

Strategic Sea Level Rise Litigation

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Abstract

Sea level rise is one of the downstream adverse effects of GHG emissions and climate change, but also a source of risk to coastal States, communities, and ecosystems, which means that sea level rise, in itself, can be viewed as a form and a source of harm to several rights protected under international law. Accordingly, although there is neither a special regime of ‘sea level rise law’, nor a specialized ‘sea level rise court’, other regimes of international law and their centralized courts, treaty-based bodies, and administrative mechanisms can contribute to pursue the private and public goals of sea level rise litigation. As such, this article maps the alternative options for sea level rise litigation at the international level through the lenses of scenarios (ie regimes of international law and international courts, treaty-based bodies, and administrative mechanisms responsible for their centralized interpretation and application), players (ie States and non-State actors), and desired outcomes (ie purposes of litigation).

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Keywords

climate change law – human rights – law of the sea – loss and damage – Paris Agreement – sea level rise – strategic litigation – UNCLOS – UNFCCC

1 Introduction: Monsieur Carême Goes to Strasbourg

On 28 January 2021, Damien Carême—a French citizen and mayor of a coastal city vulnerable to sea level rise—submitted an application before the European Court of Human Rights ('ECtHR') against his home State.¹ He alleged that France had failed to take sufficient measures to prevent the adverse impacts of climate change, namely the coastal erosion and floods that impact his rights under Articles 2 and 8 of the European Convention on Human Rights² ('ECHR'). The application was dismissed under Article 35(3) of the ECHR for being incompatible *ratione personae* with the ECHR,³ but the ECtHR did not rule out the idea that the adverse effects of sea level rise can amount to a human rights violation. The Human Rights Committee ('HRC') has also decided on sea level rise-related cases in *Teitiota*⁴ and *Billy*,⁵ proving that, even though there is no 'sea level rise law' or 'sea level rise court', sea level rise can be raised as a central argument or fact in international litigation.

The science behind Mr. Carême's application was clear. The Intergovernmental Panel on Climate Change ('IPCC') confirms a steady increase of the global-mean sea level ('GMSL') and links this increase to anthropogenic greenhouse gas ('GHG') emissions and the resulting global warming.⁶ According to the IPCC, the GMSL 'is rising, with acceleration in recent decades,'⁷ and 'is unavoidable for centuries to millennia.'⁸ Strong regional

¹ See *Carême v France* App no 7189/21 (ECtHR, 9 April 2024).

² Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) 213 UNTS 221.

³ *Carême* (n 1) §88.

⁴ *Ioane Teitiota v New Zealand*, Communication no CCPR/C/127/D/2728/2016 (24 October 2019).

⁵ *Daniel Billy et al v Australia (Torres Strait Islanders)*, Communication no CCPR/C/135/D/3624/2019 (23 September 2022).

⁶ IPCC, 'Summary for Policymakers', in Lee & Romero (eds), *Climate Change 2023: Synthesis Report. Contribution of Working Groups I, II and III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* (IPCC 2023) 1, 5.

⁷ IPCC, 'Summary for Policymakers', in Pörtner et al (eds), *IPCC Special Report on the Ocean and Cryosphere in a Changing Climate* (CUP 2019) 3, 9.

⁸ IPCC (n 6) 18. See also M Oppenheimer et al, 'Sea Level Rise and Implications for Low-Lying Islands, Coasts and Communities', in Pörtner et al (n 7) 321, 324 and 330.

variations are also projected,⁹ with a more negative impact on low-lying States and coasts, and especially small island States and the least developed States.

Sea level rise impacts are manifold and include slow-onset events (eg partial or full land submergence, land and aquifer salinization, the loss of marine ecosystems or species, land crops, and freshwater sources, as well as resettling human communities) and more frequent and more extreme sudden events (eg coastal erosion or floods).¹⁰ These impacts show that sea level rise is a form and a source of harm to several rights protected under international law. Its implications, therefore, can be viewed as a human rights violation, as Mr. Carême alleged, but also as a violation of other régimes of international law, including general international law, the law of the sea, or climate change law.

Nonetheless, State action is short to cope with the impacts that can still be avoided or mitigated. This explains why concerned individuals and civil society movements seek to bring sea level rise to international courts and tribunals,¹¹ treaty-based bodies, and administrative mechanisms, with a view of pressuring States to enhance their efforts. In this light, the purpose of this article is to map the alternative options for sea level rise litigation at the international level. To that end, this article uses a definition of 'sea level rise litigation' that includes cases in which sea level rise is raised as a central legal argument or fact; and includes adversarial and non-adversarial proceedings (eg advisory proceedings), proceedings entailing binding and non-binding decisions (eg before human rights treaty-based bodies), and proceedings before administrative mechanisms that seek to provide financial support to those who are affected by the adverse effects of sea level rise (eg the Loss and Damage Fund, or 'LDF').

To map the options for international sea level rise litigation, Section 2 explains the variables used in this article, namely its scenarios, players, and desired outcomes. Since sea level rise is a downstream impact of GHG emissions on the marine environment, Section 3 assesses the possible uses of dispute settlement means under the United Nations Framework Convention on Climate Change ('UNFCCC'),¹² the Paris Agreement,¹³ and the LDF, whilst Section 4 assesses the use of the United Nations Convention on the Law of the

⁹ IPCC (n 7) 9; Oppenheimer (n 8) 324.

¹⁰ IPCC, 'Sections', in Lee & Romero (n 6) 35, 79.

¹¹ Since the difference between international 'courts' and 'tribunals' is not relevant to this study, this article uses the expression 'international courts' to include both categories of institutions.

¹² Adopted 9 May 1992, entered into force 21 March 1994, 1771 *UNTS* 107.

¹³ Adopted 12 December 2015, entered into force 4 November 2016, 3156 *UNTS* 79.

Sea ('UNCLOS')¹⁴ in sea level rise litigation. In turn, Section 5 looks to the emerging presumption of continuing statehood as an example of a rule of general international law that can substantiate a legal claim in sea level rise litigation, whilst Section 5 elaborates on the human rights affected by sea level rise and how they can be clarified and developed by courts and treaty-based bodies. Section 7 concludes.

2 *Intermezzo: The Variables of Strategic Sea Level Rise Litigation*

This article assesses the options for sea level rise litigation using three underlying variables: (i) the scenarios, (ii) the players, and (iii) the desired outcomes. In other words, this article looks at the existing options in terms of (i) possible sources to substantiate a legal claim or request, as well as the dispute settlement, advisory, treaty-based, or administrative bodies with jurisdiction under that regime of international law; (ii) the subjects that can bring a legal claim or a request to these latter bodies; and (iii) the purposes of sea level rise litigation.

i. *The scenarios*

With regards to the scenarios, this article's angle is bi-dimensional, since it looks at the sources of a legal claim or request (ie the general or special legal régimes of international law) *and* the bodies that hold competence to decide, advise, or pronounce on that claim or request (ie the 'referees' that hold the authority to interpret rules and settle disputes under that regime).

In fact, even though there is neither a special 'sea level rise law', nor a specialized 'sea level rise tribunal', there are sources and bodies that can be mobilized in sea level rise litigation. For instance, because sea level rise is a downstream effect of GHG emissions in the marine environment, the UNFCCC legal complex (ie the UNFCCC and the Paris Agreement) and law of the sea treaties (namely, UNCLOS) are relevant sources in sea level rise litigation, being the competent courts thereunder also relevant in sea level rise litigation. Moreover, the scale of sea level rise triggers questions of general international law (eg the presumption of continued statehood of low-lying States) or related to special regimes (eg the above-mentioned impact on human rights law), which means that their rules and principles, and their dispute or advisory bodies, can also be mobilized in sea level rise litigation.

The choice of a scenario (which includes the choice of a body of law to substantiate a claim or a request and the choice of forum) depends on the

¹⁴ Adopted 10 December 1982, entered into force 16 November 1994, 1833 *UNTS* 3.

rules of standing, the desired outcomes of litigation, and an overall assessment of potential success of that claim or request. However, one option in international litigation is the formulation of parallel claims, since resorting to an international court, treaty-based body, or administrative mechanism does not necessarily exclude the parallel use of another court, body, or administrative mechanism, unless there is an identity of the parties, facts, and legal request.¹⁵ This implies that resorting to multiple proceedings—to pressure them to compete for the first, best, or most authoritative pronouncement,¹⁶ or to gradually develop aspects of the legal regime—is a valid and valuable strategy in international litigation.

In the next sections, this article maps the options for sea level litigation under climate change law, the law of the sea, general international law, and human rights law (although other regimes such as environmental law are also relevant on this matter). Although they are different bodies of law, cross-regime interaction is a requirement of customary law embodied in Article 31(3)(c) of the 1969 Vienna Convention on the Law of Treaties.¹⁷ Hence, the reading of each rule needs to take into account the full gamut of international obligations binding upon a State,¹⁸ but being different regimes means that complying with the obligations and standards under one regime does not necessarily entail complying with the obligations and standards under another regime.¹⁹ This means that the choice of a scenario has to bear in mind the need for cross-regime interaction, but also (and especially) the potential outcome of a claim under a certain regime of international law.

ii. *The players*

The prospects of sea level rise litigation also vary according to the potential ‘players’, ie the entities that hold standing to submit an application, a

15 Eg see PM Dupuy & JE Viñuales, ‘The Challenge of “Proliferation”: An Anatomy of the Debate’, in Romano, Alter & Shany (eds), *The Oxford Handbook of International Adjudication* (OUP, 2015) 135.

16 MA Tigre & A Rocha, ‘Competing Perspectives and Dialogue in Climate Change Advisory Opinions’ (2023) 117 *AJIL Unbound* 287.

17 Adopted 23 May 1969, entered into force 27 January 1980, 1155 *UNTS* 331.

18 *Obligations of States in respect of Climate Change (Advisory Opinion)* [2025] <<https://www.icj-cij.org/sites/default/files/case-related/187/187-20250723-adv-01-00-en.pdf>> accessed 29 July 2025, §354 (‘ICJ Opinion’).

19 This idea was voiced by ITLOS, to whom ‘The Convention and the Paris Agreement are separate agreements, with separate sets of obligations,’ with the implication that ‘the Paris Agreement is not *lex specialis* to [UNCLOS] and thus ... *lex specialis derogat legi generali* has no place in the interpretation of [UNCLOS].’ *Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law* (Advisory Opinion, 21 May 2024) ITLOS Case No 31, §§223–224 (‘ITLOS Opinion’).

complaint, a communication, or a request before an international court, treaty-based body, or administrative mechanism.

States are an obvious player, since they hold standing before most international courts and bodies. However, it is unlikely that States will initiate any kind of *adversarial* proceedings against other States: since all coastal States are affected by sea level rise (although on very different manners and intensities), some States prefer not to contribute to the production of a precedent that might be invoked against them in the future; States fear that litigation might damage their diplomatic and economic relations; States fear that litigation might interfere with the course of diplomatic negotiations under the Conferences of the Parties (COPs) to the UNFCCC and the Paris Agreement; and finally, the costs of litigation are higher in the case of sea level rise, since the uncertainty and lack of development of the existing rules means that litigants cannot foresee how courts will decide, and thus if courts will rule in their favour.²⁰ These factors mitigate the prospects of environmental and climate litigation in general,²¹ but low-lying and small island States, who have nothing to lose in sea level rise litigation, are less likely to feel some or most of these constraints. However, advisory proceedings are less likely to threaten political and diplomatic relations,²² although regime clarification and development that results from an advisory opinion reduces the risk and uncertainty of sea level rise litigation. Resorting to an advisory proceeding, thus, stands out as an option that satisfies the desired outcomes of litigation, whilst not creating friction in diplomatic relations.

In contrast with States, non-State actors (namely, affected or concerned individuals and civil society organizations) are more likely to resort to international litigation, if they hold standing, since they are directly affected by sea level rise-related harm and less concerned with the impact of litigation in diplomatic, political, and economic relations at the international level. Yet, the access of non-State actors to international courts, treaty-based bodies, and

20 See A Rocha & M Venkatachalam, 'Validating Rules and Clarifying Obligations through Strategic Sea Level Rise Litigation' (forthcoming).

21 Eg B Mayer, *The International Law on Climate Change* (CUP 2018) 240-241; D Shelton, 'The Participation of Nongovernmental Organizations in International Judicial Proceedings' (1994) 88 *AJIL* 611, 615; or P Stephan, 'Privatizing International Law' (2011) 97 *Virginia LR* 1573, 1641-1642.

22 Eg K Dzehtsiarou & N O'Meara, 'Advisory Jurisdiction and the European Court of Human Rights: A Magic Bullet for Dialogue and Docket-Control?' (2014) 34 *Legal Studies* 444, 450; K Oellers-Frahm, 'Lawmaking Through Advisory Opinions?' (2011) 12 *German LJ* 1033, 1046; JM Pasqualucci, 'Advisory Practice of the Inter-American Court of Human Rights: Contributing to the Evolution of International Human Rights Law' (2002) 38 *Stanford JIL* 241, 246.

administrative mechanisms is still very short. This explains why some civil society advocacy movements have preferred to work in the antechambers of litigation, namely by supporting States in the climate change advisory proceedings or preparing *amicus curiae* briefs for these advisory proceedings and for climate-related disputes.²³

iii. *The desired outcomes*

By definition, litigation means the taking of legal action by a party before a court. This corresponds to the ‘private’ purpose of litigation²⁴ (ie purposes that only directly affect the legal position of the parties to a case), which includes enforcing a right or obligation, and/or seeking harm reparation, immediate relief, or other forms of remedy (eg symbolic or political measures). Depending on the source of the right invoked, several claims might be potentially envisioned in sea level rise litigation, such as land swap or land lease, maritime boundary adjustment, financial and technological cooperation in adaptive efforts, or effective reduction of GHG emissions from the respondent State.

Nonetheless, international courts also perform the so-called ‘public’ functions.²⁵ *First*, they can be viewed by litigants as ‘purveyors of legitimacy,’²⁶ and can thus be used to bring the adverse effects of sea level rise to the forefront of the public’s attention and of diplomatic negotiations.²⁷ *Second*, being facts- and truth-settlers means that judges can endorse climate science and the scientific projections on sea level rise, as did ITLOS and the ICJ.²⁸ *Third*, litigants can resort to courts to pressure States to adopt effective climate action,²⁹ including pressure for adaptation and resilience building in coastal States and pressure for cooperation from developed States more specifically. *Fourth*, courts clarify and develop rules and States’ obligations. In the case of sea level rise, the lack of specific rules is doubly protective for States, as it provides them a wider margin for shaping their climate policies

23 See H Narulla & R Nanthakumar, ‘The Role of Civil Society in the Climate Change Advisory Proceedings’, in Tigre & Rocha (eds), *The Role of Advisory Opinions in International Law in the Context of the Climate Crisis* (Brill 2025) 246; See also Rocha & Venkatachalam (n 18).

24 V Lowe, ‘The Function of Litigation in International Society’ (2012) 61 *ICQL* 209, 212.

25 See Rocha & Venkatachalam (n 20).

26 P Sands, ‘Climate Change and the Rule of Law: Adjudicating the Future in International Law’ (2016) 28 *JEL* 19, 24.

27 See, in general, A Rocha, ‘Suing States—The Role of Courts in Promoting States’ Responsibility for Climate Change’, in Garcia & Cortês (eds), *Blue Planet Law—The Ecology of Our Economic and Technological World* (Springer 2023) 99.

28 ICJ Opinion (n 18) §§72–87; ITLOS Opinion (n 19) §§46–66.

29 J Lin, ‘Climate Change and the Courts’ (2012) 32 *Legal Studies* 35, 36.

and discourages other States from instituting judicial proceedings.³⁰ Yet, international courts, treaty-based bodies, and administrative mechanisms (although to a lesser extent) can also carve out States' obligations in the context of sea level rise (eg in the context of the human rights of the affected individuals or the standard of cooperation required from States), and clarify rules and principles, such as the ambulatory nature or stability of baselines and outer limits of maritime areas, or the presumption of continuing statehood (both recently confirmed by the ICJ).³¹

3 The UNFCCC Legal Complex

3.1 *Sea Level Rise Litigation Under the UNFCCC or the Paris Agreement*

i. *The scenario*

As the observed sea level rise is a downstream result of anthropogenic GHG emissions and the resulting climate change, the UNFCCC and the Paris Agreement could be a starting point to assess States obligations. Yet, sea level rise is only mentioned once in the UNFCCC's preamble,³² whilst 'oceans' and 'marine ecosystems' are rarely mentioned in the UNFCCC³³ or in the Paris Agreement.³⁴ Therefore, it is not easy to find obligations directly or expressly related to sea level rise under these treaties; and it is particularly difficult to find an obligation as specific as to cooperate in the adaptation effort of low-lying States, or to remedy sea level rise-related harm. The ICJ itself held that States bear an obligation to cooperate to cope with sea level rise, but rooted this obligation in general international law, instead of the UNFCCC or the Paris Agreement.³⁵

ii. *The players*

The UNFCCC and the Paris Agreement provide for a dispute settlement system based on a States' special consent declaration to the jurisdiction of the ICJ and an arbitral tribunal, under conditions of reciprocity.³⁶ Yet, such declarations are scarce (even among small island States and the least developed States),³⁷ confirming the idea that States are not particularly inclined to resort to

³⁰ Rocha & Venkatachalam (n 20).

³¹ ICJ Opinion (n 18) §§362, §363.

³² UNFCCC, Preamble, recital 12.

³³ UNFCCC, Preamble, recital 4, and art. 4(1)(d).

³⁴ Paris Agreement, Preamble, recital 13.

³⁵ ICJ Opinion (n 18) §§364-365.

³⁶ UNFCCC, art 14; Paris Agreement, art 24.

³⁷ See Declaration by Parties. UNFCCC, available at <<https://unfccc.int/process-and-meetings/the-convention/status-of-ratification/declarations-by-parties>>, accessed 30 June

litigation. Non-State actors do not hold standing before these courts, and thus can only assist States in their political, diplomatic and litigation efforts.

iii. *The desired outcomes*

The UNFCCC legal complex does not seem to be the most appropriate forum to pursue the purposes of sea level rise litigation.³⁸ In fact, the goal of the UNFCCC legal complex is to regulate the upstream concentration of GHG in the atmosphere in *almost* clinical isolation from its downstream impacts.³⁹ The UNFCCC legal complex provides the background to pressure States to regulate GHG emissions in general or to seek clarification of cooperation obligations in the context of adaptive efforts. Yet, the implications of GHG emissions in the marine environment (including its regulation as a source of marine pollution) are better understood within the law of the sea, whilst the continuing statehood condition of low-lying States needs to be balanced against other rules of general international law. These are the rules being challenged by sea level rise more directly, and thus the rules providing a broader framework for enforcing rights or obligations or seeking regime clarification or development. Compensation for harm, yet, may need a more comprehensive understanding of *all* climate change-related harm produced, which explains the usefulness of the LDF, as explained in the next section.

3.2 *Compensating Sea Level Rise-Related Harm Through the LDF*

i. *The scenario*

The LDF was operationalized at COP28⁴⁰ in order to assist developing countries that are particularly vulnerable to the adverse effects of climate change in responding to economic and non-economic permanent losses and reversible damages resulting from the adverse effects of climate change.⁴¹ The operation of an administrative mechanism that runs a trust fund does not qualify as litigation *stricto sensu*, but the LDF can work as a convenient alternative: since its rules are non-adversarial and do not involve liability or compensation,⁴² States do not need to establish other States' historical or current liability, or the link between upstream GHG emissions and downstream harm.

2025; and Paris Agreement. available at <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-7-d&chapter=27&clang=_en>, accessed 30 June 2025.

38 See Rocha & Venkatachalam (n 20).

39 *ibid.*

40 Decision 1/CP.28, 'Operationalization of the new funding arrangements, including a fund, for responding to loss and damage referred to in paragraphs 2-3 of decisions 2/CP.27 and 2/CPA.4' (15 March 2024) Doc UNFCCC/CP/2023/11/Add.1.

41 *ibid.*, Preamble, recital 3, and Annex I, §2.

42 *ibid.*, Preamble, recital 5.

ii. *The players*

Access to the LDF is limited to States,⁴³ but since the LDF allows to obtain financial assistance to cope with the adverse effects of climate change (ie to pursue a private goal of sea level rise litigation), whilst avoiding the political, diplomatic, economic, and legal costs of litigation, States are more likely to be comfortable with resorting to the LDF rather than to international courts or treaty-based bodies.

iii. *The desired outcomes*

The LDF allows to obtain a close substitute for harm compensation. Decision 1/CP.28 aims to provide financial assistance to developing countries that are particularly vulnerable to the adverse effects of climate change, whilst technical assistance might be obtained under the Santiago Network. Decision 1/CP.28 refers to 'loss' and 'damage' instead of 'compensation' or 'harm', and lists 'challenges' resulting from the adverse effects of climate change, including sea level rise.⁴⁴ Hence, loss and damage for this purpose includes sea level rise-related effects, such as the loss of territory, land and aquifers' salinization, property destruction, loss of cultural heritage, loss of biodiversity or natural resources, or human resettlement. Moreover, the LDF's practice will provide clarity regarding other 'facts' resulting from sea level rise, such as the cost of adaptation and resilience building policies (eg infrastructural costs, the diversion of budgetary resources, or a loan's interest rates).

4 Sea Level Rise Litigation Under UNCLOS

i. *The scenario*

Sea level rise is a downstream effect of GHG emissions, which in turn are a form of marine pollution under Article 1(1)(4) UNCLOS.⁴⁵ As a result, both ITLOS and the ICJ have mapped States' obligations under Part XII of UNCLOS to protect, preserve, and ameliorate the marine environment against the adverse effects of GHG emissions (irrespective of their source) and against the impacts of climate change more broadly. This includes an obligation to prevent, reduce, and control GHG emissions from States' territory or jurisdiction and an obligation of cooperation among States.⁴⁶ These latter are positive obligations that qualify as due diligence obligations also, with the

⁴³ *ibid.*, §20(e).

⁴⁴ Decision 1/CP.28, Annex I, §6.

⁴⁵ ICJ Opinion (n 18) §340; ITLOS Opinion (n 19) §§159–179.

⁴⁶ ICJ Opinion (n 18) §§345ff; ITLOS Opinion (n 19) §§193ff.

implication that their observance at the domestic level is also a matter of international law that can be controlled by international courts such as ITLOS, the ICJ, or an arbitral tribunal under Part XV of UNCLOS.

The problem, however, is that these obligations are open-textured and provide a wide margin of State discretion in their implementation, as the adoption of climate policies involve a value-based choice inherent to the political branch of the Government. Hence, even though ‘the standard of due diligence required of States in implementing all measures necessary to prevent, reduce and control marine pollution is stringent,’⁴⁷ international courts may not feel comfortable with assessing States’ climate efforts under UNCLOS, except in cases of complete lack, or blatant insufficiency, of State action, or in specific sectors such as vessel-sourced pollution. This suggests that, for the time being, sea level rise litigation under UNCLOS is not suited to pursue the enforcement of rights and obligations or the reparation for marine climate-related harm.

Moreover, Articles 286 and 287 of UNCLOS provide for the jurisdiction of ITLOS, the ICJ, an arbitral tribunal, and a special arbitral tribunal regarding ‘any dispute concerning the interpretation or application of [UNCLOS],’ but Article 297(1)(c) limits their competence to cases where ‘it is alleged that a coastal State has acted in contravention of *specified* international rules and standards for the protection and preservation of the marine environment.’⁴⁸ Not only does this provision excludes landlocked States’ GHG emissions control and regulation, but also it is difficult to grasp what are the specified international rules and standards regarding GHG emissions that apply to States in their capacity as *coastal* States.

ii. *The players*

Part XV of UNCLOS establishes a State-to-State dispute settlement system, in which non-State actors have a marginal role in prompt release proceedings and in litigation related to the activities in the Area.⁴⁹ At most, concerned civil society movements can assist States in the preparation of their submissions before an international court, or participate as *amicus curiae*, although limitedly.⁵⁰ In fact, with regards to the protection and preservation of the marine environment under UNCLOS, States are the sole rights-holders and

47 ICJ Opinion (n 18) §347. See also ITLOS Opinion (n 19) §256.

48 Emphasis added.

49 UNCLOS, arts 187–189, 292(2).

50 See A Rocha, ‘*Amicus Curiae* before the International Tribunal for the Law of the Sea: The Prospect of an Advisory Opinion on Climate Change and the Law of the Sea’ (2022) 6 *Católica LR* 87.

duty-bearers, and thus the sole entities that hold standing before ITLOS, the ICJ, or the arbitral tribunal. In addition to what was mentioned in Section 2, it must be highlighted that, with regards to the protection and preservation of the marine environment and to the regulation of GHG emissions, States seek to preserve a wide margin of discretion in the adoption and implementation of their policies. This is the major obstacle to the judicial control of due diligence obligations: although these latter signal to States that the domestic implementation of international obligations is a matter of international law, such control by an international court (ie judging the political options at the domestic level) can be perceived by States as particularly intrusive.

iii. *The desired outcomes*

Unless there is a clarification and development of the regime, it is unlikely that States will pursue one of the private goals of litigation—and even in that case, States will assess the overall litigation costs. The silver lining here is that UNCLOS is fertile ground for regime clarification and development, namely through politically less sensitive advisory opinions requested from ITLOS pursuant to Article 21 of ITLOS Statute.⁵¹ Such requests may seek for clarification of rules regarding the standard of due diligence or the conditions for reparation for harm (eg the standard of causation), or seek clarification regarding the ambulatory or permanent nature of States' maritime baselines and of their maritime areas' outer limits.

Clarifying the stability of baselines and outer limits is a pressing need for States. In fact, under UNCLOS and customary international law, coastal States are entitled to maritime zones, whose breadth is measured from the baselines along the coast.⁵² As such, the geographic configuration of a coast determines the location of baselines and outer limits, and the existence of other areas or regimes that depend on the coast-sea interaction. In principle, baselines and outer limits would be naturally ambulatory and would move sea- or landward in accordance with natural phenomena. Yet, sea level rise entails more permanent, profound, and long-term changes in the coasts than those discussed by the drafters of UNCLOS;⁵³ and States' interests (ie to exploit marine

51 Annex VI to UNCLOS. See, for instance, RR Holst, 'Taking the Current When it Serves: Prospects and Challenges for an ITLOS Advisory Opinion on Oceans and Climate Change' (2023) 32 *RECIEL* 217, 221; B Mayer, 'International Advisory Proceedings on Climate Change' (2023) 44 *Michigan JIL* 41, 52.

52 See UNCLOS, arts. 3, 33(2), 47, 57, and 76.

53 Eg S Árnadóttir, *Climate Change and Maritime Boundaries—Legal Consequences of Sea Level Rise* (CUP 2022) 7; C Blanchard, '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' (2015) 53 *Canadian YBIL* 66, 82; D

resources in their current maritime areas and in securing world peace and security) require the stability of their maritime baselines and outer limits. In recent years, thus, a new rule has emerged.⁵⁴ In 2018, the ILA Committee on International Law and Sea Level Rise suggested the formation of a new rule, as reflected in State practice, according to which baselines, outer limits, and maritime boundaries should be considered stable and permanent, irrespective of any changes in the geography of a coast.⁵⁵ No State has adjusted its baselines or outer limits because of sea level rise—and no State protested against that practice.⁵⁶ More importantly, some State practice emphasizes that preserving the integrity of UNCLOS implies the stability and predictability of maritime limits.⁵⁷

Vidas, 'Sea-Level Rise and International Law: At the Convergence of Two Epochs' (2014) 4 *Climate Law* 70, 75.

54 Eg S Árnadóttir, 'Emerging State Practice on Maritime Limits: A Grotian Moment Unveiling a Hidden Truth?' (2023) 44 *Grotiana* 4. Rocha & Venkatachalam (n 20).

55 Committee on International Law and Sea Level Rise, 'Conference Report Sidney 2018', 18-19 and 24-25, available at <<https://www.ila-hq.org/en/documents/conference-report-sydney-2018cteeversion>>, accessed 30 June 2025 ('Sidney Report').

56 Árnadóttir (n 54) 36; M Lando, 'Baseline Preservation as a Response to Sea-level Rise' (2025) 56 *Ocean Development & IL* 100, 101-102; K Purcell, *Geographical Change and the Law of the Sea* (OUP 2019) 265.

57 See 2021 Declaration on Preserving Maritime Zones in the Face of Climate Change-related Sea-level Rise [Pacific Islands Forum (PIF)] adopted 6 August 2021, <<https://forumsec.org/sites/default/files/2024-03/2021%20Declaration%20on%20Preserving%20Maritime%20Zones%20in%20the%20face%20of%20Climate%20Change-related%20Sea-level%20rise.pdf>>, accessed 30 June 2025, endorsed by the AOSIS Leaders' Declaration, 22 September 2021, §41, <<https://www.aosis.org/launch-of-the-alliance-of-small-island-states-leaders-declaration/>>, accessed 30 June 2025, by the Dhaka-Glasgow Declaration of the Climate Vulnerable Forum, 2 November 2021, §8, <<https://cvfv20.org/dhaka-glasgow-declaration-of-the-cvfv/>>, accessed 30 June 2025, and the Declaration of the 17th Meeting of the Organization of African, Caribbean and Pacific States Ministers in Charge of Fisheries and Aquaculture, 8 April 2022, 8-9, <https://www.oacps.org/wp-content/uploads/2022/05/Declaration_-7thMMFA_EN.pdf>, accessed 30 June 2025; 2023 Declaration on the Continuity of Statehood and the Protection of Persons in the Face of Climate Change-related Sea-level Rise (PIF) adopted 6 August 2023, <<https://forumsec.org/sites/default/files/2024-05/2023%20Declaration%20on%20the%20Continuity%20of%20Statehood%20and%20the%20Protection%20of%20Persons.pdf>> accessed 30 June 2025; 2024 Apia Commonwealth Ocean Declaration, 'One Resilient Common Future', 26 October 2024, §13, <<http://production-new-commonwealth-files.s3.eu-west-2.amazonaws.com/s3fs-public/2024-11/apia-commonwealth-ocean-declaration.pdf?VersionId=ILG2G1O4G7Nwp28YME7k180jjWBwmHCN>>, accessed 30 June 2025; or 2024 Declaration on Sea-level Rise and Statehood (AOSIS) adopted 25 September 2024, recital 5 of the Preamble, <<https://www.aosis.org/aosis-leaders-declaration-on-sea-level-rise-and-statehood/>>, accessed 30 June 2025, endorsed by several States during a high-level meeting on sea-level rise

In this context, the report of the ILC study group on sea-level rise notes a palpable change in State practice and in the rules of international law.⁵⁸ The wide participation of States in its works allowed the ILC to conclude that legal stability, certainty, and predictability do not preclude an interpretation of UNCLOS 'that allows for the preservation of baselines, the outer limits of maritime zones and associated entitlements notwithstanding changes to the coastline as a result of climate change-related sea-level rise,'⁵⁹ implying that States have 'no obligation to update baselines, geographical coordinates or the outer limits of maritime zones to account for changes as a result of climate change-related sea-level rise.'⁶⁰

In this context, the ICJ Opinion noted the evidence of State practice and the ILC Report to conclude that 'the provisions of UNCLOS do not require States parties, in the context of physical changes ... related sea level rise, to update their charts or lists of geographical co-ordinates that show the baselines and outer limit lines of their maritime zones once they have been duly established in conformity with the Convention.'⁶¹ It refrained from explicitly saying that baselines and outer limits are fixed and permanent, but there is no other possible conclusion arising from this wording. Hence, the emerging rule of international law regarding the stability and permanence of baselines and outer limits seems to be mature enough to be confirmed by ITLOS through an advisory opinion—which can further confirm that the rule applies to human-induced sea level rise, but also to all other factors (natural or human) that may change the geographic configuration of a coastline, and which (can) concur to the steady increase in the GMSL. Furthermore, an advisory opinion can also delve into the related questions of the status of islands, rocks, and low-tide elevations, the maritime zones of uninhabitable low-lying States, or the exact content of the obligation of cooperation.⁶² Once clarified, other outcomes of sea level rise litigation (eg maritime boundary demarcation or the enforcement of cooperation obligations under UNCLOS) can be pursued.

held on 25 September 2024 [see '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, Patrícia Galvão Teles, Nülüfer Oral and Juan José Ruda Santolaria', UN Doc A/CN.4/783 (3 February 2025) 62].

58 ILC, 'Final Report of the Study Group on Sea-Level Rise in relation to International Law', Doc A/80/10, Annex I, available at <https://legal.un.org/ilc/texts/instruments/english/reports/8_9_2025.pdf> accessed 30 June 2025 ('ILC Report').

59 *ibid.*, §27.

60 *ibid.*, §28. See also §31.

61 ICJ Opinion (n 18) §362.

62 Rocha & Venkatachalam (n 20).

5 Validating an Emerging Presumption of Continuing Statehood

i. *The scenario(s)*

As referred before, sea level rise also raises important issues of general international law, being the presumption of continuing statehood the most obvious topic. The scenarios for sea level rise litigation are manifold, but this article focuses on this latter presumption.

Sea level rise is an imminent threat to coastal areas in general, but it poses a more existential threat to low-lying States more specifically:⁶³ if their land territory becomes wholly submerged or rendered uninhabitable, more than losing maritime areas and resources therein, they risk losing their statehood condition. In the past, a ‘strong presumption against the extinction of States’⁶⁴ was argued for cases of ineffectiveness of a government or political dissolution, but the complete disappearance of land territory as a result of sea level rise was not foreseen.⁶⁵

However, low-lying States are also the least responsible for historical GHG emissions; and their disappearance is a source of risk for international peace and security⁶⁶ and for the principles of legal certainty and stability.⁶⁷ Hence, a presumption of continuing statehood of low-lying States is emerging, as evidenced in State practice.⁶⁸ This allowed the ICJ to hold that ‘once a State is established, the disappearance of one of its constituent elements would not necessarily entail the loss of its statehood.’⁶⁹ Yet, from a positive law standpoint, there is no precedent of a State that disappeared for physical reasons,

63 D Freestone, D Vidas & AT Camprubi, ‘Sea Level Rise and Impacts on Maritime Zones and Limits’ (2017) 5 *Korean JICL* 5.

64 Eg J Crawford, *The Creation of States in International Law* (2nd edn, OUP 2016) 71; M Gerrard, ‘Statehood and Sea-Level Rise: Scenarios and Options’ (2023) 17 *Charleston LR* 579, 586.

65 ILC Report (n 58) §37. See also ‘Sidney Report’ (n 55) 25. see also Rocha & Venkatachalam (n 20).

66 ILC Report (n 58) §38; Committee on International Law and Sea Level Rise, (‘Conference Report Athens 2024’) 14, <<https://www.ila-hq.org/en/documents/athens-2024-final-report-committee-on-international-law-and-sea-level-rise-26-06-2024-1>>, accessed 30 June 2025 (‘Athens Report’).

67 ‘Athens Report’ (n 66) 8-9.

68 Eg see 2023 Declaration on the Continuity of Statehood and the Protection of Persons in the Face of Climate Change-related Sea-Level Rise (n 57) §§8–13, and 2024 Declaration on Sea-level Rise and Statehood (n 57) §§7–9. See also ‘Sidney Report’ (n 55) 5–26; Committee on International Law and Sea Level Rise, ‘Conference Report Lisbon 2022’, 24-25, <<https://www.ila-hq.org/en/documents/2022-report-ila-committee-june-2022>>, accessed 30 June 2025 (‘Lisbon Report’); and ILC Report (n 58) §38.

69 ICJ Opinion (n 18) §363.

and thus there is no treaty rule or State practice applicable to the submergence of a State. This explains the clear difference in tone between the conclusions of the ILA Committee, the ILC Report, and the ICJ Opinion: while the rule on the stability of baselines and outer limits seems mature enough to be validated by an international court, the presumption of continuing statehood raises other questions of international law that are still unclear at best. The ICJ Opinion only identifies two obligations correlative to the right to continuing statehood: first, the obligation to cooperate, which 'is not a matter of choice for States but a legal obligation';⁷⁰ second, a human rights' obligation not to return an individual to his State of origin, if (s)he is to face the extreme adverse effects of sea level rise.⁷¹ This suggests that the emergence of a new rule of customary international law regarding continuing statehood is advanced, but not yet complete.

The ICJ—as an international court that holds generic subject-matter jurisdiction⁷² and is the principal judicial organ of the United Nations⁷³—also holds the sociological authority to validate the emergence of a presumption of continuing statehood. However, questions related to this presumption of continuing statehood can easily be raised as incidental to proceedings before other courts or bodies, and under other regimes of international law. For instance, the non-refoulement rule is also a human rights obligation that can be enforced before regional human rights courts and treaty-based bodies, as invoked in the *Teitiota* case, whereas maritime boundary demarcation and exploitation of marine resources disputes before ITLOS might also involve issues of continuing statehood. In addition, the array of constitutional and international arrangements necessary to preserve the functioning of a low-lying State might easily involve issues of general international law invoked before an arbitral tribunal, as well as other issues of human rights law, international investment law, or international economic law that can be brought before other international courts and bodies. This only reinforces the need for the ICJ to clarify and develop the legal implications of such a presumption.

⁷⁰ *ibid.*, §§364–365.

⁷¹ *ibid.*, §378.

⁷² See Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945) 15 *UNCIO* 355, art 36(1) ('ICJ Statute').

⁷³ Charter of the United Nations (adopted 26 June 1945, entered into force 2 October 1945) 892 *UNTS* 119, art 92; ICJ Statute, art 1.

ii. *The players*

In this scenario of lack of regime clarification or development, States are discouraged from resorting to international litigation in cases related to the emerging presumption of continuing statehood. Yet, disputes can easily arise in which the presumption of continuing statehood is raised as a collateral question, or in which a State is interested in confirming or challenging the emergence of such a presumption. Moreover, low-lying States may soon come to a point where they need to enforce their right to continuing statehood, and in that case they are clearly encouraged to resort to international litigation.

As the presumption is emerging but is not clear yet, these latter States have an interest in clarifying and developing the rule. In this light, seeking an advisory opinion from the ICJ under Article 96(1) of the UN Charter can be instrumental to clarify and develop the rule. To that end, interested States must secure a coalition vote in the UN General Assembly to request the advisory opinion, ie they need to convince the majority of the UN States Parties that it is also in their interest to clarify and develop the presumption of continuing statehood.

Finally, concerned individuals can also push for regime clarification and development of the presumption of continuing statehood, if they are able to bring it as a legal question incidental to a human rights claim or in another international claim before a court or treaty-based body in which they hold standing.

iii. *The desired outcomes*

Considering the insufficient legal density of the presumption of continuing statehood, it seems that regime clarification and development are the most pressing goals for sea level rise litigation related to the emerging presumption. For instance, once its legal implications are established, enforcement of rights and obligations or compensation for harm can be asked before an international court or treaty-based body. Before that clarification and development occurs, yet, States hold a wide margin of discretion in carving out the rights and obligations that the ICJ identified as deriving from such presumption. In this sense, just as with the rule on the stability of baselines and outer limits, pursuing regime clarification and development is a strategic preparatory step for future sea level rise litigation in relation to the presumption of continuing statehood. Furthermore, *judicial* clarification and development can also press the political activity of States, namely to undertake diplomatic negotiations and to conclude new treaties that cope with the issue of land submergence or rendered uninhabitable, or the operation of low-lying, uninhabitable or disappearing(ed) States.

6 Clarifying Human Rights of the Persons Affected by Sea Level Rise

i. *The scenarios*

Human-induced sea level rise also poses a severe threat to the effective enjoyment of human rights.⁷⁴ The rights to life, health, physical integrity, access to food and fresh water, to enjoy one's home and private life, and to private property are the most obvious human rights that are violated owing to climate change-induced sea level rise, but in abstract the full gamut of human rights might be threatened by sea level rise-related events: cultural rights and the right to self-determination of low-lying States, for instance, are directly threatened as a result of sea level rise.

In this light, although not originally constituted to clarify the implications of sea level rise, human rights bodies are becoming key *fora* for the articulation of normative standards and the adjudication of specific legal issues arising from sea level rise. Bringing a claim into human rights bodies shows there are alternative avenues to clarify and develop States' obligations and to provide compensation to victims.

Some factors explain the upsurge in climate- and sea level rise-related human rights litigation: human rights bodies are open to individuals, who are not afraid of the repercussions of litigation; the human rights grammar is one of *individuals'* rights, entailing correlative *individual State's* obligations; and human rights bodies are more experienced in dealing with questions with political nuances and States' margin of appreciation. Yet, human rights litigation is not a silver bullet: not only States hold a margin of appreciation, but also individual litigants have to face procedural obstacles, which means that compensating harm may be easier under the LDF. Moreover, with regards to the lack of adaptive responses to sea level rise, litigation is instituted against the local, low-lying State, who also qualifies as a victim of sea level rise. Resorting to the LDF can also avoid such intra-victim litigation.

Due to their relation with the previous section, this section focuses on the human right to self-determination and on the cultural human rights that can assist in the interpretation of the presumption of continuing statehood, as well as on the human rights obligations related to the

⁷⁴ See Human Rights Council Resolution No 7/23 (*Human Rights and Climate Change*) UN Doc A/HRC/7/78, 14 July 2008, where the link between human rights and climate change was first established. The same link has since been repeatedly highlighted by the Human Rights Council and Special Rapporteurs.

protection of persons affected by sea level rise. The exact extent of these human rights can be clarified and developed by the HRC, as explained below, although other human rights courts and treaty-based bodies can also clarify and develop human rights standards in relation to sea level rise. The *Carême* is evidence of that, but in abstract all human rights systems of human rights protection (universal or regional) can be mobilized in sea level rise litigation.

a) The human right to self-determination and cultural human rights

If the land territory is rendered uninhabitable, or becomes wholly submerged, the local population needs to be resettled. However, the rules of international law governing this issue are unclear or undeveloped at best. Human rights bodies, yet, can provide assistance in defining States' obligations and the right to self-determination and cultural human rights can help clarify and develop the presumption of continuing statehood. To that end, some guidance can be obtained from the works of the ILA Committee on International Law and Sea Level Rise and the ILC study group on sea-level rise in relation to international law.

In a nutshell, the right to self-determination means a people's right to freely decide its own destiny.⁷⁵ It refers, therefore, to a claim of differentiated political and cultural identity of a collectivity. In relation to sea level rise and low-lying States, the problem lies in the element of 'differentiation', since the cultural identity of a people is shaped by reference to a certain location. The continuity of a people, therefore, presupposes life in a specific place that will be rendered uninhabitable or become submerged. Accordingly, low-lying States have a right, but also a human rights *obligation* to preserve the territory of, and to, their people, in accordance with Articles 1 of the International Covenant on Civil and Political Rights⁷⁶ and of the International Covenant on Social, Economic and Cultural Rights.⁷⁷ In this regard, it is unclear whether developed States have a human rights obligation to cooperate in the preservation of low-lying territories, as suggested by the ILA Committee;⁷⁸ and if so, what exactly does it entail, who can invoke it, and against whom?

⁷⁵ Eg J Crawford, *Brownlie's Principles of Public International Law* (9th edn, OUP 2019) 621.

⁷⁶ Adopted 16 December 1966, entered into force 23 March 1976, 999 *UNTS* 171.

⁷⁷ Adopted 16 December 1976, entered into force 3 January 1976, 993 *UNTS* 3.

⁷⁸ 'Sidney Report' (n 55) 32ff.

However, in case of resettlement in another State's territory, self-determination cannot be expressed in terms of 'political independence'.⁷⁹ Self-determination, in fact, is a variable right,⁸⁰ which can include some form of local autonomy or self-government, negotiated with the host State, as well as the exclusive right of exploiting resources in former land territory or maritime zones.⁸¹ The problem is that the host State enjoys a very wide margin of discretion, resulting from its sovereign authority over a territory, and it is unclear whether human rights courts and treaty-based bodies can say more than that States bear an obligation of good-faith negotiation and cooperation. Moreover, being stripped of a prior nationality (as a result of loss of statehood) could be mitigated by securing a status of ethnic minority in the territory of the host State, but that does not prevent all negative legal consequences of loss of citizenship,⁸² and only entails an obligation of good-faith negotiation and cooperation. Finally, an alternative for low-lying States is the acquisition of territory from another State, which would counter some of these concerns, but in this regard States' discretion is even wider. In any case, the right to self-determination is not justiciable under Additional Protocol I to the ICCPR,⁸³ which means that clarification from the HRC is unlikely.

Cultural rights, in turn, are protected under Articles 27 of the ICCPR, including the right to the preservation and experience of cultural identity and to the protection of cultural heritage, but also the right to underwater heritage in case of land submergence. In *Billy*, moreover, the HRC recognized that the authors' minority culture depended on the continued existence and habitability of their islands and the ecological health of the surrounding seas.⁸⁴ This means that cultural rights have become a faux-vehicle for the UNHRC to detail violations of self-determination without using that exact terminology. This link was expressly mentioned by the

79 S Willcox, 'Climate Change Inundation, Self-Determination, and Atoll Island States' (2016) 38(4) *Human Rights Quarterly* 1022, 1034.

80 'Athens Report' (n 66) 24.

81 *ibid.*, 24. See also ILC Report (n 58) §52.

82 *ibid.*, 25.

83 *Bernard Ominayak, Chief of the Lubicon Lake Band v Canada*, Communication no 167/1984 (26 March 1990) §32.1.

84 *Billy* (n 5) §§3.5, 8.14.

ILA Committee⁸⁵ and provides an opportunity for human rights bodies to clarify and develop States' obligations to cooperate and assist low-lying States in preserving their land territory or, alternatively, in finding solutions if their territory is rendered uninhabitable or becomes submerged.

b) The Protection of Persons Affected by Sea Level Rise

Whilst self-determination and cultural rights are collective rights, other human rights are held by individuals. In this regard, no human rights treaty includes a provision directly or expressly referring to sea level rise, but the 2018 Sydney Declaration of Principles on the Protection of Persons Displaced in the Context of Sea Level Rise (Sidney Declaration), prepared by the ILA Committee on International Law and Sea Level Rise, can assist States in understanding their human rights obligations to protect the persons affected by sea level rise. Protection in case of relocation and the non-refoulement principle, in particular, are in need of greater clarification and development.

Principles 1 and 2 Sidney Declaration emphasize States' obligation to protect, assist, and respect the human rights of persons *residing* under their jurisdiction, including the protection against refoulement.⁸⁶ To flesh out this obligation, Principle 4 sets a cooperation obligation—which the ILA Committee assumes that implies a wide margin of appreciation and that it should be read in tandem with the principle of common but differentiated responsibilities and respective capabilities.⁸⁷ Furthermore, the Sidney Declaration holds that States should review their domestic migration laws 'to facilitate migration as an adaptation measure' under human rights law; and cooperate to guarantee that the 'full range of rights and protections afforded to migrants by international law is respected.'⁸⁸ Whilst securing the rights of individuals, the Sidney Declaration is silent on the collective resettlement of a community, that could allow the preservation of cultural practices that require communal sharing and observance. Finally, apart from a clear focus on internally displaced persons, the Sidney Declaration holds that 'States should admit persons displaced across

85 'Athens Report' (n 66) 23.

86 Principe 2(c).

87 'Sidney Report' (n 55) 33-34.

88 Principle 7(2).

borders ... if they are personally and seriously at risk of, or already affected by, a disaster, or if their State of origin is unable to protect and assist them due to the disaster (even if temporarily).'⁸⁹ The protection of sea level rise-related displaced persons includes a rule of non-refoulement of individuals 'fac[ing] a serious risk to their life or safety or serious hardship,'⁹⁰ and a cooperation obligation 'to find durable solutions for those persons.'⁹¹ Yet, it does not include a clear obligation to program the long-term admission of individuals, but only an obligation of non-refoulement in cases of current or imminent risk of being affected by a natural, sea level rise-related disaster.

In this sense, the Sidney Declaration applies in the sea level rise context and sets extraterritorial States' obligations to cooperate with low-lying States (namely, to assist them in protecting the rights of persons affected by sea level rise-related events, in line with the findings of the ILC)⁹² and a limited obligation of non-refoulement. This latter obligation already has a long tradition in the practice of human rights bodies, being the Sidney Declaration the bare minimum that can be asked from States with regards to non-nationals. The case-law of human rights courts and treaty-based bodies is vast, but only the *Teitiota* case was directly about non-refoulement in the context of sea level rise.⁹³ The HRC dismissed the communication on the merits, since the petitioner had presented insufficient evidence that substantiated his claim of a real risk of irreparable harm to his life in Kiribati, but opened the doors for recognition of 'sea level rise displaced persons.' In particular, the HRC stated that '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 ... given that the risk of an entire country becoming submerged under water is such an extreme risk, the conditions of life in such a country may become incompatible with the right to life with dignity before the risk is realized.'⁹⁴

⁸⁹ Principle 9(1).

⁹⁰ Principle 9(2).

⁹¹ Principle 9(3).

⁹² ILC Report (n 58) §55.

⁹³ *Teitiota* (n 4).

⁹⁴ *Teitiota* (n 4) §9.11. See also *Billy* (n 5) §8.3.

As a human rights obligation, the principle of non-refoulement is autonomous from its homonym in international refugee law, which allows the application of the principle to a wider cluster of persons. Since human rights norms are inherently open-textured, courts and treaty-based bodies can clarify and develop who fits in the category of ‘displaced person’ that cannot be returned to their country of origin in the context of sea level rise,⁹⁵ and consider whether non-refoulement applies only in cases of actual or imminent risk, or also in cases of certain, but non-imminent, land submergence. Evolution in this rule would be applauded and aligned with considerations of fairness and humanity: as Stewart notes, ‘it is possible that the submergence of a state will be all but certain and nearly complete before the risk to the right to life will be sufficiently “imminent.”’⁹⁶ The *Teitiota* rule is laudable but needs to be further carved out.

ii. *The players*

The major factor explaining the upsurge of climate- and sea level rise-related cases before human rights courts and treaty-based bodies is the fact that these latter are usually open to non-State actors. Individuals, more specifically, are directly concerned, but mostly they are the direct victims of climate- and sea level rise-related events. Mr. Carême and Mr. Teitiota, for instance, did not allege that sea level rise was an abstract concern for humankind—they argued that *their* human rights were at risk of being infringed as a result of the adverse effects of climate change and sea level rise. As seen, these human rights include the right to life, physical integrity, health, or family life, ie those closer to the very idea of human dignity. If domestic courts are unable to deliver a satisfying ruling, affected individuals who suffer the direct consequences of sea level rise and climate change have a clear incentive to resort to international sea level rise litigation.

Additionally, States also hold standing before human rights courts and treaty-based bodies, but the historic track before these courts and bodies suggest that States prefer to rely on the affected individuals to enforce their own human rights.

95 Eg M Wewerinke & M Antoniadis, ‘Vessel for Drowning Persons? The Standard-Setting Potential of International Human Rights Litigation in Addressing Climate Displacement’ (2022) 3 *Yearbook of Int’l Disaster Law* 238.

96 M Stewart, ‘Cascading Consequences of Sinking States’ (2023) 59 *Stanford JIL* 131, 149 165.

iii. *The desired outcomes*

The rules on standing before human rights courts and treaty-based bodies require the individual to invoke being ‘victim’ of State action or inaction.⁹⁷ This implies that applications and communications under human rights treaties need to pursue a private goal of sea level rise litigation, ie enforcing of a human right of the author and eventually obtaining compensation for the harm suffered. However, cases such as *Carême*, *Teitiota*, or *KlimaSeniorinnen*⁹⁸ suggest that human rights courts and treaty-based bodies do not share a particularly open reading of rules on procedural obstacles such as standing, causation, or attribution of conduct in climate- and sea level rise-related cases, but are more open to clarify and develop the content of States’ human rights obligations in the context of climate change and sea level rise. Accordingly, human rights courts and treaty-based bodies are well-suited to pursue the public purposes of sea level rise litigation, namely to legitimize a cause and concern, to establish science facts, to pressure for State action, and to carve out States’ obligations in this context. Although human rights litigation cannot be used with the view of seeking these public purposes only, affected individuals can seek them as a collateral goal to their application or communication. Moreover, some human rights treaties provide for the advisory jurisdiction of the court they institute,⁹⁹ which can be used more directly to seek the public purposes of sea level rise litigation.

7 Conclusion

Sea level rise is one of the downstream adverse effects of GHG emissions and climate change, but also a source of risk to coastal States, communities, and ecosystems, which means that sea level rise, in itself, can be viewed as a form and a source of harm to several rights protected under international law.

97 In the African human rights system, non-governmental organizations can also institute proceedings before the African Court on Human and Peoples’ Rights, even if they are not the direct victims of that violation, but there must still be one victim of the alleged human rights violation. See Protocol on the Establishment of the African Court on Human and Peoples’ Rights (adopted 9 June 1998, entered into force 25 January 2004) art 5(3) (‘1998 Protocol to the AfrCtHPR’).

98 *Verein KlimaSeniorinnen and Others v Switzerland* App no 53600/20 (ECtHR, 9 April 2024).

99 Eg ACHR, art 64; 1998 Protocol to the AfrCtHPR, art 4; Protocol 16 to the ECHR (adopted 2 October 2013, 1 August 2018) ETS No 214, art 1.

Accordingly, although there is neither a special regime of 'sea level rise law', nor a specialized 'sea level rise court', other regimes of international law and their centralized courts, treaty-based bodies, and administrative mechanisms can contribute to pursue the private and public goals of sea level rise litigation.

As such, this article mapped the options for sea level rise litigation under international law according to three variables: the scenarios (ie regimes of international law and international courts, treaty-based bodies, and administrative mechanisms responsible for their centralized interpretation and application), the players (ie States and non-State actors), and the desired outcomes (ie purposes of litigation). To that end, this article assessed the options for sea level rise litigation under the UNFCCC legal complex, UNCLOS, general international law, and human rights law, whilst acknowledging that other regimes of international law also potentially relevant in sea level rise litigation (eg international environmental law, international investment law, or international economic law).

Three major conclusions stand out from this assessment: *first*, despite the absence of a 'sea level rise law' and/or a 'sea level rise court', there is an ocean of opportunities to bring sea level rise into international litigation, including, but not exclusive of, as a central fact or legal argument. *Second*, international law rules were prepared for a world of a stable GMSL, which explains why these rules do not provide a clear or reasonable answer to the problems raised by sea level rise. As a result, regime clarification and development is needed, and international courts and treaty-based bodies (namely, the ICJ as the major judicial organ of the United Nations and the courts and treaty-based bodies responsible for the centralized interpretation and application of a treaty regime) have a sociological authority to clarify and develop aspects of a legal regime and States' obligations, and thus to pressure States to engage in diplomatic negotiations and conclude treaties that seek to cope with the adverse effects of sea level rise. And *third*, States are not particularly inclined to engage in State-to-State litigation, as they fear the overall costs of litigation. This statement is not entirely true with regards to small island States and the least developed States (which risk actual physical disappearance), but explains why regime clarification and development might be more promising through advisory opinion requests and/or individuals' applications, complaints, or communications before human rights bodies.