereignty of Chagos Islands, reached in 2024 between United Kingdom and Mauritius, which recognizes sovereignty of Mauritius over Chagos Islands, will accommodate for self-determination of Chagossians in the implementation phase, especially noting that Chagossians have voiced concerns over not being consulted on the matter. See: Agreement between the Republic of Mauritius and the United Kingdom on the Status of the Chagos Archipelago, Press Statement, available at: https://www.state.gov/agreement-between-the-republic-of-mauritius-and-the-united-kingdom-on-the-status-of-the-chagos-archipelago/ (accessed 10th October 2024). See also: Davies, Maia, Hagan, Rachel, Chagossians criticise lack of say in UK deal to hand over islands, available at: https://www.bbc.com/news/articles/cy78ejg71exo (accessed 10th October 2024).
[1071] Soete, *op. cit.* (footnote 381), p. 185.
[1072] *Ibid.*, pp. 185-186.
[1073] *Ibid*., p. 186.

of present-day Kiribati, was done within a more nuanced framework.[1074] In 1945, all residents of Banaba Islands were relocated to the island of Rabi, located in the present-day Fiji. Damage caused to the property and infrastructure on Banaba Island was officially given as an explanation behind the swift relocation.[1075] With this reason in mind, Banabans agreed to relocation.[1076] However, the real reason behind the relocation was not that, but rather the one that was known to the British colonial administration long before the start of the Second World War. Namely, British Phosphate Commission, a body that managed British, Australian, and New Zealand interests in phosphate mining in the Pacific, discowered that Banaba Island was holding significant phosphate deposits and started with commercial mining, leading to the transformation of Banaba "from an island of about five hundred inhabitants into a major phosphate-mining settlement of about three thousand people".[1077] Relocation was therefore necessary as phosphate mining is known to be an activity that leaves thoroughly devastating effects on the environment, basically rendering uninhabitable the land where surface phosphate mining was happening.

Relocation was effectuated over the course of December of 1945, when all Banabans (around seven hundred persons) were relocated to the Rabi Island. On Rabi, they were given private

[1074] For the historical context of relocation of Banabans to Rabi, see: McAdam, *op. cit.* (footnote 682), pp. 306-314.
[1075] *Ibid*., p. 311.
[1076] *Ibid.*, pp. 311-312.
[1077] Edwards, Julia B., Phosphate mining and the relocation of the Banabans to northern Fiji in 1945: Lessons for climate change-forced displacement, *Journal de la société des océanistes*, no. 138-139, 2014, p. 124. See also: *Ibid*.; Soete, *op. cit.* (footnote 381), p. 186; McAdam, Jane, Self-Determination and Self-Governance for Communities Relocated Across International Borders: The Quest for Banaban Independence, *International Journal on Minority and Group Rights,* vol. 24, no. 4, 2017, p. 430. As noted by McAdam, the 1945 resettlement ot Rabi was not the first attempt to relocate the Banabans in order to make land free for phosphate mining. From the start of exploitation of guano on Banaba Island in 1901, the British Phosphate Commission proposed relocation on multiple occasions, with the first proposal made in 1909. British Colonial Office blocked such attempts by maintaning that any relocation had to wait for the consent of Banabans, which they were not willing to give at that time. Similarly, local colonial administration thought that any attempt to relocate Banabans would be contrary to principles of humanity and therefore "repugnant". However, over the course of the years, while faced with uncertainty over habitability of Banaba Island in the future, the Banabans themselves started to contemplate relocation. Reacting to that, colonial administration started surveying for the suitable place for relocation and in 1931, the Banaban Fund was established, which collected a portion of the royalties gained from phosphate mining, with an explicit purpose to use them for purchase of a new home for Banabans. See: McAdam, *op. cit.* (footnote 682), pp. 306-309.

ownership of the land, however, the land remained part of then-colony, nowadays sovereign state of Fiji. From the international law perspective, this means that Banabans were not given sovereignty over the land on the Rabi Island nor any kind of international legal personality that would be connected to the land they were resettled to.

While not enjoying sovereignty over the island of Rabi, Banabans were indeed given a limited self-government and autonomy. Three ordinances were implemented,[1078] of which the most notable is the Banaban Settlement Ordinance, which instituted the Rabi Island Council as a self-government, autonomous body which was entrusted "with the same powers of making local regulations as were possessed by the Island Council on Ocean Island".[1079] Moreover, the Rabi Island Council was able to submit recommendations to the Governor in Council regarding a range of issues involving local government and everyday life of Banabans on the Rabi Island.[1080] Thus, the Council served as a form of local self-government and an organ of autonomy of Banabans, although based exclusively on municipal law. Next significant development came in the form of Statement of Intentions, a document made by colonial government as a response to the outcomes of the Banabans vote to make Rabi their permanent home, which was decided via referendum in May of 1947.[1081] The Statement of Intentions clearly stipulated that the Banabans retain the right of return to the Banaba Island and a range of ownership-related rights to their lands on the Banaba.[1082] These rights later

[1078] These were the Banaban Settlement Ordinance (dealing with the establishment and functioning of Banaban autonomous institutions on Rabi), Banaban Funds Ordinance (establishing the Banabans' continuing right to collect phosphate revenues and the Banaban Trust Funds Board), and the Banaban Land Ordinance (regulating the use of land on Rabi Island). Latter two ordinances were later replaced by acts enacted by Fiji legislature (in 1958, 1961, and 1970 for the Banaban Funds Ordinance and 1965, 1970, and 1985 for the Banaban Lands Ordinance, respectively), which are currently in force. See: McAdam, Jane, "Under Two Jurisdictions": Immigration, Citizenship, and Self-Governance in Cross-Border Community Relocations, *Law and History Review*, vol. 34, no. 2, 2016, p. 301. Here, as an interesting parallel, the status of Arnhem Land in Australia can be named. In that case, the Australian law enabled indigenous peoples of Arnhem Land to enjoy ownership (short of sovereignty) over the lands they inhabited from times immemorial. While not completely applicable to the case of islanders of small island states, as it does not involve relocation or separation of territory, the case provides an insightful view of the internal self-determination in practice. See: Native Title Act, 1993, available at: https://www.legislation.gov.au/C2004A04665/asmade/text (accessed: 29th December 2025).

[1079] Banaban Settlement Ordinance, Object and Reasons, quoted in: Soete, *op. cit.* (footnote 381), p. 187.

[1080] *Ibid*., p. 188.

[1081] McAdam, *op. cit.* (footnote 1077), p. 437.

[1082] *Ibid*.

found their way into the Constitution of Kiribati, to which Banaba Island was assigned once the Gilbert and Ellice Islands colony was dissolved and Republic of Kiribati established on part of the former colony's territory.[1083] This included the right to revenues stemming from the lucrative phosphate mining activities that were ongoing on the Banaba at the time. On the other hand, the Statement of Intentions also stipulated that Banabans would be "subject to the laws of Fiji in the same manner as other residents".[1084] This stipulation later on allowed the colonial government to deny the Banabans their requests for independence in 1960.[1085] Further request followed suit, but none resulted in an outcome that would provide resettled Banabans on the Rabi Island with anything more than the autonomy they enjoyed under municipal law.[1086]

The position of Banabans on Rabi was at first affected relatively little by the changes brought about to the Fijian legal system after it gained independence from the United Kingdom in 1970. The Banaban Funds Ordinance, one of the three ordinances which constituted the legal foundations of the autonomy of Banabans was revoked, however two others remained basically intact in the form of legislation and "constitutional guarantees".[1087] A change came with the 2013 Fijian Constitution. Although the 2013 Constitution stipulated that the "ownership of all Banaban land shall remain within the customary owners and Banaban land shall not be permanently alienated", a further doubt was cast on the issue of who exactly

[1083] Chapter IX. of the Constitution of the Republic of Kiribati, entitled "Banaba and the Banabans" contains numerous provisions providing for autonomy of Banabans living on Rabi within the constitutional framework of Kiribati, which McAdam identified as based upon the Statement of Intentions. See: Constitution of Kiribati, Articles 117-125; McAdam, *op. cit.* (footnote 1078), p. 314.
[1084] McAdam, *op. cit.* (footnote 1077), p. 438.
[1085] *Ibid*., pp. 442-444.
[1086] McAdam lists a number of proposals which were dicussed over the years based on discussions which were held on and off during the seventh and eight decade of the 20th Century. For example, in 1973, an opinion procured by the Banabans listed five options (statehood, trusteeship, protected state agreement, associated state status, withdrawal from the international community). Further proposals that were made over the course of years included free association with Fiji, entrenchment of rights into the constitutions of newly independent states to which Rabi and Banaba belong (which eventually became a reality in case of Kiribati). Finally, after the conclusion of the Gilbert Islands Constitutional Conference, conviened in 1978 and subsequent debates both in United Kingdom's Parliament and among islanders, further options were presented (including a lease of the islands), however none of these gained sufficient support. For the detailed chronology and explanations of proposals, see: *ibid*., pp. 447-464.
[1087] Soete, *op. cit.* (footnote 381), p. 189.

should be considered as "customary owners" of the land on the Rabi Island. This has not been clarified and could be interpreted as meaning Banabans, but also other peoples who inhabited Rabi or held rights over it before Banabans came.[1088]

Moreover, Banabans were not immediately accorded Fijian citizenship due to a complicated system of interconnections between a "belonger" status which Banabans had during colonial times, Fijian prohibition of dual nationality and equal treatment of minorities.[1089] In addition, conflicts arose between Banabans and other Fijians regarding fishing rights around Rabi.[1090]

Relocation of Banabans to Rabi "represents a unique case".[1091] However, as it involved relocation of a group of Pacific islanders from one island to another, with the relocated population being able to form a community and claim a form of autonomy on the island they were resettled to, it provides an insight into problems with which islanders faced with relocation due to sea level rise are likely to face with in cases of group relocations to nearby states.

Banabans were not the only peoples which faced livelihood problems connected with the exploitation of phosphates. Similar and, due to international fora being involved at various points, even more prominent example is Nauru. Nauru became independent in 1968, being previously a German colony before the First World War, then a mandate held jointly by the United Kingdom, Australia and New Zealand turned into a trust territory of the same trustees after United Nations trusteeship system was extended to mandates which have not become independent after the Second World War.[1092] Through all this time, British companies were

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[1088] *Ibid.*, p. 190.

[1089] Banabans, however, were not made stateless, as they retained the United Kingdom's colonial citizenship. While the United Kingdom was not eager to continue granting them this right (as that would require taking responsibility for the Banabans as United Kingdom's colonial nationals), Banabans of the first generation relocated to Rabi were able to retain their colonial citizenship, which they used as a tool to involve the United Kingdom more closely in negotiations about their status after decolonization. Eventually, younger generations of Banabans, born on Rabi, aquired Fijian citizenship. See: McAdam, *op. cit.* (footnote 1078), pp. 304-309.

[1090] *Ibid*., pp. 295-296.

[1091] Soete, *op. cit.* (footnote 381), p. 191.

[1092] Nauru officialy became part of the already established German imperial protectorate of Marshall Islands in 1888, with German commercial interests already present in the region. German companies established for colonial trade and exploitation of resources at first remained highly influential in governing the protectorate affairs, including in appointing its officials and financing administrative apparatus. Known at the time as

involved in exploration and exploitation of rich phosphate deposits present on Nauru under the agreement with German colonial administration.[1093] This eventually rendered large parts of the island uninhabitable,[1094] which led to resettlement being contemplated as a solution for Nauruans already back in 1953.[1095] A concrete proposal came in early 1960s, when trustees first proposed relocation to mainland,[1096] followed by proposal to relocate to Curtis Island.[1097]

Pleasant Island, Nauru remained a protectorate until 1907, when it became a colony proper, as part of the German New Guinea, answering directly to the government in Berlin. In 1914, Australian forces occupied Nauru. After the conclusion of the First World War, status of Nauru became subject of a tailor-made agreement, the Nauru Island Agreement, signed in Paris in 1919, which envisaged Nauru becoming internationalized, which eventually became a reality once the League of Nations decided to include it on its list of C mandates, with the United Kingdom appointed to govern it. On history of Nauru, see: Storr, Anne Caithleen, *Nauru: International Status, Imperial Form, and the Histories of International Law*, PhD Thesis, University of Melbourne, 2017, *passim*.

[1093] *Ibid*. See also: Pollock, Nancy J., Nauru Phosphate History and the Resource Curse Narrative, *Journal de la société des océanistes*, no. 138-139, 2014, pp. 111-112.

[1094] As observed by Pollock: "After mining, the rich forest was destroyed, leading to ever increasing environmental damage. The interior became a waste-land." (Pollock, *ibid.*, p. 114).

[1095] In 1953 the United Nations Trusteeship Council deployed one of its visiting missions to the Pacific Trust Territories. In its report concerning Nauru, the visiting mission observed that "In the absence of evidence to the contrary, the Mission doubts whether after the termination of the phosphate industry, Nauru would be uninhabitable for a people who by that time may be expected to have achieved a relatively high level of advancement. (…) Consequently, the Mission sees no other alternative to the resettlement of the population elsewhere. It believes that every effort should be made to minimize the social impact of the transfer and feels that this might well be achieved if the movement were to be made gradually either by individuals, groups or as a community. It is of the opinion, therefore, that the question of the transfer of the Nauruans, either individually or collectively, to another place or places agreeable to them, should not be put in abeyance until the termination of the phosphate industry, but that a plan for gradual resettlement, which might provide for the purchase of land at an early date, should be agreed upon as soon as possible." (United Nations Visiting Mission to Trust Territories in the Pacific, Report on Nauru, T/1076, 1953, p. 5). Other visiting missions came to a similar conclusion. For example, in 1962, members of the visiting mission wrote in their report that "It is true that a number of Nauruans may wish to remain in the island as long as it continues to be habitable, but the starting point in a review of this problem must be that Nauru will be incapable of maintaining the population when the phosphate is exhausted -- and present estimates indicate that this will come in less than thirty years from now." (United Nations Visiting Mission to Trust Territories in the Pacific, Report on Nauru, T/1603, 1962, p. 7).

[1096] In 1960, Australian government proposed gradual relocation of Nauruans to Australian mainland, under the condition that Nauruans accept Australian citizenship. See: Certain Phosphate Lands in Nauru (Nauru v. Australia), Memorial of the Republic of Nauru, vol. 1, 1990, available at: https://www.icj-cij.org/sites/default/files/case-related/80/6655.pdf (accessed: 28th November 2024), pp. 64-66.

[1097] In 1963, Australia stated in the Fourth Committee of the General Assembly that "Following advice from the Nauruan Resettlement Committee that subject to satisfactory political arrangements either Curtis Island or Fraser Island would be a satisfactory site for resettlement, the Australian Government had decided that Curtis Island offered the better prospects and had made suggestions on the matter to the Nauru Local Government Council and to the people of Nauru through the Director of Nauruan Resettlement." At the same time, Australian government stated decisively that "it could not transfer sovereignty over territory which was at present part of

Both proposals were finally rejected by Nauruans due to concerns for cultural assimilation and range of autonomy and self-government they would be accorded with.[1098] After that, and especially after gaining independence, Nauruans turned instead to rehabilitation of their own island, a costly project with uncertain future. In connection to that, Nauru initiated proceedings against Australia before the ICJ in 1989 which was eventually settled out of court with Australia agreeing to pay damages for destruction of Nauruan environment in the process of phosphate mining.[1099] Despite this, Nauru remains uninhabitable for a larger part up to present days and struggles to maintain a functional society,[1100] manage wealth aquired from phosphate mining and develop alternative sectors of economy, which led to one author labelling Nauru as the "first failed Pacific state",[1101] which has not, however, made it uncapable of acting in the international sphere.[1102]

Migrations in the Pacific region have not always neccesarily been forced from outside. The insightful example is that of Vaitupuans, the community of around 700 persons living at the island of Vaitupu, then part of the Ellice Islands (present day Tuvalu), who chose voluntarily to move.[1103] Citing economic hardships edured due to overpopulation, land scarcity, and extreme wheather conditions, the Vaitupuans bought land on Kioa, an island that was auctioned at the time by the colonial administration of Fiji.[1104] The community of Vaitupu relocated to the island of Kiowa in eight groups between 1947 and 1963, which brought on Kioa some 235 Vaitupuans in total.[1105] Therefore, the relocation was never *en masse*, nor forced, at least by outside factors – those who were sent by the community to Kioa, relocated,

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Australia" (18th Session, 4th Committee, 1513th Meeting, 12th December 1963, United Nations General Assembly, A/C.4/SR.1513, 1963, p. 565).

[1098] Certain Phosphate Lands in Nauru (Nauru v. Australia), Memorial of the Republic of Nauru, vol. 1, 1990, available at: https://www.icj-cij.org/sites/default/files/case-related/80/6655.pdf (accessed: 28th November 2024), pp. 68-69.

[1099] See: Certain Phosphate Lands in Nauru (Nauru v. Australia), Order of 13 September 1993, *I.C.J. Reports*, 1993, pp. 322-323.

[1100] Compare: Soete, *op. cit.* (footnote 381), p. 194.

[1101] Connell, John, Nauru: The First Failed Pacific State?, *The Round Table*, vol. 95, no. 383, 2006, p. 47.

[1102] In international relations, Nauru has a particularly strong relationship with the Russian Federation, which make sit rather unique among Pacific island states. Compare: Storr, *op. cit.* (footnote 1092), p. 223.

[1103] McAdam, *op. cit.* (footnote 682), p. 314.

[1104] *Ibid.*

[1105] *Ibid*., p. 316.

while the original settlement on Vaitupu remaining inhabited. As explained by one author, comparing this case with that of Banabans, "Kioa was clearly settled by the choice of islanders by Vaitupu, and without as much drama".[1106] While the reasons for relocation were questioned,[1107] the relocation was implemented and the two communities of Vaitupuans, the one on their original island and the one on Kioa, remain until the present day, sharing close family ties and common cultural traditions. The relocations stopped in 1963, when Fijian government immigration policy restricted further settlement of Vaitupuans on Kioa.[1108] However, Vaitupuans were able to keep their distinct identity and culture on Kioa, which prompted one author to name relocation from Vaitupu to Kioa as the only "successful community-led resettlement"[1109] in the Pacific islands region.

Another insightful example is that of Niue, a "self-governing state in a relationship of free association with New Zealand".[1110] Included into the list of non-self-governing territories after the Second World War, Niue was excluded from the list in 1974,[1111] after majority of Niueans voted for self-government for Niue in free association with New Zealand in a referendum organized under oversight of United Nations observers.[1112] Specific nature of ties between Niue and New Zealand created by this constitutional arrangement was described by

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[1106] Teaiwa, Teresia K., Rabi and Kioa: Peripheral Minority Communities in Fiji, in: Lal, Brij V., Vakatora, Tomasi R. (eds.), *Fiji in Transition: Research Papers of the Fiji Constitution Review Commission*, Suva, 1997, p. 132, quoted according to: McAdam, Jane, Ferris, Elisabeth, Planned Relocations in the Context of Climate change: Unpacking the Legal and Conceptual Issues, *Cambridge Journal of International and Comparative Law*, vol. 4, no. 1, 2015, p. 145.

[1107] Bedford thus speculated that the real reason behind the relocation was not to prevent deterioration of living conditions on Vaitupu, but rather to enhance the prestige over other Tuvaluans that had been felt by Vaitupuans, an observation echoed by McAdam. See: McAdam, *op. cit.* (footnote 682), p. 315.

[1108] *Ibid*., p. 316.

[1109] Bedford, Richard D., Resettlement of Ellice Islanders in Fiji, *Auckland Student Geographer*, no. 5, 1968, p. 51, quoted according to: *ibid*., p. 317.

[1110] Quentin-Baxter, Alison, Niue's Relationship of Free Association with New Zealand, *Victoria University of Wellington Law Review*, vol. 30, no. 2, 1999, p. 589.

[1111] Question of Niue, United Nations General Assembly, A/RES/3285(XXIX), 1974.

[1112] On the general conditions in Niue at the time of the referendum, its background, conduct and, results, see: Report of the United Nations Special Mission to Observe the Act of Self-Determination in Niue, in: Report of the Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples, vol. V, United Nations General Assembly, A/9623/Rev.1, vol. V, pp. 199, 221-232.

one scholar as “flexible relationship that can meet the sometimes different needs of each”.[1113] The Constitution of Niue, adopted in 1974 in anticipation of the referendum, specified terms of this relationship, with New Zealand being obliged to provide Niue with administrative, defence, security, foreign affairs, and economic assistance.[1114] Furthermore, New Zealand retained the right to extend its legislation over Niue, albeit only with previous request and consent given by the Niue Assembly, a representative body of Niueans.[1115] As evidenced by Niue having diplomatic relations with other states and being a member of international organizations[1116] and party to international treaties in its own right, it is not generally considered a sovereign state, but neither an entity devoid of legal personality.[1117] Rather, it would be better to think of Niue as a specific case of a legal person which has some attributes of a state, but is not a state in the full sense under international law.

As Ross notes, the case of Niue is “particularly interesting since Niue exists as its own international legal person with what might be described as a "population nucleus" living in the single atoll but a majority population living in mainland New Zealand “.[1118] By agreement between Niue and New Zealand and New Zealand legislation, Niueans are considered New Zealand citizens for purposes of obtaining residence and being permitted to work in New Zealand proper.[1119] Decades of emigration from Niue to New Zealand have created a situation in which there is currently more Niueans living in New Zealand that on Niue.[1120] Many of

[1113] Quentin-Baxter, Alison, The Cook Islands, Niue and Tokelau as Parts of the Realm of New Zealand, *Victoria University of Wellington Law Review*, vol. 52, no. 3, 2021, p. 598.
[1114] See: Angelo, Tony, Perham, Elisabeth, & Lau, Yi-Shen, Niue in New Zealand Legislation, *Victoria University of Wellington Law Review*, vol. 52, no. 2, 2021., pp. 255-262
[1115] *Ibid*., p. 266-267.
[1116] Niue is, in its own right, a member state of both universal and regional international organizations such as the UNESCO and the Pacific Island Forum. Simultanously, Niue has maintaned bilateral diplomatic relations with other states. See: Ross, *op. cit.* (footnote 300), p. 176.
[1117] For a similar conclusion, compare: Quentin-Baxter, Alison, Niue's Relationship of Free Association with New Zealand, *Victoria University of Wellington Law Review*, vol. 30, no. 2, pp. 590-591.
[1118] Ross, *op. cit.* (footnote 300), p. 177.
[1119] Both the Niue Constitution Act of 1974 and the New Zealand Citizenship Act of 1977 provide for Niue to “continue to be defined as part of New Zealand for the purpose of citizenship”. (McDonald, Caroline Jenny, *Decolonization and Free Association: The Relationships of the Cook Islands and Niue with New Zealand*, Victoria University of Wellington, PhD Thesis, 2018, pp. 136-137, 139-140).
[1120] Compare estimations of Niueans living on Niue and on New Zealand in: *ibid*., pp. 145, 148.

them are second and third generation immigrants, being born and lived in New Zealand their whole life.[1121] However, their ethnic and cultural identity remains, at least in part, linked to their Niuean heritage, despite economic reasons and increased opportunities being cited as reasons for migration to New Zealand.[1122] The situation could indeed be deemed similar to what might happen to the populations of small island states after relocation, at least while the territory of the small island states remains partly habitable and capable of sustaining at least a part of population.

Cases mentioned in this subchapter are relevant for situations with which populations of small island states are likely to face insomuch as they delineate various models of autonomy that might be relevant once population relocates to the territory under sovereignty of another state. However, these examples could only be relevant in cases of group (*en masse*) relocations, as they presuppose existence of a compact group of persons with common ethnic and cultural characteristics forming a population. Even in that case, relocation must be based on consent between parties and a clear legal arrangement. Otherwise, as these examples showed, the autonomy remains a constant point of conflict and trauma for both the relocated and host communities. In case where legal personality of peoples of small island states, which includes *jus contrahendi*, is safeguarded, it could take the form of an international treaty, adding an additional layer of protection from unilateral changes by the governments of host states. Individual relocations, on the contrary, are not likely to create willingness of host states to engage in providing the relocated islanders, which in this type of relocation do not form a compact group of peoples, with a territorially based form of autonomy similar to those provided in cited examples. Therefore, examples of non-territorial autonomy must be considered.

3.3.2. **Non-territorial autonomy**

As the name suggests, principal difference between territorial and non-territorial autonomy is in that the latter, unlike the former, is not tight to a specific geographic area. Having that

[1121] *Ibid*., p. 148, citing the inquiry by the Statistics New Zealand.
[1122] Compare: *ibid*., pp. 150-152.

in mind, non-territorial autonomy will usually be applied to groups which have a distinct identity, however do not possess a distinct geographic area on which they live.[1123] While these, as distinguishing factors between territorial and non-territorial autonomy, can be considered as *differentia specifica*, the definition of non-territorial autonomy, even less its content, has never been defined in international law as a general matter.[1124]

The idea of non-territorial autonomy, although lacking precision and definition in international law, is not a theoretical novelty. Legal systems based on personal rather than territorial principle, which allowed for diversification of legal rules applicable for various different ethnic and religious groups were in place well before the rise of nationalism in the 19th Century in some multi-ethical and multi-confessional states. Already in the ancient Roman Empire, while being far away from the concept of nationality as it is understood in the modern sense, the ancient Roman law (*jus civile*) was law applicable only to Roman citizens. Foreigners had their legal systems in place, which they were free to use in governing legal relations between themselves. This gave rise to creation of the law applicable to dealings with foreigners (*jus gentium*), those not holding Roman citizenship, regardless of the fact that gradually, territorial expansion of the Roman Empire brought many of them under the rule of Rome.[1125] The example was followed in the legal tradition of, among others, the Carolingian Empire, which was created by expansion of the Carolingians bringing together many kingdoms with their distinct cultures and legal systems. Rather than replacing these various legal systems, the Carolingians brought them together under the concept of law being applicable to the person on a basis of the "law he lived under".[1126] Somewhat similarly, the Ottoman Empire used millet system to provide non-territorial autonomy to its religious

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[1123] Nootens, Geneviève, Can Non-Territorial Autonomy Bring an Added Value to Theoretic and Policy-Oriented Analysis of Ethnic Politics?, in: Malloy, Tove H., Palermo, Francesco (eds.), *Minority Accommodation through Territorial and Non-Territorial Autonomy*, Oxford, 2015, p. 41.

[1124] Suuksi, Markku, Non-Territorial Autonomy: The Meaning of '(Non-)Territoriality', in: *ibid*., p. 84.

[1125] On the concept of citizenship and personal allegances that governed the legal relations in Roman times, see: Nussbaum, *op. cit.* (footnote 445), p. 11-12. See also: Sherwin-White, Adrian Nicholas, *The Roman Citizenship*, Oxford, 1980, p. 397, discussing how imposition of Roman law in provinces faced difficulties, which mostly led to its confinement to governing affairs between Roman citizens and Peregrini living in provinces, while the relations between Peregirni themselves remained outside of it, at least formally (with the influence of Roman legal concepts on the developments of provincial legal affairs remaining strong, however).

[1126] Soete, *op. cit.* (footnote 381), p. 197.

groups, which had the right to govern their personal affairs by their autonomous legal systems based on religious affiliation.[1127]

At the end of the 19th Century, two Austro-Marxist theoreticians and politicians Otto Bauer and Karl Renner defined a concept that aimed at calming ethnic tensions and preventing disintegration of Austria-Hungary in the environment of growing nationalism which constantly endangered the Austro-Hungarian Empire.[1128] They envisioned a system of national cultural autonomy, with "cultural communities" created for various ethnic groups that lived in the Austro-Hungarian Empire, that would remain separate from the concept of a state as a "sovereign territorial entity".[1129] In line with that, nation would function as a non-territorial entity akin to a public corporation, taking over all public matters that are connected to national cultural identity.[1130] On the other hand, a state, governed by a central government, is a territorial sovereign entity, which is entrusted only with nationally neutral political issues.[1131] This enables nation, which is culturally-based and determined by a sense of

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[1127] Erk, Jan, Non-Territorial *Millets* in Ottoman History, in: Malloy, Palermo (eds.), *op. cit.* (footnote 1123), pp. 127-128.

[1128] Otto Bauer and Karl Renner devised their theories in the context of the late 19th Century Austro-Hungarian Empire with an aim to create a model that would enable for that state to remain functional despite ethnic differences. The Austro-Hungarian Empire at the time comprised more than fifteen different nationalities. Ethnic tensions were growing rapidly, especially as industrialization brought about increased multi-culturality in cities due to influx of migrants from various parts of the monarchy. Bauer and Renner were politicians active in the Austrian Socialist Party, one of the few political organizations that did not function according to ethnic lines, but rather appealed to urban populations, especially in the Austrian part of the monarchy. Their proposal therefore tried to overcome ethnic differences and national mistrust, serving thus a practical purpose rather than being a radical intellectual effort or a theory that was not devised to ever be implemented in practice. Names of their writings are significant for that matter. Bauer named his proposal The Question of Nationalities and Social Democracy, while Renner published it under the straightforward title State and Nation. See: Nimni, Ephraim, Nationalist multiculturalism in late imperial Austria as a critique of contemporary liberalism: The case of Bauer and Renner, *Journal of Political Ideologies*, vol. 4, no. 3, 1999, pp. 293-296.

[1129] Smith, David J., NTA as Political Strategy in Central and Eastern Europe in: Malloy, Palermo, *op. cit.* (footnote 1123), p. 163.

[1130] As summarized by Nimni: "The model of national autonomy requires that all citizens declare their nationality when they reach voting age. Members of each national community, whatever their territory of residence, would form a single public body or association endowed with legal personality and sovereignty and competent to deal with all national-cultural affairs. These corporations would organise the educational system of their members, the legal system, and all other issues that are national in character. The idea here is to eliminate competition between national communities by ensuring a strict separation of competences." (Nimni, *op. cit*. (footnote 1128), p. 297).

[1131] Kann, summarizing both Renner and Bauer's views, explains this in the following words: "The citizen, even though he may live within a territory where the majority belongs to a different national group, in questions

common identity felt by persons constituting it, to be separated from the state. The state should, in their view, consist of "a shared territorial space inhabited by autonomously organized ethno-national groups".[1132] What Renner and Bauer proposed is, basically, that decoupling of nationality from territorial concepts would enable the Austro-Hungarian Empire to continue functioning and prevent its disintegration due to growing nationalism.[1133]

The ideas of Renner and Bauer were suited for the moment in which they were conceived. While they certainly postulated personal principle as a corollary to the territorial principle in the sense that the law governing personal affairs is based on national cultural identity rather than the common legal system being in place, their ideas were not conceived as to completely replace territorial principle of law.[1134] They nevertheless represent a model that envisoned some of the key characteristics of any non-territorial autonomy that small island states populations might view as crucial after relocation. These are the legal personality, autonomy in the form of democratic decision-making for the members of national cultural communities, and a solid basis for protection of national, cultural, linguistic, and other forms of identity for communities which share them while not being necessarily centered around a specific part of the territory of a host state.

Nowadays, forms of non-territorial autonomy are prevalent is states which have either peoples or minorities scattered around the respective states' territories, with members of either peoples or minority live in different parts of a state. Examples are numerous. In

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of genuine national interest should not be subject to its laws but to those of his own supra-territorial national organization. The national issue in the multinational state can thus be solved, even though clear-cut national border lines cannot, and do not have to, be established." (Kann, Robert A., Karl Renner (December 14, 1870-December 31, 1950), *The Journal of Modern History*, vol. 23, no. 3, 1951, p. 244).

[1132] Smith, *op. cit.* (footnote 1129), p. 163.

[1133] Compare: Maíz Ramon, Pereira, María, Otto Bauer: The Idea of Nation as a Plural Community and the Question of Territorial and Non-territorial Autonomy, *Philosophy and Society*, vol. 31, no. 3, 2020, pp. 293, 295.

[1134] As pointed out by Maíz and Pereira: "neither Renner nor Bauer consider the principle of personality as an alternative to the territorial principle, but as an element of correction and complementary to the first. Its proposal consists in a nuanced articulation of the territorial principle and the personnel. For example, through free individual declaration of nationality and the abandonment of ethnic-racial ascription, territoriality and personality can be combined in plural contexts. In no case is the "pure implementation" of the principle of personality postulated" (*Ibid*., pp. 297-298).

Canada[1135] and Belgium[1136], the non-territorial autonomy regime is in place for accommodating linguistic rights in linguistically diverse areas. In North Macedonia[1137] and Croatia[1138] and various other states, the concept is in place to accomodate for minorities living in different parts of the state's territory, without a single territorially based area. The predominant model of non-territorial autonomy used in these cases is based on subsidiarity.[1139] It functions on two levels, with internal self-determination (in case of peoples) or minority rights realized through their autonomous institutions created for

[1135] In Canada, linguistic autonomy is guaranteed to French-speaking schools in predominantly English-speaking provinces, and vice versa. This is ensured not only by language of education, but also through school boards, which are composed of French- or English-speaking members, depending on the language of instruction. While the system is being challenged as to the degree of autonomy these schools should possess, it nevertheless represents an example of self-governance based on personal rather than territorial principle. On the scholastic aspect of linguistic non-territorial autonomy in Canada, see: Dave Guenette, Felix Mathieu, Minority Language School Boards and Personal Federalism in Canada - Recent and Ongoing Developments in Quebec, *Constitutional Forum*, vol. 31, no. 1, 2022, pp. 19-28, especially pp. 26-28; Quebec English School Boards Association c. Procureur général du Québec, Cour Supérieure de Quebec, no. 500-17-112190-205, 2023.

[1136] In Belgium, the system of Flemish and Wallon autonomies, while predominantly territorial in nature, have some aspects of non-territorial, personal principle embedded in them. Thus, in Brussels, which is not part of either of the regions, linguistic affairs are managed by Flemish and Wallon authorities, respectively, while other aspects of autonomous affairs are managed by separate authorities of the Belgian capital city. See: Soete, *op. cit.* (footnote 381), p. 199.

[1137] In 2001, Macedonians and Albanians in what is now the Republic of North Macedonia concluded the so-called Ohrid Framework Agreement in order to end the ongoing violent skirmishes along ethnic lines which erupted as a consequence of the unresolved question of autonomy of the Albanian minority. Instead of creating the territorial autonomous unit for Albanians within the state, the Ohrid Framework Agreement recognized that rights of minorities are to be protected in all municipalities in which any minority represents a significant percent of the population (the percentages were set so that they fit the Albanian minority only). See: Ruffer, Ari, Macedonia's Ohrid Framework Agreement Reexamined in Response to Internal and External Crises: Reason for Cautious Optimism on Europe's Southeastern Border, *Columbia Journal of Transnational Law*, vol. 55, no. 2, 2017, pp. 465-469.

[1138] In Croatia, the system of cultural autonomy is in place for all national minorities according to the Constitutional Act on the Rights of National Minorities. The guarantees include the right to use a minority language in public, right to education in minority language, etc. In addition, members of minorities passing certain numerical criteria are accorded the right to political participation both on the national and local level. See: Zlatić, Vedran, Nacionalne manjine kao dio ustavotvornog naroda u Republici Hrvatskoj, in: Petričušić, Antonija, Horvat Vuković, Ana, Krešić, Mario (eds.), *Prvih dvadeset godina Ustavnog zakona o pravima nacionalnih manjina*, Zagreb, 2024, pp. 6-11.

[1139] As opposed to the model based on self-government, the models of non-territorial autonomy based on subsidiarity can be viewed as "weaker" sense of autonomy. In Nootens' words: "In the context of a discussion of TA and NTA arrangements, it is related to the issue of dealing with a diversity due to the presence of minority groups (ethnic, religious, linguistic, or national), and to some idea either of subsidiarity (a 'weaker' sense of autonomy, closer to what local and self-government can achieve) or of self-government (a 'stronger' sense, closer to what the status of federated entities entails)." (Nootens, *op. cit.* (footnote 1123), p. 35).

promoting minority language, culture, and traditions in an effort to safeguard the distinct identity of minority.[1140] This aspect of autonomy has been referred in literature as cultural autonomy.[1141] However, once these institutions, which are supported by the legal framework of the state and autonomously governed by the minority are given competences that go beyond cultural identity of a minority, the autonomy becames what is known as the functional autonomy.[1142] In any case, peoples and minorities are expected to respect the overall legal framework of the state and, while they might have significant levels of autonomy in governing their affairs, ans as a rule there is no right to seccession.[1143] Non-territorial autonomy thus serves a two-folded purpose. From the point of view of a group claiming it, the non-territorial autonomy might serve as a substitute for a claim towards self-determination. Minorities, as opposed to peoples, are not accorded the right to self-determination in general international law.[1144] However, internal self-determination, realized within the framework of an existing state, generally results in autonomy, therefore granting non-territorial autonomy to minority might lead to extending the concept of self-determination to it.[1145] On the other hand, states that have minorities which are demanding for more autonomy, are usually more open to granting non-territorial than territorial autonomy, as the latter is more likely to result in claims for secession and external self-determination.[1146]

To return to the issue at the forefront of this work, a question arises as to what extent these presented examples of non-territorial autonomy could be useful for populations of small island states. In our view, one has to be careful in examining them and trying to replicate

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[1140] Compare: *Ibid*., pp. 45-46.

[1141] For a review of various definitions of cultural autonomy as non-territorial autonomy, see: *Ibid*., pp. 43-45.

[1142] Weller, Mark, *Towards a general comment on self-determination and autonomy*, Working Paper, United Nations Commission on Human Rights, E/CN.4/Sub.2/AC.5/2005/WP.5, 2005, p. 5.

[1143] Vukas, *op. cit.* (footnote 303), p. 438.

[1144] Gros Espiell, Héctor, *The Right to Self-Determination: Implementation of United Nations Resolutions*, Study prepared by the Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, E/CN.4/Sub.2/405/Reinternatonav.1, 1980, p. 9.

[1145] Nootens, *op. cit.* (footnote 1123), p. 36.

[1146] Compare: Kymlicka, Will, National Cultural Autonomy and International Minority Rights Norms, *Ethnopolitics*, vol. 6, no. 3, 2007, p. 388.

them due to, at least, two sets of reasons. First, there is a problem of classification. As already mentioned, it is uncertain whether the populations of small island states will be regarded by the host states as peoples, minorities, or even just migrants without any recognition as a group. Traditionally, only minorities that had been long-established and well-settled in a state, were considered as minorities that should be accorded minority rights, as opposed to groups originating from recent migratory flows.[1147] Moreover, minority protection system once had a tendency to limit state's obligation only to minorities composed of their citizens.[1148] However, HRComm in its General Comment no. 23 dismissed such restrictions, noting that: "Article 27 confers rights on persons belonging to minorities which "exist" in a State party. Given the nature and scope of the rights envisaged under that article, it is not relevant to determine the degree of permanence that the term "exist" connotes. Those rights simply are that individuals belonging to those minorities should not be denied the right, in community with members of their group, to enjoy their own culture, to practise their religion and speak their language. Just as they need not be citizens, they need not be permanent residents. Thus, migrant workers or even visitors in a state party constituting such minorities are entitled not to be denied the exercise of those rights."[1149] This interpretation, however, generated much criticism as over-expansive, specifically due to the drafting history of the Article 27 of the ICCPR pointing in another direction.[1150]

[1147] Compare: Vukas, *op. cit.* (footnote 303), pp. 352-355.; Wolfrum, Rüdiger, The Emergence of "New Minorities" as a Result of Migration, in: Brölmann, Catherine, Lefeber, René, Zieck, Marjoleine (eds.), *Peoples and Minorities in International Law*, Dordrecht/Boston/London, 1993, pp. 162 *et passim*.

[1148] As noted by Vukas "for many commentators the possession of the nationality (citizenship) is a *sine qua non* for every member of a minority". See: Vukas, *ibid*., p. 351. Indeed, the League of Nations minority protection system "linked the granting and exercise of civil, cultural and political rights to citizenship". See: Wolfrum, *ibid*., p. 157.

[1149] General Comment No. 23: Article 27 (Rights of Minorities), Human Rights Committee, CCPR/C/21/Rev.1/Add.5, 1994, Paragraph 5.2.

[1150] In the annotations to the Draft International Covenants of Human Rights, for example, there are the following words explaining the meaning of the word "minorities" as understood by the delegations of states discussing what would become the text of Article 27 of the ICCPR: "It was agreed that the article should cover only separate or distinct groups, well-defined and long-established on the territory of a State. This appeared to be the meaning of the opening clause, 'in those States in which ethnic, religious or linguistic minorities exist…'" See: Draft International Covenants on Human Rights: Annotation prepared by the United Nations Secretary-general, A/2929, 1955, p. 181. See also: Vukas, *op. cit.* (footnote 303), p. 353, Duursma, *op. cit.* (footnote 424), p. 41, Wolfrum, *op. cit.* (footnote 1147), p. 160.

With the designation of indigenous peoples, the matter is even more complex, as it is indeed possible for the indigenous peoples to be considered distinct even after relocation from their ancestral territories.[1151] However, this is generally conditioned by the state's willingness to recognize the peoples as indigenous at the first place, which might be hard to obtain in cases of recently relocated islanders.

One of the most advanced systems of non-territorial autonomy in place in the contemporary (international) legal framework are the Sami parliaments. Therefore, it is often cited as a model and we consider it in the same way. At the same time, we are aware that the aforementioned dissimilarity, namely that islanders are unlikely to be recognized the same array of rights as indigenous peoples, applies.

The Sami are indigenous peoples of Sapmi (known as Lapland in non-Sami languages, albeit this name is considered inappropriate by the Sami), a vast region spanning across sovereign states of Norway, Sweden, Finland, and Russian Federation. Highest number of those identifying as Sami live in Norway, however all of the aforementioned states host a recognized population. The Sami have preserved a distinct language, culture, and way of life which is endangered by, *inter alia*, linguistic assimilation. For example, this means the impossibility for Sami children to learn Sami languages in schools. Similary, extraction of resources and other development projects, such as constructing railways, roads, and other infrastructure, in the areas Sami are traditionally using for raindeer husbandry created additional constrains.[1152]

On a political plan, Sami are represented in Norway, Sweden and Finland by Sami parliaments, three distinct bodies established via national legislation of respective states. Norwegian Sami Parliament thus has thirty-nine members which are elected across seven constituencies with significant Sami population.[1153] Swedish Sami Parliament, in turn has

[1151] Kingsbury, *op. cit.* (footnote 866), p. 386.

[1152] Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya: The situation of the Sami people in the Sápmi region of Norway, Sweden and Finland, Human Rights Council, A/HRC/18/35/Add.2, 2011, pp. 15-19.

[1153] The Sami Parliament of Norway has been established by the Sami Act, passed into law by the Norwegian Parliament in 1987. Since its first meenting in 1989, the Sami Parliament has functioned as a consultative body

thirty-one members, which are elected on a separate list.[1154] The right to vote is given only to those who qualify as Sami according to criteria set by legislation governing the elections.[1155] Finnish Sami Parliament has twenty-one members, which are elected in a mixed system where one part of members is elected in specifically designated constituencies comprising areas where significant Sami populations exist, while the rest are elected on a state-wide list by all voters who qualify as Sami.[1156] Finally, in Russian Federation, there is no body established that would be similar to Sami parliaments in aforementioned states. Therefore, only non-governmental organizations represent the Sami of Russia.[1157]

Sami parliaments are entrusted with political representation of the Sami in the three states where they have been established. With that in mind, Special Rapporteur Anaya called them "the principal vehicles for Sami self-determination in Norway, Sweden and Finland"[1158] adding that they "represent an important model for indigenous self-governance and participation in decision-making that could inspire the development of similar institutions elsewhere in the world"[1159]. However, he immediately notes how such an assumption must be taken with a significant amount of caution as to the real power and influence that Sami

in significant cases concerning the Sami, including the Raindeer Husbandry Act regulating the key traditional activity of the Sami, which is also crucial for their identity. See: Soete, *op. cit.* (footnote 381), pp. 205-206.

[1154] See: Sami Parliament Act, 1993, Chapter 2, Paragraph 2. The Sami Parliament of Sweden has been established by the Sami Parliament Act, passed into law by the Swedish Parliament in 1993. As explained Special Rapporteur Anaya, basing his analysis on the Sami Parliament Act: "The specific tasks of the Swedish Sami Parliament include allocating State funds for Sami organizations, cultural programmes and other matters; appointing the board of directors for a Sami school; managing work to promote the Sami language; participating in community development, including in relation to reindeer herding and use of land and water; and providing information about Sami conditions." (Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya: The situation of the Sami people in the Sápmi region of Norway, Sweden and Finland, Human Rights Council, A/HRC/18/35/Add.2, 2011, p. 8).

[1155] For the regulation of the elections for the Sami Parliament of Sweden, see: Sami Parliament Act, 1993, Chapter 3.

[1156] The Sami Parliament of Finland has been established in 1972, while the current Sami Parliament Act was adopted by the Parliament of Finland in 1995. See: Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya: The situation of the Sami people in the Sápmi region of Norway, Sweden and Finland, Human Rights Council, A/HRC/18/35/Add.2, 2011, pp. 8-9.

[1157] Soete, *op. cit.* (footnote 381), p. 208.

[1158] Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya: The situation of the Sami people in the Sápmi region of Norway, Sweden and Finland, Human Rights Council, A/HRC/18/35/Add.2, 2011, p. 11.

[1159] *Ibid.*

parliaments are able to exert on the respective governments in important matters that concern the Sami populations they represent.[1160] Indeed, Sami Parliaments have only consultative status in all three states where they have been established.[1161] While all three states have in some form created a framework in which Sami Parliaments must be consulted in the legislative process regarding matters that concern the Sami, this process does not always result in an agreement and the views of Sami parliaments are not adhered to.[1162] Moreover, Sami parliaments combine consultative with administrative functions, which might result in a confusion over whether they can really act as independent representative bodies of the Sami peoples or administrative organs of states in some matters.[1163] Similarly, state authorities are not obliged to consult Sami parliaments in budgetary matters, and the parliaments themselves sometimes experience lack of funding, especially in discharging their costlier administrative responsibilities.[1164]

While Sami parliaments certainly represent a significant tool enabling internal self-determination of the Sami peoples, they were not created in direct response to international legal standards, but out of good practice transformed into municipal legal norms of the three out of four states in which Sami live as indigenous peoples.[1165] This, however, changes with the adoption of the Nordic Saami Convention. This Convention, concluded in 2017, was a result of a relatively long process involving the Sami Parliamentary Council, a body bringing

[1160] Compare: *ibid*.
[1161] *Ibid*., p. 6-9.
[1162] Compare: Soete, *op. cit.* (footnote 381), pp. 205-206.
[1163] Carstens, Margret, Sami Land Rights: The Anaya Report and the Nordic Sami Convention, *Journal on Ethnopolitics and Minority Issues in Europe*, vol. 15, no. 1, 2016, pp. 78-79.
[1164] Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya: The situation of the Sami people in the Sápmi region of Norway, Sweden and Finland, Human Rights Council, A/HRC/18/35/Add.2, 2011, p. 12.
[1165] The position of Nordic governments in the process that led to adoption of the International Labour organization's Convention no. 169 on Indigenous and Tribal Peoples shows this. In that process, the governments of Norway and Sweden, among other governments of Western states with indigenous populations, "preferred a convention that did not move beyond existing domestic laws, or laws that were in the process of being adopted". See: Vik, Hanne Hagtvedt, Semb Anne Julie, Who Owns the Land? Norway, the Sami and the ILO Indigenous and Tribal Peoples Convention, *International Journal on Minority and Group Rights*, vol. 20, no. 4, 2013, p. 535.

together the three Sami Parliaments.[1166] In framing the Sami position in the states parties to the Nordic Sami Convention, the single most important provision is Article 3, which explicitly grants Sami the right to self-determination.[1167] This provision is framed as to cover typical elements of internal self-determination, mirroring in that regard the UNDRIP, which recognizes the right of indigenous peoples to self-determination as well.[1168] Moreover, the Nordic Saami Convention contains a specific set of provisions regarding the position of Sammi parliaments and their relations with the institutions of signatory states.[1169] Among these, Article 16 is of particular importance as it stipulates that Sami parliaments must be consulted in "matters of major importance for the Sami". This is joined by further limitation on the states not to "adopt or permit measures that may significantly damage the basic conditions for Saami culture, Saami livelihoods or society, unless consented to by the Saami parliament concerned".[1170] Basing her argument on this provision, Soete therefore rightly concludes that the Nordic Saami Convention would provide the Sami with the "actual autonomy" through the rights it gives to the Sami parliaments.[1171]

However, it should be noted that Sami are still not represented on the Nordic Council, unlike some other entities possessing different types of territorial autonomy (Faroe Islands, Greenland, Åland Islands). That fact, combined with financial insecurities Sami parliaments

[1166] Carstens, *op. cit.* (footnote 1163), pp. 93-94.

[1167] In the English translation ot the text, Article 3 in full reads as follows: "As a people, the Saami has the right of self-determination in accordance with the rules and provisions of international law and of this Convention. In so far as it follows from these rules and provisions, the Saami people has the right to determine its own economic, social and cultural development and to dispose, to their own benefit, over its own natural resources." For the English text of the Nordic Saami Convention, see: Nordic Saami Convention, 2017, available at: https://www.regjeringen.no/en/topics/indigenous-peoples-and-minorities/Sami-people/nordisk-samisk-samarbeid/nordic-sami-convention/id86937/ (accessed: 23rd May 2024).

[1168] Article 3 of the UNDRIP provides the right to (internal) self-determination to indigenous peoples. See: Wheeler, *op. cit.* (footnote 1019), 2018, pp. 137 *et passim*.

[1169] Nordic Saami Convention, Articles 14-22.

[1170] In full, Article 16 of the Nordic Sami Convention reads as follows: "In matters of major importance to the Saami, negotiations shall be held with the Saami parliaments before decisions on such matters are made by a public authority. These negotiations must take place sufficiently early to enable the Saami parliaments to have a real influence over the proceedings and the result. The states shall not adopt or permit measures that may significantly damage the basic conditions for Saami culture, Saami livelihoods or society, unless consented to by the Saami parliament concerned."

[1171] Soete, *op. cit.* (footnote 381), p. 208.

are facing and differences in legal status of the Sami in different states, points out that their autonomy is still very much regarded as a matter with significant room for improvement.[1172]

Sami model is certainly an advanced one, albeit not without flaws and operational problems in practice. In case non-territorial autonomy becomes a reality for peoples of small island states, similar problems might arise, however non-territorial autonomy should not be disregarded as it provides a way to safeguard at least some aspects of right to self-determination.

So far, we have discussed the right to self-determination. There are, however, other human rights concerns that are likely to arise in relation to sea level rise, especially as relocation becomes a reality. In the next chapter, we shall elaborate on these concerns from the perspective of international human rights law.

Chapter 4 – **Human Rights Concerns in the Process of Relocation – A Quest for the Relevant Legal Framework**

The decision to relocate did not come easily. While there might be an environmental degradation, disaster or climate change induced process such as sea level rise a perciptating event, it is followed by weighting of reasons for and against migration, its facilitators and constrains.[1173] Climate change induced migrations cannot be explained as a simple cause and effect nexus. Rather, it is a series of complex decisions that prompt peoples to decide to relocate, especially if such relocation involves crossing the international border.[1174] Different factors, including political, structural, socio-economic circumstances influence people's decision to move.[1175] Therefore, discourse on environmental migrations is better encapsulated in the concept of vulnerability layers, rather than as a straightforward relation between an event and the decision to move. The basic presumption of the vulnerability layers paradigm

[1172] Compare: *ibid*., pp. 208-209.

[1173] For a model of environmentally induced migrations, see, generally: Graeme, Hugo, Environmental Concerns and International Migration, *The International Migration Review*, vol. 30, no. 1, 1996, p. 111.

[1174] McAdam, *op. cit.* (footnote 117), p. 20.

[1175] Mota Borges, Isabel, *International Law and Environmental Displacement: Towards a New Human-Rights Based Paradigm*, PhD Thesis, Univerity of Oslo, Faculty of Law, 2015, p. 51.

is, as name suggests, that there are multiple vulnerabilities to which peoples are exposed due to climate change.[1176] In the context of environmentally induced migrations, there are at least four vulnerability layers.[1177] First one is general, acknowledging that all persons are vulnerable to the effects of environmental change. While it is useful to understand environementally induced migrations as a global problem, this layer does not elucidate much on the specific characteristics of any group, including persons living in small island states, and as such is not very useful to explain their motivation to relocate. Second vulnerability layer focuses on localized circumstances that collective entities face with.[1178] In the context of persons living on small islands this is, first and foremost, uninhabitability due to effects of rising sea levels start. It differentiates them as the local context that is different to all other parts of the world due to real possibilities that their states will be rendered completely uninhabitable due to inundation, which creates specific set of problems not experienced by any other group. Third vulnerability layer, which depends on the specific characteristics of person, age, sex or group tends to be involved due to specific circumstances of living in small island states, which only exacerbate theats of sea level rise and cause migration to be contemplated as a solution not only due to sea level rise, but also due to other factors. Finally, the fourth vulnerability layer emphasizes circumstances and context of a particular situation and the capability of affected persons to cope with the situation.[1179] In case of islanders, it is clear that solutions requiring relocation across international borders will need the response of host states, which positions them into this final layer as well. As evidenced by the historical examples of relocation in the Pacific region, it is possible that something starting as a relocation project which should protect those relocating, ends in exacerbating community vulnerability and further environmental degradation.[1180] What is more, if other options were

[1176] *Ibid.*, p. 50.

[1177] *Ibid.*, pp. 50-51. The concept of vulnerability layers itself is based on work by Florencia Luna. See: Luna, Florencia, Identifying and Evaluating Layers of Vulnerability – a Way Forward, *Developing World Bioethics*, vol. 19, no. 2, 2019, pp. 86-95.; Luna, Florencia, Elucidating the Concept of Vulnerability: Layers Not Labels, *The International Journal of Feminist Approaches to Bioethics*, vol. 2, no. 1, 2009, pp. 121-139.

[1178] *Ibid.*

[1179] *Ibid.*

[1180] For example, in 2011, the Government of Fiji carried out the relocation of Narikoso village, located on the Ono Island in the Kadavu island chain. The relocation, initiated due to concerns over severe coastal erosion ongoing as a consequence of rising sea levels, resulted in extensive works being done on the island by the

available, peoples are usually inclined not to move, but rather to remain and adapt *in situ* which again might create significant vulnerabilities due to inability to cope with the worsening living conditions due to sea level rise.

As Cernea has pointed out, any relocation of population carries in itself significant impoverishment risks, which can, in turn, result in serious human rights violations. He identifies the following risks as especially pertinent is cases of forced relocations: landlessness, joblessness, homelessness, marginalization, food insecurity, increased morbidity, loss of access to common property resources, community disarticulation.[1181] Cultural assimilation and loss of traditional cultural patterns is another risk often mentioned.[1182] To this, risks to security can be fairly added, as the sea level rise drives populations which will have to relocate without the readily available security framework to rely on.[1183] Of course, this problem is not restricted to small island states and concerns many states around the world that have low-lying coastal areas. However, small island states, and consequently their populations, are in a peculiar position because they do not have "reserve" territories, parts of their own territory that are not in dangerous position due to sea level rise.

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military of Fiji, which included excavation of a mountaintop, removal of the mangroves, extensive use of explosive and heavy engeneering equipment, and anchoring of a cargo ship at the coral reef. All these activities led to further environmental damage done to the ecological system of the Ono Island. In the end, the government had to introduce a programme to repare the ecological damage done to the island. Moreover, relocated residents of Narikoso were reluctant to move and expressed the sentiment of loss of cultural values once relocation was completed. See: Bertana, Amanda, Relocation as an Adaptation to Sea-Level Rise: Valuable Lessons from the Narikoso Village Relocation Project in Fiji, *Case Studies in Environment*, vol. 3, no. 1, 2019, pp. 2-3, 6.

[1181] Cernea, Michael M., *Impoverishment Risks, Risk Managment, and Reconstruction: A Model of Population Displacement and Resettlement*, Paper presented to the UN Symposium on Hydropower and Sustainable Development, Beijing, 2000, pp. 13-21.

[1182] With regard to the risk of cultural assimilation, the Co-Rapporteurs of the International Law Commission have observed in their Second Issues Paper that: "When people move as a result of slow-onset events such as sea-level rise or coastal erosion, they risk losing their cultures that are attached to traditional territory. The inability to live on ancestral lands or close to the ocean might for some be at the odds with their right to pursue their protected cultural rights. This is relevant in respect of the enjoyment of cultural rights by indigenous groups and minority populations, including their ability to identify with a particular community and, so, to engage in their cultural practices" See: Galvão Teles, Ruda Santolaria, *op. cit.* (footnote 16), p. 62.

[1183] However, as warned by Nishimura, fraiming climate change migrations as security issues only can have negative consequences for the people on the move, as "framing climate change primarily as a national security issue can hinder protection efforts and naturalize the external political and economic factors at play". See: Nishimura, Lauren, 'Climate Change Migrants': Impediments to a Protection Framework and the Need to Incorporate Migration into Climate Change Adaptation Strategies, *International Journal of Refugee Law*, vol. 27, no. 1, 2015, p. 121.

When this fact is taken into account, question of possible relocations becomes more complex as only remaining destinations on which these peoples might relocate are within territories of other states, what, of course, raises a question about their right to do so and legal status in a state in which they choose to relocate. Complex issues of climate change-induced migrations create a whole new momentum to how international law treats migrations and raises many doubts about how useful existing legal solutions and instruments that contain them can be.[1184]

In international human rights law, displacement for various reasons is an old and well-established topic, but with climate change, a new layer is added to it.[1185] Throughout the history, reasons for displacement were various, from wars to natural catastrophes, but only some of these reasons were regarded as those that deserve their place in international legal instruments. A question of how to relate peoples relocating because of climate change to international refugee law is a highly contested matter, and as such subject to a prolonged academic debate. Peoples of small island states forced to relocate due to sea level rise are definitely a part of this complex question, because their possible migrations from their homelands to other parts of the world is, at least directly, induced by deterritorialization as a direct consequence of sea level rise. This question than leads to others, some of which are connected to most vital interests of peoples such as nationality, self-determination or preserving cultural identity, not to mention other economic, social and cultural rights. All these will be further elaborated, but here they are mentioned as additional arguments for inclusion of peoples as a separate category, distinct from the small island state as a subject of international law.

With that in mind, we must, however, consider relocation as a scenario for persons inhabiting small island states, as it is indeed migration the only option remaining once their homes on islands become uninhabitable due to sea level rise. Therefore, first task is to define what is ment under the notion of relocation.

[1184] See: McAdam, *op. cit.* (footnote 117), pp. 49-50.
[1185] *Ibid.*, pp. 42-44.

4.1. **Planned and individual relocations – two distinct scenarios**

Generally, relocation is defined as "physical process of moving people" that "can be voluntary or forced, large scale or small scale".[1186] Moreover, relocation is "intended to be permanent" which differs the term from evacuations, which are temporary and forsee return once danger that caused evacuation lapses.[1187] While these elements often regarded as a common ground, one must note that relocation is neither a term defined in an international treaty, nor there is a consensus among experts on what exactly relocation entails.[1188]

With relocation becoming an inevitable reality, one of the key questions is in which way it will be effectuated? Basically, there are two available options. First option is that there could be a relocation of a whole population of small island state, refered to as en masse relocation. On the contrary, second option involves individual relocations of islanders to different states which are willing or able to receive them. There are at least two ways in which these scenarios differ. One is operational, while the other is legal, as, arguably, different human rights standards will apply.

Operational differences are quite clear-cut. *En masse* relocation, in general, means relocation of a whole community.[1189] In case of small island states, this could, in extreme scenarios where entire state territory becomes submerged or uninhabitable due to sea level rise, amount to relocation of the whole of the state's population to a foreign territory.[1190] Such relocation is only realistic when it is conceptualized through planned relocation scenario, as there must be a central authority willing to engage in organizing and facilitating such a move in order for it to be succesful.

The ILA' s Committee on International Law and Sea Level Rise in its Sydney Declaration of Principles on the Protection of Persons in the Context of Sea Level Rise has defined "planned relocation" as "a planned process in which persons voluntarily move or are forced to move

[1186] McAdam, Ferris, *op. cit.* (footnote 1106), p. 140.
[1187] *Ibid.*
[1188] *Ibid.*
[1189] McAdam, *op. cit.* (footnote 117), p. 143.
[1190] *Ibid.*, p. 144.

away from their homes or places of temporary residence, are settled in a new location within their own or another State, and are provided with the conditions for rebuilding their lives. Planned relocation is carried out under the authority of the State and is undertaken to protect persons from risks and impacts related to disasters and environmental change in the context of sea level rise". [1191] This includes not only small island state's government (or another authority, such as an international agency given authorization by the small island state's government to engage into the process), but also government or another authority capable of organizing such an effort in receiving state. Principle 4 of the Sydney Declaration of Principles on the Protection of Persons in the Context of Sea Level Rise, which bears the title Duty to Cooperate, stipulates that the duty to cooperate in the context of sea level rise includes the effort to "facilitate cross-border migration in anticipation of, or in reaction to, irreversible environmental degradation or sudden-onset disasters linked to sea level rise".[1192]

Of course, before actual planned relocation begins, na agreement should be reached both small island state's and receiving state's respective governments. There is no framework in general positive international law that would give a clear answer as to how this consent will be given of which would rule the process of relocation at all.[1193] En masse relocation of

[1191] Committee on International Law and Sea Level Rise, Sydney Declaration of Principles on the Protection of Persons in the Context of Sea Level Rise, International Law Association, 2018, Definitions. As confirmed by the Committee on International Law and Sea Level Rise in its commentary of the Sydney Declaration, the definition is not an original product of the Committee's deliberations. It rather reproduces, albeit not literally, the definition proposed by the paper published in 2015 under the auspices of the Brookings Institution, Georgetown University and the United Nations High Commissioner for Refugees titled Guidance on Protecting People from Disasters and Environmental Change through Planned Relocation. This document defines planned relocation as: "a planned process in which persons or groups of persons move or are assisted to move away from their homes or places of temporary residence, are settled in a new location, and provided with the conditions for rebuilding their lives. Planned Relocation is carried out under the authority of the State, takes place within national borders, and is undertaken to protect people from risks and impacts related to disasters and environmental change, including the effects of climate change. Such Planned Relocation may be carried out at the individual, household, and/or community levels." See: Guidance on Protecting People from Disasters and Environmental Change through Planned Relocation, available at: https://www.brookings.edu/wp-content/uploads/2016/06/GUIDANCE_PLANNED-RELOCATION_14-OCT-2015.pdf (accessed: 13th March 2023), p. 5; See also: International Law Association, Sydney Conference, Report, 2018, p. 28.

[1192] Principle 4, Paragraph 2, SubParagraph a, iii. of the Sydney Declaration of Principles on the Protection of Persons in the Context of Sea Level Rise.

[1193] For the assessment of existing international law regimes governing cross-border movements of persons and how they are unsuited for sea level rise-induced planned relocations of peoples of small island states, see *infra*.

populations is not unprecedented, however, historical examples are made obsolete either by not fitting into the general positive human rights obligations that the states have in contemporary international law or, more often, by significantly different circumstances under which they were performed.[1194]

With that in mind, a new legal framework is needed in order to facilitate the process of planned relocation. A question thus arises about what is the most suitable way to create such a framework, as, as already mentioned, one does not exist in contemporary positive international law. It seems that the search for an answer will guide to individual agreements between a small island state engaging in planned relocation and a receiving state willing to enter into such agreement as host population of small island state once the move is accomplished. The reason for this conclusion is simple. Any planned relocation inevitably creates legal obligations on the side of receiving state.[1195] Some of these obligations might have significant economic and political impact on societies of receiving states. Having that in mind, it is hardly real to expect states to agree on an abstract set of rules specifically targeting planned relocations of populations of states instigated by sea level rise. Instead of a general framework for all cases, a series of agreements between individual small island state and a state willing to receive population of a particular small island state is a more realistic option on case of planned relocation. While this seems logical, recent practice of states concluding bilateral agreements concerned with, *inter alia*, protection of persons against the effects of sea level rise, however limited it might be, has not yet confirmed that planned relocation of whole communities is to be envisaged, notwithstanding the smallness of the speculative number of peoples on the move. The Falepili Union Treaty, concluded in

[1194] As catalogued by Campbell, Goldsmith, and Koshy, there are 86 communities in the Pacific Islands Region which at some point in their history went through a collective relocation. Out of these, 37 migrations were caused by environmental variability, 13 by environmental degradation due to human actions, while other causes include conflict, development projects, cultural lifestyle, urbanisation, conversion to Christianity, and miscellanea. Some of these were in fact evacuations, and communities returned after the reasons for evacuation had ceased to exist. See: Campbell, John, Goldsmith, Michael, Koshy, Kanyathu, *Community Relocation as an Option for Adaptation to the Effects of Climate Change and Climate Variability in Pacific Island Countries (PICs)*, Asia-Pacific Network for Global Change Research, 2005, pp. 22-25. McAdam, however, adds that out of these "there appear to be no cases of international relocation in the post-colonial era". See: McAdam, *op. cit.* (footnote 117), p. 143.

[1195] For the discussion of particular legal frameworks of obligations of recieving states, see *infra* in 4.2. – 4.7.

2023, provides for a "special human mobility pathway".[1196] While this might seem as a step forward into embracing planned relocations, it in fact, as explained by commentators, is a rather general concept lacking legal clarity, which moreover seems not changing the quota system and restrictions related to the status of relocated islanders in Australia, thus not changing the status quo and hardly contributing to the enhanced protection of persons relocating due to sea level rise, or creating new robust relocation schemes.[1197]

On the other hand, individual relocations do not necessarily require new international agreements being set up as a framework for them. For an individual relocating from one state to another, there are international law standards which apply in order to protect basic human rights. In general, this is also true even in an extreme (and unlikely) situation of all islanders relocating to one receiving state, but in an unorganized way as otherwise, it would be *en masse* relocation. However, relevance of existing framework for cross-border migrations in cases of climate change induced movements is a highly debatable topic. In absence of a legal framework specifically tailored to encompass migrations induced by climate change, it is doubtful that the existing framework provides a solution that would solve operational dilemmas islanders will face.

Next chapters will therefore be devoted to the various regimes of international law that might be relevant for relocations without a planned scenario based on an international agreement. We will start with the refugee law.

4.2. **Refugee law**

Much has been written on the possibility of fitting persons displaced due to climate change effects into the realms of international law concerning refugees.[1198] In fact, the notion of

[1196] Falepili Union Treaty, Article 3 Paragraph 1.

[1197] Raman, Rashmi, Pakpahan, Daniel, *Falepili Union Treaty, statehood and protection of persons in light of sea-level rise: state practice of preserving the status quo?*, available at: https://cil.nus.edu.sg/blogs/falepili-union-treaty-statehood-and-protection-of-persons-in-light-of-sea-level-rise-state-practice-of-preserving-the-status-quo/ (accessed 15th January 2024).

[1198] For a general overview of the relation between refugee law and environmental change, see, for example: Black, Richard, *Environmental Refugees: Myth or Reality*, Working Paper no. 34, United Nations High Commissioner for Refugees, 2001, pp. 1-14, Suhrke, Astri, Environmental Degradation and Population Flows,

"environmental refugees" has been present in international legal theory ever since it was first defined by Essam El-Hinnawi in his report prepared and published under the auspices of the United Nations Environmental Programme in 1985.[1199] For the purposes of his thematic report on the subject, El-Hinnawi defined environmental refugees as "people who have been forced to leave their traditional habitat, temporarily or permanently because of a marked environmental disruption (natural and/or triggered by peoples) that jeopardized their existence and/or seriously affected the quality of their life".[1200] The definition was intrinsically linked with the concept of environmental disruption as a cause of movement, which he, in turn, defined very broadly, as "any physical, chemical and/or biological changes in the ecosystem (or the resource base) that render it, temporarily or permanently, unsuitable to support human life".[1201] While wide-encompassing, this link has been criticized as to its applicability in situations fitting into the definition of environmental disruption.[1202] This is because the definition requires environmental disruption to have already taken place in oreder for a person to qualify as environmental refugee. What is more, there must be a causal link established between a particular case of displacement and the environmental disruption that caused it.

Considering all this, it might be hard for islanders of small island states to be subsumed under the notion of environmental refugee as proposed by El-Hinnawi definition. This is because their movement, although perciptated by sea level rise, which is an environmental disruption in El-Hinnawi's sense of the term, primarily would not be an ex post facto decision, but rather an anticipatory event.

Journal of International Affairs, vol. 47, no. 2, 1994, pp. 473-496, McAdam, *op. cit.* (footnote 117), pp. 39-51, Torres Camprubí, *op. cit.* (footnote 35), pp. 149-155, Mota Borges, *op. cit.* (footnote 1175), pp. 81-85.

[1199] In fact, the idea of persons becoming "refugees" due to environmental hazards is older than El-Hinnawi's proposal of a definition, existing as early as 1948. For example, William Vogt in his book Road to Survival, one of the controversial early works of environmentalist movement, discussed the idea of persons displaced "in the ecological sense". See: Vogt, William, *Road to Survival*, New York, 1948, p. 107.

[1200] El-Hinnawi, Essam, Environmental Refugees, United Nations Environmental Programme, UNEP(02)/E52, 1985, p. 4.

[1201] *Ibid.*

[1202] Torres Camprubí, *op. cit.* (footnote 35), p. 151.

After the pioneering work of El-Hinawi, the debate on "ecological refugees" concept continued both in academia and on the plane of political advocacy. New definitions have been proposed. For example, Myers defined environmental refugees as "people who can no longer gain a secure livelihood in their erstwhile homelands because of drought, soil erosion, desertification, and other environmental problems",[1203] while Crisp, in turn, defined the same term as "people who are displaced from or who feel oblidged to leave their usual place of residence, because their lives, livelihoods and welfare have been placed at serious risk as a result of adverse environmental, ecological or climatic processes and events".[1204] However, none of these defitions has gained widespread support so far, leaving the concept without the consensus as to its precise scope and meaning.

There have been strong voices that totally rejected the notion,[1205] while others have affirmed it with caution.[1206] What is more, international organizations whose mandate encompasses international migrations have likevise resisted to adopt the term "environmental refugees" preferring other notions.[1207] While the notion is sometimes acknowledged as useful for policy awareness raising, it comes somewhat unsurprisingly that it never became part of binding international agreement and thus entered positive international law. Finally, usefulness of the "environmental refugees" concept has been rejected by the peoples of small island states themselves who have consistently rejected being labelled as refugees, calling the application of the term onto them offensive and producing a "stigma".[1208]

[1203] Myers, Norman, Environmental Refugees in a Globally Warmed World, *Bioscience*, vol. 43, no. 11, 1993, p. 752

[1204] Crisp, Jeff, Environmental Refugees: a UNHCR Perspective, cited in: Mota Borges, *op. cit.* (footnote 1175), p. 82, footnote 47.

[1205] Black, *op. cit.* (footnote 1198), pp. 7-8, which focus on sea level rise.

[1206] Williams, *op. cit.* (footnote 118), pp. 506, 517-520, 523-524.

[1207] On the practice of United Nations High Commissioner on Refugees and the IOM, see: McNamara, Karen Elisabeth, *The Politics of Environmental Refugee Protection at the United Nations*, PhD Thesis, University of New South Wales, 2006, pp. 95-99, 132-142.

[1208] In an interview conducted by McAdam in 2009, then-President of Kiribati, Anote Tong said that "when you talk about refugees – climate refugees – you're putting the stigma on the victims, not the offenders", and continued by explaining that "We don't want to lose our dignity. We're sacrificing much by being displaced, in any case. So we don't want to lose that, whatever dignity is left. So the last thing we want to be called is 'refugee'. We're going to be given as a matter of right something that we deserve, because they' ve take away what we have". See: McAdam, *op. cit.* (footnote 117), p. 41.

4.2.1. **Current regime under the 1951 Convention and the 1967 Protocol – insufficient protection?**

The relevant instrument for the protection of refugees under general international law is the 1951 Convention relating to the Status of Refugees[1209] and the Protocol that amended it and extended the scope of its protection, adopted in 1967[1210]. These instruments were drafted and adopted after the Second World War, with the Cold War and post-War reconstruction in Europe defining world affairs.[1211] It, therefore, does not come as a surprise that, at the time, movement as a consequence of environmental degradation was not included in the definition of a refugee.[1212] Reflecting these contextual realites, the 1951 Convention defines refugee as a person who "owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such

[1209] Convention relating to the Status of Refugees, 1951, *United Nations Treaty Series*, vol. 189, no. 2545, 1954, pp. 137-221.

[1210] Protocol relating to the Status of Refugees, 1967, *United Nations Treaty Series*, vol. 606, no. 8791, 1967, pp. 267-292.

[1211] Compare: Hathaway, Hathaway, James C, A Reconsideration of the Underlying Premise of Refugee Law, *Harvard International Law Journal*, vol. 31, no. 1, 1990, pp. 145-146; Cooper, Jessica B, Environmental Refugees: Meeting the Requirements of the Refugee Definition, *New York University Environmental Law Journal*, vol. 6, no. 2, 1998, p. 482; Duong, Tiffany T.V., When Islands Drown: The Plight of "Climate Change Refugees" and Recourse ot International Human Rights Law, *University of Pennsylvania Journal of International Law*, vol. 31, no. 4, 2010, p. 1250. However, Einarsen notes that this is just one of the possible interpretations of the drafter's motives as there are other commentators "claiming that the refugee problem in the aftermath of the Second World War was largely considered a humanitarian issue and to constitute a common international responsibility of States". See: Einarsen, Terje, Drafting History of the 1951 Convention and the 1967 Protocol, in: Zimmerman, Andreas, (ed.), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary*, Oxford, 2011, p. 52.

[1212] This, however, does not mean that the idea was not deliberated upon. In fact, "ecological refugees" were deliberately excluded from the definition. As one delegate (Robinson of the State of Israel) to the Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons stated "it was difficult to imagine that fires, floods, earthquakes or volcanic eruptions, for instance, differentiated between their victims on the grounds of race, religion or political opinion" (Summary record of the 22nd meeting, held at the Palais des Nations, Geneva, on Monday, 16th July 1951, Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, A/CONF.2/SR.22, 1951, p. 6). See: Einarsen, *ibid.*, pp. 61-62.

fear, is unwilling to return to it".[1213] The definition has been extensively commentated, debated and criticized upon, however the dominant view among scholars is that its interpretation does not allow for persons displaced due to climate change effects be subsumed under the notion of refugees.[1214] The reasons for this are multi-faceted, but all come down to the fact that persons migrating due to environmental problems, including climate change and sea level rise, do not withstand the definitional requirements under the 1951 Convention and the 1967 Protocol.

While it is generally possible to state that sea level rise which will eventually make islander's places of residence uninhabitable will create a fear related to the uncertainties of relocation, "well-founded fear" is a state-of-the-art legal concept with a precisely defined meaning, which is not equivalent to the general idea of fear that can instigate cross-border relocation. There are two generally accepted interpretations of what qualifies as a well-founded fear, one being the objective, other the subjective one. The objective approach conceptualizes well-founded fear as a "purely objective matter"[1215]. It is for the competent authority, usually the national court of immigration authority, to determine whether there is sufficient evidence to

[1213] Article 1, Section A, Paragraph 2, 1951 Refugee Convention. The same Paragraph furthermore limited the application of the 1951 Convention only to the persons who became refugees due to "events occurring before 1 January 1951". Furthermore, Article 1, Section B, Paragraph 1 allowed state parties to make a declaration that further limited the application of the definition to "events occurring in Europe". The 1967 Protocol removed both limitation clauses, allowing, however, for both limitations to be kept in place by the states which were parties to the 1951 Convention before the adoption of the 1967 Protocol and made the declaration limiting the refugee status in accordance with the limitation clause. See: Article I, Paragraphs 2 and 3 of the 1967 Protocol, also: Schmahl, Stefanie, Article 1 B (Definition of the Term 'Refugee'), in Zimmerman (ed.), *op. cit.* (footnote 1211), pp. 467-479.

[1214] See, for example: McAdam, *op. cit.* (footnote 117), pp. 42-48; Terminski, Bogumil, *Environmentally-Induced Displacement: Theoretical Frameworks and Current Challenges*, Geneva, 2012, pp. 53 *et passim*; Grote Stoutenburg, *op. cit.* (footnote 109), pp. 401-403; Williams, *op. cit.* (footnote 118), pp. 507-510; Duong, *op. cit.* (footnote 1211), pp. 1249-1250; Ross, *op. cit.* (footnote 300), p. 22; McCallough, Shaun, In a Rising Sea of Uncertainty: A Call for a New International Convention to safeguard the Human Rights of Citizens of Deterritorialized Asia-Pacific Small Island-States, *Colorado Natural Resources, Energy & Environmental Law Review*, vol. 26, no. 1, 2015, pp. 125-128. On the contrary, a minority view is that the notion of persecution under the international refugee law could be interpreted to include climate change. See: Cooper, *op. cit.* (footnote 1211), pp. 501, 519-529; Kozoll, Christopher M., Poisoning the Well: Persecution, the Environment, and Refugee Status, *Colorado Journal of International Environmental Law and Policy*, vol. 15, no. 2, 2004, pp. 297-307.

[1215] Zimmerman, Andreas, Mahler, Claudia, Article 1 A, para. 2 (Definition of the Term 'Refugee'), in Zimmerman (ed.), *op. cit.* (footnote 1211), p. 340.

consider the fear to be well-founded.[1216] In the case of populations of small island states, it is not difficult to establish that a fear of not being able to continue inhabiting their previous residence due to flooding caused by sea level rise is indeed well-founded. The other approach, as mentioned, is the subjective one. As explained by Zimmerman and Mahler "the emotional reactions of persons seeking refugee status (…) may vary".[1217] Therefore, "in order to determine the subjective element, available information relating to the conditions in the respective country of origin must confirm that the applicant's fear is reasonable and thus well-founded"[1218]. Again, subjective approach, when employed, can be combined with the objective one.[1219] Similarly enough to the purely objective approach, it is relatively easy to state that there will most certainly be a degree of subjective fear of relocation due to sea level rise effects, as case studies have shown.[1220]

Whichever approach (or their combination) is taken, a well-founded fear required for refugee status under the 1951 Convention and 1967 Protocol "presupposes the violation of the individual's human rights due to government's direct or indirect action, whether by State action or by non-State persecution tolerated by the respective territorial State".[1221] Following this is that fear arising out of any threat that is not caused by the action which can be attributed to state or state-tolerated private action, is not a well-founded fear as understood by the 1951 Convention and 1967 Protocol, therefore preventing a person to qualify as a refugee. In the refugee law, such violation is known uder the term "persecution". While there is "no universally accepted definition of 'persecution',[1222] Zimmerman and Mahler identified that

[1216] Compare: *ibid.*
[1217] *Ibid.*, p. 339.
[1218] *Ibid*.
[1219] *Ibid*., p. 338.
[1220] For example, based on the interview conducted with a government official in Kiribati, McAdam was able to note the view that climate change "may provide a 'tipping point' that would not have been reached in its absence" for international relocations (McAdam, Jane, Refusing 'Refuge' in the Pacific: (De)Constructing Climate-Induced Displacement in International Law, in: Piguet, Étienne, Pécoud, Antoine, de Guchteneire, Paul (eds.), *Migrations and Climate Change*, Cambridge, 2010, p. 122).
[1221] Zimmerman, Mahler, *op.cit.* (footnote 1215), pp. 439-440.
[1222] *Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, United Nations High Commissioner for Refugees, 2019, p. 21.

persecution "contains two main elements, namely a sufficiently severe human rights violation and a determination regarding the perpetrator of the violation".[1223] With human rights violation, it could be argued that in general, any human rights violation could "at least, as a matter of principle, lead to refugee status".[1224] However, as explained by Goodwin-Gil and McAdam, basing their argument on the analysis of the practice of both international and domestic courts and administrative bodies, environmental harms *per se*, while they very well might prompt peoples to move across international borders, simply do not meet the threshold required for persecution under refugee law.[1225] The reason for this is the specific quality that a harm must have in order for a particular event to be understood as persecution under refugee law. Namely, for a person to qualify as a refugee, the risk that is causing the human rights violation must not be general and indiscriminate, but rather based on the violation of individual's human rights, which is either the result of state's actions or tolerated by a state.[1226] Sea level rise, while disproportionately affecting small island states, is not discriminate in a sense that it creates human rights violations based on discrimination of islanders due to some individual characteristic.

It is similarly difficult to establish who would be the perpetrator of the violation. In classic conceptualizations of persecution under the 1951 Convention and the 1967 Protocol, the persecutor is either the state of origin, usually being the same one of which the refugee is a national in the first place, or a non-state actor within that state.[1227] With islanders, the persecutor is neither of this. It is, in fact, hard to establish one. Paradoxically, in a search for attribution of responsibility for climate change, one would inevitably have to attribute it to the very same industrialized states[1228] which will most likely be the ones to which islanders

[1223] Zimmerman, Mahler, *op.cit.* (footnote 1215), p. 345.
[1224] *Ibid*., p. 354.
[1225] See: Goodwin-Gil, Guy, McAdam, Jane, *The Refugee in International Law*, Oxford, 2007, pp. 90-134. Moreover, As noted by McAdam, notwithstanding that breaches of economic, social and cultural rights are accepted as violations amounting to persecution, the result remains the same in an effort to frame climate change related harms into the notion of persecution. See: McAdam, *op. cit.* (footnote 117), pp. 43-44.
[1226] Zimmerman, Mahler, *op.cit.* (footnote 1215), p. 439-440.
[1227] *Ibid.*, p. 358.
[1228] Another option would be to attribute it to the international community as a whole. While this might be an interesting endevour, it is very unlikely that this would satisfy the treshold required for persecution, as under

will avail themselves for help in relocation, as they are those which have contributed to the climate change by failing to reduce their greenhouse gas emissions.[1229] At the same time, these developed, industrialized states are those "to which the movement might be sought".[1230] This turns the traditional persecution paradigm upside-down, as persecutors would be the very states from which protection is sought.[1231] That paradoxicality is best illustrated on one of the most important consequences of ascribing refugee status, the obligation of non-refoulment. In 1951 Convention, the *non-refoulment* principle is written into the Article 33.[1232] The *non-refoulment* principle in its core contains an obligation of state not to return a person to a state where there is a significant risk of irreparable harm of serious human rights violations upon return.[1233] In other words, persons should not be returned to jurisdiction where they are very likely to face persecution amounting to such violations. However, a logical question here comes into the interplay – where could they return in the first place? Once territory of small island states becomes uninhabitable or completely submerged, they indeed would have no place to return to. Consequently, there is no practical possibility for persecution that would preclude return and trigger *non-refoulment* obligations. In the end, *non-refoulment* principle becomes inapplicable in the extreme case of total uninhabitability or submergence of territory of small island states. On the other hand, it could continue to be

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the refugee law, the agent of persecution must be identifiable. Compare: McAdam, *op. cit.* (footnote 117), p. 45.

[1229] *Ibid.*

[1230] *Ibid.* Indeed, recent developments, such as the Falepili Treaty between Tuvalu and Australia (which envisages a special mobility scheme for Tuvaluans immigrating to Australia), or cases of individual relocations from small island states in the Pacific to Australia and New Zealand (such as the Teitiota case) confirm this observation.

[1231] *Ibid*. This, in turn, creates a situation which "allows developed countries to sit in judgment of their greenhouse gas-producing emissions while mediating interim solutions that restrict the bracketed legal classification of refugee status for newly dispossessed "sociological" refugees ". See: Rossi, Christopher R., The Nomos of Climate Change and the Sociological Refugee in a Sinking Century, *George Washington International Law Review*, vol. 50, no. 3, 2018, p. 646.

[1232] However, *non-refoulment* principle is not confined to the 1951 Convention. It is widely accepted that obligation of *non-refoulment* of refugees has become a norm of customary international law. Moreover, it has been interpreted by human rights treaty bodies as applicable under international human rights protection regimes. See: Allain, Jean, The *Jus Cogens* Nature of Non-Refoulement, *International Journal of Refugee Law*, vol. 13, no. 4, 2001, pp. 538-542.

[1233] For a general interpretation of *non-refoulement* in the refugee law, see: Kälin, Walter, Caroni, Martina, Heim, Lukas, Article 33, para. 1, in: Zimmerman (ed.), *op. cit.* (footnote 1211), pp. 1357-1423

employed in various situations where there is still possibility for return, as migrations are likely to start much before territory becomes actually uninhabitabile.[1234] What is more, due to unavailability of traditional refugee status, this would enable host states to represent themselves not as fulfilling their obligation and taking responsibility, but rather as providing shelter for islanders out of charitable motives.[1235]

Moreover, there is a need for that violation to be "for reasons of" listed in the definition. Namely, these are "race, religion, nationality, membership of a particular social group or political opinion". This list is enumerative, only those persecuted for one of the reasons listed are able to claim refugee status. In case of islanders, it is clear that race, religion, nationality, and political opinion are not among reasons which can relate to sea level rise induced migrations. While it might seem that membership of a particular social group could be the reason for persecution in case of climate change induced migrations,[1236] however even this reason does not swithstand on closer examination. Islanders are not persecuted because they are islanders or belonging to any other particular social group, but rather they decide to migrate due to the natural phenomenon that affects habitability of small island states. Therefore, none of the reasons stated in the definition of refugee cannot be readily applied. In a similar context of natural disasters, this logic is followed by the United Nations High Commissioner for Refugees' Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection, which explicitly exclude victims of natural disasters from the scope of protection under the 1951 Convention and the 1967 Protocol, "unless they also have well-founded fear of persecution for one of the reasons stated".[1237] The ILC's Co-Rapporteurs on the sea level rise in relation to international law have observed that the "same reasoning would be applicable in relation to the adverse effects pf climate change,

[1234] Compare Torres Camprubí, *op. cit.* (footnote 35), pp. 199-200.
[1235] Halstead, Erin, Citizens of Sinking Islands: Early Victims of Climate Change, *Indiana Journal of Global Legal Studies*, vol. 23, no. 2, 2016, p. 833.
[1236] Cooper, *op. cit.* (footnote 1211), pp. 525 *et passim*.
[1237] *Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, United Nations High Commissioner for Refugees, 2019, p. 19.

such as sea-level rise".[1238] Therefore, human rights violations due to humanly induced, albeit natural processes of sea level rise do not fall under the reasons for persecution that are envisaged by the definition.

Regarding the latter part of the definition, stating that the refugee "is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it", it is relatively simple to state that islanders will be practically unable to avail themselves to protection of the small island state, which is the one of which they are, presumably, nationals or have habitual residence is. The small island state's institutions will, in all likelihood, either cease to function or will be transformed into being of a very different kind.[1239] However, the 1951 Refugee Convention uses the notion "unable to avail himself of the protection of that country" in a notably different sense. From the drafting history of the 1951 Convention, it can be understood that only refugees which are stateless or refused protection by their government should be considered as unable to avail themselves to protection of their state.[1240] Statelessness of islanders is a contentious question which will, however, arise only after possible diminishment of statehood of small island state, which, in case it happens at all, will happen well after the time that migration already took place, and even if ultimately considered stateless, islanders would still fall back on the persecution criterion. The second situation is even less likely to occur. Governments of small island states will most likely be willing to support islanders both before, during and after relocation, but it is the question of efficacy of such protection that is at stake. [1241]

[1238] Galvão Teles, Ruda Santolaria, *op. cit.* (footnote 16), p. 67.

[1239] For the discussion of the possible scenarios for functioning of the institutions of small island states post-inundation, see *supra* in 3.2.11. and 3.3.

[1240] Zimmerman, Mahler, *op. cit.* (footnote 1215), pp. 443-444.

[1241] As contextualized by McAdam: "For example, the governments of Kiribati and Tuvalu are not responsible for climate change as a whole, nor are they developing which increase its negative impacts on particular sectors of the population. Indeed, the Tuvaluan and I-Kiribati governments remain willing to protect their citizens, although the extent of their ability to do so over time is unclear." See: McAdam, *op. cit.* (footnote 117), p. 45.

Based on these arguments, we concur with the opinion that islanders fleeing their homes on small islands due to sea level rise, similarly to other persons migrating for reasons of climate change related events, are not refugees under the 1951 Refugee Convention, [1242] save for one exception. That exception would be the situation in which sea level rise is combined with the acts of small island state that could amount to persecution, such as deliberate denial of assistance to part of the population motivated by one of the reasons for persecution enumerated in the 1951 Convention, or explicit refusal of international aid that could help in mitigating the effects of sea level rise.[1243] As all of the small island states analysed in this work act in a directly opposite way, this scenario is very unlikely ever to become a reality.[1244]

Finally, the refugee law is structured in a way that it grants protection to persons qualifying as refugees once they relocate to a state party to the relevant instrument or become refugees while already in that state (refugees *sur place*).[1245] In case of islanders relocating the need for international assistance would not necessarily be crucial when coming to the host state

[1242] Existing case law of national courts and administrative agencies confirms this conclusion. On multiple instances, islanders have claimed refugee status in different states, for example Australia and New Zealand, only to be turned down by judicial and administrative authorities for not fulfilling the criteria for refugee status. Thus, in one early case, the New Zealand Refugee Status Appeals Authority wrote that: "This is not the case where the appelants can be said to be differentially at risk of harm amounting to persecution due to any of these five grounds. All Tuvalu citizens face the same environmental problems and economic difficulties living in Tuvalu. Rather, the appellants are unfortunate victims, like all other Tuvaluan citizens, of the forces of nature leading to the erosion of coastland and the family property being partially submerged at high tide. As for the shortage of drinkable water and lack of hygienic sewerage systems, medicines and appropriate access to medical facilities, these are also deficiencies in the social services of Tuvalu that apply indiscriminately to all citizens of Tuvalu and cannot be said to be forms of harm directed at the applellants for reason of their civil or political status." See: Refugee Appeal no. 72189/2000, Refugee Status Appeals Authority, New Zealand, 2000, Paragraph 13; see also other cases cited in: McAdam, *ibid.*, p. 47, footnote 43.

[1243] Compare, generally: McAdam, *ibid.*, pp. 47-48.

[1244] In Ioane Teitiota v. Chief Executive of the Ministry of Business, Innovation and Employment which led to subsequent proceedings in front of the HRComm (albeit on different grounds of complemetary protection under general human rights law), the New Zealand Supreme Court wrote that: "In relation to the Refugee Convention, while Kiribati undoubtedly faces challenges, Mr Teitiota does not, if returned, face "serious harm" and there is no evidence that the Government of Kiribati is failing to take steps to protect its citizens from the effects of environmental degradation to the extent that it can." See: Ioane Teitiota v. Chief Executive of the Ministry of Business, Innovation and Employment, Supreme Court of New Zealand, Case no. [2015] NZSC 107, 2015, Paragraph 12.

[1245] Lapaš, Davorin, *Međunarodnopravna zaštita izbjeglica*, Zagreb, 2008, p. 8.

(although that does not mean there is no need for it at that moment), but also before and during relocation process.

4.3. **Law on statelessness**

The ICJ has defined nationality as "a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties".[1246] While nationality thus serves a prominent role for the legal status of every individual in general as it "provides individuals with a juridical personality that enables them to live a private life",[1247] there is no right to nationality recognized under international law as a general human right in a sense that every human being has a right to aquire nationality of a state.[1248] Traditionally, questions of acquisition and loss of nationality were considered part of the *domaine réservé* of every state.[1249] However, in contemporary international human rights law this has changed, and right to nationality is today considered by the Human Rights Council to be a fundamental human right,[1250] albeit this is not unrestricted and mainly covers, as explained by one commentator, only "certain limits and

[1246] Nottebohm Case (second phase), Judgement, *I.C.J. Reports*, 1955, p. 23.

[1247] McAdam, Jane, Preserving Statehood through Population and Government: Safeguarding Nationality and Franchise in the Context of Sea- Level Rise and Mobility, *New Zealand Yearbook of International Law*, vol. 20, no. 1, 2024, p. 20.

[1248] Compare: Peters, Anne, Extraterritorial Naturalizations: Between the Human Right to Nationality, State Sovereignty and Fair Principles of Jurisdiction, *German Yearbook of International Law*, vol. 53, 2010, pp. 625, 628-629, 659-664.

[1249] In Nottebohm Case (second phase) Judgement, the ICJ explained this traditional understanding of nationality by the international law in the following words: "It is for Liechtenstein, as it is for every sovereign State, to settle by its own legislation the rules relating to the acquisition of its nationality, and to confer that nationality by naturalization granted by its own organs in accordance witli that legislation. It is not necessary to determine whether international law imposes any limitations on its freedom of decision in this domain." (Nottebohm Case (second phase), Judgement, *I.C.J. Reports*, 1955, p. 20).

[1250] Adopted in 2016, the Human Rights Council Resolution titled Human Rights and Arbitrary Deprivation of Nationality explicitly reaffirmed that the "right to a nationality of every human person is a fundamental human right" (Human Rights and Arbitrary Deprivation of Nationality, Human Rights Council, A/HRC/RES/32/5, 2016, Paragraph 1). See also earlier resolutions related to this topic: Human Rights and Arbitrary Deprivation of Nationality, Human Rights Council, A/HRC/RES/7/10, 2008; Human Rights and Arbitrary Deprivation of Nationality, Human Rights Council, A/HRC/RES/10/13, 2009; Human Rights and Arbitrary Deprivation of Nationality, Human Rights Council, A/HRC/RES/13/2, 2010; Human Rights and Arbitrary Deprivation of Nationality, Human Rights Council, A/HRC/RES/20/5, 2012; Human Rights and Arbitrary Deprivation of Nationality, Human Rights Council, A/HRC/RES/26/14, 2014.

safeguards – in particular, obligations to prevent statelessness and to ensure children's right to a nationality".[1251] Notably, the Universal Declaration of Human Rights contains the right to nationality in its Article 15[1252], but it is a soft law instrument, and the right has in any case been interpreted as a right of a person to be conferred a nationality by a state, not a duty of state to confer nationality to any person which would find him- or herself in a position to do so.[1253] Under the ICCPR, the right of every child to be accorded a nationality is recognized by Article 24, Paragraph 3.[1254] This provision has limited impact in situations of sea level rise induced migrations, as it is limited only to subsidiary *ius soli* claim against states that are party to the Covenant.[1255] The Convention on the Rights of the Child similarly stipulates the right of the child to aquire nationality at birth.[1256] This means that it might be applicable only in situations of children which will be born after relocation, insomuch as they should be accorded a nationality of a host state and even that might prove questionable and prone to different interpretations.[1257] In addition, there are other instruments in human rights law that include provisions aimed at the reduction of statelessness. These are the Convention on the Nationality of Married Woman,[1258] the Convention on the Elimination of All Forms of

[1251] McAdam, *op. cit.* (footnote 1247), p. 19.

[1252] Article 15 of the Universal Declaration of Human Rights proclaims that: "1. Everyone has the right to a nationality. 2. No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality."

[1253] As explained by McAdam "international law presumes that every individual should be conferred a nationality from birth, and retain a nationality throughout their lives" See: McAdam, *op. cit.* (footnote 1247), p. 19.

[1254] Article 24 Paragraph 3 of the ICCPR stipulates simply that "Every child has the right to acquire a nationality."

[1255] Compare: Nowak, *op. cit.* (footnote 307), pp. 561-562.

[1256] Article 7 Paragraph 1 of the Convention on the Rights of the Child in full reads as follows: "The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and as far as possible, the right to know and be cared for by his or her parents."

[1257] This is the result of the application of the customary international legal rule that every state shoud grant nationality to otherwise stateless child born into its territory, for which some authors are, in our opinion, convincingly arguing to exist under general international law. See, arguing in favour of customary rule on children's nationality: Worster, William Thomas, Customary International Law Requiring States to Grant Nationality to Stateless Children Born in Their Territory, *Statelessness & Citizenship Review*, vol. 4, no. 1, 2022, pp. 119, 138.

[1258] Article 1 of the Convention on the Nationality of Married Women stipulates that "neither the celebration nor the dissolution of a marriage between one of its nationals and an alien, nor the change of nationality by the husband during marriage, shall automatically affect the nationality of the wife". See: Convention on the

Discrimination against Women,[1259] the Convention on the Elimination of All Forms of Racial Discrimination,[1260] the International Convention on the Protection of All Migrant Workers and their Families (hereinafter CRMW),[1261] the International Convention on the Protection of Persons with Disabilites,[1262] along with a number of regional treaty law instruments.[1263] As useful as they might be in situations of acquisition of potential loss of nationality by children and other persons that would otherwise be considered stateless, these widely accepted international instruments do not provide an answer to the question of what will happen to nationality of islanders who are already nationals of small island states once relocation is implemented. This question is, of course, interlinked with the more general problem of continuity of small island states once their territory becomes uninhabitable or physically submerged.

Nationality of Married Woman, 1957, *United Nations Treaty Series*, vol. 309, no. 4468, 1958, pp. 65-102, Article 1.

[1259] Article 9 of the Convention on the Elimination of All Forms of Discrimination against Women provides women with "equal rights with men to acquire, change or retain their nationality", along with further elaboratons of that right.

[1260] Article 5, Paragraph d, Subparagraph iii of the Convention on the Elimination of All Forms of Racial Discrimination explicitly names the right to nationality among "other civil rights" that the state party is oblidged to respect without discrimination.

[1261] Article 29 of the CRMW provides that: "Each child of a migrant worker shall have the right to a name, to registration of birth and to a nationality". See: Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, 1990, *United Nations Treaty Series*, vol. 2220, no. 39481, 2004, pp. 3-260, Article 29.

[1262] Article 18 of the Convention on the Rights of Persons with Disabilities recognizes the right to a nationality, which persons with disabilities should enjoy "on an equal basis with others". That right is further elaborated to include "the right to acquire and change a nationality" and the right not to be "deprived of their nationality arbitrarily or on the basis of disability". The same Article 18 recognizes the right of persons with disabilities to "leave any country, including their own" and the right of children with disabilities to acquire a nationality.

[1263] For example, the European Convention on Nationality was specifically concuded by member states of the Council of Europe in order to "promote the progressive development of legal principles concerning nationality" and contains a number of provisions which deal with contentious issues such as acquisition and loss of nationality, multiple nationalities and procedures relating to nationality. In this context, Article 4, which explicitly stipulates that "everyone has the right to a nationality" and that "statelessness shall be avoided" is especially relevant. See: European Convention on Nationality, *European Treaty Series*, vol. 166, 1997. In other regional contexts, the American Convention of Human Rights in its Article 20 accords the right to nationality to every person and the African Charter on the Rights and Welfare of the Child contains provisions which provide every child with the right to aquire a nationality (Article 6).

According to traditional international law, once a state is estinguished without a successor, its nationality ceases to exist and its nationals become stateless.[1264] While this seems logically sound and might be inevitable if small island states indeed cease once their territory becomes submerged or completely uninhablitable, the practice shows that there are no clear rules under international law regarding the nationality issue in cases of discontinuation of statehood.[1265] With regard to cases of statelessness in situations of transformation of legal personality, existing historical examples remain confined to situations where there has been a successor state present.[1266] In these situations, customary international law recognizes "a strong presumption in favor of the prevention of statelessness in any change of nationality, including in state succession".[1267] The ILC's Draft Articles on Nationality of Natural Persons in relation to the Succession of States reflect this presumption in Article 1, which defines that "Every individual who, on the date of the succession of States, had the nationality of the predecessor State, irrespective of the mode of acquisition of that nationality, has the right to the nationality of at least one of the States concerned, in accordance with the present articles.",[1268] further elaborating this in Articles 4 (Prevention of statelessness)[1269] and Article 5 (Presumption of nationality).[1270]

[1264] Compare: Soete, *op. cit.* (footnote 381), p. 94.

[1265] McAdam, *op. cit.* (footnote 117), p. 140. See also: Alexander, Heather, Simon, Johnathan, Sinking into Statelessness, *Tilburg Law Review*, vol. 19, no. 1, 2019, pp. 23-25.

[1266] In the advisory opinion delivered in the Questions concerning the Aquisition of Polish Nationality case, the PCIJ observed that Poland is oblidged to grant its nationality to persons whose parents had been permanently resident at the territories which it recieved after it had been ressurected after in the aftermath of the First World War. See: Questions concerning the Aquisition of Polish Nationality, *P.C.I.J. Series B*, no. 7, 1923, pp. 15-16, 21.

[1267] Blackman, Jeffrey L, State Successions and Statelessness: The Emerging Right to an Effective Nationality under International Law, *Michigan Journal of International Law*, vol. 19, no. 4, 1998, p. 1183.

[1268] Draft Articles on Nationality of Natural Persons, *Yearbook of the International Law Commission*, vol. II, Part Two, 1999, p. 20.

[1269] Article 4 thus stipulates that: "States concerned shall take all appropriate measures to prevent persons who, on the date of the succession of States, had the nationality of the predecessor State from becoming stateless as a result of such succession." See: *ibid.*, p. 21.

[1270] Full text of Article 5 is: "Subject to the provisions of the present draft articles, persons concerned having their habitual residence in the territory affected by the succession of States are presumed to acquire the nationality of the successor State on the date of such succession." See: *ibid.*

A stateless person, according to the definition contained in the Convention relating to the Status of Stateless Persons adopted in 1954 is "a person who is not considered a national by any state under the operation of its law".[1271] This definition is limited to the so-called *de jure* statelessness.[1272] A person is *de jure* stateless when he or she is denied a nationality by the law of a state, meaning that the person in question is no longer legally considered a national by any state.

On the other hand, the definition does not include cases of the so-called *de facto* statelessness. *De facto* statelessness concerns effectiveness of one's nationality in a sense that one could be considered *de facto* stateless even being de jure national of a particular state, but this nationality proves to be practically ineffective.[1273] According to the non-binding definition contained in the Prato Conclusions on the Concept of Stateless Persons under International Law, which encompasses both *de jure* and *de facto* statelessness, stateless persons are "persons outside the country of their nationality who are unable or, for valid reasons, are unwilling to avail themselves of the protection of that country. Protection in this sense refers to the right of diplomatic protection exercised by a State of nationality in order to remedy an internationally wrongful act against one of its nationals, as well as diplomatic and consular protection and assistance generally, including in relation to return to the State of nationality".[1274] As opposed to the definition of stateless person under the 1954 Convention, Prato Conclusions thus include in the concept those that do have nationality and are unable or unwilling to resort to protection of that state (*de facto* stateless persons).

To date, *de facto* statelessness is not covered by international treaty law and does not enjoy outright protection.[1275] The issues of *de facto* statelessness were, however, touched upon in the processes of negotiating both of those treaties. In the case of 1954 Convention, it resulted

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[1271] Convention relating to the Status of Stateless Persons, 1954, *United Nations Treaty Series*, vol. 360, no. 5158, 1960, pp. 130-207, Article 1.
[1272] McAdam, *op. cit.* (footnote 117), p. 140.
[1273] *Ibid.*
[1274] Expert Meeting: The Concept of Stateless Persons under International Law (Prato Conclusions), United Nations High Commissioner for Refugees, 2010, p. 6.
[1275] McAdam, Jane, Saul, Ben, An Insecure Climate for Human Security? Climate-Induced Displacement and International Law, *Sydney Centre for International Law Working Paper*, no. 4, 2008, p. 9, McAdam, *op. cit.* (footnote 117), p. 141.

in the Final Act of the United Nations Conference on the Status of Stateless Persons containing the paragraph which "recommends that each Contracting State, when it recognizes as valid the reasons for which a person has renounced the protection of the State of which he is a national, consider sympathetically the possibility of according to that person the treatment which the Convention accords to stateless persons".[1276] This provision recommends state parties to the 1954 Convention to treat *de facto* stateless persons in a similar way as those stateless *de jure*. The wording makes clear that it applies only to persons who have "renounced the protection of the State", which introduces the subjective element into the definition of de facto statelessness and has prompted interpretation that only persons who are considered as refugees should be covered by this provision, thereby significantly narrowing its scope.[1277] In any case, one must be aware that this paragraph is not part of the 1954 Convention text proper, but in the formally non-binding Final Act. What is more, it is not worded as an obligation, but rather as a recommendation. In a similar, albeit less restrictive, fashion, the Final Act of the United Nations Conference on the Elimination or Reduction of Future Statelessness which pertains to the 1961 Convention contains a resolution which "Recommends that persons who are stateless de facto should as far as possible be treated as stateless de jure to enable them to acquire an effective nationality".[1278] Therefore, it must be concluded that the international law framework for stateless persons, which notably includes the 1954 Convention and the 1961 Convention on the Reduction on Statelessness, provides protection in form of binding provisions only to *de jure* stateless persons.

The United Nations High Commissioner for Refugees recognized threats that this difference between *de jure* and *de facto* statelessness and the lack of protection for the latter poses for islanders of small island states faced with sea level rise already back in 2009. At the time, in a submission titled Climate Change and Statelessness: An Overview, it noted: "Should

[1276] Article III of the Final Act, see: Final Act of the United Nations Conference on the Status of Stateless Persons, 1954, United Nations Treaty Series, vol. 360, no. 5158, 1960, pp. 117-129.
[1277] Massey, Hugh, UNHCR and *De Facto* Statelessness, *Legal and Protection Policy Research Series*, LPPR/2010/01, United Nations High Commissioner for Refugees, 2010, pp. 18-19.
[1278] Resolution I as appended to the Final Act, see: Final Act of the United Nations Conference on the Elimination or Reduction of Future Statelessness, 1961, *United Nations Treaty Series*, vol. 989, no. 14458, 1975, pp. 250-278.

statehood cease, the population would be rendered stateless. Disappearance of a State due to loss of territory or the permanent exile of the population or the government is without precedent. The international community could agree that the affected States would continue to exist nonetheless. Even in such a case, however, governments of affected States would face many constraints in practice, and their populations would be likely to find themselves largely in a situation that would be similar to if not the same as if statehood had ceased. The population could thus be considered *de facto* stateless."[1279] While this holds true, it remains doubtful whether the islanders could be considered *de jure* or *de facto* stateless once they relocate due to further uninhabitability of the small island states. The issue, therefore, requires further analysis.

It is clear that submergence of territory and relocation of population of small island states will have an effect on effective enjoyment of their rights as citizens. However, whether this will amount to statelessness in a legal sense is a question that cannot be resolved as simple as it seems. This is because dichotomy between *de jure* and *de facto* statelessness is far from clear cut, the latter, as already mentioned, is not category that is at all recognized by binding international law instruments relevant to issues of statelessness. Before breaking down the vagueness of the notion of *de facto* statelessness, first the problem of employing de jure statelessness, which indeed is a legally defined category, to islanders will be highlighted.

With regard to *de jure* statelessness, the question whether islanders might become de jure stateless will directly depend on the fait of legal personality of small island states. If legal personality would indeed be extinguished by the gradual sea level rise which will devoid small island states of permanent population and territory, *de jure* statelessness becomes relevant, as nationality is lost once state which conferred it ceases to exist without successor state. On the contrary, if legal personality of a small island state would be preserved in a form that allows for a nationality to be retained or conferred, de jure statelessness does not become

[1279] Climate Change and Statelessness: An Overview, Submission submitted by the United Nations High Commissioner for Refugees (UNHCR) supported by the International Organization for Migration (IOM) and the Norwegian Refugee Council (NRC) to the 6th session of the Ad Hoc Working Group on Long-Term Cooperative Action (AWG-LCA 6) under the UN Framework Convention on Climate Change (UNFCCC), 2009, p. 2

an issue. This does not mean that the legal personality of small island state must be territorial in nature. Rather, it must be such that its laws are not extinguished in order for islanders to still be considered nationals of their respective small island state.[1280] However, in the latter case, it is highly doubtful to what such a nationality comes down to. In other words, should it be considered effective or not, could legal persons that would be successors to small island states' legal personalities be able to provide effective protection to their nationals as they would not have possessed the traditional powers or prerogatives of states. The case in point is found in the impossibility of deterritorialzed small island state to readmit its nationals. The duty of state to readmit its nationals is a longstanding principle of international law, which one commentator described as "firmly fixed within the corpus of general international law".[1281] In case small island states become uninhabitable due to inundation, it will be practically impossible to readmit their nationals. As has been argued, this makes the duty of readmission impossible, which in turn renders "nationality" of deterritoralized legal persons meaningless for most practical intents and purposes.[1282] Thus, islanders who would find themselves being nationals of such successor entities would at least be de facto stateless.

To recall the definition of statelessness from the 1954 Convention, a stateless person is the one who is not "considered a national by any state".[1283] It has been extensively noted previously in this work how statehood is a defined concept of legal personality which requires that an entity which is willing to define itself as a state has to be a territorial one. Other forms of legal personality do exist; however, a person is considered stateless while not being considered a national by "any state".[1284] Therefore, if small island states' legal personality is

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[1280] Compare: Zetter, Roger, The Role of Legal and Normative Frameworks for the Protection of Environmentally Displaced People, in: Laczko, Frank, Aghazarm, Christine (eds.), *Migration, Environment and Climate Change: Assessing the Evidence*, Geneva, 2009, p. 428.

[1281] Goodwin-Gill, Guy S., *International Law and the Movement of Persons Between States*, Oxford, 1978, p. 137.

[1282] Simon, Johnatan, Alexander, Heather, No Port, No Passport: Why Submerged States Can Have No Nationals, *Washington International Law Journal*, vol. 26, no. 2, 2017, pp. 319-321.

[1283] Article 1 Paragraph 1 of the 1954 Convention.

[1284] This includes extinction of a state, as would be the case with small island states if their territory would be submerged without international community recognizing some legal personality to them aftewards. See: Grote Stoutenburg, *op. cit.* (footnote 109), pp. 406-409. Compare also: Lallemant, Hervé Raimana, L'Apatride

indeed transformed into form different from statehood once the population is resettled and territory submerged, it is doubtful whether legal connection that might exist between the entity that is successor to small island state and its former nationals could indeed by subsumed under the notion of nationality.[1285] If the answer was indeed negative, meaning that this relation, whatever its nature and content might be, was not nationality, this would, in turn, have rendered the islanders both *de jure* and *de facto* stateless. The consequence would be that protection that is given by the 1954 and 1961 Conventions to *de jure* stateless persons would be extended to relocated islanders. As noted by one commentator, while such protection is inedeed manifestly insufficient to address the specific needs of islanders, the fact that the 1961 Convention applies to them could be useful insomuch as the United Nations High Commissioner for Refugees has a mandate to protect stateless persons.[1286]

There are, however, counterarguments to such a proposition. There are entities which have been territorial, but have since lost its territory while continuing to accord citizenship and award passports. Of course, these are *sui generis* entities, the Holy See and the Sovereign Military Order of Malta. However, the special status of legal personality of these entities cannot be equated with what might become of legal personality of small island states. Holders of Holy See passports, mostly diplomats and other high officials of the Catholic Church, are in addition nationals of either their state of origin or the Vatican City State.[1287] Similarly, holders of passports issued by the Sovereign Military Order of Malta posess nationality of the state of origin.[1288] This prompted some authors to conclude that *sui generis* entities do not posess the capacity to bestow nationality.[1289] While this might be contested, as those holding passports of *sui generis* entities are indeed considered by them to be under operation of their law, at least for the time when they are acting in a capacity that requires identitfication via

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Climatique et la Disparition d'État dans le Pacifique du Sud, *Revue Juridique Polynésienne*, vol. 15, no. 1, 2009, pp. 90-92.

[1285] Compare: Alexander, Simon, *op. cit.* (footnote 1265), p. 23-25.

[1286] Kolmannskog, Vikram, Climate Change, Environmental Displacement and International Law, *Journal of International Development*, vol. 24, no. 8, 2012, p. 1074.

[1287] Turack, Daniel C., Passports Issued by Some Non-State Entities, *British Yearbook of International Law*, vol. 43, 1968-1969, pp. 212-214.

[1288] *Ibid.*, pp. 214-215.

[1289] Grote Stoutenburg, *op. cit.* (footnote 109), p. 430.

the identity document issued by tha sui generis entity, what is certain is that the "citizenship" of these entities is accorded on different principles from nationality bestowed by states. This is because, although most of the states recognize it as valid, it does not operate as nationality in a sense that their citizens constitute a nation.

Somewhat paradoxically, although *de jure* statelessness of islanders might provide them with benefits of protection that international law provides for stateless persons, it is doubtful whether the islanders will want themselves defined as such. The reasons for this could be found in the idea that the concept of nationhood contains some degree of connection to common cultural, ethnical, political, cultural, social values.[1290] If declared stateless, it is possible islanders might feel as that being lost. In our view, however, that should not be the case. Statelessness is a purely legal category defined by a formal bond of citizenship. It does not, or at least does not have to, contain values. On the other hand, that does not mean that nationality is not connected to identity.[1291] Indeed, the connection between nationality and identity is usually well established. At the same time, it is common knowledge and often occurs in practice that a person is citizen of a state to which it does not feel culturally or ethnically attached. In that sense, the problem should be addressed pragmatically. Voices that advocate for supporting diasporic cosmopolitanism in the sense of relationship based not on territorial,[1292] but rather on Internet-based or other connections should not be disregarded as a tool for enabling islanders to remain connected, sharing both identity, values and performing certain functions such as voting in elections for leadership of the legal person that

[1290] Compare the concept of a cultural nation as conceptualized by Guibernau, which, however, still presupposes existing territory: Guibernau, *op. cit.* (footnote 863) pp. 1258-1260.

[1291] The concept of "global citizenship", which emphasizes that people often fail to consider the impact their actions have on global commons, is built on criticizing this, acknowledging that the "global" view of one's identity has to coexist with the identity based on nationality in order to successfully address tranboundary problems such as climate change. See: Halstead, *op. cit.* (footnote 1235), pp. 629-630; Harris, Paul G., Climate Change and the Impotence of International Environmental Law, *Penn State Environmental Law Review*, vol. 16, no. 2, 2008, pp. 334-343.

[1292] As defined by Michelle McKinley, it is "the cosmopolitan claim that shared identities and human solidarities are no longer conterminous with territorial delimitations". See: McKinley, Michelle A, Conviviality, Cosmopolitan Citizenship, and Hospitality, *Unbound*, vol. 55, no. 5, 2009, p. 60.

took over the legal personality of small island state.[1293] If the understanding of islanders as *de jure* stateless once small island state of which they are nationals indeed transforms its legal personality or even loses it, would be adopted by other states, the islanders should benefit from it. Their cultural identity will not be endangered by the mere fact that they are considered stateless by law. Historical experiences of Pacific islanders being able to safeguard their identity and autonomy regardless in spite of frequent migrations, vast distances between islands and legal environments that have not recognized their specificites confirms this.[1294]

Turning to *de facto* statelessness, the core question is what islanders might be provided with in case they are considered *de facto* stateless. Ineffectiveness of one's citizenship is, in the first place, an unstable category which is difficult to subsume in legal terms.[1295] Although there have been proposals to include de facto statelessness into the framework of protection instituted by 1954 and 1961 Conventions, that remains highly uncertain. We have noted how the Final Act of the 1954 Convention restricted application of recommendation to treat de facto stateless in the same fashion as de jure stateless only to those persons who have renounced the protection of states of which they are formally nationals. Therefore, islanders would most likely not be covered by this clause, as their de facto statelessness would not be caused by renounicing the nationality of their respective small island states, but rather by inability to avail themselves to the protection of the states of their nationality. The 1961 Convention Final Act contains no such restrictions. Therefore, if a state party to the 1961 Convention in which islanders relocate decided to follow the recommendation to treat the de facto stateless islanders in the same fashon as de jure stateless persons, it would be able to

[1293] Ross, *op. cit.* (footnote 300), pp. 210-211. See also the work by Katerina Diamandaki, who identified Jews, Kurds, Assyrians, Palestinians, and Tibetans as nations which have successfully created virtual, Internet-based communities for safeguarding and sharing their common values (Diamandaki, Katerina, Virtual Ethnicity and Digital Diasporas: Identity Construction in Cyberspace, *Global Media Journal*, vol. 2, np. 2, 2003, p. 7).

[1294] For example, Hau'ofa, based on the personal and generational experiences of ways of life in Oceania, was able to claim that movement is indeed a core component of the identity of peoples of Oceania, rather than an obstacle to its continuity. See: Hau'ofa, Epeli, Our Sea of Islands, *The Contemporary Pacific*, vol. 6, no. 1, 1994, pp. 148 *et passim*.

[1295] Compare: Tucker, Jason, Questioning *de facto* Statelessness, *Tilburg Law Review*, vol. 19, no. 1-2, 2014, p. 277.

extend the protection that 1961 Convention gives to de jure stateless persons. That protection, however, does not include the obligation of a state party to grant its nationality to the persons considered stateless, except in case of those born in the state, which would otherwise be stateless.[1296]

The problems with *de facto* statelessness in practice are two-folded. In the first place, is doubtful what constitutes ineffective citizenship. At which stage on could claim that his citizenship has become so ineffective that it renders him stateless? Various criteria could be employed and none seems to cover all possible situations.[1297] In the second place, there is a question of what protection would be accorded to stateless persons even if the application of the 1954 and 1961 Conventions is indeed extended to cover them. This second question is in fact relevant for both categories, *de jure* and *de facto* statelessness, as the conventions themselves do not discriminate among stateless persons once a person is recognized as such.

The question of value of protection provided by the two conventions to stateless persons is as contentious as the one whether islanders should be accorded that protection in the first place. The 1954 Convention contains provisions which provide for various rights for stateless persons, including rights to non-discrimination, welfare including housing, employment, administrative assistance. These rights are to be respected by the contracting party on which territory stateless persons (as defined by the Convention itself) find themselves to be residing. In the sense of protection it offers, the 1954 Convention is highly similar to 1951 Convention Relating to the Status of Refugees. The 1954 Convention acknowledges itself that the protection it offers is a relatively basic one by providing that "Except where this Convention contains more favorable provisions, a Contracting State shall accord to stateless persons the

[1296] *Argumentum ex* Article 1 of the 1961 Convention. See also Article 24, Paragraph 3 of the ICCPR and Article 7 of the Convention on the Rights of the Child (providing every child with the right to acquire nationality).

[1297] For example, one criterion is the concept of the so-called diplomatic protection, defined as state's capacity to provide "protection to remedy an internationally wrongful act committed against one of its nationals", but also as "providing diplomatic and consular assistance in general". In that scenario, effective citizenship would cease once small island state becomes incapable of providing diplomatic protection to its nationals. See: Grote Stoutenburg, *op. cit.* (footnote 109), p. 425. Alternatively, McAdam postulates political franchise (including both the right to vote and right to stand for public office) as a "core benefit" of citizenship. See: McAdam, *op. cit.* (footnote 1247), p. 27.

same treatment as is accorded to aliens generally".[1298] Again, in similarity to the 1951 Refugee Convention, the enjoyment of rights is subject to reciprocity, which makes it even weaker in case of individual relocations to various host states.[1299]

The 1961 Convention is structured as a document that should assist in reducing statelessness of persons who would otherwise be born stateless. In that sense, it is relevant to islanders only after relocation, in the extreme case that relocation would indeed render them stateless. That would than, in turn, oblige host state party to the 1961 Convention to grant nationality to former islanders' children born on the territory of host state or whose parents were previously granted nationality of the same state. Protection offered by the 1961 Convention is thus again fairly limited in scope.

Finally, both 1954 and 1961 Conventions have relatively low number of state parties, not even all small island states being party to them.[1300] This limit even further the already weak protection that international law offers to stateless persons in practice. In many instances, protection comes down to individual states and their national frameworks for reduction of statelessness, if they exist at all. As with populations of small island states it is highly uncertain whether they will in any case qualify as stateless, and the protection offered to stateless persons is in any case weak, it seems to us small island states' authorities should avoid reducing their populations to stateless status.[1301]

[1298] Article 7 Paragraph 1 of the 1954 Convention.

[1299] Robinson, Nehemiah, Convention Relating to the Status of Stateless Persons: Its History and Interpretation, A Commentary, Division of International Protection of the United Nations High Commissioner for Refugees, 1997, available at: https://www.oas.org/dil/1954_Convention_relating_to_the_Status_of_Stateless_Persons.pdf (accessed: 27th December 2024).

[1300] The 1954 Convention currently has 99 state parties, along with 23 signatories. The 1961 Convention has 81 state parties, along with 5 signatories. See: Convention relating to the Status of Steteless Persons, Status, available at: https://treaties.un.org/pages/ViewDetailsII.aspx?src=TREATY&mtdsg_no=V-3&chapter=5&Temp=mtdsg2&clang=_en (accessed 3rd January 2025); Convention on the Reduction of Statelessness, Status, available at: https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=V-4&chapter=5&clang=_en (accessed 3rd January 2025).

[1301] For a contrary opinion, claiming that it would be better not to maintain nationality of small island states once they become unable to perform normal state functions, in order for islanders to at least be able to take advantage of the protection international law provides to stateless persons, see: Alexander, Simon, *op. cit.* (footnote 1282), p. 312, footnote 22.

4.4. **Progressive development of international law in order to accommodate persons relocating due to climate change effects**

For peoples moving across international borders due to effects of climate change, including islanders of small island states, there exist at least two significant "protection gaps".[1302] The first one, named "rights" or "normative" gap is present due to refugee law at its current stage of development being indeed inadequate to be properly applied in cases of displacement form small island states (or due to climate change effects in general, for that part). [1303] The second one, called the "funding gap" occurs, as the name suggests, due to financial and material resources being inadequate for relocation.[1304]

In an effort to address the "normative gap", different groups of proposals can be identified. Several ambitious proposals are aimed at creating a new binding international treaty, new Protocol to the 1951 Convention, or amending existing treaties (either 1951 Convention or the UNFCCC) that would be specifically tailored to address the problems of peoples moving due to climate change effects. Such proposals have been advanced by states, independent scientific bodies under the patronage of states, international organizationsand academia likewise. Among the states, in 2006, the Government of Maldives notably proposed a new protocol to the 1951 Refugee Convention. The draft envisaged expanding the existing definition of a refugee under the Article 1 of the 1951 Refugee Convention in order to include persons migrating accross international borders due to climate change related events ("climate refugees").[1305] Two years later, in 2008, German Advisory Council on Global

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[1302] Wyman, Katarina Miriam, Responses to Climate Migration, *Harvard Environmental Law Review*, vol. 37, no. 1, 2013, pp. 175-185.

[1303] As observed by Källin, reflecting on the case of international normative framework available for people displaced from small island states "In this case, normative gaps exist for those who move abroad, leaving them in a legal limbo as (prima facie) they are neither migrant workers nor refugees." (Källin, Walter, Conceptualizing Climate-Induced Displacement, in: McAdam, Jane (ed.), *Climate Change and Displacement: Mulidiciplinary Perspectives*, Oxford/Portland, 2010, p. 91).

[1304] Wyman, *op. cit.* (footnote 1302), p. 181.

[1305] See the protocol referenced in: Bierman, Frank, Boas, Ingrid, Protecting Climate Refugees: The Case for a Global Protocol, *Environment*, vol. 50, no. 6, 2008, p. 11 *et passim*; Wyman, *ibid.*, pp. 175-176, footnote 43; Docherty, Bonnie, Giannini, Tyler, Confronting a Rising Tide: A Proposal for a Convention on Climate Change Refugees, *Harvard Environmental Law Review*, vol. 33, no. 2, 2009, p. 365, footnote 90; McAdam, Jane, Swimming against the Tide: Why a Climate Change Displacement Treaty is Not the Answer, *International Journal of Refugee Law*, vol. 23, no. 1, 2011, p. 6, footnote 14.

Change, an advisory body of the Government of the Federal Republic of Germany proposed that states should conclude a "cross-sectorial multilateral convention" distinct from the 1951 Refugee Convention that should "at miminum" include the following: "acknowledgement of environmental damage as a cause of environmentally induced migration; protection of environmental migrants through the granting of at least temporary asylum; establishment of a formula for the distribution of environmental migrants which ensures that among potential host countries no individual states are overburdened; establishment of an equitable formula for the distribution of the costs of receiving refugees; equalization of the financial burdens of climate-related environmental degradation".[1306] Similar proposals for conclusion of a new, tailor-made international agreement had came from the international non-governmental organizations[1307] and legal scholars.[1308] To that end, there are even unofficial drafts prepared. Thus, a group of scholars from the University of Limoges published the Draft Convention on the International Status of Environmentally-Displaced Persons.[1309] It is a comprehensive draft which provides a significant number of detailed provisions, including a definition of

[1306] See: *Climate Change as a Security Risk*, German Advisory Council on Global Change, 2008, p. 129.

[1307] A Bangladeshi non-governmental organization, Equity and Justice Working Group Bangladesh, proposed in 2009 that a protocol to the United Nations Framework Convention on Climate Change should be enacted that would recognize "climate refugees" as "universal natural persons" thereby granting them protection over the course of cross-border migrations. See: Climate Change Induced Forced Migrants: in need of a dignified recognition under a new Protocol, Equity and Justice Working Group Bangladesh (EquityBD), 2009, pp. 15-18. As noted by McAdam, EquityBD has since revised the terminology and does not use the term "refugee" any more. See: McAdam, *op. cit.* (footnote 1305), p. 6, footnote 16.

[1308] Two scholars of the Harvard Law School, Bonnie Docherty and Tyler Giannini, proposed a "Convention on Climate Change Refugees", which would be an "independent" or "stand-alone" instrument. To that end, their proposal envisages a new definition of a "climate change refugee" (distinct from existing definitions of environmental or climate change refugees) and lists a range of components that should be included in the proposed new instrument. See: Docherty, Giannini, *op. cit.* (footnote 1305), pp. 350, 372 *et passim*. Frank Bierman and Ingrid Boas, in a slightly different fashion, proposed a Protocol to the United Nations Framework Convention on Climate Change, which would, however, lead to a similar endgoal of creating new, tailor-made legal framework for people migrating in response to climate change. See: Biermann, Boas, *op. cit.* (footnote 1305), p. 8 *et passim*. Angela Williams similarly proposed that a new global climate change agreement ("post-Kyoto agreement" – the article was published in 2008) within the United Nations Framework Convention on Climate Change should include requirements for states to take action in addressing climate displacement, including by means of regional cooperation. See: Williams, *op. cit.* (footnote 118), p. 520.

[1309] See the integral text of the proposal in: Prieur, Michel Prieur, Michel, Marguénaud, Jean-Pierre, Monediaire, Gérard, Betaille, Julien, Drobenko, Bernard, Gouguet, Jean-Jacques, Lavieille, Jean-Marc, Nadaud, Séverine, Roets, Damien, Bouin, Frédéric, Burgat, Florence, Cournil, Christel, Dinh, Van, Ballesta, José Juste, Lador, Yves, Mazzega, Pierre, Michelot, Agnès, Shelton, Dinah,, Draft Convention on the International Status of Environmentally-displaced Persons, *Revue Européenne de Droit de l'Environnement*, vol. 4, 2008, pp. 381-393.

environmentally displaced person. The Draft Convention thus defined "environmentally-displaced persons" as "individuals, families and populations confronted with a sudden or gradual environmental disaster that inexorably impacts their living conditions and results in their forced displacement, at the outset or throughout, from their habitual residence and requires their relocation and resettlement",[1310] providing them at the same time with a "right to resettlement"[1311] which is further elaborated as including "transparent and open legal procedures for the demand and grant or refusal of the status of environmentally-displace person".[1312] Similarly, a group of scholars and legal practitioners form Australia published the unoffical draft for the Convention for Persons Displaced by Climate Change, which included a proposal to create the dedicated international organization under the name Climate Change Displacement Organization, which would provide assistance to state parties to the Convention and very peoples on the move as well.[1313]

4.5. **International law concerning migrants**

Migrants, of course, can be refugees if they satisfied the criteria for refugee status under international law.[1314] However, situations of persons migrating across international border that do not satisfy stringent criteria for granting the refugee status under international law are not rare. As we have explained, persons migranting across international border due to climate change-related causes, including sea level rise, are unlikely to be considered refugees.[1315] Therefore, we should look into the international legal protection of migrants as a separate category, as well.

[1310] *Ibid.*, p. 397.

[1311] Article 7 Paragraph 1 of the Draft Convention, *ibid.*, p. 400.

[1312] Article 9 of the Draft Convention, *ibid.*, p. 401.

[1313] See the proposal elaborated in: Hodgkinson, David, Burton, Tess, Anderson, Heather, Young, Lucy, The Hour when the Ship Comes in: Convention for Persons Displaced by Climate Change, *Monash University Law Review*, vol. 36, no. 1, 2010, p. 81-100.

[1314] Kugelmann, Dieter, Migration, in: Wolfrum, Rüdiger (ed.), *Max Planck Encyclopaedia of Public International Law*, vol. IV, 2012, p. 153.

[1315] For the arguments supporting this conclusion, see *supra* in 4.2.

While migrants are omnipresent in general discourse and across the media, the only international treaty that specifically regulates migrants on a universal level is the CRMW.[1316] Adopted by the United Nations General Assembly in 1990,[1317] this convention has defined "migrant worker" as "a person who is to be engaged, is engaged or has been engaged in a remunerated activity in a State of which he or she is not a national".[1318] From this definition, one can ascertain that the CRMW was concluded with a purpose to create legal framework for economic migrations.[1319] In addition, this convention includes "persons married to migrant workers or having with them a relationship that, according to applicable law, produces effects equivalent to marriage, as well as their dependent children and other dependent persons who are recognized as members of the family by applicable legislation or applicable bilateral or multilateral agreements between the States concerned"[1320] among members of the family protected along with a migrant worker.

However, the CRMW does not provide the same type of protection for any person that comes to a certain state. Rather, the CRMW distincts among the two categories of migrant workers and members of their families. The first category of migrants are those that are "documented or in a regular situation", which the CRMW defines as persons that "are authorized to enter, to stay and to engage in a remunerated activity in the State of employment pursuant to the

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[1316] Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, 1990, *United Nations Treaty Series*, vol. 2220, no. 39481, 2004, pp. 3-260

[1317] The CRMW was adopted after a decade-long process of negotiations which involved numerous drafts that reflected competing interests of states, centered along two readings (the first one lasted until 1984, while the second was completed in 1990, when the CRMW was adopted) as focal points in the process. See: Lonnroth, Juhani, The International Convention on the Rights of All Migrant Workers and Members of Their Families in the Context of International Migration Policies: An Analysis of Ten Years of Negotiation, *International Migration Review*, vol. 25, no. 4, 1991, pp. 721-722.

[1318] CRMW, Article 2, Paragraph 1. Article 2, Paragraph 2 further list specific types of migrant workers to which convention applies, such as frontier or itinerary workers. Article 3, however, excludes some categories of persons from the application of the CRMW (international officials, persons who participate in development programmes, investors, refugees and stateless persons, students and trainees, seafarers).

[1319] Indeed, when looking into the process that led to the adoption of the CRMW, one finds economic growth in states that received economic migrants, along with an idea to regularize migration flows as primary metajuridical reasons behind the long process of drafting of this treaty. Compare: Batistella, Graziano, Migration and Human Rights: the Uneasy but Essential Relationship, in: Cholewinsky, Ryszard, De Guchteneire, Paul, Pécoud, Antoine (eds.), *Migrations and Human Rights: The United Nations Convention on Migrant Workers' Rights*, Cambridge, 2009, pp. 56-57; Lonnroth, *op. cit.* (footnote 1317), pp. 716-721.

[1320] CRMW, Article 4.

law of that State and to international agreements to which that State is a party".[1321] On the other hand, "non-documented or in an irregular situation" are all those persons that satisfy the definition of a migrant worker and factually engage in a remunerated economical activity in a state of which they are not nationals, however do not have a legal sanction of the receiving state authorizing them to do so.[1322] From these definitions, it is clear that the question whether a migrant worker in a particular situation is to be considered regular is not a question of international, but rather of municipal law of the receiving State and international agreements to which that state is a party.[1323] Only regular migrant workers enjoy full protection under the CRMW.[1324] However, that does not mean that the CRMW accords no protection to the other category, that of undocumented migrants. Rather, the CRMW "does permit states to afford lesser protections to irregular migrant workers than to documented migrants",[1325] but does not allow state parties to treat undocumented migrants as mere aliens. Structure of the CRMW is such that all migrant workers enjoy basic human rights regulated by Part III of the CRMW, [1326] while regular migrants (and members of their families) enjoy additional rights under Part IV of the CRMW. While the CRMW is the longest (containing,

[1321] *Ibid*., Article 5, Subparagraph a.

[1322] *Ibid.*, Article 5, Subparagraph b. Unlike the definition of documented migrant worker, this definition does not allow the state party to regulate the criteria for obtaining the status of undocumented migrant workers by their municipal law. Rather, the status of undocumented migrant worker is based upon criteria contained in this definition.

[1323] In a hypothetical situation where there would be disagreements between the municipal law and international law that is binding for a particular state, the latter would prevail under this stipulation. Therefore, the receiving state which has entered international agreements regulating the status of migrant workers and is at the same time party to the CRMW is not completely free of international obligations when deciding who is a documented and who is an undocumented migrant worker.

[1324] Bosniak, Linda S., Human Rights, State Sovereignty and the Protection of Undocumented Migrants under the International Migrant Workers Convention, *International Migration Review*, vol. 25, no. 4, December 1991, p. 758.

[1325] *Ibid*.

[1326] In fact, as noted by the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, a treaty body established under the CRMW, the protection of human rights of irregular or undocumented migrant workers "in other international human rights treaties often have a wider scope than their counterparts in Part III of the Convention" (General comment No. 2 on the rights of migrant workers in an irregular situation and members of their families, Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, CMW/C/GC/2, 2013, Paragraph 8).

in total, 93 articles) and most elaborate among core human rights treaties,[1327] rights that migrant workers enjoy under the CRMW are mostly "a more precise interpretation of human rights in the case of migrant workers".[1328] In fact, they can be broadly divided into the two traditional categories known to international human rights law, civil and political[1329] and economic, social, and cultural rights,[1330] respectively.[1331]

Could, therefore, islanders of small island states who relocate to a host state be considered migrant workers and enjoy the protection under the CRMW? Generally, yes, provided that in any particular case they secured work (a remunerated activity) in a host state. This is, unfortunately, not true due to it being particularly suitable for climate change driven migrations,[1332] but rather due to the non-existance of other legal frameworks that would be more closely adapted to suit the specificities of climate migration. The CRMW, with its panoply of rights that it provides for migrant workers could be a legal framework for regularizing migrations of islanders. These rights include protection against *refoulement*.[1333]

[1327] Desmond, Alan, The Triangle That Could Square the Circle? The UN International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, the EU and the Universal Periodic Review, *European Journal of Migration and Law*, vol. 17, no. 1, 2015, p. 45.

[1328] De Guchteneire, Paul, Pécoud, Antoine, Introduction: The UN Convention on Migrant Workers' Rights, in: Cholewinsky, Ryszard, De Guchteneire, Paul, Pécoud, Antoine (eds.), *Migrations and Human Rights: The United Nations Convention on Migrant Workers' Rights*, Cambridge, 2009, p. 8.

[1329] Civil and political rights protected under the CRMW are, *inter alia*, right of life (Article 9), protection against torture and other cruel, inhuman or degrading treatment or punishment (Article 10), right to freedom of thought, conscience and religion (Article 12), right to freedom of thought, conscience and religion, right to liberty and security of person (Article 16).

[1330] Economic, social, and cultural rights protected under the CRMW are, *inter alia*, right to be free of conditions amounting to slavery, servitude, or other forms of forced or compulsory labour, right to join trade unions (Article 26), right for respect of cultural identity and right not to be prevented from maintaining cultural links with the state of origin (Article 31).

[1331] This, however, does not mean that the CRMW has not established "few new rights specific to the condition of migrants (such as the right to transfer remittances or to have access to information on the migration process)". (*Ibid.*).

[1332] The Preamble of the CRMW, while mostly reflecting the treaty's primary focus on economic migrations, newertheless acknowledges that the drafters of the CRMW were "considering the situation of vulnerability in which migrant workers and members of their families frequently-find themselves owing, among other things, to their absence from their State of origin and to the difficulties they may encounter arising from their presence in the State of employment" (CRMW, Preambular Paragraph 9). The formulation thus allows for interpretations that are somewhat broader from focusing only on the economic aspect of migrations.

[1333] In its General Comment no. 2, the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families noted that regarding the *non-refoulement* obligation under the CRMW: "this principle covers the risk of torture and cruel, inhuman or degrading treatment or punishment, including

Article 22 Paragraph 1 of the CRMW explicitly prohibits collective expulsion of migrant workers and members of their families.[1334] Regarding individual expulsions, the CRMW does not ban them, however makes relatively significant procedural obligations for states engaging in the practice.[1335]

While the CRMW, *prima facie*, provides a suitable legal framework for islanders in the process of relocation, there are significant drawbacks that make it less believable for it to become a tool that would see widespread use in practice. The most notable among these problems is the fact that CMRW remains unratified by many states, especially those that receive significant numbers of migrant workers.[1336] In addition to this obstacle to wider applicability of CRMW in cases of migrations of islanders related to the effects of sea level

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inhumane and degrading conditions of detention for migrants or lack of necessary medical treatment in the country of return, as well as the risk to the right to life (arts. 9 and 10 of the Convention). It also applies to situations where individuals would not be protected from onward refoulement. The Committee is of the view that migrants and members of their families should be protected in cases where expulsions would constitute arbitrary interference with the right to family and private life. Migrants and members of their families in an irregular situation with international protection needs should also be protected against expulsion." (General comment No. 2 on the rights of migrant workers in an irregular situation and members of their families, Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, CMW/C/GC/2, 2013, Paragraph 50).

[1334] This prohibition might become highly relevant in case of planned relocation of islanders. As explained by the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, as a corollary of the prohibition of collective expulsion under Article 22 Paragraph 1 of the CRMW: "States parties have an obligation to ensure that their expulsion procedures provide sufficient guarantees to ensure that the personal circumstances of each migrant worker are genuinely and individually taken into account." (*Ibid*.).

[1335] These include the right for a decision on expulsion to be carried out "only in pursuance of a decision taken by the competent authority in accordance with law", in addition to other procedural guarantees such as the right of judicial review, right to compensation in case a decision on expulsion is subsequently annulled etc. See: CRMW, Article 22, Paragraph 2.

[1336] As of the end of 2024, the CRMW has 60 parties and 40 signatory states. Among these, there are virtually none of the developed states which accept significant numbers of migrant workers. In addition, none of the developed states in the (sub)regions of small island states analysed in this work (such as Australia or New Zealand), which are already attracting migration from small island states and are likely to attract further migrations in the future, are parties to the CRMW. See: International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, Status, United Nations Treaty Collection, available at: treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-13&chapter=4 (accessed: 29th December 2024). According to a group of authors discussing the matter of low rate of ratifications, this can be explained by the cost of ratification, which include: "policy change, uncertainty, and sovereignty costs" In addition, they conclude that: "These costs are most salient for states that have large immigrant populations." (Western, Shaina D., Lockhart, Sarah P., Money, Jeanette, Does Anyone Care about Migrant Rights? An Analysis of Why Countries Enter the Convention on the Rights of Migrant Workers and Their Families, *International Journal of Human Rights*, vol. 23, no. 8, 2019, p. 1288).

rise, another important obstacle to suitability of CRMW in the cases that are in focus of this work is that the CRMW was designed to regulate human rights of individual labour-motivated migrants and their families. This means that it does not reflect specificities of climate change migration, which often involve different patterns of vulnerability from those migrant workers face with. Nevertheless, CRMW shows that the model for migration exists and migrants that are not refugees can be accommodated and provided with human rights, including the right of *non-refoulement*, in international law. Therefore, in the following paragraphs, we will look into other migrant-related instruments that developed in more recent times, reflecting increased awareness for climate change-induced migrations.

On a more general plane, the International Organization for Migration (hereinafter IOM) defined a migrant as "an umbrella term, not defined under international law, reflecting the common lay understanding of a person who moves away from his or her place of usual residence, whether within a country or across an international border, temporarily or permanently, and for a variety of reasons".[1337] The IOM specifically accompanied this definition with a disclamer pointing out that this definition "was developed by IOM for its own purposes and it is not meant to imply or create any new legal category".[1338]

Responding to the specificities of migration driven by climate change-related events, including sea level rise, the IOM has complemented its general definition of a migrant with the one concerning environmental migration. Thus, according to the IOM, environmental migrants are "people or groups, who, for compelling reasons of sudden or progressive changes in the environment that adversely affects their lives or living conditions, are obliged to leave their habitual homes, or chose to do so, either temporarily or permanently, and who move either within their country or abroad".[1339] Again, the IOM accompanied this definition with a disclaimer, noting that "This definition of environmental migrant is not meant to create any new legal categories. It is a working definition aimed at describing all the various

[1337] Sironi, Alice, Bauloz, Céline, Emmanuel, Milen (eds.), Glossary on Migration, *International Migration Law*, no. 34, International Organization for Migration, Geneva, 2019, p. 132.
[1338] See: *Ibid.*
[1339] Brown, Oli, Migration and Climate Change, International Migration Law, no. 31, *International Organization for Migration*, Geneva, 2008, p. 15. See also: *Ibid*., p. 64.

situations in which peoples move in the context of environmental factors."[1340] In case of relocation, peoples of small island states, whether moving in a planned scenario or in series of individual relocation, would be migrants in the sense of these definitions. They would be moving across international border, with the "progressive changes in the environment that adversely affects their lives or living conditions" being the primary reason behind the migration. This, however, does not provide them with any specific rights under international law.

The process of creation of new international legal instruments concerning migrations began in 2016, when the New York Declaration for Refugees and Migrants was adopted. It clearly directed the way of progressive development of refugee and migrant law towards soft law instruments.[1341] In the New York Declaration for Refugees and Migrants, sea level rise in not explicitly mentioned, however climate change figures prominently among reasons for migration that require international legal responses.[1342] Structured as a series of non-binding commitments of States,[1343] the New York Declaration for Refugees and Migrants, and especially its Annex II under the name Towards a Global Compact for Safe, Orderly and Regular Migration served as precursor for the adoption of the Global Compact for Safe, Orderly and Regular Migration (hereineafter GCM). The importance of the New York Declaration for Refugees and Migrants for islanders of small island states is that it directly

[1340] Sironi *et al*., *op. cit.* (footnote 1337), p. 65.

[1341] The New York Declaration for Refugees and Migrants was adopted in the form of the UN General Assembly resolution pursuant as an outcome of the high-level meeting dedicated to the topic of global responses to the large movements of refugees and migrants. It included two annexes, the first one concerning the development of the Comprehensive Refugee Response Framework and the second one, Towards a Global Compact for Safe, Orderly and Regular Migration which set up the process culminating in the adoption of the GCM. See: New York Declaration for Refugees and Migrants, United Nations General Assembly, A/RES/71/1, 2016.

[1342] In the first paragraph which defines reasons for migration, New York Declaration for Refugees and Migrants postulated that: "Some people move in search of new economic opportunities and horizons. Others move to escape armed conflict, poverty, food insecurity, persecution, terrorism, or human rights violations and abuses. Still others do so in response to the adverse effects of climate change, natural disasters (some of which may be linked to climate change), or other environmental factors. Many move, indeed, for a combination of these reasons." (*Ibid*., Paragraph 1).

[1343] The commitments that states took upon themselves by the New York Declaration for Refugees and Migrants are divided in three groups: commitments that apply to both refugees and migrants, those specific to refugees, and those specific to migrants, respectively. This shows that in the process initiated by this document, the divide between the two categories remains clear, despite them sharing a number of characteristics and vulnerabilities.

and specifically acknowledges climate change and natural disasters among important drivers of migration. Further legal developments ensued in the process leading to the most comprehensive global migration law instrument that was adopted two years after the New York Declaration for Refugees and Migrants.

Adopted in 2018, the GCM, is a comprehensive non-binding, soft law instrument that regulates migrations.[1344] Structurally, the GCM consist of a series of 10 guiding principles, 23 objectives and 187 actions related to the objectives that should "achieve safe, orderly and regular migration along the migration cycle".[1345] Within its framework, the GCM prominently included climate change, natural disasters, and sea level rise as drivers of migration.

Already in the Preamble, the GCM recalls the UNFCCC, the Paris Agreement and the Sendai Framework for Disaster Risk Reduction 2015–2030 among the international legal instruments on which the GCM rest upon.[1346] The first substantive reference on climate change within the GCM comes in Objective 2, which includes a subheading on "Natural disasters, the adverse effects of climate change, and environmental degradation". Under this subheading, there are commitments of states towards, *inter alia*, strengthening joint analysis and sharing information on migration movements, development of resilience strategies to sudden-onset and slow-onset disasters (among which sea level rise is explicitly mentioned), integration of displacement considerations into disaster preparedness strategies, harmonization of approaches to address vulnerabilities (including on regional level), and developing coherent approaches to migration in consultation with relevant consultative processes.[1347]

[1344] Global Compact for Safe, Regular and Orderly Migration, United Nations General Assembly, A/RES/73/195, 2019.

[1345] This structure has been criticized as fragmented and lacking focus. As one author had argued, the design of the GCM "remains complex and piecemeal" due to the "no clear articulation of priority between the twenty-three objectives" and "actions that are supposed to be taken by states to implement these objectives" being "eclectic" (Compare: Chetail, Vincent, The Global Compact for Safe, Orderly and Regular Migration: A Kaleidoscope of International Law, *International Journal of Law in Context*, vol. 16, no. 3, 2020, p. 254).

[1346] GCM, Paragraph 2.

[1347] *Ibid.*, Paragraph 18, Subparagraphs h-l.

The second objective of the GCM that explicitly references sea level rise is Objective 5, which requires that states "enhance availability and flexibility of pathways for regular migration" the GCM specifically postulates that states will "cooperate to identify, develop and strengthen solutions for migrants compelled to leave their countries of origin owing to slow-onset natural disasters, the adverse effects of climate change, and environmental degradation, such as desertification, land degradation, drought and sea level rise, including by devising planned relocation and visa options, in cases where adaptation in or return to their country of origin is not possible".[1348] Within this objective, the two situations, namely migrations caused by slow-onset and those caused by sudden-onset disasters, remain distinct, not only sematically, but also regarding to actions that states have committed to undertake.[1349] In case of slow-onset disasters, the GCM mentions only "planned relocations and visa options".[1350] In addition, exclusion clause[1351] was added to this commitment, as it applies only to "cases where adaptation or return to their country of origin is not possible."[1352] For small island states and their peoples this provision is inded crucial, as it recognizes the exact situation they might face with and mentions concrete responses which, if implemented, could have provided islanders with a stable and real pathway for migration.

Finally, in Objective 23 under which the states committed to "strengthen international cooperation and global partnerships for safe, orderly and regular migration" specifically mentions SIDS, among other designations of groups of states, as those towards which the state would "take joint action" in addressing challenges they face with.[1353] Moreover, under the same Objective 23, the GCM calls for action to "accelerate the implementation" of the 2030 Agenda for Sustainable Development in geographical areas "from which irregular

[1348] *Ibid*., Paragraph 21, Subparagraph h.
[1349] Groenendijk, Kees, Objective 5: Enhance availability and flexibility of pathways for regular migration, in: Guild, Elspeth, Basaran, Tugba, *The UN's Global Compact for Safe, Orderly and Regular Migration: Analysis of the Final Draft, Objective by Objective*, London, 2018, p. 19.
[1350] GCM, Paragraph 21, Subparagraph h.
[1351] Groenendijk, *op. cit.* (footnote 1349), p. 20.
[1352] GCM, Paragraph 21, Subparagraph h.
[1353] *Ibid*., Paragraph 39.

migration systematically originates", which include, inter alia, areas that are under "consistent impact" of climate change.[1354]

Based on analysis of these provisions and rethoric that they contain, the GCM can indeed be regarded as the first universal commitment of states to find solutions for migrations instigated by the sea level rise. It is significant that the states, by adopting the GCM, have not subsumed climate change (and sea level rise) related migrations under some broader scenario covering other situations, but rather as a separate, notable cause of migratory flows. This explicit inclusion of disaster-related and climate change-related migration has been variously described as a "breakthrough"[1355] and criticized as restrictive as it does not bring an actual new momentum to the obligations of states, but rather reiterates already known concepts.[1356] Be that as it may, one has to agree with the ILC's co-rapporteurs on sea level rise and international law in an assessment that in the GCM "for the first time, the international community has made specific commitments not only to address disasters and climate change as drivers of migration, but also to protect those who are compelled to leave their countries because of such events".[1357]

In addition to the explicit references to climate change and sea level rise, the GCM contains a range of provisions that would become relevant for islanders in the process of relocation. In general, the GCM requires from states to "respond to the needs of migrants who face situations of vulnerability, which may arise from the circumstances in which they travel or the conditions they face in countries of origin, transit and destination, by assisting them and protecting their human rights, in accordance with our obligations under international law".[1358] This commitment is placed within the objective 7 which aimes to "address and reduce

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[1354] *Ibid*., Paragraph 39, Subparagraph b.

[1355] Kälin, Walter, The Global Compact on Migration: A Ray of Hope for Disaster-Displaced Persons, *International Journal of Refugee Law*, vol. 30, no. 4, 2018, p. 665.

[1356] See, for example, an argument by Capone, writing that in the context of climate change-related migrations, "neither the GCM nor the GCR have embedded significant provisions to strengthening the protection offered to those affected by this phenomenon". See: Capone, Francesca, The Alleged Tension between the Global Compact for Safe, Orderly and Regular Migration and State Sovereignty: 'Much Ado about Nothing'? , Leiden Journal of International Law, vol. 33, no. 3, 2020, p. 719.

[1357] Galvão Teles, Ruda Santolaria, *op. cit.* (footnote 16), p. 65.

[1358] GCM, Paragraph 23.

vulnerabilities in migration".[1359] We have noted how the islanders on the move would find themselves in a situation which exacerbates many of their existing and creates new vulnerabilities.[1360] Therefore, it is important that the GCM reiterated that these vulnerabilities must be addressed by individual states under the international human rights' legal framework.[1361]

Regarding the prohibition of collective explusion and the *non-refoulement* obligation of states, the GCM contains provision on both. In objective 21, the GCM stipulates that the states commit to "upholding the prohibition of collective expulsion and of returning migrants when there is a real and foreseeable risk of death, torture and other cruel, inhuman and degrading treatment or punishment, or other irreparable harm, in accordance with our obligations under international human rights law".[1362] While the GCM does not mention *non-refoulement* explicitly, in this statement the principle is contextually restated as an existing rule of international human rights law.[1363] There is nothing in this provision that would make it, even within the realm of soft law, a progressive development of international law. Indeed, the GCM text does not postulate *non-refoulement* as an independent protection principle, but rather as an obstacle to removal.[1364] Moreover, in the context of small island states faced with sea level rise, there is no acknowledgment of a specific situation in which the return to the state of origin is not possible.

The GCM acknowledges and continues to uphold the legal distinction between refugee and migrant categories. In the text, there is an explicit statement which confirms this, stating that

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[1359] Under one classification of the GCM's objectives, objective 7 is one of those that "promote global public policies for migratory management, which in a second phase should be developed through the adoption of national public policies". See: Fajardo del Castillo, Teresa, The Global Compact for Safe, Orderly and Regular Migration: A Soft Law Instrument for Management of Migration respecting Human Rights, *Paix et Securite Internationales - Journal of International Law and International Relations*, no. 8, 2020, p. 81.

[1360] On vulerabilities of persons on the move due to climate change related events, see supra in 1.2.3.

[1361] This is significant as it means that the GMC, while a soft law text in itself, reiterates explicitly hard law obligations towards migrants which states have under general international human rights law. Compare, for example: Höflinger, Tim, Non-Binding and Therefore Irrelevant? The Global Compact for Migration, *International Journal*, vol. 75, no. 4, 2020, p. 664

[1362] GCM, Paragraph 37. This objective reflects the prohibition of collective expulsions that forms part of binding international law under the CRMW, as well.

[1363] Chetail, *op. cit.* (footnote 1345), p. 262.

[1364] *Ibid*., p. 263.

"migrants and refugees are distinct groups governed by separate legal frameworks. Only refugees are entitled to the specific international protection defined by international refugee law."[1365] While this might seem obvious, and very well is, it is significant insofar as it is a vivid expression of the character of GCM as restatement of existing international law concerning migrations, not its substantive progressive development. In turn, it raises a broader question on legal character of the GCM, the one that has generated significant academic discussions.[1366] For our topic, the question is significant insomuch as it gives an answer as to how relevant the GCM really is when it comes to operationalizing legal responses to migrations of islanders.

The GCM is a soft law instrument. Soft law instruments of various kind do not impose obligations on states, but that does not preclude them to provide important guidance and clarification for interpretation in numerous fields of contemporary international law.[1367] That this happened in the realm of climate change law can only further the argument that states will be more willing to commit themselves to targets imposed by soft law instruments and not a binding treaty.[1368] International climate change law has in years after the 2015 Paris Agreement increasingly moved its focus from binding targets fixed by treaty obligations to nationally determined contributions and the GCM, while not a document concerned with climate change in the first place, fits into this trend.[1369] Indeed, from the perspective of host states, this is a better suited solution. While soft law texts are not without consequences for

[1365] GCM, Paragraph 4.

[1366] See, for example: Newland, Kathleen, The Global Compact for Safe, Orderly and Regular Migration: An Unlikely Achievement, *International Journal of Refugee Law*, vol. 30, no. 4, 2018, pp. 657-660; Peters, Anne, The Global Compact for Migration: to sign or not to sign?, EJIL:Talk!, available at: https://www.ejiltalk.org/the-global-compact-for-migration-to-sign-or-not-to-sign/ (accessed: 29th December 2024); Hilpold, Peter, Opening up a New Chapter of Law-Making in International Law: The Global Compacts on Migration and for Refugees of 2018, *European Law Journal*, vol. 26, no. 3-4, July 2020, pp. 235-238; Oelgemöller, Christina, Allinson, Kathryn, The Responsible Migrant, Reading the Global Compact on Migration, *Law and Critique*, vol. 31, no. 2, 2020, p. 197, Höflinger, *op. cit.* (footnote 1361), pp. 665-672; Fajardo del Castillo, *op. cit.* (footnote 1359), pp. 56-57;

[1367] Thürer, Daniel, Soft Law, in: Wolfrum, Rüdiger (ed.), *Max Planck Encyclopaedia of Public International Law*, vol. IV, 2012, pp. 270, 275.

[1368] McAnaney, Sheila C., Sinking Islands? Formulating a Realistic Solution to Climate Change Displacement, *New York University Law Review*, vol. 87, no. 4, 2012, pp. 1202-1203.

[1369] Compare: Capone, *op. cit.* (footnote 1356), pp. 727-728.

interpretation of legal obligations of states (hard law),[1370] to rely on soft law instruments means, *in ultima linea*, to rely on good will of host states which might or might not employ standards written in it. Thus, uncertainty remains as a latent threat when one would have to rely upon the GCM only. Its added value, however, is in the fact that the commitments made under it, while not binding in themselves, reiterate existing obligations under international human rights law. At the same time, the GCM could and should lead states in devising legal responses for developments of international law that governs sea level rise-related migrations. Therefore, next chapters examine how this has unfolded under two distinct bodies of law – bilateral agreements and general human rights law, respectively.

4.6. **Bilateral agreements**

The Republic of Marshall Islands is a state in free association with the United States of America.[1371] The legal basis for free association is the Compact of Free Association, a bilateral agreement between the Republic of Marshall Islands and the United States of America.[1372] The Compact establishes a relationship that includes significant provisions concerning financial aid, security and foregin policy guarantees for the Republic of Marshall Islands.[1373] In the context of migrations, however, the Compact of Free Association is

[1370] For the reference to the particular context of the GCM, see: Peters, *op. cit.* (footnote 1366), Höflinger, *op. cit.* (footnote 1361), p. 665.

[1371] For the explanation of the relationship free association between the Republic of Marshall Islands and the United States of America, see *supra* in 1.2.2.3.

[1372] For the text of the original Compact of Free Association between United States of America and the Republic of Marshall Island (concluded in 1983, entered into force in 1986) see: Compact of Free Association, Act of January 14, 1986, US Public Law No. 99-239, 1986. For the text of the 2003 amended version of the Compact, see: Compact of Free Association, as Amended, between the Government of the United States of America and the Government of the Republic of Marshall Islands, 2004, US Department of State, Treaties and Other International Acts Series, no. 04-501, 2004. For the text of the amendments, see: United States Congress, Consolidated Appropriations Act, 2024, Title II "Amending Compacts of Free Association".

[1373] See, generally: Morris, Kevin, Navigating the Compact of Free Association: Three Decades of Supervised Self-Governance, *University of Hawai'i Law Review*, vol. 41, no. 2, 2019, pp. 397-410; New Compact of Free Association Agreements with Micronesia, the Marshall Islands, and Palau Approved by Congress, AJIL Contemporary Practice of the United States, *American Journal of International Law*, vol. 118, no. 3, 2024, pp. 546-547.

significant as it provides the Marshallese with the special legal avenue that allows for admittance to the United States of America.[1374]

The purpose of the migration pathway established by the Compact was somewhat idealistically summarized by the United States' Government Accountability Office in preparation for the negotiations on the 2003 version of the Compact in the statement that its purpose is "to strengthen ties between the United States and the Freely Associated States".[1375] In reality, the Compact[1376] provides that Marshallese "may be admitted to, lawfully engage in occupations, and establish residence as a nonimmigrant in the United States and its territories and possessions (…) without regard to (…) the Immigration and Nationality Act".[1377] This general provision is further limited by subparagraphs, establishing five categories of Marshallese that may be admitted to the United States of America following this pathway. These are the citizens of the former Trust Territory of Pacific Islands that became citizens of the Republic of Marshall Islands on independence and remained citizens to the date of migration to the United States of America, citizens of the Republic of Marshall Islands that aquired this status at birth, immediate relatives of the persons belonging to the former two

[1374] Article IV of the 2003 version of the Compact of Free Association between the United States of America and the Republic of Marshall Islands, titled "Immigration" contains provisions on this aspect of the relationship between the two states. Under their respective compacts, persons with ties to the other two freely associated states, the Federal States of Micronesia and the Republic of Palau enjoy equivalent rights. See: Compact of Free Association, As Amended, between the Government of the United States of America and the Government of the Federated States of Micronesia, US Department of State, Treaties and Other International Act Series, no. 04-625, 2004; Agreement between the Government of the United States of America and the Government of the Republic of Palau Following the Compact of Free Association Section 432 Review, US Department of State, Treaties and Other International Act Series, no. 18-919.2, 2018.

[1375] Migration from Micronesian Nations Has Had Significant Impact on Guam, Hawaii, and the Commonwealth of the Northern Mariana Islands, Report to the Congressional Requesters, United States General Accounting Office, 2001, p. 8.

[1376] The latest revision of the Compact of Free Association happened in 2024, when the financial part was revised, following its expiry in 2023. The 2024 revision of the Compact has not affected the part of the 2003 version that concerns migrations, thereby allowing it to remain in force as a renewed part of the agreement. See: United States and Marshall Islands Celebrate Renewal of Compact of Free Association, available at: https://mh.usembassy.gov/united-states-and-marshall-islands-celebrate-renewal-of-compact-of-free-association/ (accessed: 30th December 2024).

[1377] Compact of Free Association, as Amended, between the Government of the United States of America and the Government of the Republic of Marshall Islands, Treaties and Other International Acts Series, US Department of State, Treaties and Other International Acts Series, no. 04-501, 2004, Article IV, Section 141, Parapgraph a.

groups (provided that they fulfil additional requirements), naturalized citizens of the Republic of Marshall Islands that are actual residents of it (again fulfilling additional requirements), and immediate relatives of citizens of the Republic of Marshall Islands, if the citizens are serving in the United States Armed Forces or on active reserves.[1378] In summary, according the these provisions, citizens of the Republic of Marshall Islands that belong to one of these categories do not need a visa and may freely reside and work in the United States of America.[1379] However, the United States of America may refuse entry even to persons who belong to one of these categories. There are, firstly, exceptions written in the Compact regarding persons who come to the United States of America for purposes of adoption and for persons who became citizens of the Republic of Marshall Islands pursuant to an investment.[1380] Secondly, even those that do not belong into one of the exceptions and do fulfil all the requirements for admittance under the Compact, can be refused entry into the United States of America under the Immigration and Nationality Act.[1381]

Therefore, this migration pathway, while useful and indeed used by the islanders of freely associated states,[1382] has significant restrictions and does not allow for unrestricted entry of the Marshallese into the United States of America. For our topic, it is relevant to assess would it be useful for migrations in sea level rise-related situations. The Compact does not provide for migration pathway that is tailored to respond to sea level rise or, generally, climate

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[1378] *Ibid*., Paragraph a, Subparagraphs 1-5. Dema grouped these five categories into three "general", namely, "(1) any person who was a citizen of the TTPI and therefore became a citizen of the RMI, the FSM, or Palau on the effective date of the Compacts; (2) any person who acquires the citizenship of the RMI, the FSM, or Palau at birth; and (3) certain categories of naturalized citizens of the RMI, the FSM, and Palau, or relatives of such citizens" (Dema, *op. cit.* (footnote 151), p. 186).

[1379] *Ibid*., p. 187; Morris, *op. cit.* (footnote 1373), pp. 402-403

[1380] Compact of Free Association, as Amended, between the Government of the United States of America and the Government of the Republic of Marshall Islands, 2004, US Department of State, Treaties and Other International Acts Series, no. 04-501, 2004, Article IV, Section 141, Parapgraphs b and c.

[1381] Dema, *op. cit.* (footnote 151), pp. 187-188; Morris, *op. cit.* (footnote 1373), p. 403. The Immigration and Nationality Act is part of the national law of the United States of America that governs immigration to that state.

[1382] In 2020, the United States' Government Accountability Office has estimated that the number of "compact migrants" from the three freely associated states that lived in the United States of America in 2018 numbered 94,399 people. Considering that the total population of the three states does not exceed 180,000 persons, this indeed shows that the migration pathway was consistently used by the islanders. See: Compacts of Free Association: Populations in U.S. Areas Have Grown, with Varying Reported Effects, United States Government Accountability Office, 2020, p. 14.

change-related migrations.[1383] Reasons behind such a conclusion are multi-faceted and exist both on the side of the freely associated states and the United States of America. Regarding the freely associated states, including the Marshall Islands, the first problem that would likely arise is the one that is common to all forms of migration, notwithstanding the legal framework. On multiple occasions, small island states, including the Republic of the Marshall Islands, have voiced their preference for adaptation instead of migration.[1384] When it comes to the status of free association, this preference gets another layer. The compacts' provisions on economic aid from the United States to the freely associated states could be, and indded already are, used as a significant source of funding for adaptation projects, such as erecting seawalls or building artificial islands. Therefore, freely associated states, including the Marshall Islands, are logically more inclined to keep these parts of the agreement in place and not to encourage migration. Finally, the self-determination concerns are likely to point against the use of compacts as tools for providing legal framework for migration. This is due to their structure which is clearly favouring individual instead of collective migrations.

In 2024, Australia and Tuvalu concluded the Falepili Union Treaty. Within the Falepili Union, two states have established the special immigration procedure, which enables Tuvaluans to use a "special human mobility pathway" to migrate to Australia. By the Falepili Union Treaty, Tuvaluans are granted the right to access Australia, which includes the rights to "live, study and work" in the receiving state and to "access Australian education, health, and key income and family support on arrival". [1385] Under this scheme, migration is not without restrictions, as it is constrained by the imposition of yearly quotas and visa availability.[1386] The mobility

[1383] Dema, *op. cit.* (footnote 151), p. 199.

[1384] For example, speaking in the UN General Assembly in 2024, the President of the Republic of the Marshall Islands, Hilda Heine, voiced this opinion clearly by stating that while sea level rise "poses a threat to long term ability to remain in our islands", the Marshallese strongly support "stability and legal identity" that "remains fixed, in the future, just as it is now" (RMI President Heine delivers statemen to UNGA79, available at: https://forumsec.org/publications/remarks-rmi-president-heine-delivers-statemen-unga79 (accessed: 20th December 2024)).

[1385] Australia-Tuvalu Falepili Union Treaty, Article 3, Paragraph 1.

[1386] See: Explanatory Memorandum – Falepili Union, available at: https://www.dfat.gov.au/geo/tuvalu/australia-tuvalu-falepili-union-treaty/explanatory-memorandum-falepili-union-between-tuvalu-and-australia (accessed: 27th December 2025). See also: Guilfoyle, Douglas, Green,

pathway, which forms part of the broader integration of state parties under the Falepili Union Treaty, was, unlike the compact of free association to which it is reminiscent in many aspects, concluded as a reaction to sea level rise.[1387] However, doubts reagrading the feasibility of migration due to the quotas, opposition to the treaty among Tuvaluans, and self-determination (as the Falepili Union Treaty seems to favour individual migrations as well) remain.[1388]

Whatever proposal finds its way in any possible form, it can be safely concluded that international law for protection of refugees as it stands at the moment does not provide a framework peoples on the move due to sea level rise could completely rely on. Progressive development of international law would be needed. Therefore, we have to turn to other regimes that might provide help, including exploring general international human rights law as the broadest category.

4.7. ***Non-refoulement*** **obligations under civil and political rights**

As a paramount human right,[1389] the right to life is protected by all important human rights treaties, both on universal and regional level. On the universal level, the ICCPR contains provisions protecting human right to life in its article 6.[1390] Within it, the paragraph 6 (1)

Alex, The Australia-Tuvalu Falepili Union Treaty: Security in the face of climate change … and China?, EJIL:Talk!, available at: https://www.ejiltalk.org/the-australia-tuvalu-falepili-union-treaty-security-in-the-face-of-climate-change-and-china/ (accessed: 27th December 2025).

[1387] The Preamble of the Falepili Union Treaty explicitly states that "the special and unique circumstances faced by Tuvalu and that climate change is Tuvalu's greatest national security concern" (Australia-Tuvalu Falepili Union Treaty, Preamble, Paragraph 8).

[1388] For observations on the Falepili Union Treaty see also *supra* in 4.1. See also: Guilfoyle, Douglas, Green, Alex, The Australia-Tuvalu Falepili Union Treaty: Statehood and Security in the Face of Anthropogenic Climate Change, American Journal of International Law, vol. 118, no. 4, 2024, p. 685 *et passim*.

[1389] The right to life was consistently referred to as a "supreme human right" and the right without which "all other human rights would be devoid of meaning" by the drafters of the international legal instruments protecting the human rights and in the international legal scholarship. Likewise, the Human Rights Committee described the right to life as a "supreme right" in its General Comment no. 6. See: Nowak, *op. cit.* (footnote 307), p. 121; General Comment no. 6, Article 6: Right to Life, Human Rights Committee, CCPR/21/Add.1, 1982, Paragraph 1.

[1390] In full, article 6 of the ICCPR provides that: "1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life. 2. In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgement rendered by a competent court. 3. When deprivation of life

provides with the general recognition of right to life. It defines the human right to life as the "inherent right of every human being" that "shall be protected by law".[1391] Likewise, the Convention on the Rights of the Child protects the right to life of a child in Article 6[1392] and the Convention on the Right of Persons with Disabilities in Article 10.[1393] On the regional level, all regional human rights protection frameworks have included right to life in their respective human rights treaties.[1394] In this subchapter, we shall focus on the universal dimension of the right to life.

Within the ICCPR framework, the HRComm is the treaty body that is mandated to interpret the treaty under which it was established.[1395] In 2019, the HRComm adopted General Comment No. 36,[1396] in which it elaborated on the connection between human right to life and environmental degradation. From General Comment no. 36, this paragraph deserves quoting, as it directly addresses the HRComm's views on the issue: "Environmental degradation, climate change and unsustainable development constitute some of the most

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constitutes the crime of genocide, it is understood that nothing in this article shall authorize any State Party to the present Covenant to derogate in any way from any obligation assumed under the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide. 4. Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases. 5. Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women. 6. Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant."

[1391] As explained by Nowak: "The special significance of the right to life is underlined by the adjective 'inherent' (inhérent'), which is only used in Art. 6(1), and by the use of the (declaratory) present tense 'has' instead of 'shall have'. With this wording (…) the majority of delegates (…) sought to give expression to the natural law basis of the right to life. (…)". See: Nowak, *op. cit.* (footnote 307), p. 122.

[1392] In full, the Article 6 of the Convention on the Rights of the Child provides that: "1. States Parties recognize that every child has the inherent right to life. 2. States Parties shall ensure to the maximum extent possible the survival and development of the child." This structure of the Article, especially its Paragraph 2, prompted the Committee on the Rights of the Child to remark that "the right to survival and development can only be implemented in a holistic manner, through the enforcement of all the other provisions of the Convention" (General Comment no. 7, Implementing Child Rights in Early Childhood, Committee on the Rights of the Child, CRC/C/GC/7, 2005, Paragraph 10).

[1393] In full, Article 10 of the Convention on the Rights of Persons with Disabilities reads as follows: "States Parties reaffirm that every human being has the inherent right to life and shall take all necessary measures to ensure its effective enjoyment by persons with disabilities on an equal basis with others."

[1394] See: Article 2 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, Article 4 of the American Convention on Human Rights, Article 4 of the African Charter on Human and Peoples' Rights, Article 5 of the Arab Charter on Human Rights.

[1395] The Human Rights Committee was established under Article 28 Paragraph 1 of the ICCPR.

[1396] General Comment no. 36, Article 6: Right to Life, Human Rights Committee, CCPR/C/GC/36, 2019.

pressing and serious threats to the ability of present and future generations to enjoy the right to life. The obligations of States parties under international environmental law should thus inform the content of article 6 of the Covenant, and the obligation of States parties to respect and ensure the right to life should also inform their relevant obligations under international environmental law. Implementation of the obligation to respect and ensure the right to life, and in particular life with dignity, depends, inter alia, on measures taken by States parties to preserve the environment and protect it against harm, pollution and climate change caused by public and private actors. States parties should therefore ensure sustainable use of natural resources, develop and implement substantive environmental standards, conduct environmental impact assessments and consult with relevant States about activities likely to have a significant impact on the environment, provide notification to other States concerned about natural disasters and emergencies and cooperate with them, provide appropriate access to information on environmental hazards and pay due regard to the precautionary approach."[1397] From the quoted paragraph, in cases of "environmental degradation, climate change and unsustainable development", violations of the right to life have been connected by the HRComm with the concept of "life with dignity". The HRComm thus moved away from restrictive interpretations of the right to life in cases concerning environmental and climate change effects towards interpreting right to life as encompassing dignity rather than only deprivation of live itself as a consequence of climate change.[1398]

To operationalize these observations in legal language of obligations of states under international environmental law with the respect of right to life with dignity, the HRComm called upon states to take measures "to preserve the environment and protect it against harm, pollution and climate change caused by public and private actors".[1399] The wording thus

[1397] *Ibid*., Paragraph 62.

[1398] As noted by one commentator, the incorporation of "life with dignity" into the Article 6 of the ICCPR "highlights the permeability between the right to life and economic, social and cultural rights". Furthermore, "the preferable interpretation is that Article 6 addresses those circumstances that plausibly threaten one's life and simultaneously undermine dignity". (Joseph, Sarah, Extending the Right to Life under the International Covenant on Civil and Political Rights: General Comment 36, *Human Rights Law Review*, vol. 19, no. 2, 2019, pp. 357-358).

[1399] General Comment no. 36, Article 6: Right to Life, Human Rights Committee, CCPR/C/GC/36, 2019, Paragraph 62.

implied that states have an obligation to take positive action in order to prevent ("preserve (…) and protect") environment with a goal that degradation and climate change do not reach a point when they become infringement of the right to life. What is more, the obligation applies also in situations where the response to the harm stemming out of environmental degradation or climate change would exceed the capacities of the state.[1400] In that case, a state should seek external assistance.[1401]

Another dimension of state arising from the duty to protect the right to life that is particularly relevant for populations of small island states in case of relocation, is that obligation can trigger the states' obligations under the principle of non-refoulment, even in the cases where the person in question does not qualify as a refugee. In the same General Comment No. 36, the HRComm expressed this obligation in the following way: "The duty to respect and ensure the right to life requires States parties to refrain from deporting, extraditing or otherwise transferring individuals to countries in which there are substantial grounds for believing that a real risk exists that their right to life under article 6 of the Covenant would be violated.".[1402] The HRComm continues to explain that "The obligation not to extradite, deport or otherwise transfer, pursuant to article 6 of the Covenant, may be broader than the scope of the principle of non-refoulement under international refugee law, since it may also require the protection of aliens not entitled to refugee status."[1403] The legal logic behind these obligations is in the idea that the right to life, as a universal right and a precondition for respect of many other

[1400] Cullen, Miriam, Disaster, Displacement and International Law: Legal Protections in the Context of a Changing Climate, *Politics and Governance*, vol. 8, no. 4, 2020, p. 277.

[1401] See: *Ibid.* The obligation to seek external assistance in situations that exceed capacities of the affected state is well-established in international disaster law. Already in 2003, the Institute of International Law adopted a Resolution on humanitarian assistance. In it, Principle III Paragraph 3 stipulated that "Whenever the affected State is unable to provide sufficient humanitarian assistance to the victims placed under its jurisdiction or de facto control, it shall seek assistance from competent international organizations and/or from third States." See: Humanitarian Assistance, Resolution, 2003, available at: https://www.idi-iil.org/en/sessions/bruges-2003/?post_type=publication (accessed: 30th December 2025).

[1402] General Comment no. 36, Article 6: Right to Life, Human Rights Committee, CCPR/C/GC/36, 2019, Paragraph 30.

[1403] *Ibid.*, Paragraph 31.

rights, is indeed to be protected by all states. If a state has "substantial grounds for believing that a real risk exists"[1404] it should not extradite a person to a state where such a risk is located.

Both of these dimensions of human right to life are interconnected and thus equally relevant for peoples whose life might be under threat due to effects of environmental threats, including sea level rise.

First dimension can be understood as direct protection of the core of right to life. It acknowledges that environmental harms of various kinds, can indeed jeopardize life and be classified as a violation of the right to life as protected under international law. Within this dimension, McAdam identifies the following criteria as relevant for the establishment of a violation: "the risk to life must be actual or imminent; the applicant must be personally affected by the harm; environmental contamination with proven long-term health effects may be a sufficient threat, however there must be sufficient evidence that harmful quantities of contaminants have reached, or will reach, the human environment; a hypothetical risk is insufficient to constitute a violation of the right to life; and cases challenging public policy will, in the absence of an actual or imminent threat, be considered inadmissible".[1405] Therefore, this dimension is especially relevant for the situation in the very affected states, as it covers violations of rith to life directly stemming out of environmental causes, including sea level rise.

These questions were dealt with by the HRComm in multiple views concerning individual communications under Optional Protocol 1, out of which the Portillo Cáceres v. Paraguay[1406] case could be emphasized as the first one which deserves attention. The case was not directly concerned with climate change effects, let alone sea level rise, but it addressed the standards relevant for establishing violation and nature of states' obligations stemming from environmental causes. The authors of the communication were Paraguayan nationals, living in a remote, agricultural environment, where cultivation of soyabean was done on a large

[1404] *Ibid.*
[1405] McAdam, *op. cit.* (footnote 117), p. 57.
[1406] Portillo Cáceres v. Paraguay, Human Rights Committee, CCPR/C/126/D/2751/2016, 2019.

scale, involving use of large quantities of pesticides.[1407] This caused at least one death and multiple serious health issues to the authors of communication.[1408] After examining the case, the HRComm found violation of Article 6 of the ICCPR. The state failed to take any meaningful positive action in order to prevent spraying of pesticides, which is an activity that had and continues to have a significant negative impact on life of authors of communication, thereby presenting a "reasonably foreseeable threat" to their right to life under Article 6 of the Covenant.[1409] The case is particularly significant not only for clarifying the concept of imminent threat, but also on a more general level, as it represented the first time that the HRComm found a violation of Article 6 of the ICCPR in a concrete case stemming from individual application, relying in its reasoning on the General Comment no. 36.[1410]

Few years later, the HRComm came back to the issue in another case that originated out of the communication authored by the group of islanders living on the islands of Boigu, Masig, Warraber and Poruma, which are part of the Torres Strait Islands group. Unlike the Portillo Cáceres v. Paraguay, this case, which got the name Daniel Billy *et al.* v. Australia[1411] according to the name of one of the authors, concerned environmental harms stemming directly from sea level rise effects. The authors claimed that their right to life under Article 6 of the Covenant was violated by the sea level rise causing a wide array of problems to their livelihood, including difficulties in growing crops, gardening and fishing, which are essential for maintaining their livelihoods.[1412] They complained that the states' failure to take "adaptation and mitigation measures" for mitigating these climate change related problems, "failed to prevent foreseeable risk to life", thereby violating Article 6 of the ICCPR.[1413] The majority opinion in the HRComm, however, was that no violation of Article 6 occured. The main argument behind such a conclusion was that the state party to the proceeding (Australia)

[1407] *Ibid*., Paragraphs 2.5-2.8.
[1408] *Ibid*., Paragraph 3.5.
[1409] *Ibid*., Paragraph 7.5.
[1410] Le Moli, Ginevra, The Human Rights Committee, Environmental Protection and the Right to Life, *International and Comparative Law Quarterly*, vol. 69, no. 3, 2020, p. 736, 738-740.
[1411] Daniel Billy et al. v. Australia, Human Rights Committee, CCPR/C/135/D/3624/2019, 2022.
[1412] *Ibid*., Paragraphs 2.3-2.7.
[1413] *Ibid*., Paragraph 3.4.

and its agencies are taking a wide array of "adaptive measures to reduce existing vulnerabilities and build resilience to climate change-related harms in the Islands".[1414] The state party has thereby fulfilled its obligation to enact positive measures as concerns Article 6 (to prevent foreseeable loss of life) and no violation of Article 6 was found.[1415] While finding that no violation of Article 6 has been ongoing, the majority duly noted that environmental causes can trigger violations of right to life and that states have obligation to take positive action to mitigate "real and foreseeable risk" from that happening.[1416] In that regard, case Daniel Billy *et al.* v. Australia indeed represents a move forward in the HRComm's reasoning on the relation between right to life and climate change. In it, the

[1414] *Ibid*., Paragraph 8.7. With regard to that, commentators observed that: "It appears that the Committeeacknowledged the necessity of a preventive approach in this contextso as to not only consider the eventual realisation of the risk a violation. This aspect will be key for pending and future climate change litigation, as it is often precisely the point to prevent future disastrous effects of climate change in the first place. Unfortunately, the Committee did not provide more guidance under which circumstances the isk of submergence may lead to such a violation. Its reasoning suggests that there is no violation of Article 6 ICCPR as long as the Statetakes measures to assist a community in adapting to a continuously changing climate. Yet it is not clear whether these adaptation mea-sures are required to be effective, successful or completed within aspecific timeframe." See: Lentner, Gabriel M, Cenin, Weronika, Daniel Billy et al v Australia (Torres Strait Islanders Petition): Climate change inaction as a human rights violation, *Review of European, Comparative and International Environmental Law*, vol. 33, no. 1, 2024, pp. 142-143.

[1415] "The Committee considers that the information provided by the State party indicates that it is taking adaptive measures to reduce existing vulnerabilities and build resilience to climate change-related harms in the Islands. Based on the information made available to it, the Committee is not in a position to conclude that the adaptation measures taken by the State party would be insufficient so as to represent a direct threat to the authors' right to life with dignity." See: *ibid*.

[1416] *Ibid*., Paragraph 8.6. Moreover, while not finding the violation of Article 6 based on application of the real and foreseeable risk standard, the HRC found a violation of Article 27 of the ICCPR. This prompted commentaries as to the litigation strategies and different standards employed in assessing violations of Article 6 and Article 27 of the ICCPR, with one commentator observing that: "climate litigants dealing with similar situations may consider reorienting their efforts towards other rights, also noting that, in the case at hand, the remedies granted were unlikely to change much if a violation of the right to life was established. In this regard, the case highlights the potential of Article 27 on the right to culture as a promising avenue for climate complaints." (Luporini, Riccardo, Climate Change Litigation before International Human Rights Bodies: Insights from Daniel Billy et al. v. Australia (Torres Strait Islanders Case), *Italian Review of International and Comparative Law*, vol. 3, no. 2, 2023, p. 250). Similarly, other commentators have observed that: "We note that the Committee did not conclude that Australia's adaptation and mitigation measures were so insufficient that they represented a direct threat to the authors' right to life with dignity and so did not find a violation by the State party of the authors' rights under Article 6 of the Covenant, although dissenting opinions provide additional perspectives on Article 6 for future reference. As such, the significance of the case remains within the domain of Indigenous rights." (McGaughey, Fiona, Maguire, Amy, Purcell, Sasha, Torres Strait Islanders Leading the Charge on the Human Rights Implications of Climate Change: Daniel Billy et al v Australia, *University of Western Australia Law Review*, vol. 51, no. 1, 2023, p. 98).

HRComm confirmed that climate change in general, and sea level rise in particular, could have detrimental effects on the right to life that could, provided that they meet a threshold of "real and foreseeable risk", be regarded as violations of Article 6 of the ICCPR. Moreover, the HRComm confirmed that states, under, *inter alia*, Article 6 of the ICCPR, have an obligation to implement effective adaptation measures to address the negative effects of sea level rise on the enjoyment of right to life with dignity. In the context of small island states faced with sea level rise, such conclusion is higly relevant as it shows that all states which have jurisdiction over persons that are facing possible violations of right to life under the Article 6 of the ICCPR, have an obligation to implement positive adaptation measures to prevent breaches of right to life with dignity. In case of sea level rise, this concerns both small island states and host states.

The majority's views were contested by a number of individual opinions by members of the HRComm.[1417] Among them, especially relevant in our view is the partially dissenting opinion submitted by Committee members Arif Bulkan, Marcia V. J. Kran and Vasilka Sancin.[1418] In their opinion, the three members touch what seems to us as the core issue for islanders of small islands faced with sea level rise, at least during the relocation process. The core issue of the separate opinion of three members (Bulkan, Kran, Sancin) is which standard should be applied when establishing a link between right to life and environmental degradation. The majority, as mentioned in the previous paragraph, opted for the "real and foreseeable risk", which is different from "reasonably foreseeable threat" used in previously described Portillo Cáceres v. Paraguay case. The dissenters state that the standard used by the majority "was borrowed from the dissimilar context of refugee cases", expressly mentioning the case Ioane

[1417] Individual Opinion of Carlos Gómez Martínez, member of the Committee, Annex I; Individual opinion of Committee member Duncan Laki Muhumuza (dissenting), Annex II, Individual opinion of Hernán Quezada Cabrera, member of the Committee (partially dissenting), Annex III, Individual opinion of Committee member Gentian Zyberi (concurring), Annex IV, Daniel Billy et al. v. Australia, Human Rights Committee, CCPR/C/135/D/3624/2019, 2022.

[1418] Joint opinion of Committee members Arif Bulkan, Marcia V.J. Kran and Vasilka Sancin (partially dissenting), Daniel Billy et al. v. Australia, Human Rights Committee, CCPR/C/135/D/3624/2019, 2022, Annex V.

Teitiota v. New Zealand as the one form which the stricter standard, applied by the majority, stems from.[1419]

This brings us to the second dimension of human right to life that is relevant for islanders of small island states.

Violations of right to life can trigger *non-refoulment* obligations of states even in a situation where a person which would face such a violation does not meet the threshold to be considered a refugee. From the standpoint of refugee law, the idea that risk of violation of certain general human rights, including the right to life, could give rise to the obligation of a state not to remove persons out of their jurisdiction to a jurisdiction where there is a real risk such violations would occur is known as complementary protection.[1420] In the General Comment no. 36, the HRComm wrote that: "The duty to respect and ensure the right to life requires States parties to refrain from deporting, extraditing or otherwise transferring individuals to countries in which there are substantial grounds for believing that a real risk exists that their right to life under article 6 of the Covenant would be violated. Such a risk must be personal in nature and cannot derive merely from the general conditions in the receiving State, except in the most extreme cases."[1421] This interpretation was originally established in connection to the death penalty, as the HRComm had been called to adopt views regarding communications which concerned extradition to a state where an individual will face capital punishment.[1422]

The case Ioane Teitiota v. New Zealand[1423] touched upon the issue in the context of climate change induced sea level rise. The author of the communication was a national of Kiribati

[1419] *Ibid*., Paragraphs 2 and 3.

[1420] As explained by McAdam: "In legal terms, 'complementary protection' describes protection granted by States on the basis of an international protection need outside the 1951 Convention framework. It may be based on a human rights treaty or on more general humanitarian principles, such as providing assistance to persons fleeing from generalized violence." (McAdam, Jane, *Complementary Protection in International Refugee Law*, Oxford, 2007, p. 21).

[1421] General Comment no. 36, Article 6: Right to Life, Human Rights Committee, CCPR/C/GC/36, 2019, Paragraph 30.

[1422] See: McAdam, *op. cit.* (footnote 117), pp. 151-152.

[1423] Teitiota v. New Zealand, Human Rights Committee, CCPR/C/127/D/2728/2016, 2019.

who moved to New Zealand and applied for asylum, claiming that his life would be under threat due to sea level rise if he returned to Kiribati.[1424] The New Zealand authorities, administrative and judicial bodies alike, refused him, claiming that it cannot be established that the effects of sea level rise the author will face with if returned to Kiribati are not of such a magnitude as to jeopardize his right to life.[1425] Being a petition from a national of small island state faced with possible total submergence of its habitable territory who relocated and relied in his claims before the HRComm on the *non-refoulement* principle under Article 6 of the ICCPR, Teitiota v. New Zealand is indeed of crucial value for the relation between the *non-refoulement* dimension of the right to life and sea level rise.

Based on the evidence provided by the author, the HRComm examined four possible sources of harm that could result in a violation of right to life if the author had been returned to Kiribati: violence on Tarawa due to overcrowding and land disputes, worsening quality of land, making the growing of crops unsustanable, lack of fresh and potable water due to salinization of aquifiers, sudden-onset phenomena, which, in connection with sea level rise, could result in extensive flooding.[1426] By examining information before it, the HRComm came to the conclusion that New Zealand authorities did not act arbitrarily in their decision to remove the author back to Kiribati, as neither of these risks are of a nature that is required to justify *non-refoulement* obligation under Article 6. In the words of the HRComm: "The information made available to the Committee does not indicate that when the author's removal occurred, there was a real and reasonably foreseeable risk that he would be exposed to a situation of indigence, deprivation of food and extreme precarity that could threaten his right to life, including his right to a life with dignity."[1427] The HRComm used a "real and foreseeable risk"[1428] standard as a key concept for deciding whether return of the author to

[1424] *Ibid*., Paragraphs 2.1-2.2.
[1425] *Ibid*., Paragraphs 2.3-2.10.
[1426] Compare: Sommario, Emmanuele, When climate change and human rights meet: A brief comment on the UN Human Rights Committee's Teitiota decision, *Questions of International Law*, Zoom In, vol. 71, 2020, p. 59.
[1427] *Ibid*., Paragraph 9.9.
[1428] In a previous case with dissimilar context, named Touissant v. Canada, the Human Rights Committee adopted the view that "right to life had been too often narrowly interpreted (…) the obligation of States parties to respect and ensure the right to life extends to reasonably foreseeable threats and life-threatening situations

Kiribati presented a violation of Article 6 of the ICCPR. While noting that such a risk must be individualized,[1429] the HRComm engaged into a thorough examination of facts, concluding that the effects of sea level rise, with which the author will inevitably face if removed to Kiribati, either do not present a real and foreseeable risk,[1430] or can be considered only a general risk, not individual one.[1431] Therefore, the majority in the HRComm found no violation of Article 6 of the ICCPR. This, in turn, led to the majority adopting a view that *non-refoulement* obligations of New Zealand under Article 6 were not applicable in this case.[1432]

Although it did not find a violation of Article 6, the HRComm in this case nevertheless noted that environmental degradation, and sea level rise in particular, could cause violations of right to life and trigger states' *non-refoulement* obligations under Article 6. The relevant observation of the HRComm deserves quoting in full: "The Committee is of the view that without robust national and international efforts, the effects of climate change in receiving States may expose individuals to a violation of their rights under articles 6 or 7 of the Covenant, thereby triggering the *non-refoulement* obligations of sending States. Furthermore, given that the risk of an entire country becoming submerged under water is such an extreme risk, the conditions of life in such a country may become incompatible with the right to life

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that can result in loss of life" (Touissant v. Canada, Human Rights Committee, CCPR/C/123/D/2348/2014, 2018, Paragraph 11.3)

[1429] See: Teitiota v. New Zealand, Human Rights Committee, CCPR/C/127/D/2728/2016, 2019, Paragraphs 8.4 and 9.7.

[1430] "While recognizing the hardship that may be caused by water rationing, the Committee notes that the author has not provided sufficient information indicating that the supply of fresh water is inaccessible, insufficient or unsafe so as to produce a reasonably foreseeable threat of a health risk that would impair his right to enjoy a life with dignity or cause his unnatural or premature death." (*Ibid*., Paragraph 9.8).

[1431] "In assessing the author's circumstances, the Committee notes the absence of a situation of general conflict in Kiribati. It observes that the author refers to sporadic incidents of violence between land claimants that have led to an unspecified number of casualties, and notes the author's statement before the domestic authorities that he had never been involved in such a land dispute. The Committee also notes the Tribunal's statement that the author appeared to accept that he was alleging not a risk of harm specific to him, but rather a general risk faced by all individuals in Kiribati." (*Ibid*., Paragraph 9.7); "The information made available to the Committee does not indicate that when the author's removal occurred, there was a real and reasonably foreseeable risk that he would be exposed to a situation of indigence, deprivation of food and extreme precarity that could threaten his right to life, including his right to a life with dignity. " (*Ibid*., Paragraph 9.9).

[1432] *Ibid*., Paragraph 10.

with dignity before the risk is realized."[1433] In other words, the HRComm clarified that exposure to the effects of such a process can trigger obligations not only of states where such events are happening, but also an obligation of other states not to extradite persons to states where there is a real and foreseeable, individualized risk for life of such persons. Therefore, in Teitiota, the HRComm noted that in cases where there exists a risk of submergence of the entire (habitable) territory of a state, the incompatibility of living conditions with right to life with dignity might create *non-refoulement* obligation of states before submergence happens. This is especially important as sea level rise is a slow onset process. It means, among other, that before sea level rise begins to cause loss of life, it will have a range of effects that jeopardise a right to a life with dignity, which is in turn a vital component of right to life.

In the practice of the HRComm outside of climate change and sea level rise context, affirming non-refoluement obligation in cases of an existing risk that refoulement would lead to violations of right to life under Article 5 of the ICCPR is not a novelty.[1434] Within the climate change context, such view is consistent with the approach of the HRComm in General Comment no. 36,[1435] and the international legal scholarship.[1436] Moreover, it could be argued that the decision in Teitiota affirmed the *opinio juris* of states expressed in the GCM adopted in 2018, where states espressed their commitment to uphold "the prohibition of collective expulsion and of returning migrants when there is a real and foreseeable risk of death, torture and other cruel, inhuman and degrading treatment or punishment, or other irreparable harm, in accordance with our obligations under international human rights law".[1437]

Two separate opinions were attached to the views of the majority, both dissenting. HRComm member Duncan Laki Muhmuza questioned the threshold of the majority for a real and

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[1433] *Ibid*., Paragraph 9.11.

[1434] See, for example: Kindler v. Canada, Human Righs Committee, CCPR/C/48/D/470/1991, 1994, Paragraphs 13.1-13.2.

[1435] General Comment no. 36, Article 6: Right to Life, Human Rights Committee, CCPR/C/GC/36, 2019, Paragraph 30.

[1436] The Sydney Declaration of Principles on the Protection of Persons Displaced in the Context of Sea Level Rise, adopted in 2018 by the International Law Association's Committee on International and Sea Level Rise, for example, includes the "right to be protected against refoulement" among the duties of states to respect human rights of protected persons under Principle 2 of the Declaration.

[1437] Global Compact for Safe, Regular and Orderly Migration, United Nations General Assembly, A/RES/73/195, 2019, Paragraph 37.

foreseeable risk to be established as individualized (personal).[1438] He argued that the threshold employed by the majority is too high and placed unreasonable burden of proof on the author, thereby repeating the errors made by New Zealand authorities.[1439] In her dissenting opinion, HRComm member Vasilka Sancin argued that the HRComm failed to note that access to drinking water, one of the principal reasons for which the author claimed violations of right to life, was not ensured in reality by the actions of government of Kiribati.[1440] Although the government of Kiribati had plans to distribute safe drinking water to its population in places where traditional sources had been contaminated due to sea level rise, these plans were not fulfilled in a manner which would eliminate the risk to the author if removed back to Kiribati.[1441]

Views adopted by the Human Rights Committe in Teitiota v. New Zealand and Daniel Billy et al. v. Australia show that there are, in essence, two different sets of obligations that fall under the scope of Article 6 of the Covenant. First could be framed as an obligation of the state where sea level rise is causing such an effect as to jeopardise right to life to undertake positive measures for mitigation of such effects. Second one is the obligation of all states to refrain from returning those who are under their jurisdiction to places where effects of sea level rise present a real and foreseeable, individualized (personal) risk to life. From this, it can be easily assumed that the first obligation primarily concerns those states which have sovereignty over territories that are experiencing changes due to sea level rise. In cases of small island states, those are the very states and their governments. They should adopt and meaningfully undertake positive measures aimed at mitigation of negative sea level rise effects such as loss of traditional sources of drinking water, difficulties in agricultural practices due to salinization of soils, housing shortages due to uninhabitability of the islands' territories etc. On the other hand, the second obligation primarily concerns those states to which members of populations of small island states decide to relocate to. Their obligation,

[1438] Individual opinion of Committee member Duncan Laki Muhumuza (dissenting), Annex I, Teitiota v. New Zealand, Human Rights Committee, CCPR/C/127/D/2728/2016, 2019.
[1439] *Ibid*., Paragraphs 5 and 6.
[1440] Individual opinion of Committee member Vasilka Sancin (dissenting), Annex II, Teitiota v. New Zealand, Human Rights Committee, CCPR/C/127/D/2728/2016, 2019, Paragraph 4.
[1441] *Ibid*., Paragraph 5.

as established under views adopted in Teitiota v. New Zealand, is essentially a *non-refoulment* obligation in cases where there is a real and foreseeable individual risk to life in case of return to the place of origin, the small island state

The two obligations are complementary in nature. They address different facets of the same problem, while providing remedies of different kind. While the HRComm has addressed both of them (in cases Teitiota v. New Zealand and Billy et al. v. Australia, albeit in different context, of which only the former case is directly related to international migration), the question of when the threshold which connects them with possible violations of right to life stands is still elusive.[1442] From Teitiota v. New Zealand, it is clear that the HRComm established a rather high threshold, which is very difficult to reach.[1443] In addition to the criteria of personal, real and foreseeable risk, the HRComm in Teitiota held that such risk would have had exposed the author "to a situation of indigence, deprivation of food, and extreme precarity that could threaten his right to life, including his right to a life with dignity"[1444] with regard to difficulites in growing crops. At the same time, the HRComm held with respect to the problem of scarcity of potable water on Tarawa that it should be "inaccessible, insufficient or unsafe so as to produce a reasonably foreseeable threat of a health risk that would impair his right to enjoy a life with dignity or cause his unnatural or premature death"[1445] for a *non-refoulement* obligation under Article 6 to arise. As noted by McAdam, "While this very high threshold might have been appropriate had only one of the above elements been present, it is arguably too high when a range of rights are impacted. Instead, a cumulative assessment is more appropriate."[1446]

While this conclusion could be forseen and understood as the HRComm refrained itself from making a case that would set a precedent for all future petitions related to climate change migrations,[1447] it nevertheless enabled also for the petition to be dismissed, which is more

[1442] Compare: McAdam, *op. cit.* (footnote 136), p. 725.
[1443] Compare: *ibid*., p. 714.
[1444] Teitiota v. New Zealand, Human Rights Committee, CCPR/C/127/D/2728/2016, 2019, Paragraph 9.4.
[1445] *Ibid*., Paragraph 9.8.
[1446] McAdam, *op. cit.* (footnote 136), p. 714.
[1447] Compare: Imbert, Louis, Premiers éclaircissements sur la protection internationale des «migrants climatiques», *La Revue de Droits de l'Homme*, Actualités Droits-Libertés, 2020, pp. 12-15.

controversial. Following, arguably, the wording and logic of the General Comment no. 36, the only situation in which the HRComm could deviate from the personal nature of risk and confirm the existence of the *non-refoulement* obligation in cases where the risk is of general scope or nature, is what had been named in the General Comment no. 36 as an "extreme case".[1448] Therefore, essentially there were two avenues that the author could have used to establish a violation of Article 6 in the Teitiota Case. The first one is to prove that there is a real, foreseeable and personal risk with which he would have faced if he was to be deported back to Kiribati.[1449] The other is that conditions in Kiribati are of such a nature to create an extreme case, in which case even a more generalized risk might suffice.[1450] The only assessment of the HRComm that might seem to be leaning in that direction, thereby creating an exception to the application of the "real and foreseeable risk" test is the one concerning scarcity of drinking water. In it, the HRComm seemingly applied the less strict test of "reasonably foreseeable threat of a health risk". However, the result was not different. The HRComm left the burden of proof for the author at a restrictively high level, adopting a view that water rationing which is in place in Tarawa does not "impair his right to enjoy a life with dignity or cause his unnatural or premature death".[1451] Regarding the claim of violation due to inability to grow crops due to effects of salinization, the HRComm again applied the "real and foreseeable risk" standard, dismissing the claim and agreeing with findings of New Zealand authorities. This points to another observation, namely that the HRComm restricted itself to individual assessment of various conditions in Kiribati that could have created *non-refoulement* obligation for New Zealand, rather than taking a cumulative approach, combining the factors to reach the threshold.[1452]

[1448] Compare Paragraph 30 of the General Comment no. 36, in which the Human Rights Committee iterated that for the *non-refoulement* obligation to manifest "a risk must be personal in natureand cannot derive merely from the general conditions in the receiving State, except in the most extreme cases" (General Comment no. 36, Article 6: Right to Life, Human Rights Committee, CCPR/C/GC/36, 2019, Paragraph 30).

[1449] Compare: Sommario, *op. cit.* (footnote 1426), p. 58.

[1450] *Ibid.*

[1451] Teitiota v. New Zealand, Human Rights Committee, CCPR/C/127/D/2728/2016, 2019, Paragraph 9.8.

[1452] McAdam, Jane, *op. cit.* (footnote 131), p. 714.

To that regard, one can remark that choosing different legal strategies might have resulted in different outcomes. For example, combining the claim under Article 6 of the Covenant and Article 7, which concerns cruel, inhuman, and degrading treatment might, in the opinion of one commentator, lead to different results, as the standard applied might be different, the key question being "whether the conditions on Kiribati amounted to crual, inhuman and degrading treatment".[1453] Similarly, claim that had been brought to the HRComm in the name of wife and children of the author, and not only himself, might have been treated differently by the HRComm, especially concerning the timframes, which were crucial in deciding the case.[1454] As one author noted commenting on the case, there is a possibility that, by relying on the "extremely difficult living conditions that he and his wife had personally experienced before leaving Kiribati", might result in an affirmation of *non-refoulement* obligations of New Zealand.[1455]

In what might be the most controversial view adopted in the Teitiota v. New Zealand case, the HRComm, while accepting "the author's claim that sea level rise is likely to render Kiribati uninhabitable", noted that "time frame of 10 to 15 years, as suggested by the author, could allow for intervening acts by Kiribati, with the assistance of the international community, to take affirmative measures to protect and, where necessary, relocate its population".[1456] This claim, along with the finding that Kiribati is already taking some adoptive measures to mitigate the effects of sea level rise, allowed for the HRComm's majority to conclude that "the information made available to it does not demonstrate that the conduct of the judicial proceedings in the author's case was clearly arbitrary or amounted to a manifest error or denial of justice, or that the courts otherwise violated their obligation of independence and impartiality".[1457] In Teitiota decision, the HRComm, for that part, never

[1453] *Ibid.*, p. 716.
[1454] *Ibid.*, pp. 716-717.
[1455] Sommario, *op. cit.* (footnote 1426), p. 61, basing his reasoning on the Jasin v. Denmark decision, in which the Committee affirmed that Denmark violated the Article 6 by failing to provide individualized assessment of the author's case, in which the return to Italy, would had ment facing with extremely poor living conditions.
[1456] Teitiota v. New Zealand, Human Rights Committee, CCPR/C/127/D/2728/2016, 2019, Paragraph 9.12.
[1457] *Ibid*., Paragraph 9.13.

provided a specific guidance as to the timeframe.[1458] Of course, any case that is brought in front of the HRComm, as different persons, even in facing similar circumstances, might experience harm at different points in time, must be decided on an individual basis. Nontheless, the HRComm in Teitiota indeed missed an opportunity to provide a guidance as to what might be the circumstances that would indeed trigger the *non-refoulment* obligation in this particular case.

The views adopted in Teitiota v. New Zealand and mostly reproduced in Billy et al. v. Australia paint somewhat of a cynical picture of relation between right to life under Article 6 of the ICCPR and effects of sea level rise as its potential violation. On one hand, the Committee acknowledged that the Article 6 should be applied broadly, so as to encompass effects of environmental degradation. On the other, that does not mean much if the threshold that should be reached in order to establish a violation is set too high. Although first reactions to the Committee decision from both the international organizations[1459] and academia were positive,[1460] on a second thought it could be viewed as imposing significant obstacles to possibility of success of future non-refoulment claims of islanders coming from small island states. Reasons for such a claim are clear. First of all, the views adopted by the Committee leave much room for speculation as to what would be the set of circumstances that would allow for a breach to be established.[1461]

[1458] Compare: McAdam, *op. cit.* (footnote 136), pp. 719-720.

[1459] For example, the Office of the United Nations High Commissioner for Human Rights released a statement in which it hailed Teitiota v. New Zealand as a "historic case" which "opens door to climate change asylum claims" (Historic UN Human Rights case opens door to climate change asylum claims, available at: https://www.ohchr.org/en/press-releases/2020/01/historic-un-human-rights-case-opens-door-climate-change-asylum-claims (accessed: 1st August 2023)).

[1460] McAdam, for example, characterized Teitiota v. New Zealand as a "landmark determination". However, she acknowledged its limitations as well. See: McAdam, *op. cit.* (footnote 136), p. 709 *et passim*.

[1461] In line with this, McAdam observed that " Thus, an unsatisfying, but perhaps inevitable, limitation of the Human Rights Committee's decision is its failure to provide guidance as to where the tipping point lies." (McAdam, *ibid.*, p. 719). Moreover, this elusivness of criteria, as McAdam called it, led one author to question whether the case Billy et al. v. Australia casted new light on the question by connecting Article 27 and Article 6 of the ICCPR in a way that right to life of indigenous peoples is inextricably connected to their indigenous cultures, thereby triggering the *non-refoulement* obligations. See: Hagiarian, Benjamin, The Daniel Billy v Australia Case; Its Semantics and the Characterization of a Climate Threat as a Cause for Migration, *Amsterdam Law Forum*, vol. 15, no. 1, 2023, pp. 8-9.

Notwithstanding these limitations, to date, case Teitiota v. New Zealand, although failing to find that the violation of Article 6 indeed exists as consequence of dealing with effects of sea level rise, presents a seminal case for the peculiar relation between sea level rise and right to life under the ICCPR. In the first place, this case touched upon one of the most pressing issues for islanders of small island states under threat due to sea level rise, namely the issue of relocation. Within it, the Committee noted a few important interpretations of states' obligations under Article 6 of the Covenant, although none of it was completely new or unknown beforehand.

4.8. **Conclusion on the options for legal status of islanders during and after the process of relocation**

While relocation is certainly not the desired, it might come as an inevitable, at least for some of the islanders. As we have shown by examining various international legal regimes that provide protection to persons on the move between states, none of them is particularly suited to accommodate for very specific situation of islanders moving across international borders for reasons related to sea level rise. Some of the more contemporary frameworks, although mentioning climate change related migrations as a concept, are either non-binding or remain under ratified, or restrict its application by the high standard of proof that they impose on the islanders. Finally, these frameworks are mostly not well-suited for accommodating the self-determination as a specific basic human right that is at stake in cases of relocations of whole communities and their subsequent establishment on the territory of the host state.

Therefore, agreements such as the Falepili Union Treaty and the treaties of free association, which, as bilateral agreements, can accommodate for peculiarities of sea level rise-related protection of human rights of islanders on the move, remain the most viable option. However, as evidenced by both the Falepili Union Treaty and the treaties of free association, these treaties, while vital for small island states that concluded them, nevertheless remain unequal in many ways.

General conclusions

Principle of international cooperation is grounded in some of the basic documents which form the core of contemporary international law. The Charter of the United Nations in its Article 1 promotes "international co-operation in solving international problems of an economic, social, cultural, or humanitarian character" as one of the purposes of United Nations. Similarly, the Friendly Relations Declaration lists as one of the principles the duty of states to co-operate in accordance with the Charter of the United Nations. The Friendly Relations Declaration further names some of the spheres of international relations in which states are especially called upon cooperation. Among them are international peace and security, protection of human rights, cooperation in economic, social and cultural fields. As it has been explained in various chapters, all of these are endangered by the sea level rise effects on small island states and adaptation options require cooperation from other states. The Friendly Relations Declaration is generally regarded as part of customary international law and as such principles contained in it are binding for states, which was expressed also in various treaty law provisions, including those in fields of human rights and climate change law. As such, both the United Nations Charter and the Friendly Relations Declaration provide a general, but solid basis of one of the core principles which should be employed when in conceiving international communities' responses to sea level rise effects on small island states and their populations.

The situation that small island states are facing with is indeed unprecedented. In this work, we have tried to provide some reflections on the human rights perspective of the interlinked bundle of international legal problems that sea level rise imposes upon them. In doing this, we devoted significant part of this work to the right to self-determination, as we conceive it as crucial for all other human rights issues, the logic that is, as we have tried to show, supported by the most significant international stakeholders, including the very small island states. In this part, we followed the logic that aimed to preserve the most important outcome of self-determination, namely the legal personality of small island states. However, in this effort one also has to embrace the realty of the possibility of loss of habitable territory of small island states. If that happened, it would inevitably transform the nature of legal

personality by shifting it away of traditional statehood. We have tried to provide legal avenues in which such an effort would be feasible, accounting that self-determination in a continuing right, which, however, has to adapt to physical and societal realities. Identity and the common characteristics of the peoples of small island states will not whither away with sea level rise. International law should acknowledge that, however in a sense that allows it to continue recognizing specific qualities that statehood entails. Indeed, continuity of statehood without any further qualification is not the answer for peoples of small island state's self-determination once sea level rise imperils their homlands. Rather, by simply acknowledging continuity of statehood, international law risks unneccesary inconsistencies without providing real remedies for the peoples of small island states. Therefore, in this work, we tried to conceptualize the idea of self-determination of peoples of small island states viewed through feasible options which include reconfiguration of legal personality based on the identity of the peoples, coupled with the autonomy. It seems to us that this is the best way to accommodate for fruitful continuation of self-determination as a human right of peoples of small island states.

While certainly unwanted and prone to exposing the islanders to additional vulnerabilities, relocation from small island states that have become uninhabitable due to sea level rise cannot be ruled out as a scenario. In this process, especially in cases of individual relocations, the protection of individual human rights remains crucial. Again, this is a field in which international law cannot provide readily-made answers to the peculiarities of situation. By analysing the existing frameworks of refugee law, law of statelessness, migration law and complementary protection under general international human rights framework, we have shown how these norms were not created in order to govern specific situations of sea levewl rise-induced cross-border migrations. Therefore, we argued that providing bilateral frameworks of assistance to small island states and their populations might prove as the best option. However, in such a scenario, one must be very careful not to negate self-determination again by concluding the agreements that would favour the host states in a particularly strong way, as small island states, faced with the imminent threat, are in a notably weaker positions in negotiations leading up to such agreements.

Indeed, one could reasonably claim that most pressing problems small island states are facing with are not those of adaptation, but transformation. Small island states will have to transform their legal personality and their population will have to significantly change their way of life and ways in which they exercise many human rights. This, *in ultima linea*, is not the problem of adaptation which can be achieved through international cooperation, but of transformation of some basic ideas of international law, among which are legal personality of some of the key human right concepts. Thus, the problem is not economical, technical or developmental, which are areas under which cooperation is usually conceived. The problem is, in essence, a legal one. However convincing that interpretation might be, it is missing the reality. Those dimensions are interlinked.

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