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The Hidden International Legal Obligation: The Prevention of Climate Statelessness.

Author: Adriana Díaz-Quirós

Supervisor: Majtényi Balázs

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Abstract:

So far, the academic literature has mainly approached the risk of "climate statelessness" of the populations of Tuvalu, Kiribati, the Maldives and the Marshall Islands from a reactive perspective, always renouncing their territory or their entire statehood as the only way to avoid their statelessness. This thesis, however, lays the legal foundations for a proactive response to this anomalous situation while proposing a scheme for its implementation. By analysing the case of these small island states from a human rights perspective, as statelessness is a human rights issue, among other things, a violation of the right to nationality, and reviewing the international legal obligations of the various actors of the international community, mainly states (individually and collectively) and the UN, under international law and international human rights law, this thesis elucidates a general legal obligation to “prevent Human Rights violations”. Thus, it draws attention to the fact that preventing the climate statelessness arising from the loss of statehood, because of the impact of climate change is a matter of fulfilling international legal obligations and responsibilities. Furthermore, it analyses the R2P implementation framework as a model to propose a coherent and operational framework for implementing this international legal obligation at the state and international community level.

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*"Some may understand this use of existing doctrine as a kind of "**reflective equilibrium**": **we argue for a new view by showing that it is both attractive in its own right and not incongruent with considered judgments that we are reluctant to give up**."*

Jeremy Waldron

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Abbreviations:

ACHR: American Convention on Human Rights

CAT: Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment.

CC: Climate change.

CCD: Climate Change Department of the Government of Tuvalu.

CEDAW: Convention on the Elimination of All Forms of Discrimination against Women.

CERD: International Convention on the Elimination of All Forms of Racial Discrimination

CIL: Customary International Law

COE: Council of Europe

Convention against Genocide: Convention on the Prevention and Punishment of the Crime of Genocide.

COP: Conference of the Parties.

CRPD: Convention on the Rights of People with Disability.

CRS: Convention on the Reduction of Statelessness.

CSSP: Convention relating to the Status of Stateless Persons

ECHR: European Convention on Human Rights.

ECtHR: European Court of Human Rights.

HR Committee: United Nations Human Rights Committee

HR: Human Right

HRs: Human Rights

HRC: United Nations Human Rights Council

HRL: Human Rights Law

I-ACHR: Inter-American Court of Human Rights.

IC: International Community

ICISS: International Commission on Intervention and State Sovereignty

ICJ: International Court of Justice

ICPRMW: International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families

IL: International Law.

OHCHR: Office of the High Commissioner for Human Rights.

R2P: Responsibility to protect.

Refugee Convention: Convention relating to the Status of Refugees

SDG: Sustainable Development Goals.

SIS: Small Island States (referring to Tuvalu, the Maldives, Kiribati and the Marshall Islands).

TPC: Triple Planetary Crisis

UDHR: Universal Declaration of Human Rights.

UN: United Nations.

UNEP: United Nations Environment Programme.

UNFCCC: United Nations Framework Convention on Climate Change.

UNGA: United Nations General Assembly.

UNHCR: United Nations High Commissioner for Refugees.

UPR: Universal Periodic Review.

Introduction:

Relevance, research question, and hypothesis

If, according to customary law, States must have a permanent population, defined territory and effective government (Montevideo Convention, 1933, art. 1), what would happen if the territory of a State disappears or becomes uninhabitable? What would happen if that State's entire population is forced to leave its territory and migrate because of that reason? Would its government be able to keep being functional? Would the State retain its sovereignty? Would that State be a State, or would it lose its statehood? Who would be responsible then for the protection and promotion of the Human Rights (HRs) of its former population? And, if the risk of all this happening could be predicted, wouldn't there be or shouldn't be a way of preventing it? Or, at least, trying to prevent it?

Although these questions seem to be material for a science fiction dystopia, they are the reality currently faced by some Small Island States (SIS) due to the impact of Climate Change (CC) on their territories and, consequently, on the other elements of their statehood. For the first time in modern history, there exists a real and tangible risk of entire States vanishing from the map, becoming extinct because of CC. To date, this is a risk completely unknown to any international field of knowledge, therefore, there are minimal answers as to how to react to it, prevent it or what to do when it happens. The number of States affected is small, only Tuvalu, Kiribati, Marshall Island and the Maldives are at real risk of disappearing (Nevitt, 2022; Park, 2011; Piguet, 2019), nevertheless, that does not take away the attractiveness and relevance of the study of their case.

The novelty and singularity of the SIS' risk of losing their statehood because of CC and the potential consequences of it have attracted the attention of numerous scholars and authors who have approached the issue from very diverse disciplines such as political science (Vaha, 2015), sociology (Beyerl, et al., 2018; Lazrus, 2015; Milan et al., 2016) international law (Caligiuri, 2022; Starita, 2022), human rights law (HRL) (Cataldi, 2022), asylum law (Salvador Gimeno, 2020) or international migration, either at from its legal (Leal-Arcas, 2012) or sociological level (Campbell & Warrick, 2014; Curtain & Dornan, 2019). Undoubtedly, it is an extremely contemporary, relevant and intellectually engaging topic. Thus, the present thesis is framed within the work of authors such as DelGrande (2021), Nevitt (2022), McAdam, (2012) Park (2011) and Piguet (2019) who have approached the topic from the perspective of its relationship with the right to nationality (i.e. article 15 of the Universal Declaration of Human Rights (UDHR)) and the risk of statelessness that the loss of statehood entails. Nevertheless, this

thesis does so from an innovative angle aiming at finding a legal basis within the HRL framework (one of the most protective branches of IL) for the prevention of climate statelessness, and, thus also for the prevention of the loss of statehood of the SIS while acknowledging the limitations of these States regarding the implementation of CC adaptation and mitigation measures, as well as the incompatibility of the proposals of the abovementioned authors with the worldview and the community and national feelings of the population of the SIS at risk.[1] Therefore, this thesis aims to find a legal basis for an early and proactive response to the impact of CC on the SIS, instead of a reactive one, which would try to avoid the migration or resettlement of the SIS population.

Hence, the thesis focuses on the international responsibility of other actors beyond the SIS themselves, namely the Internacional Community (IC), in the prevention of climate statelessness when, as is the case, States are unable to comply with their international obligations under HRL, specifically their international obligation to "prevent human rights violations". Since this is a new approach to the issue, innovative and unconventional perspectives have been taken, diving into the most preventive and protective wing of HRL in search of the legal basis from which to derive such IC's responsibility to preserve the effectiveness and protection that HRL offers to individuals. This challenging task has required to resort to unexpected protective frameworks of HRs such as Responsibility to Protect (R2P). Nevertheless, this unconventional approach is nothing new in the history of human rights, which is one full of decisive moments in which unexpected actions were taken, and unprecedented measures were developed to give answers to questions that no one dared to face or cared enough about before, at least not out of fiction.

In this way, the research question that has motivated this thesis has been whether or not ***there is an international obligation in the existing international legal framework for the International Community to prevent the climate statelessness of the population of SIS*****,** as, in case there is, it would bring another responsive actor to the table who would have the legal obligation to assist the SIS in the adaptation to the impact so CC. To carry out the research and find answers to that question, the hypothesis was as follows: ***The principle of prevention of human rights violations and Pillar I and II of the Responsibility to Protect provide a specific legal basis for the international community's responsibility to prevent climate statelessness and its application.*** The investigation of this hypothesis will shed light

[1] As it will be explained later in the thesis, most of the proposals dealing with the issue entail the acceptance of the disappearance of the SIS as States, or the abandonment of their territory, which clash intensely with the strong communal feeling and connection to the islands of the populations affected (Lazrus, 2015), as well as with their adaptation preferences (McAdam, 2012).

on the SIS case and the actors responsible for the protection of the right to nationality of the SIS population, as well as the international obligation to prevent (climate) statelessness.

Methodology and sources

The methodology followed in the research has been the doctrinal analysis of a specific topic or case since it provides the perfect framework to thoroughly examine the phenomenon of climate statelessness and the responsibility of different actors in its prevention and to obtain detailed knowledge about it. The case subject matter of the study, i.e. the climate statelessness arising from the loss of statehood due to CC is a contemporary real-world phenomenon (Yin, 2018) that raises complex and challenging questions (Remenyi, 2012), and offers the opportunity to expand the current knowledge in the field as well as to test the accuracy of the current HRL framework to provide answers to this unparalleled situation. It is thus, an extreme/deviant case, according to Flyvbjerg (2013) taxonomy. Likewise, the limited number of States threatened by this specific type of climate statelessness also allows for drawing a clear delimitation of the case under research (Remenyi, 2012), as well as eases the design, proposal and development of innovative solutions.

Thus, the thesis follows the deductive approach of the desk research carried out, starting from exploring the context surrounding the case to substantiate and endow it with specific content. Then, it continues with a clear analysis of the HRL framework to provide evidence of the international obligation to "prevent HRs violations" deep-rooted in its DNA and present throughout all its elements. All this leads coherently to elucidating the legal basis for the IC's subsidiary responsibility in the prevention of climate stateless as inherent to its legal obligation to "prevent HRs violations" and its complementary responsibility in the discharge of States' obligation to "prevent HRs violations" when they are unable to do so.

Primary (governmental and international organizations' documents and reports, jurisprudence, empirical sociological studies, treaties. etc) and secondary sources (books, academic articles, book chapters) have been used to conduct the research. The HR international treaties, international HR courts jurisprudence, as well as the reports of Secretary-General Ban Ki-Moon on R2P, resolutions of the UN organs and general comments, recommendations and concluding observations of the treaties' bodies are examples of primary sources. Moreover, the CC and environmental data provided by the reports of the IPCC and Tuvalu's CC policy and National Strategy for Sustainability are also primary sources which have been used to gather first-hand information regarding the challenges faced by the SIS. All these official sources have been complemented and enriched by the findings of empirical and qualitative

studies such as the ones conducted by Lazrus (2015) and Campbell & Warrick (2014). Secondary sources have been used in the analysis of the international HRL and, specifically, in the study and analysis of the legal framework for the prevention of statelessness, highlighting the proposals for the prevention of climate statelessness offered by authors such as McAdam (2012) or Park (2011). The selection of the sources responds both to the criterion of officialism and to that of specialization in each of the subjects covered in this thesis.

Regarding the limitations encountered, it is worth mentioning that the contemporaneity of the subject, its peculiarity and uniqueness, although having offered ample space for innovation and the search for new proposals, allowing for great creativity, also presented a considerable limitation when it came to finding existing legal bases that could respond to this reality so far unimaginable. The limits of the current international HRs legal framework have been tested, a task that always entails a high level of risk, as do unprecedented proposals. However, only by applying a high level of creativity and innovation can the limits be pushed, and unimaginable situations addressed. Likewise, geographical distance from where the events under research are taking place has also posed a considerable obstacle, especially when trying to avoid the biases that geographical distance from a problem may entail to the perception of risk and the plausibility and suitability of the possible solutions. This is one of the reasons why the research has not only been limited to the legal sphere but has also dived into sociocultural and sociological resources to try to limit the biases of distance, so that the proposals respect as much as possible the worldview and preferences of the affected communities.

Thesis outline

This thesis is structured in the following way: Chapter I presents the growing international concern and institutionalization of the Triple Planetary Crisis (TPC) and the consequent "greening process" of the HRs system and the recognition of new climate-related HRs (Argren, 2021, p. 171). It also addresses how CC is impacting the SIS' territory and highlights the fact that, although adaptation is possible, it requires resources, mainly economic, far above those available to the SIS. Finally, it tackles the issue of statelessness focusing on that which would arise from the loss of statehood of the SIS, which in the scope of this thesis has been named: climate statelessness and questions if the current international statelessness framework could apply to it.

Chapter II offers an in-depth analysis of the international principle and legal obligation to "prevent HRs violations" in the HRL and the international system at large. and principle and provides an examination of their content and nature. Moreover, it explores the international legal obligation to prevent

statelessness as enshrined in the 1961 Convention on the Reduction of Statelessness (CRS) and interpreted by the UNHCR, but also as a logical corollary of the right to nationality. Finally, it presents a teleological interpretation of the international system and its HR branch to provide a comprehensive overview of the presence and source of the principle of prevention of HRs violations in the IC, structured through the UN, and the international system.

Chapter III deals with the subsidiary/complementary responsibility of the IC in the discharge of the international obligation to "prevent HRs violations" as a means to preserve their effectiveness and protection when States are unable to effectively do so alone. It explores the legal basis of this IC's complementary responsibility and comments on the need to develop an international mechanism or framework for its implementation, drawing inspiration on the R2P principle, the most salient and sophisticated international framework for the prevention of HRs violations, and its implementation framework organized in three Pillars. Thus, aiming at offering a proactive preventive answer to climate statelessness.

CHAPTER I: CLIMATE STATELESSNESS AND HUMAN RIGHTS

Contextualizing the problem: Human Rights and Environmental Issues.

'*Humanity is waging war on nature. This is senseless and suicidal.'*

(Antonio Guterres, 2021, p. 4).

With these words, the UN Secretary-General initiated the 2021 UNEP report which aimed to show States and other stakeholders the way to deal with the triple transnational threat posed by Climate Change (CC), Biodiversity loss, and Air Pollution within the framework of the Sustainable Development Goals (*Making Peace with Nature*, 2021).

Undoubtedly, the scope, dimension, and tangibility of the Triple Planetary Crisis, (to use the UN jargon), have promoted and motivated environmental action at many different levels in recent decades: urban, national, regional, and global. The effects and impacts of CC, Biodiversity loss, and Air Pollution have ceased to be science fiction delusions and have become part of the ordinary lives of millions of people, giving rise not only to material and economic losses but also to the irremediable loss of human, animal and plant life (UN Climate Change, 2022). The unfeasibility of a healthy and prosperous future,

with full enjoyment of fundamental rights and freedoms, becomes increasingly obvious if the current environmental crisis is not tackled properly and promptly.

On this background, two main developments have been taking place in the international and global scene to face what seems to be the greatest challenge of our time: this TPC. On the one hand, already at the beginning of the 90s, the International Community (IC) (mainly structured through the UN system) decided that it was necessary to get down to the task of dealing with the consequences of human activity on the environment by drafting and adopting the Rio Conventions: the 1992 UN Framework Convention on Climate Change (UNFCCC) and the 1992 UN Convention on Biological Diversity, each of them aimed at engaging with one of the three elements of the planetary crisis, and the 1994 UN Convention to Combat Desertification, meant to mitigate the effects of droughts on the land (UN Climate Change, 2022). In this way, global environmental action was codified and left open to future development in an attempt to remedy not only the effects that the TPC was already having at the time but also its future evolution and impacts as well as to prevent them from reaching levels that would be impossible to cope with.

Because of its scope and immediacy, CC has possibly been the aspect of the planetary crisis that has attracted the most media, institutional, popular, scientific, academic, and legal attention. To support and coordinate coherently the global action against CC within the framework of the UNFCCC, this convention established the UN Climate Change Secretariate which is in charge, among other tasks, of the organization of the annual COPs, the largest UN conferences in which the different parties to the UNFCCC and other stakeholders put in common the latest advancements on the matter and negotiate future plans of action upon them (UN Climate Change Secretariat, n.d.-a) Hence, the UNFCCC embodies a well-structured international forum and legal framework that has allowed the IC to institutionalize its environmental action against CC in such a way that even its primary members, i.e. States, but also other interested parties, have made legal international commitments to carry out and implement concrete measures, plans, and policies to stabilize the greenhouse emissions ‘at a level that would prevent dangerous anthropogenic (human-induced) interference with the climate system’ (UN Climate Change Secretariat, n.d.-d). Within this framework, both the Kyoto Protocol and the Paris Agreement are noteworthy.

Although no longer in force, the Kyoto Protocol, which entered into force in 2005 despite having been adopted in 1997, provided the UNFCCC with an operational architecture by legally binding industrialized States, economies in transition, and the EU to reduce and limit their greenhouse gasses

emissions according to individual objectives, as well as imposing on them reporting and mitigation obligations under a monitoring mechanism led by the UN Climate Change Secretariat. Moreover, by only binding developed countries and establishing an Adaptation Fund to finance adaptation projects in developing countries, it strengthened the recognition and implementation of the principle of "common but differentiated responsibility and respective capabilities" (UN Climate Change Secretariat, n.d.-c).

On its part, the Paris Agreement, the first international convention on CC legally binding for all its parties, sets up a 5 years-circle mechanism of National Determined Contributions through which each State party is to commit itself to reducing its greenhouse gas emissions in an increasingly ambitious way. The Paris Agreement also establishes an international framework for financial, technical, and capacity-building support to those countries who, individually, might not have the capacity to deal with the impact of CC or implement effectively their National Determined Contributions (UN Climate Change Secretariat, n.d.-c).

Thus, the evolution of the international legal framework aimed at dealing with the TPC and the environmental degradation caused by human activity reveals that these issues are in the spotlight of the IC. Moreover, the fact that States have decided to legally bind themselves to tackle these issues through international agreements is clear evidence of how relevant they consider them to be.

Likewise, the pivotal role of the fight against the TPC within the UN system and the IC in a broader sense can also be inferred from the fact that it is a crucial element of the UN 2030 Agenda for Sustainable Development, being six of its seventeen SDGs directly or indirectly connected or contributing to it. For instance, SDG 13 is devoted to Climate Action to combat CC, and SDGs 14 and 15 (Life below Water and Life on Land respectively) focus on, among other objectives, protecting biodiversity on land and underwater. Nevertheless, SDGs 7 (Affordable and Clean Energy), 11 (Sustainable Cities and Communities) and 12 (Responsible Consumption and Production) are also highly interconnected with the articulation of the IC actions to tackle the TPC. On the other hand, another consequence of the growing international awareness of the need to act on the TPC has been the diversification of the fields of knowledge and branches of international law from which these actions and related measures are being orchestrated, including the Human Rights Law (HRL) branch and field.

The human rights approach to the TPC was motivated by the realization that the human right (HR) to live a peaceful existence requires a healthy environment that can provide food, water, shelter, and clean and unpolluted air (Thorne, 1991 as cited in Cramer, 2009). Moreover, as also pointed out by Cramer (2009), the articulation of the narrative of protection of the environment and the action against

the TPC in terms of HRs offered those fighting for the cause a more effective language since States have been familiar with the HRs language for a longer time than to the environmental one, and the protection arising from the HRL field is more powerful than the protection arising from other branches of International Law (IL), mostly due to the existence of individual rights and not only state obligations. In this way, the connection between HRs and action against the components of the TPC or environmental action has been twofold: on the one hand, a "*greening process*" of the HRs system has been taking place for the last decades, on the other hand, new HRs have been or are, by the time of writing this thesis, being born (Argren, 2021, p. 171).

The "greening process of the HRs system" refers to the growing attention that the environmental dimension of HRs is gaining recently, not only coming from civil society and environmentalists or climate activists but also from treaty bodies, regional tribunals, special rapporteurs, and other UN HRs mechanisms (Knox, 2018). HRs such as the right to life, health, food, water, housing, culture, development, property, and home and private life have been examined through the green lenses of environmental protection in order not only to stress that 'the obligations of States to respect, protect and fulfil human rights apply in the environmental context no less than in any other' (Knox, 2018, p. 6) but also to highlight the close connection between HRs and environmental issues and how the TPC impacts the enjoyment of the HRs directly.

Environment-related HRs which were not even thought of when the international system envisioned for their protection was drafted, are also developing because of the exacerbation of the impact of the TPC on the ordinary lives of individuals. Take as an example the HR to a clean, healthy, and sustainable environment. It was in the late 60s when the UNGA addressed for the first time the connection between HRs and environmental protection (Cramer, 2009). Not long later, the UN drew attention to the existence of a HR 'to an environment of quality that permits a life of dignity and wellbeing' ("Report of the United Nations Conference on the Human Environment," 1972, p. 4) during the 1972 UN Stockholm Conference on the Environment. Since then, the formal recognition of the right to a clean, healthy, and sustainable environment as a HR has been on the international table, revolving and evolving, and gaining more and more momentum through the years. In 2021, the HRC formally recognized for the first time the existence of such a right (HRC, 2021). In July 2022, it was the UNGA the one who, through the adoption of the draft resolution 76/L.75, also acknowledged this right as a HR (UNGA, 2022).

Concerning the connection between HR and the environment, it is also worth noting the so-called Aarhus Convention. Officially named: "Convention on Access to Information, Public Participation in

Decision-making and Access to Justice in Environmental Matters", the Aarhus Convention is the 'only legally binding global instrument on environmental democracy' and a landmark convention that interlinks "traditional" HRs (such as the right to access to information, to decision making and to justice) with environmental rights and relates them both to accountability and transparency (United Nations Economic Commission for Europe, n.d.). Article 1 of the Aarhus Convention states that it aims to 'contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being' (Aarhus Convention, 1998, article 1). Thus, this convention not only recognized the existence of a right to a "healthy and appropriate for the well-being" environment (through a legally binding document enshrining state obligations on the matter) but made a direct and unavoidable connection between it and other HRs. Furthermore, the ulterior development and subsequent practice derived from the implementation of this convention have motivated some scholars and activists to advocate for the emergence of other new rights such as the right to information *about* the environment (Argren, 2021).

The growing number of CC-related cases in HRs regional systems is another obvious piece of evidence of the strong interconnection between the TPC, in specific of CC, and HRs. Through climate litigation, individuals of many different countries and backgrounds are challenging the way HRs cases have been understood until now. See, for example, the *Duarte Agostinho* case, the *KlimaSeniorinnen* case,[2] and the *Greenpeace Nordic* case which the European Court of Human Rights (ECtHR) has already considered admissible at the preliminary stage. Regardless of the way the ECtHR rules in each of the cases, the mere fact that these cases have made their way to the regional court is already having an impact on how CC the international action against CC is conceived and perceived. Likewise, requests for advisory opinions as the one submitted by the Republic of Colombia and the Republic of Chile to the Inter-American Court of Human Rights (I-ACHR) on the Climate Emergency and Human Rights (*Request for an advisory opinion on the Climate Emergency and Human Rights*, 2023) or the United Nations General Assembly's request to the ICJ on the obligations of States regarding CC (UNGA, 2023)

[2] By the time of writing this chapter, none of these cases had been decided. Nevertheless, on April 9th, 2024, the ECtHR issued its decision on both: regarding Duarte Agostinho case, the applicant's request to expand the judicial application was also rejected ans the case was eventually deemed inadmissible because the applicants had not exhausted domestic remedies in Portugal before submitting their case to the European court and (*Duarte Agostinho and Others v. Portugal* and 32 Other States - Climate Change Litigation, 2024); on the other hand, regarding the KlimaSeniorinnen case, the ECtHR found that Swaziland had violated Article 8 (Right to respect for private and family life) and Article 6(1) (Right to a fair trial) (*KlimaSeniorinnen v Switzerland* (ECtHR) - Climate Change Litigation, 2024).
By the time of writing, July 5th, 2024, The *Greenpeace Nordic* case is still pending before the European court (*Greenpeace Nordic and Others v. Norway* - Climate Change Litigation, 2022).

show that not only individuals but also States and the IC are increasingly aware of the connection between HRs and the components of the TPC, as well as of the fact that this crisis gives rise to HRs obligations with which they have to comply.

Another major example of the international application of the HRs approach to the fight against the TPC and its consequences, is the evolution and growing acceptance of the concept of *Ecocide* and the defence of its inclusion in the Rome Statute of the International Criminal Court as an international crime. Coined following the legal definition of Genocide (although lacking both, international recognition and official definition), *Ecocide* is to be understood as 'unlawful or wanton acts committed with knowledge that there is a substantial likelihood of severe and either widespread or long-term damage to the environment being caused by those acts' (Independent Expert Panel for the Legal Definition of Ecocide, 2021, p. 5). Despite that the amendment to the Rome statute and the global recognition of *Ecocide* as an international crime does not seem to be going to happen any time soon, the recognition as such by individual States, such as Belgium (Gairdner, 2024) is undoubtedly contributing to the international acceptance of the concept or, at least, to the international reflection on the need (or lack of it) of such legal concept.

Undoubtedly, the TPC, and, because of the reasons stressed earlier, CC are challenging directly not only the struggles faced by individuals in their day-to-day lives but also how the IC understands, addresses, and verbalises them. In this sense, the HRs approach to environmental action has allowed the IC to discover not only the greenest aspects and dimensions of the international system of protection and promotion of HRs, but also the need to develop, recognise, and act upon new HRs to face efficiently and effectively the hustles stemming from the impact of the TPC if the ultimate goal of the HRs system, i.e. the enjoyment of these rights by the individuals of all nations, regardless of their race, sex, language, or religion (UN Charter, 1945), is to be realised.

Thus, it is the HRs approach to the TPC and, mainly, to CC (as one of its main components) the one to which this thesis contributes. In what remains of Chapter I, the impact of CC on the enjoyment of a specific HR, i. e. the right to nationality, by the population of the SIS will be explored and the international HRs framework potentially applicable to it, according to the current state of evolution and development of HRL, will be discussed.[3] Chapters II and III offer a legal basis from which to approach

[3] As mentioned earlier, the prevention and protection envisioned and implemented in the field of HRL are two of the most effective ones within the whole international legal system and, for this reason, this thesis will explore this branch of law and the possibilities it can offer to the case at hand.

the issue, always within the current HRL system, but drawing on very different sources to present a completely innovative and fresh approach to it. Therefore, the goal of this thesis is to navigate the channels and avenues that exist in today's HRL to give an effective answer from the HRs perspective to the impact of CC on the enjoyment of the right to nationality of the population of specific SIS which statehood is being challenged by the TPC. It is, thus, a question of exploring the green dimension of this international right, as well as its limits, and researching the need (or lack thereof) to create at the international level some other formula or measure, beyond and upon the existing ones, to preserve the protection and effectiveness of this HRs.

The issue at hand: the impact of Climate Change on the statehood of the SIS.

The first thing that needs to be clarified is "*the impact of CC"* potentially threatening "*the enjoyment of the right to nationality of the population of specific SIS"* and how their *"statehood is being challenged by the TPC*". To do so, this sub-section will provide answers to: which are the SIS whose statehood is being challenged by the impact of the TPC, specifically by CC? How is their statehood being challenged? The objective is to contextualize and ground the HRs dimension of the issue: the risk of violation of the right to nationality of the populations of these States.

In the scope of this thesis, the acronym SIS refers to the four specific island states that have been identified by the academia and the IC, based on scientific information and prospects of the evolution of CC, as being at risk of losing their statehood as a consequence of its impact, i. e. Tuvalu, Kiribati, Marshall Island, and the Maldives (Nevitt, 2022; Park, 2011; Piguet, 2019)[4]. Although different, sovereign and independent states, these four SIS are facing a similar threat: they might lose their statehood as a combined effect of the impact of CC and other pre-existing environmental and socioeconomic stressors (McAdam, 2012). The four of them are members of the group of Small Island Developing States (SIDS), and Kiribati and Tuvalu also belong to the group of Least Developed Countries (LDCs) (Park, 2011). The membership to these groups provides a clue as to what is the crux of the matter: these four SIS are being adversely affected by CC, even though they have contributed little to it, and they lack the resources (mainly, economic resources) to develop effective adaptation and mitigation strategies. Consequently, the habitability of their territory is decreasing rapidly, primarily because of the shortage of fresh, drinkable water (DelGrande, 2021; Nevitt, 2022; McAdam, 2012; Park,

[4] Piguet (2019) also includes Nauru in this list, nevertheless, as not all authors do so, Nauru has been excluded from the scope of the thesis.

2011; Piguet, 2019). Should their territory become impossible to inhabit (which is a real risk), their population would have to migrate or be relocated *en masse* (DelGrande, 2021; McAdam, 2012; Park, 2011; Piguet, 2019), including its government, which would be forced to function in exile (DelGrande, 2021; McAdam, 2012; Park, 2011).

Although hard to imagine, the risk of uninhabilability of the SIS is a real risk that has been identified by the Intergovernmental Panel on Climate Change (IPCC) since its very first report in 1990 (Piguet, 2019). Additionally, already in 2007, the IPCC drew attention to the threat that sea level rise poses to the sovereignty and exitance of this SIS (IPCC, 2007). Images of Atlantis-like states have plagued the media ever since, sometimes spurred by the SIS themselves, as a cry for help and IC's environmental action, sometimes motivated by the faraway communities' lack of understanding of the real implications of this risk (McAdam, 2012); primarily because these islands will become uninhabitable well before they sink and physically disappear (McAdam, 2012; Park, 2011).[5]

Taking Tuvalu as a specific example would provide this abstract concept of "loss of statehood" with some tangible data and images. Tuvalu is the fourth-smallest State on Earth and is located in the South Pacific region, mid-way between Hawaii and Australia. Its territory is divided into nine atoll islands whose average altitude above the sea level is less than 3 meters (CCD, 2021). It has an Economic Exclusive Zone of 900.000 square km (Ministerio de Asuntos Exteriores, Unión Europea y Cooperación, 2023). As it has no rivers, Tuvaluans' only source of fresh water is rainwater (CCD, 2021, p. 11), since the underground water has been polluted by seawater intrusions (exacerbated by the sea level rise, the intensity of the rainfalls and the floods) (CCD, 2021; McAdam, 2012). The recurrent seawater inundations have also impacted the fertility of the soil, affecting its capacity to grow crops (CCD, 2021; Nevitt, 2022). Moreover, since 1933, the annual mean temperature and the number of extremely hot days have been increasing (Australian Bureau of Meteorology and CSIRO, 2014, pp. 305-306), a meteorological phenomenon expected to continue in the coming decades (CCD, 2021). In addition, the increase in acidification and temperature of the ocean is having a huge deteriorating impact on the coral reefs that surround the islands. As a result of the combined effect of these two CC-related phenomena, coral reefs are suffering from several bleaching processes more and more often, limiting their ability to recover (IPCC, 2021). There is a very high confidence that this trend will continue in the future even if the mean increase of the surface temperature is limited to 1ºC relative to the 1982-1999 period (CCD,

[5] Some predictions place around 2050 as the date when large parts of the territory of these SIS, if not the entire territory, could become uninhabitable (Park, 2011; Nevitt, 2022).

2021). The quality and survival of the coral reefs are directly connected to the patterns of behaviour of the fishes that inhabit them. Additionally, due to the low altitude of the islands and the speed of the rising of the sea level, Tuvalu's territory could disappear in the no so far future (Park, 2011, p. 1).

A clear picture of the issue's magnitude cannot be gained without some more details. Tuvalu's population (10.645 people) is mainly formed by subsistence farmers and fishermen (CCD, 2021), who are highly vulnerable to the impacts of CC on freshwater, land, and fish behaviour. Likewise, due to its remoteness from international and regional markets, scarce natural resources, and small population, Tuvalu's economy is very modest, being the offshore fisheries (CCD, 2021), the sale of fishing licenses, and the international development aid the main sources of State's income (Ministerio de Asuntos Exteriores, Unión Europea y Cooperación, 2023).

Thus, it is easy to conclude that Tuvalu's resources to adapt and mitigate the impact of CC on its territory and population, which are considerably strong, are minimal. However, if effective adaptation and mitigation measures are not implemented, and the evolution of CC is not halted, Tuvalu's territory, as well as the territory of the other SIS will not be suitable for sustaining life.

In this way, although there is no internationally agreed definition of what a State is, statehood is normally understood as the combination of the criteria enshrined in Article 1 of the Montevideo Convention on the Rights and Duties of States (1933): a defined territory, a permanent population, an effective government and the capacity to enter into relations with other States (DelGrande, 2021; McAdam, 2012; Nevitt, 2022; Park, 2011; Piguet, 2019)[6]. In the context of the SIS, CC is obviously challenging the first of these criteria, however, it is also challenging the other three.

Indeed, the impact of CC on the territory is the easiest to perceive. If the sea level keeps rising, the territory of the SIS, or a big part of it, will sink. There is no requirement in IL regarding how much territory a State must have to be considered as such, technically, as long as there is some territory that can host some population, the requirement of territory might be fulfilled (McAdam, 2012). Indeed, one of Kiribati's adaptation proposals was to create a government outpost at the highest point of the country to maintain its statehood somehow and continue to exploit the resources of its Exclusive Economic Zone (McAdam, 2012).[7] However, if the territory becomes uninhabitable before it is submerged, as is predicted to happen, not only would it very likely cease to satisfy the "territory" criterion necessary for statehood

[6] International lawyers normally agree on the first three criteria (M. Balázs, "personal communication", May 29th, 2024)
[7] Nevertheless, considering how CC is affecting the temperature and acidification levels of the Pacific Ocean, some questions about the value of the resources of the Exclusive Economic Zone of the SIS in the future might arise.

(DelGrande, 2021), but also the population and the government would be forced to migrate, further threatening the statehood of the SIS.

In the same line, there is also no minimum requirement of population for a state to exist or continue to exist, but as interpreted so far, IL seems to demand some permanent population inhabiting the territory and being under the effective authority of the government for this requirement to be met (McAdam, 2012; Park, 2011). If the territory becomes uninhabitable it means that, by definition, no population will be permanently (nor sporadically) leading its life on it, therefore, this prerequisite would hardly be met. Moreover, if *en masse* migration or relocation takes place, the population of the SIS will be under the jurisdiction of different States, which would limit considerably the power of the SIS' governments over it (unless an agreement about the cession of sovereignty of a portion of land is agreed to preserve the statehood of the SIS) (DelGrande, 2021; McAdam, 2012; Park, 2011).

The third criterion of the four-fold definition of State is the existence of an effective government that can independently exercise its authority over the population who inhabits permanently a defined territory and enter into relations with other States. The uninhabitabitability of the territory would force the governments of the SIS to abandon it, restricting their power to that of governments over their nationals abroad, since their nationals, also forced to emigrate, will find themselves under the jurisdiction of the host States (McAdam, 2012). The absence of the government from the territory of the state, may not pose great legal challenges since governments in exile have been a recurrent thing in history, but this has always been a temporary and exceptional situation. If continued over a prolonged time, presupposed, forever, there is much to be wondered whether this condition of statehood would be met (McAdam, 2012).

The last requirement, i.e. the capacity to enter into relations with other states, is normally considered a consequence of the condition of statehood more than a criterion itself (McAdam,2012). However, if a State is not recognized by the rest of the States of the IC, or by a considerable group of them, the existence and survival of such a State is quite unluckily as it would be isolated from the international economic and legal relationships.

Thus, for a State to exist, it is understood that these four requisites need to be met, nevertheless, there is no evidence to follow, nor previous similar situations that could shed some light on when is the exact moment in which a State ceases to exist (DelGrande, 2021). So far, from the states' practice, it can be inferred a strong presumption of continuity of the existence of states once they are officially recognized, even if some of the aforementioned prerequisites are not fulfilled (DelGrande, 2021;

McAdam, 2012; Park, 2011), hence, the coining of the term "failed state", which is intended to accommodate realities in which some of the elements of statehood are not completely fulfilled. Furthermore, so far, the extinction of states has only taken place in the context of State succession (McAdam, 2012; Nevitt, 2022), never has there been a situation in which a state simply disappears with no other State taking its place. Thus, the threat that CC poses to the statehood of these SIS is a situation completely unprecedented in IL and all other branches of international knowledge.

Adaptation to such a threat, however, is not impossible, the Netherlands is a perfect example (Park, 2011; Piguet, 2019). However, this adaptation entails a cost that states such as Tuvalu and the other SIS, with their extremely limited economy, cannot bear on their own. Nevertheless, if they do not do so, there is a real risk of losing their condition of State.[8]

When it comes to the respect, fulfilment and protection of the HRs of individuals, the first duty bearers are States, normally being the State of nationality in the front line of that responsibility. However, what happens if the State of nationality disappears, and no other State replace it? How does that impact the enjoyment of the HRs of its former population? And, more specifically, how does this affect their right to nationality? If a State ceases to exist, it is to be expected that its nationality ceases to exist too. If so, what would be the legal status of the former population of the extinct State?

Untangling Climate Statelessness resulting from the loss of statehood.

To find answers to the HRs-related questions posed at the end of the previous sub-chapter, it is necessary to change the lenses through which to study the case, from the political science perspective to the sociological one, coming up with the consecutive query: how would an eventual loss of statehood impact the lives of those living in Tuvalu and the other SIS?[9]

As mentioned earlier, it is not clear when the SIS will cease to exist, however, it is clear that, when they do so, their population will become, because of unprecedented reasons in IL, *de jure* stateless (McAdam, 2012; Park, 2011). Nevertheless, until the extinction of these States is officially declared, their population is in danger of becoming *de facto* stateless (McAdam, 2012; Park, 2011), i.e. lacking an

[8] It is difficult to predict when exactly this will occur, due to the strength of the presumption of continuity of states, however, the time will come when the erosion of statehood will be such that it will not be possible to maintain the presumption of continuity.

[9] Although CC is impacting the lives and HRs' enjoyment of the population of the SIS in various ways, this thesis addresses the question from the perspective of the consequences of CC on the enjoyment of the right to nationality (article 15, UDHR) as a corollary of statehood.

effective nationality (DelGrande, 2021; UNHCR, 2008; van Wass, 2008) as their "own States" (a term borrowed from the HR jargon), normally understood as their "country of nationality", would not be able to fulfil their duties regarding HRs. *De facto* and *de jure* stateless people suffer from similar or the same obstacles in their everyday lives and the enjoyment of their HRs, nevertheless, *de facto* stateless people's situation can prove to be even more thorny since they would quite certainly not be able to fully benefit from the international framework of protection of stateless people unless they are legally recognized as such.[10]

Nonetheless, considering that there is a real risk of "climate statelessness" (meaning, in the scope of this thesis, statelessness or breach of article 15 of the UDHR induced by the impact of CC on the statehood of SIS and the international legal uncertainty that this would bring) and the purpose of this thesis, which is to find a legal avenue from which to derive the IC's obligation to take actions to ameliorate the conditions faced by Tuvalu and the other SIS to prevent "climate statelessness", it is of utmost importance to understand what "climate statelessness" would imply to comprehend how will the eventual loss of statehood impact the lives of those living in the SIS, in specific, with regards of the enjoyment of their HRs since statelessness (and climate statelessness) is indeed a HR issue (Foster & Lambert, 2016). To do so, what stateless means and how it is internationally legally framed, needs to be explored in the first place.

According to Article 1 of the Convention relating to the Status of Stateless Persons (CSSP) (1949), a stateless person is one 'who is not considered as a national by any State under the operation of its law', a definition that is regarded as customary international law (Fisher, 2015; Foster y Lambert, 2016). Consequently, "statelessness" is the state of being a stateless person, i.e. a person who lacks a nationality, which, according to the ICJ, is a 'legal bond' (*Nottebohm Case*, 1955, p. 23) between a State and a person. This legal bond or genuine link entails duties and rights for both parties (van Wass, 2008). Hence, being stateless means that those rights, as well as those duties, connected to nationality, are inaccessible.

From this brief explanation of statelessness, the first interconnection with HRs can be inferred, forasmuch as "lacking a nationality" is a direct violation of Article 15 of the UDHR (1948): the right to

[10] It is worth noting, though, that *de jure* stateless people normally face great hustles so as to be legally and formally recognized as stateless (Foster y Lambert, 2016; van Wass, 2012), a technical and practical obstacle that hinders considerably their access to the international protection granted by the international HRL system to stateless people (van Wass, 2012). Thus, both, *de jure* and *de facto* stateless people normally face similar challenges in the enjoyment of their HR.

nationality. The link between statelessness and violations of HRs should technically, end there because HRs are not "national rights" and, since the creation and development of the international system of protection of HRs, these rights are mostly not granted by each State to its nationals, but by the IC to every human being only owing to his or her human condition (van Wass, 2012). This is what van Wass (2012) calls the '*denationalizatio*n' of HR (pp. 23-25), which has eroded the connection between nationality and access to HRs since 1945. [11]

However, even if the internationalization and codification of HRs bestow individuals with rights that every State needs to respect, protect, and, to a certain degree, fulfil, the HRL system hides limitations and exclusions that leave stateless people out of its protection as, for example, those rights which are legally limited to citizens of each State such as the right to participate in the government and other political processes or the freedom of movement and to leave and re-enter ones' country (Foster y Lambert, 2016; UNHCR, 2012; van Wass, 2012) (which in the case of stateless people is normally none, as it has already been pointed out that "one's country" is usually understood as "the country of nationality"). Likewise, States have the right to expel from their territory those individuals who are not their nationals (even though respecting the general principles of no discrimination, equality before the law, and equal protection of the law) (van Wass, 2012). Moreover, the enjoyment of social, economic, and cultural rights by stateless people can also be, and it usually is, negatively affected by their lack of nationality (Foster y Lambert, 2016; UNHCR, 2012; van Wass, 2012). In the case of developing countries, this negative, or at least not positive, impact on their access to economic rights is even permissible under the ICESC, which grants States a wide margin of appreciation as to which extent they fulfil these rights towards non-nationals (ICESC, 1966, art. 2(3) (being stateless people non-nationals of every State or "nationals" of States that cannot fulfil those rights (ineffective nationality)). Furthermore, rights such as the right to get married, work, education, healthcare, or housing can also be affected by the "technical" or "practical" issue of lacking a nationality or documentation recognising the status of stateless (Foster y Lambert, 2016; UNHCR, 2012; van Wass, 2012). Likewise, in the European context, States restrict the application of the protection of minority's rights to their nationals (M. Balázs, "personal communication", May 11th, 2024).

[11] As a clear example of this denationalization of HR, van Wass (2012) mentions the HR Committee *General Comment No. 15: The Position of Aliens Under the Covenant*, from the 11th of April 1986, in which it reaffirms that the ICCPR applies to every individual regardless of her or his nationality, or absence of it.

Therefore, even if HRs have gone through a "denationalization" process in the last decades, the mere existence of a right to have a nationality, and the continuous violations of this right, highlight the importance of the condition of being national of some State in the enjoyment of HRs (van Wass, 2012). Indeed, Hanna Arendt's (1951) claim about the right to nationality as the "right to have rights" has not gone out of fashion and still has today some meaning and consistency.

Nevertheless, the adversity faced by stateless people has not gone unnoticed, and the IC agreed to elaborate two international conventions tackling the issue: the 1954 CSSP and the 1961 Convention on the Reduction of Statelessness (CRS). The 1954 CSSP defines the legal status of stateless people to provide them with a legal bond to States for the protection and promotion of their HRs without discrimination, aiming at improving their life standards and quality (DelGrande, 2021; Fisher, 2015; UNHRC, 2008; van Wass, 2012;). On the other hand, the 1961 CRS constitutes a comprehensive and logical compilation of binding measures on the prevention of statelessness (UNHCR, 2008; van Wass, 2012) as prevention is understood to be the most effective way of tackling statelessness (UNHCR 2008, 2012).[12] Despite that not all States are parties to these conventions[13], some flaws in their implementation[14], and some gaps in the protection they provide, their combined effect, the regional treaties on the matter,[15] and the broader development of the international HR framework have advanced the conditions and standards of living of the stateless people (Foster y Lambert, 2016), at least of those who are legally recognised as so. However, their plight is far from being resolved.

After this perusal of the general framework applicable to stateless people, the question arises as to whether this international protective and preventive framework would be applicable to the cases of climate statelessness studied in this thesis. Undoubtedly, the extinction of the SIS would render ineffective the nationality of the current citizens of these SIS, pushing them to a *de facto* (in the worst of

[12] The international legal obligation to prevent statelessness will be further examined in the next chapter.

[13] By 03-05-2024, according to the UN, the number of States parties to the CSSP amounts to 98 (United Nations, n.d.-b); the number of States parties to the CRS amounts to 80 (United Nations, n.d.-a).

[14] As mentioned before, the lack of identification and documentation of stateless people makes it very difficult not only to know their total number in the world, but also hinders their access to the rights and protections that the international system grants them.

[15] At the regional level, in Europe there are two conventions dealing with statelessness issues: the European Convention on Nationality and the Council of Europe Convention on the Avoidance of Statelessness in relation to State Succession. The ACHR and the African Charter on the Rights and Welfare of the Child also address issues related to the prevention statelessness (UNHCR - The UN Refugee Agency, 2007).

the cases) or *de jure* (in the least bad one) statelessness.[16] In the case of an eventual recognition of the extinction of the SIS and the loss of their statehood and sovereignty, this recognition would imply that their territories have ceased to be inhabitable, forcing their population, including probably their (ineffective from this moment on) government, to migrate to survive. This massive migration, i. e. this migratory process involving the entire population, constitutes a paramount threat to the survival of the particular and native culture of the population of the SIS and the threads of cohesion and solidarity of their nations. Taking Tuvalu again as an example, a massive migration or relocation would challenge the strong feeling of community that characterizes its population as well as its egalitarian worldview in which not only their communal feeling but also the connection between this community and the nature of their islands plays a pivotal role (Lazrus, 2015).

Moreover, if this massive migration takes place in the context of the extinction of the SIS, which would render their population climate stateless, they would face the same problems as stateless people in general: they will depend on the migration laws of the host States and the status and rights they will grant them (Lazrus, 2015; Park, 2011; UNHCR, 2009), not being able to benefit from, as the rest of stateless people non-refugees, the protection given by the Refugee Convention (even when their migration would not have been, to a great extent, voluntary) as CC is not considered by this convention a ground on which to grant asylum (Refugee Convention, 1952, para. 1(2)). This limitation to the applicability of the Refugee Convention to climate stateless people brings back the question of whether even the protection granted by the stateless international legal framework would apply to the specific case at hand.

Indeed, climate-stateless people would not be considered nationals of any State under the operation of its law, simply because such a State would have ceased to exist. Once again, however, to access that protection, the extinction of the SIS would need to be officially and legally declared first. Similarly, it is not certain that the 1961 CRS would apply to climate-stateless people since this convention deals with the prevention of statelessness resulting from loss, renunciation, or deprivation of nationality; from the failure of acquiring a nationality at birth; and from specific circumstances of state succession. The applicability of the 1961 convention, thus, would depend on whether climate statelessness will be accepted as resulting from any of those grounds, which is still a mystery for the current state of

[16] Park (2011) also points out that, if the extinction of the SIS is not declared unanimously and simultaneously by the IC and all its members, some States may cease to recognise their existence earlier than others, leading to an uneven international legal status for the population of the SIS: they would be considered *de jure* stateless by some host States, but they would face *de facto* statelessness in those host States that would not have ceased to recognize the statehood of the SIS.

development of IL. Nevertheless, having arrived the moment of extinction of the SIS, it is undisputable that the passport of their population, considered as the physical representation of the nationality of a person, would be as legally and formally useful as the paper bills of the Monopoly board game. These passports would become a relic of what was once a nationality, a right to have rights, no longer effective or, even, existent. The population of the SIS, among them, Tuvaluans, would be stateless.

However, the suitability of the framework of protection of stateless people to the case at hand is not free of doubts, especially considering the uncertainty related to when and how the formal extinction of the SIS would be declared. Not to mention that this framework is far from optimal in itself to truly lead a human life. The population of this SIS, once fully considered nationals of their "own State", would be doomed to see their right to nationality breached because of causes that they alone can hardly fight, but that maybe could be prevented with some international implication on the matter. According to 1961 CRS and its further development, shouldn't statelessness be prevented in general? Likewise, according to the HRL, shouldn't HRs' violations be prevented? As with many other challenges arising from the impact of CC, the SIS' case is a completely unprecedented situation, a case with which IL and IHL had never had to deal before. A situation that, undoubtedly will have a great impact on the enjoyment of the HRs of the population of the SIS.

CHAPTER II: THE INTERNATIONAL OBLIGATION TO PREVENT HUMAN RIGHTS VIOLATIONS

If a birthday to the current international legal system of HRs must be established, it would be fair to say it was born on June 26th, 1945. That day, the UN Charter was signed by 51 States, and, from that moment on, the whole system was devised, drafted, codified, and implemented.[17] It is true that the UN Charter does not codify a list of HRs, however, it is in it where the promotion and respect for HRs and fundamental freedoms for all, without distinction as to race, sex, language, or religion (UN Charter, 1945) was enshrined as one of the main purposes of an IC which found itself, from that moment on, institutionalized by the UN.

[17] The roots of this system can be traced back to ancient times, signs of its spirit, values, principles and structure have been present in human History for a very long time, nevertheless, 1945 is normally considered as the starting point of the current international system of protection and promotion of HRs.

Undoubtedly, the creation of the UN was, on the one hand, a reaction to the horrible episode of history that humanity had just witnessed, the Holocaust and the Second World War (Hamburg, 2010), on the other hand, a call for the termination of the legal abusive system of international relations that Colonialism represented. The UN Charter and the development of the international legal system that came with it, including the codification of the HRL, can be considered logical consequences of an attempt to find an international order in which States and human beings, as their citizens, could be able to lead their lives safely and peacefully.

In a way, it could be concluded that the whole international system, as it is known today, was envisioned as having the idea of "prevention" as a key goal. In 1945 the IC decided to set in motion a system to prevent the recurrence of recent events, thus, if the international system had DNA, the concept and principle of prevention could be easily found as a core element. However, this concept of prevention is far from being a mere inspiring principle. Because of its predominant position in the minds of those who design the international system as it is known today, the principle of prevention is deeply enrooted in the current international legal system of respect and promotion of HRs, so much so, that the prevention of HRs violations is to be considered an international obligation inherent to it (HRC, 2018). Nevertheless, prevention has never really been in the spotlight of the HRs field, [18] indeed, prevention is a concept that has been largely overlooked or underemphasized in the field and the international branch of law that regulates it.[19]

Implicit calls for the prevention of HRs violations can be easily found in HRs treaties and in the HRs literature, so it would not be fair then to state that there is a lack of understanding of its relevance. Nonetheless, the fact of it being a lot of times implicit has caused that, when it comes to the development of implementation mechanisms and the practical application of HRL, the attention has often been placed on reacting to violations instead of on preventing them (Ramcharan, 2010). In the foreword of the B.G. Ramcharan book on *Preventive Human Rights Strategies*, Thomas G. Weiss and Rorden Wilkinson (2010) describe the evolution of the HRs' field, and HRL by extension, as a "game of catch-up" where the IC has tried to "counter abuses" once they have already taken place rather than to prevent them.

[18] Skogly (2023) argues that one of the reasons behind the lack of engagement with the exploration of the content of the obligation to prevent HRs violations might be the fact that, for it to be completely fulfilled, many different actors, at various levels and from different backgrounds need to work together.

[19] It is also worth noting that the concept of "prevention" is not only inherent to HRL, but also to other branches of IL such as the prevention of environmental damage in Environmental International Law or the prevention of armed conflicts in Humanitarian Law.

Considering that the main goal of the system is for all men and women, without discrimination, to have their HRs respected and protected, does not make more sense to prevent violations, when it is possible, than to cure their effects? Moreover, in an unprecedented situation, such as the one that SIS will have to face, it does not seem a suitable answer to react when the violation of HRs has already happened (i.e. the loss of statehood of the States, leading to their populations' climate statelessness and violating their right to nationality, among others). Prevention measures need to be taken.

The present chapter draws attention to the presence of the principle of prevention of HRs violations in the current international system and HRL and, by doing so, highlights the existence of a legal obligation of members of the IC, in specific States, to prevent HRs violations. The first part of the chapter will deal with the explicit codification of the principle as a legal obligation in the HRs treaty system, then it will address the elucidation of its content and scope carried out by the HRs courts and treaty bodies. It will also address how the principle can be found all throughout the current structure of the international system and how its legal formulation can be considered a general legal obligation applicable to all the HRL system. To conclude, it will provide some remarks on the international legal framework on statelessness from the lenses of the international legal principle and obligation to "prevent HRs violations".

Legal sources on the principle to Prevent Human Rights violations.

The legal obligation to "prevent HR violations" in the international HR treaty system.

Quick research on WhatConvention.org on the obligation to "prevent HRs violations", allows to discover that the etymological root "*prevent*" appears in 183 multilateral conventions dealing with HRs issues. Out of this list, the Convention on the Rights of the Child (CRC) (1989) has the highest number of ratifications, although other broadly ratified conventions and declarations are also included, for example, the two 1966 ICCPR and the ICESC, the CEDAW (1979) and the CRPD (2008). With a significantly lower number of ratifications, although also important in the UN HRs treaty system, the ICPRMW also includes words whose root is "*prevent*." At a regional level, the treaties on the prevention of torture and inhuman or degrading treatment or punishment, as well as on the prevention of violence against women and trafficking of human beings may catch the attention of the observer quite easily. In this way, the total number of relevant articles containing words with this root, according to the search engine, amounts to 846. This figure includes not only the verb "*to prevent*," but also all the mentions of the noun "*prevention*" (appearing in 86 treaties and 304 articles) and the adjective "*preventive*" (present in 44 treaties and 76 articles).

Indeed, these figures can be taken as an overview of the legal duty of States to "prevent HRs violations", but they are not sufficient to fully prove the existence of such a legal obligation, as well as they do not limit its existence to themselves.[20] The quantitative calculation of the number of times this term appears in the treaties is important since the explicit presence of a term in those treaties might facilitate interpretative tasks and reduce possible conflicts that could arise from them. Nevertheless, the explicit presence of the term or derived terms neither implies that their substantive content and the obligations they entail are perfectly explained and stated in those treaties nor restricts this obligation only to those international legal agreements in which the term/terms appear. As discussed in this chapter, the current international HRs legal system not only consists of international conventions, covenants, and agreements, but it is a constellation of different legal elements and documents that form its content and shape its implications and implementation. Likewise, very different actors have the authority to impact the content of international legal obligations, their implications and implementation.[21] It is important to bear in mind the previous reflection to better comprehend why and how the principle and obligation of "prevention of HRs violations" apply to all HRs and is necessary for successful compliance with the HRs standards (Skogly, 2023), way beyond those treaties in which words such as "*preventive*", "*prevention*" or "*to prevent*" are included.

Having said that, when searching for the legal basis of the obligation to "prevent HR violations" and following article 38(1) of the Statute of the ICJ (1945) on the sources of international law, a good starting point would be to discuss those treaties and conventions in which the concept and duty of "prevention of HRs violations" are explicitly included in their text. In this way, the two first conventions that need to be addressed, as they are the two international treaties in which the obligation to prevent is omnipresent (Skogly, 2023; Ramcharan, 2010), are the Convention against Genocide (1948), and the CAT (1984). Indeed, the Convention against Genocide was the first HRs treaty ever drafted and approved whose spirit is entirely devoted to prevention (Bieńczyk-Missala, 2021), specifically to the prevention of the crime of genocide and other war crimes, as a direct consequence of the events that took place in

[20] WhatConvention.org only browses international treaties and declarations, leaving out soft law instruments and HRs jurisprudence, which hinders the possibility of having a holistic overview of how many times this concept is mentioned in the international HRs legal system.

[21] This thesis understands IL as an assemblage of norms, acts, (soft and hard) legal propositions and obligations which have been created not only by States, but by international organisations or, even, by the IC itself, thus, overcoming Weil's (1983) positivism and his fears regarding relative normativity. Moreover, as explained later, there are other international actors such as the treaty bodies who have the authority to influence, mainly by their interpretative tasks, the evolution and development of HRL. Therefore, HRL is embedded in a relative normativity which, far from impairing its effectiveness, enriches and qualifies it.

Europe the years before its signing in 1948. Article 1 of the Convention against Genocide (1948) states, literally, that: 'The Contracting Parties confirm that genocide (...) is a crime under international law which they undertake *to prevent* and to punish' (emphasis added). This article could be considered the first time in the history of the current international HRL system in which prevention and punishment are seen and understood as two sides of the same coin, already back in 1948.

Although it is true that there has not been a huge development of the Convention against Genocide at the international level in terms of direct prevention[22] (Ramcharan, 2010), it is to say, measures that are directly aimed at preventing HRs violations before they have already taken place and not at deterring their recurrence after they have already been committed (HRC, 2015), it is also true that the jurisprudence of the International Court of Justice (ICJ) in cases concerning the Convention against Genocide has made it possible, on the one hand, to affirm the *jus cogens* nature of the cross-cutting principles of the convention (Ramcharan, 2010), and on the other hand, to develop and advance the substantive content of the obligation to "prevent HR violations" in general.

Likewise, article 2 of the CAT provides that each state party needs to effectively take all kinds of measures (legislative, judicial, administrative, etc.) to prevent torture anywhere under their jurisdiction and that this obligation is a non-derogable one (CAT, 1984). In addition, its Optional Protocol, adopted in 2002, is completely devoted to the direct prevention of torture and cruel, inhuman or degrading treatment or punishment by establishing a system of regular visits to places of detention and deprivation of liberty (Optional Protocol to the CAT, 2002, article 1). Moreover, the Committee Against Torture, the treaty body established by the CAT, has helped to develop what the obligation to prevent torture entails and how States should comply with it. By doing so, it has also contributed to developing the understanding and reach of the general obligation to "prevent HRs violations". In fact, article 2 of the CAT itself already provides a great hint about what prevention of HRs violations may involve, i.e., legislative, judicial, administrative, and all other kinds of necessary measures.

Apart from these two conventions, it is also interesting to mention the so-called Palermo Protocol from 2000. Formally named *Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children*, this protocol is added to the United Nations Convention against Transnational Organized Crime and one of its main purposes is to '*prevent* and combat trafficking in persons, paying

[22] For instance, the Convention against Genocide does not establish an international monitoring mechanism aimed at mitigating or preventing the crime of genocide.

particular attention to women and children' (Palermo protocol 2000, article 2 (a)) (emphasis added). In this way, this protocol is also governed by the principle of prevention of HRs violations, just like the two conventions mentioned above (Skogly, 2023). Likewise, to be included in this category of international treaties where prevention of HRs violations is the overarching objective and obligation, brief mention deserves the 1970 Convention on the Prevention and Punishment of the Crime of Apartheid, which enshrines the obligation not only to abolish apartheid and racial segregation but also to prevent the emergence of any support for them (Bieńczyk-Missala, 2021).

Furthermore, the principle and obligation to "prevent HRs violations" can be also found in other treaties and conventions, although not as the general goal of the whole agreement. Skogly (2023) discusses two other types of treaties in which the legal obligation to "prevent HRs violations" can be found: those where it appears as an obligation applicable to a specific part of the treaty and those in which the obligation to prevent (HRs violations) is considered an obligation to be fulfilled through concrete implementation and compliance measures. The CERD (1965) is a clear example of the former type of treaty. Article 3 of this convention establishes that state parties commit themselves to '*prevent*, prohibit and eradicate' (emphasis added) racist practices and acts of apartheid anywhere under their jurisdiction (CERD, 1965, article 3). The presence of the principle and obligation in question in the CERD, even when explicitly mentioned, differs from that of the Convention against Genocide, the CAT, and the Palermo Protocol in the fact that the prevention of racially discriminatory practices is one of the avenues to achieve the overall objective of the convention, i.e. the eradication of racial discrimination; the obligation to prevent racially discriminatory practices (understood as HRs violations) is a necessary corollary of the main aim, without which it would not be possible for the treaty to display fully all its effects, but it is only one of the obligations among a list of them.

On the other hand, the third type of treaty is that in which the obligation to "prevent HRs violations" is considered from the point of view of the implementation of the agreement, and not as a general obligation applicable to all or part of it. Thus, the obligation to "prevent HRs violations" becomes a mandatory tool in the execution of the objectives and purposes of these conventions. Skogly (2023) points out the two optional protocols to the CRC on the Sale of Children, Child Prostitution, and Child Pornography (2001) and on the Involvement of Children in Armed Conflict (2000) as instances of this sort of obligation to "prevent HRs violations" in international legal agreements. The Convention for the Suppression of the Traffic in Persons and of the Exploitation on the Prostitution of Others (1949) is another example of this kind.

Conducting an exhaustive analysis of all the treaties in which the root "*prevent*" is included in order to classify them into one of these three categories would be interesting, however, not necessarily constructive for the purpose of this thesis. The sample provided aims, and manages, to show that, indeed, the principle of prevention of HRs violations is more than an abstract guiding principle of the protection and promotion of HRs, instead, it is a tangible obligation that is explicitly included and can be easily found in the UN HRs' treaty system.

Likewise, this obligation can also be traced at the regional level. The European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (1987); the Inter-American Convention to Prevent and Punish Torture (1985); the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (1994); the Convention on Preventing and Combating Violence against Women and Domestic Violence (2011), the Protocol to the African Charter on Human and People's Rights on Rights of Women in Africa (2003), etc. All these treaties include the concept, idea, and obligation to "prevent HRs violations" as a legal obligation, stated explicitly either as a dominant purpose of the convention or as a secondary but crucial obligation necessary for it to be completely and correctly implemented.

Thus, based on the information presented in this sub-section, it can be concluded that, indeed, the legal obligation to "prevent HRs violation" is enshrined in the general HRs' treaty system and it is present in a wide range of treaties and conventions. Nevertheless, as mentioned earlier, HRL is not only made up of treaties and conventions, but there are other sources of international law in which this obligation is also present, and which enjoy immense importance in the assembling of documents, acts and legal texts that constitute the legal basis of this obligation. In this regard, it is worth going briefly through some of the jurisprudence of judicial and quasi-judicial HRs treaty bodies and courts so as not only to obtain a more complete account of the legal basis of the obligation but also to understand better how its content and implications have evolved and been clarified by all these different actors.

The international obligation to "prevent HRs violations" in the jurisprudence of the HRs courts and treaty bodies.

Regarding the legal basis of the obligation to "prevent HRs violations" it is also important to take into account sources of international law other than treaties and conventions, such as the 'judicial decisions' (Statute of the ICJ, 1945, article 38 (d)) and other 'secondary treaty law' (Chinkin, 2022, p. 89) sources. In this way, in the field and subject matter at hand, these additional sources of international law are constituted, on the one hand, by the jurisprudence of international courts, for instance, the ICJ,

the ECtHR, or the I-ACHR (judicial decisions) and, on the other hand, by the general comments and recommendations of the treaty bodies (authoritative interpretations of the content of the treaties which gave rise to their existence).

Moreover, the jurisprudence of the international courts and the publications of the treaty bodies provide States and relevant actors with a further explanation and guidance on the substantive content and implications of the general and specific international HRs obligations to which they commit themselves by signing or adhering to the various international conventions. By doing so, international courts and treaty bodies play a crucial general role in the prevention of HRs violations, since their clarifications of the content of the HRs obligations allow States to better understand what they can and cannot do under HRL, contributing to both levels of the prevention of HRs violations: the protection of the rights or direct prevention (the avoidance of violations beforehand, as State know in advance what they must not do) and the non-repetition (non-recurrence) of those acts or omissions that constitute a violation (Rieter, 2021; HRC, 2015), normally considered like so by a judgment or quasi-judgment of one of these bodies after the act or omission has already taken place.

In addition, when it comes to the international understanding of the broad legal obligation to "prevent HRs violations" and its implications (and not to the specific preventive wing of each of the HRs' obligations), the contribution of these actors has been of utmost importance. Not only have they expanded the reach of the obligation beyond the agreements where it is explicitly contained, but they have also provided it with concrete substantive content, highlighting its nature as a legal obligation that enjoys an international specific significance from which to derive specific responsibilities and duties.

In this regard, take as a starting point the jurisprudence of the ICJ. In the *Bosnia and Herzegovina v. Serbia and Montenegro Case* (2007), the ICJ dealt at length with the obligation to prevent genocide codified by the Convention against Genocide and, by doing so, it also advanced the substantive content of the general obligation to "prevent HRs violations" (Skogly, 2023). In this case, the ICJ issued an interpretation of the obligation to prevent genocide as being one 'of conduct and not of result' (*Bosnia and Herzegovina v. Serbia and Montenegro*, 2007, para. 431) and established that the obligation to prevent this atrocity crime does not begin when a genocide begins, but at an earlier stage, at the moment in which the State 'learns of, or should normally have learned of, the existence of a serious risk' (*Bosnia and Herzegovina v. Serbia and Montenegro*, 2007, para. 430) of the commission of genocide. These two points have had a major impact on the understanding of the obligation and principle of "prevention of HRs violations" beyond the particular prevention of genocide.

When defining the fundamental elements of the international legal obligation to "prevent HRs violations" the I-ACHR's case *Velázquez-Rodriguez v. Honduras* (1988) is also to be considered a leading case. In this case, the Inter-American court upheld the due diligence obligations of the judicial and governmental authorities of Honduras to prevent and investigate HRs violations and stated that, indeed, States can incur international responsibility if they do not take proper actions to 'prevent a violation or to respond to it' (*Velázquez-Rodriguez v. Honduras*, 1988, para. 172). This HRs court has further contributed to the clarification of the substantive element of the obligation to "prevent HRs violations" in its Advisory Opinion regarding State Obligations in relation to the Environment in the Context of the Protection and Guarantee of the Right to Life and the Personal Integrity (2017). As Skogly (2023) sharply stresses, in this Advisory Opinion the I-ACHR aligns with the ICJ interpretations by emphasizing that it is not an obligation whose breach can be deduced directly from the violation of a right since it is an obligation of 'means or behaviour' (*The Environment and Human Rights*, 2017, para. 118), not of result. Nevertheless, being an obligation of means, behaviour or conduct does not mean whatsoever that the obligation is completely void of specific content. Using HRs familiar language, in paragraph 144 the court held that, even though it is certainly not possible to make an exhaustive list of all the preventive measures a State could have implemented to avoid a violation, 'certain minimum measures can be defined that States must take within their general obligation to take appropriate [procedural] measures to prevent human rights violations as a result of damage to the environment' (*The Environment and Human Rights*, 2017, para. 144).[23]

From the jurisprudence and advisory opinion of the I-ACHR, it can be inferred that the scope and implications of the obligation to "prevent HRs violations" are not solely related to the HRs violations codified in the conventions where the root "prevent" is explicitly mentioned. Article 4 of the American Convention on HRs (ACHR) (1969) deals with the Right to life (which is not the main focus of protection of any of the conventions fully governed by the obligation to "prevent HRs violations", nor of any of the

[23] When considering the Scope of Articles 4 (1) and 5 (10) in relation to Articles 1 (1) and 2 of the American Convention on HR, the I-ACHR indicates that the main reason why, in that specific context, this exhaustive list of preventive measures cannot be draft is because these measures might change depending on the violation meant to be prevented and the State party which is trying to prevent it (paragraph 144).

It is also worth noting, though, that when devising preventive measures to be applied, a certain level of uncertainty and unpredictability needs to be considered. This is one of the implications of the obligation to "prevent HRs violations" in its broad terms. Since it is one of conduct and not necessarily of result, and there will always be some degree of uncertainty in the expected outcome of that conduct, it is unrealistic to demand States to foresee every single possible future scenario in which HRs could be violated and how these possible violations could be prevented. Nevertheless, when there is a real risk of a HRs violation happening, States need to implement all necessary measures to prevent it.

above-mentioned treaties which include this etymological root). Article 5 of the ACHR (1969), although dealing with torture and other cruel, inhuman, or degrading punishment or treatment, codifies a broader right to 'human treatment', but does not mention any specific obligation to "prevent HRs violations". Thus, according to this court, the scope of the obligation to "prevent HRs violations" does exceed its explicit codification as well as applies even to HRs which are not the core element of treaties devoted to prevention. Moreover, in its advisory opinion about *The Environment and Human Rights* (2017), the I-ACHR interlinks the obligation to "prevent HRs violations" to the environmental impact of certain actions, a link that is also present in the prevention of climate statelessness.

Moving on to a different regional system, the ECtHR has also contributed to fostering the understanding of the obligation to "prevent HRs violations" providing States with more knowledge on how to appropriately implement it. In its ruling on the case *Öneryildiz v. Turkey* (2004), the ECtHR established that Article 2 of the ECHR (right to life) 'lays down a positive obligation on States to take appropriate steps to safeguard the lives of those within their jurisdiction' (*Öneryildiz v. Turkey*, 2004, para. 71) and that this positive obligation entails implementing legislative as well as administrative measures to disincentive threats to the right to life, regardless of whether these threats come or not from a public activity or actor. Therefore, the ECtHR held that Turkey had violated Article 2 of the ECHR because its 'national authorities did not do *all that could have been expected* of them *to prevent* the death of the applicant's close relative' (*Öneryildiz v. Turkey*, 2004, para. 71) (emphasis added). By highlighting that the authorities did not do "*all that could have been expected*", the European court agrees with the ICJ and the I-ACHR that States incur legal responsibility for breaching the obligation to "prevent HRs violations" not when such violations occur, but when they fail to take all necessary measures to try to prevent them from occurring in the first place. In other words, it is an obligation of conduct, not of result.

When it comes to ECtHR's jurisprudence, it is also worth mentioning its consecration and recurrent confirmation of one of the most salient formulations of the legal obligation to "prevent HRs violations": the principle of non-refoulement. Widely discussed and known by HRs advocates, jurists, lawyers, and scholars, the principle of non-refoulement, upheld by the ECtHR in such paradigmatic cases as *Soering v. UK* (1989), is a legal HRs principle that expresses like no other the obligation of States to "prevent HRs violations" when there is a risk that they may occur, even when the agents that would potentially commit such violations are not part of the State that intends to carry out the extradition nor would the breaches or violations take place in its territory or jurisdiction.

The ECtHR's interpretation of Article 3 of the ECHR (prohibition of torture) in preventive terms aligns also with that of the Human Rights Committee of Article 7 of the ICCPR (HR Committee, 1992) and the Committee Against Torture's interpretation of Article 3 of the CAT. Thus, these articles and their interpretations conducted by the above-mentioned actors, although of different nature, constitute a solid legal basis for the principle of non-refoulment and, therefore, subsidiarily, of the general legal obligation that lies behind the principle and legal obligation to "prevent of HRs violations".

Before considering the treaty bodies' contribution to the elucidation of the international legal obligation to "prevent HRs violations", it is worth considering the legal value of the role and conclusions of these treaty bodies (i.e. general comments and recommendations as well as the concluding observations on States' reports) as sources of international law. Chinkin (2022) argues that the treaty bodies' concluding observations and the general comments can be considered as 'secondary treaty law' as States consent implicitly to the authority of the committees by their sign and adherence to the treaties that create them. Likewise, stronger legal force can be deduced from the interpretations and considerations of those committees that have the legal authority to conduct quasi-judicial tasks through individual complaints or communications procedures.[24] In this regard, the HR Committee, in its General Comment 33 (2009), refers to its views as "impartial" and "independent" and having 'judicial spirit'. Its position has been supported by the ICJ which considers the views of the HR Committee as meriting "great weight" (*Ahmadou Sadio Diallo*, 2010, par. 66) in its judgments. In this way, the views of the treaty bodies are to be considered authoritative interpretations of the HRs conventions and treaties having legal value as secondary sources of international law (Chinkin, 2022).

The work of the Committee against Torture, following the preventive nature of the CAT, is deeply embedded in the principle of "prevention of HRs violations" and its formulation as a legal obligation, being its interpretation of the principle of non-refoulment mentioned earlier only one of its examples. In addition, as already emphasized, other committees have also dealt with the obligation of States to prevent the violations of the HRs enshrined in the treaties that establish them.

For instance, the CEDAW Committee dealt for the first time with the concept of due diligence (another of the formulations of the general obligation to "prevent HRs violations" laying on States) in

[24] Only eight treaty bodies have the mandate to consider this kind of communications or complaints: the Human Rights Committee; the Committee on Social, Cultural and Economic Rights; the Committee Against Torture, The Committee on the Rights of the Child, the Committee on the Rights of Persons with Disabilities, the Committee on the Elimination of Racial Discrimination; the Committee on Enforced Disappearance; Committee on the Elimination of Discrimination against Women.

1992 when addressing the relationship between discrimination and violence against women and calling for the implementation of positive measures for non-recurrence (Rieter, 2021). Since then, the States' due diligence obligations and the prevention of violence against women have become an inevitable tandem, restated by the CEDAW Committee on multiple occasions, such as its General Recommendation No. 28 where it reaffirmed States parties' '*obligation to prevent*, investigate, prosecute and punish…' (CEDAW committee, 2010, para. 19) (emphasis added) to comply with article 2 of the CEDAW. Likewise, the joint General Recommendation/General Comment of the CEDAW committee and the CRC committee addresses the due diligence obligations of States in the prevention of violence and HRs violations towards women and children (CEDAW/CRC committees, 2014).

The CRC Committee's General Comment No. 13 (2011) also touches upon the obligation to "prevent HRs violations" when it refers directly and explicitly to the '*obligation to prevent* violence and *violations of human rights*' (CRC Committee, 2011, para. 5) (emphasis added) as one of the obligations and responsibilities State parties need to comply with at national, provincial, and municipal levels.

Apart from in its General Comment No. 20, the HR Committee has also considered the obligation to "prevent HRs violations" in General Comment No. 36 dealing with the right to life (article 6 of the ICCPR) and in its General Comment No. 31 (2004) it draws attention to the potential breach of the ICCPR by States who do not comply with their due diligence obligation to prevent private persons or entities from violating HRs.

Likewise, the development of the HRL conducted by the treaty bodies and other UN organs has contributed to making the obligation to "prevent HRs violations" a necessary binomial of the elimination of discrimination of particular groups beyond women and children, such as people with disability and minorities, and of discrimination on particular grounds (either religion or belief, race or sexual orientation) (HRC, 2015, para. 5).

Therefore, it can be concluded that, indeed, the principle of prevention of HRs violations is not only present in the international legal system as a wide-reaching principle, but it is a legal obligation that has concrete and specific legal sources, even beyond the treaties and conventions that explicitly codify it (Skogly, 2023). From the jurisprudence of HRs courts, as well as from authoritative interpretations of the treaty bodies, it can be inferred that this obligation is not limited to those treaties and conventions that enshrine this legal obligation explicitly, but it is an overarching legal obligation inherent to every single HR without which the respect, protection, and fulfilment of these rights would not be impossible to achieve.

Content of the responsibility to prevent Human Rights violations.

Before analysing the legal principle of prevention of HRs violations in the international system, it is worthwhile to compile the constitutive elements of this obligation to understand better what it entails for the States and, subsidiarily, for the IC.

Firstly, it needs to be clarified that the obligation to "prevent HRs violations" is broader than the one limited to the obligation to protect as it is also implied in the States' obligations to respect and to fulfil HRs. States comply with the obligation to "prevent HRs violations" when they regulate the actions of third parties to prevent them from breaching the HRs of individuals, but also when they refrain from making decisions, enacting laws, and implementing policies that would otherwise amount to a HRs violation (obligation to respect) and when they actively facilitate and provide for the appropriate conditions for the enjoyment of HRs (obligation to fulfil) (Skogly, 2023). Thus, the obligation to "prevent HRs violations" encompasses the three types of HRs obligations that States need to observe in the context of HRL. From the above and the jurisprudence of international courts and treaty bodies, it also follows that the obligation to "prevent HRs violations" is both a positive (CEDAW, 1992, para. 24(e); *Öneryildiz v. Turkey*, 2004) and a negative obligation. To prevent the breach of HRs, States must sometimes cease or refrain from repeating actions (non-recurrence) that constitute HRs violations, but also take all necessary measures to effectively avoid the occurrence of these violations (HRC, 2015), either again or for the first time.

When it comes to compliance with the positive obligation to "prevent HRs violations", States need to take all necessary, concrete, and effective measures reasonably available to them. These may include, but are not limited to, legislative, administrative, and judicial measures (CAT, 1984; *Öneryildiz v. Turkey*, 2004; HRC, 2015).

Additionally, it is crucial to stress once more the nature of this obligation as an obligation of conduct and not of result (*The Environment and Human Rights*, 2017; *Bosnia and Herzegovina v. Serbia and Montenegro*, 2007). In this regard, from the jurisprudence of the ICJ and the I-ACHR, it follows that this obligation of conduct is not breached if the violation occurs but if all reasonable measures of prevention are not taken. Moreover, a failure of States to comply with the obligation to "prevent HRs violations" might happen even if States can prove that should they have implemented all necessary measures it would not have been enough to prevent the violation, since the combined discharge of the obligation to prevent of various States might have resulted in the avoidance of the violation should they all have taken all the necessary measures (*Bosnia and Herzegovina v. Serbia and Montenegro*, 2007,

para. 430). Likewise, from the jurisprudence of the international courts, it can be inferred that the responsibility of States to "prevent HRs violations" starts when they know, or should have known, that there is a serious risk of a HRs violation and not when it has already taken place or when it is beginning to take place (*Bosnia and Herzegovina v. Serbia and Montenegro*, 2007).

Finally, the HRC (2015) identifies two types of specific practical actions in the obligation to "prevent HRs violations": direct preventive or mitigation actions and indirect or non-recurrence actions. The former try to 'eliminate risk factors and establish a legal, administrative and policy framework which seeks to prevent violations' (HRC, 2015, p. 5); the latter are implemented after a violation has already happened so as for it not to happen again, these types of actions usually involve identifying and dealing with the root causes of the violation (HRC, 2015). Before moving toward considering the overarching nature of the principle of prevention of HRs violations in the international system and the IC at large, it is worthwhile to consider the international obligation to prevent statelessness to provide the reader with a more detailed picture of the legal obligations which compliance this thesis is trying to uphold.

The international obligation to prevent statelessness.

As statelessness is the potential legal or de facto status that the population of the SIS will acquire when their extinction arrives, and the prevention of the violation of Article 15 of the UDHR and the subsequent violations of HRs are the main focus of the present thesis, it is necessary to analyse the specific international obligation to prevent statelessness to see if it can apply to the prevention of climate statelessness. As mentioned in the first chapter, the international legal obligation to prevent statelessness finds its main source in the 1961 CRS. Once again, "prevention", "prevent" or "preventive" are words that do not appear in its text, but the prevention of statelessness is undoubtedly its overarching objective.

Indeed, in the not even three pages introductory note made by the UNHCR to this convention in 2015, the UN organ mentions up to seven times the etymological root "*prevent*", as a way to highlight the prevention of cases of statelessness as the main goal of the treaty which compiles binding rules for the conferral and non-withdrawal of nationality (UNHCR, 2015). Likewise, the UNHCR never misses the opportunity to remind states that "prevention" is one of the most effective ways, if not the most, to deal with statelessness (UNHCR, 2008; 2010).

Although not arising directly from the CRS, but from the subsequent expansion of its mandate by the UNGA in 1974 and 1995, the UNHCR is bestowed with the task of providing 'relevant technical and advisory services pertaining to the preparation and implementation of nationality legislation to interested States' (UNGA, 1996, para. 15). This mandate was further clarified by its Executive Committee's

conclusions in 2006 about the *Identification, Prevention and Reduction of Statelessness and Protection of Stateless Persons.* Thus, the UNHCR, which has some authority over the interpretation and implementation of the convention after the UNGA endorsed[25] the Executive Committee's conclusions, has always recognised prevention as a key element and a primary objective of the CRS. Moreover, it has contributed to the understanding and content of this international legal obligation through reports, guidelines, ministerial conferences, and high-level expert meetings. Its Global Action Plan to End Statelessness by 2024 aimed at eradicating statelessness by resolving and preventing cases of statelessness has also helped to enlarge the reach and understanding of the prevention of statelessness as an international legal obligation.

However, as already mentioned, the CRS does not include any measure regarding the prevention of *climate* statelessness, as climate was not considered a source of statelessness when it was drafted. This could hinder the application of this convention (including the legal obligation to prevent statelessness) to the case of the SIS. Nevertheless, the obligation to prevent statelessness is broader than that enshrined in the CRS.

Regional treaties such as the ACHR and the African Charter on the Rights of the Child also include preventive measures regarding statelessness (UNHCR - The UN Refugee Agency, 2007). Moreover, in footnote 94 of the case *the Yean and Bosico children* (2005), the I-ACHR grounds this legal obligation not only in the CRS but also in article 29 of the ICPRMW, article 7.1 of the CRC and article 24.3 of the ICCPR. Although all these articles deal with the conferral of nationality to children who otherwise would be stateless, an aspect of the obligation to prevent stateless for which there is a strong presumption of having acquired the level of customary international law by itself (Immanuel, 2022), they also evidence the legal obligation to prevent statelessness. Immanuel (2022) also indicates the right not to be arbitrarily deprived of nationality and to voluntarily renounce nationality as CIL aspects of the right to nationality, fostering the perception of this right as CIL.

Other international HRs courts have also upheld the right to nationality as CIL (*Anudo Ochieng v. United Republic of Tanzania*, 2018, para 76) or as directly interconnected with other rights, such as the right to private life even though the right to nationality may not be recognized in their regional treaty (*Genovese v. Malta,* 2011, para. 29-30). The right to nationality either being connected to other

[25] See: UN General Assembly (2007, Jan 25th). *Resolution adopted by the General Assembly on 19 December 2006 [on the report of the Third Committee (A/61/436)*]. 61st Sess. UN doc A/RES/61/137.

fundamental rights or part of CIL strengthens the argument for the prevention of statelessness as an international legal obligation, since not preventing statelessness in cases where it could be prevented, or not implementing all necessary means to prevent it (because prevention of HRs violations is an obligation of conduct and not of result), would lead to a violation not only of article 15 of the UDHR but of several other HRs linked with it as well as a violation of CIL.

The avoidance of statelessness as a fundamental principle of international law or as CIL has also been stressed by the HRC (HRC, 2013, para. 6) and the Council of Europe (COE, 1997, para. 33). Despite *avoidance* and *prevention* do not have to be necessarily the same, prevention is undoubtedly an effective way to avoid statelessness. The CIL level of the obligation to prevent statelessness is still underdeveloped, especially because of a lack of opinion juris due to the close link between this right and the sovereignty of States, but the presumption of it being CIL is gaining strength among scholars, international bodies, and s courts (Immanuel, 2022). Nevertheless, as shown in this sub-chapter, and although the CRS does not include nor engage with climate as a source of statelessness to be prevented, there is already strong evidence in the HRL system that sustains the interpretation, understanding, and perception of the prevention of statelessness as an international legal obligation, applicable even to States not parties to the convention. Moreover, the prevention of statelessness, regardless of its source, needs to be considered in the broader picture of the international legal obligation to "prevent HRs violations" that has been largely addressed in the present chapter. Statelessness is the disruption of the legal bond between individuals and a State, a disruption that equals, primarily, a violation of the right to nationality, but also a violation of many other connected HRs, as explained in the first chapter of this thesis.

Thus, according to HRL, statelessness must be prevented, not only because of the international legal obligation to prevent statelessness (independently of what causes it) but also because it is a HRs violation, which prevention stems directly from the current state of development of the HRL system.

The international legal principle of prevention of HRs violations beyond the HRs treaty system and HRs jurisprudence.

As argued above, far from being a detached-from-reality interpretation of the HRs system, the international obligation to "prevent HRs violations" is very present in the international legal framework governing the field, beyond the treaties and conventions that codify it in any way. This obligation, pointed out and elucidated on multiple occasions by international courts and HRs treaty bodies, constitutes the legal formulation of the principle of prevention of HRs violations that guides the entire system of HRs and, in a broader reach, the whole international system. It is easy, however, to overlook the existence of

this principle and obligation since, as a general rule, and as noted above, mention of them is not particularly prolific in the international legal system. However, a teleological interpretative analysis of the international legal system might help to realise that these two elements are overarching and inherent to its aims and purposes.

From a teleological perspective, the text of the HRs treaties and the intentions of their parties were and are aimed at providing individuals with substantive rights that will protect them from various kinds of abuses. Prevention of these abuses is, thus, a logical consequence of the overall objective of the system.

Moreover, if we are to consider that treaties should serve the interests of all the individuals affected by them, and not only of their direct parties (i.e. States and, sometimes, international organizations) as argued by Dothan (2018), the principle of prevention of HRs violations becomes even more strongly a necessary corollary of the legal system of promotion and protection of HRs as stated in the UN Charter and articulated by the various HRs treaties. Little sense makes boasting that proper efforts are being allocated to the respect, protection, and fulfilment of HR if preventive measures are not considered. In this line, the Preamble of the Vienna Declaration and Program of Action (1993) sets the need to design and implement preventive mechanisms to achieve the full realization of all HRs. Further on in the text of this declaration, a cornerstone of the HRs system, other preventive obligations of States are also enshrined.

Likewise, when conducting a teleological interpretation, special attention is to be given to the subsequent practice that results from the application of international agreements. The consideration of this subsequent practice is contemplated as a means of better understanding the intention of the parties to the conventions (Jacobs, 1969) as well as of adapting their texts to new conditions that arise over time (Dothan, 2018) since the objective of the teleological interpretation is to respect and give effect to the general purpose of the treaties throughout the time these treaties are in force.

In this regard, the evolution of the application of HRs treaties almost effortlessly reveals a strong emphasis on the principle of prevention. Take for example the mandate and practice of the treaty bodies. Treaty bodies, directly created by the HRs conventions, apart from issuing general comments / general recommendations and considering individual complaints or communications (when they have been legally empowered to do so), monitor the implementation of these agreements by the different State parties. By doing so, they play a preventive role in the legal system of HRs (Bieńczyk-Missala, 2021), both directly and indirectly. They can identify and draw international attention to potentially harmful

States' actions and conduct that need to be changed or stopped before they materialise into violations and to violations already taking place and that need to be drawn to an end and not repeated.

Furthermore, the principle of prevention is also prominent in the "early warning" and "urgent actions" procedures that some treaty bodies can put into motion. The early warning procedure, specific to the CRPD and CERD committees, is aimed precisely at preventing tense HRs situations from escalating into conflicts with greater violations of HRs (United Nations, n.d.-c). On the other hand, these two committees and the Committee on Enforced Disappearances have the mandate to issue "urgent actions" to call the attention of the States parties to their respective conventions to critical situations to prevent or reduce the scale or number of serious breaches (in the cases of the CRPD and the CERD) or to immediately start the investigation into the whereabouts of the missing person to prevent further violations of their rights (in the case of the Committee on Enforced Disappearances).

Additionally, a prominent manifestation of the principle of "prevention of HRs violations" is the interim measures that some HRs judicial and quasi-judicial bodies are entitled to issue.[26] Although not exclusive from the HRL, but gaining great relevance in this international system lately, these interim measures, which may entail positive or negative obligations for States, are intended to 'terminate abuse rather than primarily to compensate the victim or the victim's family after' (Pasqualucci, 2005, p. 3) a possible violation is committed, thus they serve a direct preventive objective when an individual taking part into a judicial/quasi-judicial proceeding is at 'immediate danger of suffering irreparable injury' (Pasqualucci, 2005, p. 10).

Moreover, the legal development and consecration of principles such as "non-refoulment" and "due diligence" constitute sharp examples of the primordial and central role that prevention of HRs violations plays in the international legal system of HRs even though it might not have been stated explicitly and directly as such in the HRs treaties. Thus, the development and evolution of all these practices, mechanisms, and principles throughout the history and scope of the HRL system reveal that, indeed, the prevention of HRs violations is a principle and a legal obligation that directly serves one of the main goals of the entire international system: the promotion and protection of the HRs of everyone, without distinction as to race, sex, language, or religion, just as it was enshrined for the first time in Article 2 of the UN Charter and then confirmed by various other HRs treaties such as the ICCPR and the

[26] Although the term used to refer to these measures may differ from some regional systems to others, the bodies entitled to issue them are the ICJ, the ECtHR, the I-ACHR, the UN HRs Committee, the Committee against Torture of the UN, and the Inter-American Commission on HRs.

ICESCR. The ultimate legal basis of the principle of prevention of HRs violations and its consequent legal obligation is, therefore, to be found directly in the UN Charter. Consequently, it is unsurprising that manifestations of them can also be perceived in the organization of the IC beyond the specific HRs treaty system.[27] Different UN mechanisms, procedures and organs demonstrate the importance and centrality, not only of the protection and promotion of HRs but also of the principle of prevention of HRs violations.

In 2010, Ramcharan (2010) theorised about the potential preventive role that the newly born HRC and its Universal Periodic Review (UPR) could play, and he was not wrong. The UPR, just like the monitoring mechanisms of the treaty bodies, allows the HRC to discharge an important role in the direct and indirect prevention of HRs violations; additionally, this UN organ has also efficiently contributed to the consecration and clarification of the principle and obligation to "prevent HRs violations" through its reports and resolutions.

In 2015 the HRC approved a report on *The Role of Prevention in the Promotion and Protection of Human Rights* (2015) in which the High Commissioner for HRs presented a considerably lengthy explanation of the content and practical implications of the principle as well as the role of international and regional stakeholders in its implementation. The report was preceded by a broad process of consultations and seminars that mobilised the IC, and specifically the relevant actors in the HRs field, to reflect jointly and in detail on the value of prevention in the protection of HRs, helping to create a common international idea and understanding of the principle.

From that moment on, the HRC paid even closer attention to the role of prevention in achieving the ultimate objectives and realising the true meaning of the protection and promotion of HRs, to the point of identifying the prevention of HRs violations as an inherent element of these objectives and, consequently, also of its mandate (HCR, 2018) and calling to all its mechanisms and procedures to integrate prevention as part of their work, including their reporting activities (HRC, 2020, para. 3). Notably remarkable is the weight of prevention in the mandate of the Office of the High Commissioner for Human Rights (OHCHR), a leading UN institution in the promotion and respect of HRs. Entrusted by the UNGA with the task of assisting the IC in the full realisation of all HRs and the prevention of HRs violations, (UNGA, 1994, para. 4(f)), the OHCHR draws international attention to different HRs issues

[27] It is worth noting that the UN is taken as the main source of structuring the IC, thus, the presence of the principle and obligation subject of study of this thesis in the UN system is considered as an example of the presence of these principle and obligation in the IC at large.

and is endowed with the authority to conduct investigations and publish reports on the matter (United Nations, n.d.).

In the same line, it is worth highlighting the attention paid by the different Secretaries-General of the UN in the establishment and acceptance of the principle of prevention of HRs violations, standing out the contributions of the UN Secretary-General Ban Ki-moon and his coining and development of the R2P concept and doctrine, which gives to prevention a pivotal role in the international management of gross HRs violations. Likewise, although very limited and sometimes highly politicised, the Security Council and the UNGA have also sporadically raised their voices to call for the promotion and respect of HRs (tasks which, as already discussed in the present chapter, also entail the prevention of their violations).[28]

Hence, the presence of the principle of HRs prevention in the international system goes far beyond its legal formulation in the international HRs treaty system. The development and implementation of the preventive role of the above-mentioned bodies and institutions are the results of the normal practice of the UN, a practice that arises directly from the implementation of the UN Charter coherently with its ultimate objectives and goals, i.e. 'the promotion and encouragement of respect for HRs and fundamental freedoms for all' (UN Charter, 1945, article 2(3)), just like it is openly and explicitly enshrined in its article 2.

Thus, a teleological interpretation, not only of the HRs treaties but also of the UN Charter itself, leads to the conclusion that the principle of prevention of HRs violations not only exists but is deeply rooted in the international HRs legal system and the normal functioning of the UN system. It is a principle that has a specific and precise legal formulation, wide-reaching and cross-cutting in the HRL system, which the States must comply with.

However, what happens when a State, although wanting to, is unable to comply with this obligation? Would this mean that the legal obligation is left empty of content and effectiveness? If so, considering the nature of the obligations related to HRs, this would imply leaving individuals deprived of their rights, a flagrant violation of the ultimate objective of the international HRs system, and of the UN system itself. In this sense, when a State is unable to fulfil its obligation to prevent HRs violations, is there any means in the current international system to preserve the content and effectiveness of that

[28] For a prominent example of this kind see the Security Council (2000, October 31st). *Resolution 1325, adopted on the 31st of October 2000*, UN Doc. S/RES/1325 about the prevention of violations of women's rights during conflicts.

obligation through the IC? The following chapter will explore the possible answer to that question in the specific context of the prevention of climate statelessness faced by the SIS.

CHAPTER III: LOOKING FOR A SOLUTION

Chapter I has introduced the current HRs issues faced by the SIS' population in the context of the TPC. Chapter II has presented and discussed the general international principle and obligation to "prevent HRs violations" and the particular one to prevent statelessness. The combined reading of these two chapters raises the following question: can SIS effectively fulfil their international obligation to "prevent HRs violations", specifically the violation of their population's right to nationality (and other related HRs) arising from their potential loss of statehood? If the answer to this question is no, how can the content of these obligations be preserved effectively, mainly the enjoyment and protection of HRs that they entail? Who or what is responsible for discharging such obligations if States alone cannot do so?

Chapter III deals with these questions and proposes an innovative and fresh reading and understanding of the current international legal and political frameworks to provide some answers. To do so, Tuvalu's case will be again used as the basis for the discussion in an attempt to ease, but also to concretise, the comprehension of the proposal. Taking Tuvalu's case, it can be concluded that the capacity of this State to comply with its obligation to prevent the violation of its population's HRs caused by the impact of the TPC, placing special focus on its climate statelessness, is as limited as its resources and means to do. Not only the size of the State but also its insulation, remote location, scarcity of natural resources, and the structure of its economy hinder its overall capacity to face the impact of the TPC, specifically of the CC.

These enormous constraints, however, have not prevented the government and people of Tuvalu from trying to implement all measures at their disposal to mitigate and adapt to CC. Thus, measures at the household, local, national, and international levels have been set in motion in recent years to preserve the habitability of the islands, delaying the loss of statehood and the subsequent climate statelessness.

When it comes to the household level, the coping strategies against the impact of CC are mainly based on the storage and rationing of food and drinkable water, as well as the construction of rock walls to protect the houses and crops from the sea-level rise, the floods, and the saltwater intrusions (Beyerl et al., 2018). At the local and community level, there are two Tuvaluan traditions, still present in the ordinary lives of the outer islands, which aim at enhancing their adaptation capacities: *toka* and *taumalo* (Lazrus, 2015). The former refers to the previously mentioned household systematic storage of food and

water, the latter is a community-based and randomly organized competition in which every family must show to the rest of the community their supplies of food and water to see if they would be prepared in case of the strike of a flood, cyclone, storm… The participation in the *taumalo* is mandatory (Lazrus, 2015). Even though these practices may not contribute much to Tuvalu's overall ability to prevent its population's climate statelessness, by strengthening the household and local CC coping mechanisms, mass migration is postponed and, therefore, also the loss of statehood.

Policies and action plans are also being drafted, approved, and implemented at the national level, and Tuvalu's government (as well as the governments of other SIS) is trying to be significantly active in the international fora in order not only to draw attention to their case but also to foster the global action against the TPC. Both elements can be considered as part of Tuvalu's attempt to fulfil its international obligation to "prevent HRs violations", and in specific, the obligation to prevent (climate) statelessness. Nevertheless, despite all these efforts and how well-intentioned they may be, it is worth, and necessary, considering the case in which they were not enough to tackle the risk of climate statelessness effectively. Because, indeed, as it has been exposed in Chapter I, such a risk exists, and it is not that dystopian to think about it. How would then be preserved the effectiveness and protection entailed in the obligation to "prevent HRs violations"?

Drawing on the current state of development of the IL and, precisely, of the international HRs system, this present Chapter aims to provide both, a legal basis and an implementation scheme, to advocate for the subsidiary or complementary responsibility of the IC's, structured mainly through the UN, its organs, and mechanisms, in the discharge of the international obligation to "prevent HRs violations" to preserve the effectiveness of the protection that it provides to individuals. Among all the members of the IC, nevertheless, the chapter will focus mainly on the joint and shared role and responsibility of States, as they are its principal actors, subjects of IL, and bearers of HRs duties; nevertheless, the whole IC is to be considered co-subsidiarily responsible.

The legal basis of the IC's responsibility.

In the search for the legal basis for the complementary or subsidiary responsibility of the IC in the prevention of HRs violations, it is necessary to remember, first, that this obligation is inherent to the system of promotion and respect for HRs, as demonstrated in the previous chapter. Consequently, finding a legal basis for the IC's responsibility to respect and promote HRs would also amount to finding a legal source for the subsidiary/ complementary responsibility of the IC in the prevention of HRs violations.

This is why, the UN Charter itself, the ultimate source of the international HRs system, is going to be explored as the first source of this responsibility. Article 1 of the UN Charter (1945) establishes which are the primary purposes of the international organization: the maintenance of international and universal peace and security; the development of friendly relations among nations of equal rights and the respect for peoples' right to self-determination; the achievement of '*international cooperation in solving international problems* […] *and in the promoting and encouraging respect for HRs and for fundamental freedoms*'; and the harmonization of the actions of the nations to accomplish the previous aims (UN Charter, 1945, article 1) (emphasis added). To fulfil these purposes, article 55 sets clear that the UN needs to promote, among other things, the 'universal respect for, and observance of HRs and fundamental freedoms' (UN Charter, 1945, article 55). A joint reading of these two articles leads to the conclusion that the UN, as the main institutionalization of the IC, has the legal obligation to promote the respect of HRs in the fulfilment of its purposes (one of which is, itself, the promotion and encouragement of the respect for these rights). Therefore, if the international obligation to "prevent HRs violations" is inherent to the promotion and respect of HRs, it could be concluded that according to the current state of development of IHL and the core purposes and fundamental obligations of the organization, as they are enshrined in the UN Charter, the UN has indeed the obligation to contribute to the prevention of these violations.

Moreover, Article 56 of the UN Charter codifies the international legal commitment of all members of the UN to take actions, separately but also jointly, for the achievement of the purposes of Article 55 (UN Charter, 1945, article 56). When the member states of the UN ratified the UN Charter, they became legally bound by this obligation 'to take *joint* and separate action' (UN Charter, 1945, article 56) (emphasis added) in the promotion of the universal respect for HRs and fundamental freedoms, as well as to cooperate with the UN to achieve so. Back in 1945, these obligations did not have a precise meaning since the HRL system had not been truly developed yet, however, its evolution since then has provided these obligations, and other HRs obligations, with very detailed content, including, for instance, the international legal obligation to "prevent HRs violations". Thus, States that have ratified the UN Charter (roughly all States on Earth) and the UN are subjects of the legal obligation to promote the respect of HRs (F. Gómez, personal communication, 2023; Bieńczyk-Missala, 2021, p. 25).

Particular attention should be drawn to the fact that both, articles 55 and 56 of the Charter presume some degree of common or joint discharge of the obligations they enshrined. The UN is, in the end, an international organization formed by States, hence, any action that it implements will be an international

action in nature, coming either from the sum of actions of its members (thus, international in the sense of involving more than one State) or from the international organization itself (thus, coming from the most structured representation of the IC as a collective actor). On the other hand, article 56 of the Charter (1945) not only refers to the individual obligation of States to act to promote the respect of the HRs but also to their obligation to take "*joint*" actions to do so. This article, thus, calls for international actions to be taken to comply with it. In this way, both articles provide a legal basis for the obligation of the IC, in particular of States and the UN, to take actions involving more than one State or actor to comply with the international legal obligation they establish effectively. Therefore, not taking such joint or international actions would amount to a breach of Articles 55 and 56 of the UN Charter, as well as a breach of Article 1[29], as the UN, and its member States, would not be taking all the measures they could to fulfil the purposes of the international organization.

This interpretation of articles 1, 55, and 56, aligns also with the denationalization of HRs put forward by van Wass (2012) and the universal character of these rights. As she stresses, the international system of promotion and respect of HRs was born from the IC's belief that, if effectiveness in the implementation and protection of HRs was to be guaranteed, national institutions and legislation could not be the only ones bestowed with the whole responsibility to do so, international actions and mechanisms were also needed. Only in this way, the system would be truly universal and based on the human nature of every individual, and not a mere aggregation of diverse State obligations towards their own citizens.

Therefore, according to the universal and international character of the system of respect and promotion of HRs, which finds its ultimate legal source in articles 1, 55, and 56 of the UN Charter, as well as according to the posterior development and evolution of HRL, States and the UN, primary actors of the IC, have the international legal obligation to take international and joint actions to give effect to the protection of HRs, being the prevention of their violation one of its essential aspects.

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[29] Although not talking directly about the protection and promotion of HRs but about the security aspect of the impact of CC, the possible breach of Article 1 of the UN Charter should the Pacific nations be submerged, was already pointed out by the president Kelekele of the Republic of Vanuatu in 2008:

> [Talking about the submersion of the SIS] If such a tragedy should happen then the United Nations and its members will have failed in their first and most basic duty to a Member and its innocent people, as stated in Article 1 of the Charter of the United Nations. (UNGA, 2008, p. 6).

Moreover, when examining particularly the international obligation to "prevent HRs violations" as part of the legal system of protection and promotion of HRs, and the consequential obligation of States to take joint/international actions in the prevention of such violations, it is worth noting the ICJ's interpretation of the content of the States' obligation to prevent genocide. In paragraph 430 of the case *Bosnia Herzegovina v. Serbia and Montenegro* (2007), the international court underlines that States are called to comply with their preventive obligations regardless of the prospects of success they might foresee beforehand since the combined efforts of various States could achieve what the individual compliance of only one State might not be able to achieve: the prevention of the violation of the HRs of the population being subjected to genocide. In this way, the court acknowledges the existence of certain violations of HR that might require the combined efforts of different or all States to be prevented and underscores the international obligation of States to make those joint efforts, implementing all the measures within their powers to do so (*Bosnia Herzegovina v. Serbia and Montenegro*, 2007). It might be arguable whether with this interpretation the ICJ is acknowledging or not the overall subsidiary/complementary responsibility of the IC in the States' discharge of the obligation to prevent of HRs violations, nevertheless, what is clear is that the international court is calling States to join forces to prevent those violations since, not doing so, could amount to a breach of their individual obligation to avoid them, leading to their international legal responsibility, and even liability, for it.

Moreover, a significant source of the legal basis for the IC's complementary obligation to "prevent HRs violations" can also be found in the international system of prevention of gross HRs violations and atrocity crimes. In paragraphs 138 and 139 of the UNGA resolution on the outcome of the 2005 World Summit, the IC not only recognized its obligation to encourage and assist States in preventing the commission of atrocity crimes, but it also endorsed its own complementary responsibility in the protection of peoples of all States against these gross HRs violations, through the structure of the UN and by the use of diplomatic, humanitarian and other peaceful means (UNGA, 2005, para. 138 & 139). Indeed, there are already some explicit sources of some IC's complementary responsibility in the current international HRs system. Likewise, these two paragraphs are the foundation of the international Responsibility to Protect (R2P) principle, which can be considered the most sophisticated framework for the prevention of HRs violations ever envisioned and implemented by the IC (Ramcharan, 2010). For this reason, this international principle is also going to be explored to identify further sources of the complementary responsibility of the IC in the discharge of the obligation to "prevent HRs violations".

Since the moment of its conception, which can be traced back roughly to 2001 and the ICISS report on "Responsibility to Protect", R2P has been aimed at providing the IC with a new understanding and implications of States' sovereignty and how to prevent the most conscience-shocking and inhumane acts, to use Walzers' (1977) terminology. For the ICISS those "conscience-shocking" acts that should be prevented encompassed a different range of avoidable catastrophes (mass murder, rape, and starvations, for instance) (ICISS, 2001, p. VIII), however, the IC restricted the international acceptance and applicability of R2P to the prevention of gross HRs violations (genocide, crimes against humanity, war crimes, and ethnic cleansing) and the course of action in case their occurrence. Nevertheless, despite being focused on the avoidance of the four international crimes, R2P and the prevention of mass atrocities are closely interlinked with the general legal obligation to "prevent HRs violations". Indeed, R2P highlights the tackling of direct and root causes of the international crimes as an unavoidable step to avert their occurrence. In this way, to properly implement R2P and specifically, to address the root causes of the atrocity crimes, the prevention of more "general" HRs violations arising from the political, economic, legal, or military-specific context of each case may need to be carried out (ICISS, 2001; Poerana & Handayani, 2021).

Thus, the international formulation of R2P, as endorsed by the UNGA in its resolution 60/1 and subsequent SC resolutions which reaffirmed the concept[30], acknowledges the need for the prevention of those HRs violations whose escalation could lead to the commission of atrocity crimes or gross HRs violations. Likewise, R2P emphasizes and operationalizes the primary responsibility of States to implement their obligation to "prevent HR violations", while it also underlines the international subsidiary responsibility of the IC in the matter when States are unwilling or unable to do it by their own means (ICISS, 2001; UNGA, 2009). Undoubtedly, the robustness of the argument defending R2P as a suitable source of the IC's subsidiary or complementary responsibility in the prevention of HRs violations finds itself challenged by the still ongoing discussion on the normative value of the principle even when applied to the prevention of gross HRs violation, and not to other "lesser" breaches of these rights[31].

[30] See Security Council's Resolutions 1674 (2006); 1894 (2009); 2117 (2013), and 2150 (2014).

[31] It could also be discussed to what extent the *en masse* loss of nationality of the SIS' population and the related breaches of HRs that would arise from their (climate) statelessness would be a "lesser" violation of their HRs or something different from a gross violation of HRs. Ultimately, it is not the number of victims or individuals affected that determines the commission of a serious and gross violation of HRs, but the nature of the violation. Aren't the cases of (potentially avoidable) extinction of a nationality and consequent climate statelessness presented in this thesis of enough seriousness to be considered a gross HRs violation?

It goes beyond the scope of this thesis to provide a full account of the legal and normative value of R2P, nevertheless, it is worth noting that this chapter understands R2P as a 'codified international principle and an emerging constitutional norm' (Wyatt, 2019, p. 3) which finds its legal grounding in well-established, accepted and, most of the times, already codified principles of existing international law, e.g. the obligation to prevent and punish genocide, enshrined in the Convention against Genocide; States obligations arising from International Humanitarian Law; or, the international obligation to comply with the law (Australia Red Cross, 2011; Bellamy & Dunne, 2016). Likewise, it is also notable that the complementary responsibility of the IC that is being put forward in this chapter is part of the "responsibility to prevent", the core of the R2P. There is among States and scholars a wide consensus about the existence of such responsibility in the context of R2P, even when its institutionalization, clarification and formulation as an international law or rule are taking place simultaneously, thus, complicating its implementation and understanding (Huisingh, 2013).

Therefore, for the purpose of this thesis, R2P is to be considered as an international codified principle that establishes a coherent and wide-accepted framework of implementation of the obligation to "prevent HRs violations", in specifically, gross HRs violations. Likewise, it is a principle that, based on paragraphs 138 and 139 of the resolution 60/1 of the UNGA, recognizes and operationalizes the subsidiary responsibility of the IC in the prevention of such violations. The subsequent development and clarification of the content of R2P, even if still ongoing, has also provided the IC with a roadmap on how to implement this complementary responsibility on the matter, which further supports the idea of the IC having accepted, to a certain degree, the implications of R2P, including, its subsidiary responsibility in the discharge of States' preventive obligations under the international HRL system.

Hence, from the current state of evolution of HRL and IL in general, it can be concluded that articles 1, 55, and 56 of the UN Charter, as well as the ICJ's jurisprudence on the obligation to prevent genocide, paragraphs 138 and 139 of the UNGA resolution 60/1 and, more widely, R2P principle, constitute solid legal sources of the existence of legal responsibility of the UN and States, as primary and preferred actors of the IC, to act jointly and internationally to prevent the violation of HRs.[32] Furthermore, these legal sources need to be considered within the bigger framework of the general international legal

[32] It is worth highlighting that this reading and interpretation of the IL and IHL systems do not seek to displace States as the first and primary HRs duty bearers in favour of the IC, as to do so would undermine the level of protection that these international legal systems provide. This interpretation seeks to reinforce that level of protection by elucidating a complementary or subsidiary responsibility of the IC when States are unable to effectively implement their international obligation to "prevent HRs violations".

obligation to "prevent HRs violations" which has been discussed in the previous chapter, and the presumption of effectiveness of the protections and rights that the HRs' system confers to individuals, regardless of their nationality or absence of it, race, sex, language, or religion, since only this presumption of effectiveness makes the HRs system truly universal and the IC their natural habitat of evolution, development, enjoyment, and protection.

The practical aspect: some remarks on the implementation of the IC's responsibility to prevent climate statelessness.

The previous sub-chapter has discussed the legal basis for the IC's, precisely of States and the UN, complementary responsibility in the discharge of the State's international obligation to "prevent HRs violations". By doing so, drawing on already accepted legal commitments under IL and, in particular, under HRL, the IC has been recognized as an actor that, in case States cannot fully implement their international obligation to "prevent HRs violations" (hence the complementarity of the IC's responsibility), should take actions to subsidiarily preserve the effectiveness and protection that this obligation entails.

However, the existence of this legal basis does not answer the practical aspect of the question, i.e. how can the IC, putting special focus on the UN and States (collectively), comply with this subsidiary responsibility? Is there any already existing mechanism, framework, or scheme in the HRs system that could be used to address the problem faced by the SIS and implement the obligation to "prevent HRs violations" effectively? If not, is there anything that could serve as a basis for a new mechanism, framework, or scheme that could do so?

Before considering possible answers to these questions, it might be useful to briefly comment on the need or lack of it for the development of such an implementation framework or scheme. To do so, it is necessary to go back to the content of the obligation subject matter of analysis and evaluate whether the requirements for it to arise are fulfilled in the case of the SIS. The first element of this obligation that should be present to ponder the different and possible ways how to comply with it, would be the existence of a serious risk of such violation taking place and the States' or the IC's knowledge (or them being reasonably expected to know) about the existence of such a risk. Regarding the former, Chapter I has provided the data and analysis of the existence of a real risk of climate statelessness, as there is a real risk of loss of statehood for the SIS because of the impact of CC. This risk might not be considered completely imminent, but the threat it poses not only to the enjoyment of the rights of the population of the SIS but also to their condition of sovereign States is, undoubtedly, a serious one.

Moreover, it could be argued that the "perception" of such risk as serious and real is based on scientific predictions that may or may not become a reality, nevertheless, neither is the obligation of prevention expected to be implemented only when the risks are already a reality (*Bosnia and Herzegovina v. Serbia and Montenegro*, 2007), nor the lack of full scientific certainty should be used as a reasonable ground for the avoidance of preventive measures to minimize potential serious or irreversible risks (as stated by the precautionary principle in article 3 of the UNFCCC (1992), one of the principles leading the development of practices and measures designed to deal with the impacts of the TPC and which has been included in multiple multilateral and regional agreement (Pinto-Bazurco, 2020).

Likewise, when it comes to the knowledge, or expectation of such knowledge, about the existence of this risk by States collectively, the UN, or the IC at large, multiple examples lead to the conclusion that this knowledge is already present. For instance, the Paris Agreement includes explicit mention of the 'special circumstances' of the small developing island States (Paris Agreement, 2015, art. 4(6)) and the fact that they are 'particularly vulnerable to the adverse effects of CC" (Paris Agreement, 2015, art. 9 (4) and art. 11 (1)). The urgency and scope of the CC-related impacts on these States are also acknowledged in their preferential access to simplified approval procedures for financial resources and enhanced readiness support (Paris Agreement, 2015, art. 9 (9)) and in the explicit mention of their need for capacity-building support in the implementation of adaptation and mitigation actions (Paris Agreement, 2015, art. 9 (9)). Thus, all those States who have signed and ratified the Paris Agreement have implicitly also recognized the existence of a serious risk posed by CC to these specific States. Likewise, the UN also acknowledges a strong link between SDG n. 13 ('Take *urgent* action to combat CC and its impacts') (United Nations, n.d.-d) (emphasis added) and 15 ('Protect, restore and promote sustainable use of terrestrial ecosystems, sustainably manage forests, combat desertification, and halt and reverse land degradation and halt biodiversity loss' (United Nations, n.d.-d)) when addressing the situation of the SIS. Therefore, it can also be concluded that the UN is aware of a real and serious risk faced by the SIS regarding the impact of CC.

The extent to which the IC is aware of the risk of climate statelessness of the population of the SIS and not only of the impact of the CC on them is more difficult to assess, however, climate statelessness is a logical consequence of the loss of statehood of the SIS, which in turn, based on the current patterns of the evolution of CC, is more than a potential effect of its impact. Thus, the IC (UN and States collectively considered) should know by now, based on the current state of scientific development, the existence of a real and serious risk of climate statelessness. Hence, according to the

content of the international obligation to "prevent HRs violations" explored in Chapter II and the IC's complementary responsibility in the discharge of such obligation, as presented in the previous sub-chapter, there is a need to find a way for the IC to implement its responsibility to prevent HRs violations in the case of the risks faced by the SIS with regards to the risk of climate statelessness of their population, since: there is a real and serious risk of climate stateless (which is a breach of the HRs of the population of the SIS), and this risk is known or should be known by now by the UN and States, as primary actors and subjects of the IC.

By this point, it is relevant to recall that the international obligation to "prevent HRs violations" is an obligation of conduct and not of result, therefore, just as at the State level of discharge of this obligation, the IC is expected to take all necessary and reasonable, positive and negative measures and actions to prevent those violations from happening, but an eventual breach of the rights would not mean, by itself, a concomitant violation of the responsibility to "prevent HRs violations". In this way, finding a coherent international mechanism or framework to operationalize and put into practice the complementary responsibility to "prevent HRs violations" of the IC and implementing this mechanism or framework fully should be enough to fulfil the requirements of compliance with this responsibility, even if the violations end up not being completely prevented.

This brings back the practical, yet essential, questions posed at the beginning of the sub-chapter: Is there an already existing mechanism, framework, or scheme that could be used to tackle the problem faced by the SIS and implement the obligation to "prevent HRs violations", particularly to prevent climate statelessness, effectively? If not, is there anything that could serve as a basis for it? The remainder of this chapter will deal with possible answers to these questions.

Responsibility to Protect: a roadmap for the preservation of the effectiveness of the international legal obligation to "prevent HRs violations"?

As already emphasized, the climate statelessness with which this thesis deals, i.e. the one arising from the loss of statehood of the SIS, is a completely unprecedented and unknown situation for the IC, IL, HRL, and the HRs system in general. There is, thus, no international coherent and organized framework or mechanism dealing specifically with this issue. Likewise, so far, most of the authors who have engaged with the issue from the perspective of the risk of climate statelessness and how to prevent it, take as an inescapable reality the uninhabitability of the islands. Thus, the proposals for the prevention of statelessness and, consequently, for the prevention of the violation of the HR to nationality put forward

by those authors (DelGrande, 2021; Park, 2011; Piguet, 2019; McAdams, 2012; Nevitt, 2022) are inevitably linked to the relocation or mass migration of their population, either to:

- a territory whose sovereignty is fully ceded to the SIS from another State in an attempt to transfer the SIS to a new location (thus maintaining its statehood and, consequently, the nationality of their population).
- another state with which the SIS would form a federation or confederation before disappearing (the nationality of this newly created federation or confederation would be acquired by the SIS population, avoiding their climate statelessness),
- a third country, whose nationality would be acquired by the SIS population so that they could access the rights and protections that go with it.

Park (2011) and McAdams (2012) also explore the possibility for the SIS to maintain some sort of statehood through the principle of presumption of continuity and continued international recognition, or through a form of international personality other than statehood, however, either of these two options would involve a high risk of *de facto* climate statelessness to the population of the SIS.[33]

However, all these proposals, although avoiding climate statelessness, are based on reactive responses to the impact of CC on the statehood of the SIS and the right to nationality of their populations, not to say that they would very likely undermine the egalitarian worldview, the link with nature and territory and the sense of community of the populations concerned. In a world and at a time where there are examples that, from a technical point of view, adaptation to CC is possible, shouldn't the implementation of the obligation to "prevent HRs violations" first focus on its proactive wing? However, the research that has been conducted up until the moment of writing this thesis made it impossible to provide any existing framework or mechanism of prevention of climate statelessness that tackled the problem from a proactive point of view.

This is why the present subsection represents a completely new interpretation of the international HRs system and, drawing upon the international obligation to "prevent HRs violations" and the complementary responsibility of the IC in its discharge, approaches the edge of the realm of the hitherto unimagined to respond to this gap proactively, not only from a HRs perspective but also from a social

[33] In fact, from the point of view of the protection of the HRs of the population of the SIS, it could be even more productive to declare themselves extinct so its population could, at least, benefit from the statelessness framework protection.

and sociological perspective aiming at preserving the culture, worldview, and sense of community of the populations concerned.

In this way, to find some basis for a framework or mechanism that could fill this gap, the international HRs system has been researched looking for an already existing international framework for the prevention of HRs violations. Agreeing with the analysis of the HRs system conducted by Ramcharan (2010), R2P is the most salient and sophisticated, if not the only such framework, although designed specifically, and exclusively, to deal with gross HRs violations. Indeed, as mentioned earlier, R2P constitutes a codified and accepted principle that has given rise to the articulation of an implementation scheme of the responsibility of States and the IC regarding international crimes, but it is also a principle and a scheme of action which:

- Acknowledges that some States might be unable to fulfil their obligations to "prevent HRs violations" on their own (as is the case of the SIS) so,
- It provides a legal basis for and operationalizes (through its subsequent development) the subsidiary responsibility of the IC to give effect to the protection of HRs that the obligation to prevent international crimes confers on individuals.
- R2P also puts in the centre those who are looking for support (their needs and preferences) and not those granting such support (Ramcharan, 2010).
- When it was coined, it was to be understood as a commitment to help local efforts to address avoidable HRs violations (particularly, avoidable catastrophes (ICISS, 2001) and atrocity crimes).

Nevertheless, the use of R2P as a basis for the elaboration of an implementation mechanism for the complementary responsibility of the IC in the discharge of the obligation to "prevent climate statelessness" should be understood only as a direct source of inspiration, insofar as this principle was not designed for that purpose and, in the absence of political will to do so, its narrow scope of application cannot be extended to mitigate or adapt to the effects of CC. Therefore, this sub-chapter should not be interpreted directly as an attempt to enlarge the scope of the application of R2P, since this would potentially go against articles 138 and 139 of the UNGA resolution 60/1 as well as against paragraph 10 (b) of the Secretary-General report on the implementation of R2P where he states that:

> The responsibility to protect applies, *until Member States decide otherwise*, only to the four specified crimes and violations: genocide, war crimes, ethnic cleansing, and crimes against humanity. *To try to extend it to cover* other calamities, such as HIV/AIDS, *climate change, or the response to natural disasters, would undermine the 2005 consensus and stretch the concept beyond recognition or operational utility*. (UNGA, 2009, p. 8) (emphasis added).

Nevertheless, it is worth noting that neither paragraphs 138 and 139 of the UN resolution 60_1, nor Ban Ki-Moon's[34] further follow-up on the outcome of the Millennial Summit, prohibits such an extension of scope, but they subject it to an international consensus among States that has not yet been reached. Reaching such a political consensus requires a concomitant political will, which can be motivated by drawing attention to the need, and legal obligation, to fulfil the complementary international responsibility to prevent HRs violations in cases of risk of climate statelessness such as the one explored in this thesis[35].

However, even if this political will and consensus are not achieved, R2P can still serve as a basis for developing a new framework to prevent climate statelessness. R2P, specifically its Pillars I and II, would not be the legal basis of the proposed, innovative framework, but the principle giving coherence and ordering the articulation of all the legal instruments already existing and those still to come, in a way that they provide an effective framework for the implementation of the legal obligation to prevent climate statelessness, at State and IC level. Thus, neither paragraphs 138 and 139 would be breached, nor paragraph 10(b) of Ban Ki-Moon's report.

Some of the already existing and accepted international commitments in the area of the UNFCCC and other related environmental international agreements, as well as already existing in the HRs system, in particular in the area of prevention of statelessness, could serve as the chassis of such a framework, although there is a need for the development of more ambitious and matter-focused instruments if effectiveness is to be achieved, and the content of the obligation to "prevent HRs violations" is to be preserved. The legal basis for the development of such a framework should be found in the general

[34] Ban Ki-Moon was the UN Secretary-General in 2009, therefore, author of the Report approved by the UNGA in the UNGA, 2009.

[35] Moreover, the extension of the application suggested should be understood as restricted only to the four cases of climate statelessness explored in this thesis for being borderline cases, so it would be only a very limited extension.

international obligation to "prevent HRs violations" presented in the previous chapter, the existence of a legal basis for the IC's complementary responsibility in the discharge of such obligation, the presumption of effectiveness of the protection of the legal system of HRs, and the ultimate purpose and objective of the institutionalization and internationalization of the protection and promotion of HRs through the UN system. Likewise, the recent legal development and evolution in environmental protection and action against the TPC discussed in Chapter I show that there is international political will to tackle the effects of the TPC and acknowledge the strong connection between HRs and the TPC. This new framework aims to contribute to the latter, as it implies an interpretation of the impact of CC on the SIS from a HRs perspective. In addition, this framework for the prevention of climate statelessness would be free from one of the main limitations of the R2P principle: its Pillar III and the threat to sovereignty that it may represent. The cases of climate statelessness to which this scheme is intended to apply, besides being very limited in number (only four), do not require any military intervention to avoid the violation of HRs that they entail.[36] It would be enough with the implementation of the responsibility to prevent that R2P represents (the most widely accepted one by the IC) and not necessarily the responsibility to react. Thus, the proposed framework would draw inspiration only from Pillars I (States responsibility) and Pillar II (IC's responsibility to support the capacity-building of States in the prevention of gross HRs violations).

Pillar I of the proposed framework or scheme, as is the case in R2P, would imply the SIS' protection, respect and fulfilment by of the HRs of their populations, which consequently entails their protection from HRs violations. Therefore, under this framework, the SIS would need to comply with their legal obligation to "prevent HRs violations", in specific, their obligation to prevent (climate) statelessness by the implementation or undertaking of all necessary and reasonable, positive and negative measures and actions. In case this would not be enough to effectively prevent the violation of the HRs at stake, Pillar II should be implemented.

In the context of R2P, Pillar II focuses on the IC's assistance to States in their compliance with the protection of their populations either by encouraging and helping them to comply with their prevention responsibilities (UNGA, 2005, para. 138) or by helping them to build their capacity to do so

[36] Although Pillar III involves both peaceful and non-peaceful interventions and means from the IC, the proposed framework, in order to avoid the foreseeable resistance to its application or development that might arise from the attempt to apply Pillar III to the cases under study, would leave out Pillar III in its entirety, since assistance in SIS capacity building to address CC impacts should be sufficient for the IC to fulfil its complementary responsibility in preventing climate statelessness, without even having to consider issues related to threats to the sovereignty of the SIS' in which it is intended to be applied.

(UNGA, 2005, para. 139). It is to say, Pillar II involves a well-structured framework for the implementation of the IC's complementary responsibility through assistance to States which are unwilling or unable to comply with their international legal obligations of prevention of atrocity crimes before they take place without this implying a substitution of the States' primary responsibility to prevent them, a takeover of their responsibility, or an imposition of a "correct" way to implement their responsibility or legal preventive obligations (UNGA & Security Council, 2014). The application of Pillar II, thus, does not undermine the sovereignty of States but reinforces it by offering a scheme for the fulfilment of the collective complementary responsibility of the IC regarding the prevention of gross HRs violations based on the equal sovereignty of States and the effective protection their populations (UNGA & Security Council, 2014). R2P was indeed drafted and developed to be applied in the context of the prevention of atrocity crimes, however, the R2P-like framework put forward in this subsection would envision a Pillar II focused on the assistance of the IC in developing the capacity of the SIS to prevent climate statelessness as well as on encouraging the compliance with the preventive responsibilities regarding climate statelessness not only by the SIS themselves but also by the IC at large through, for example, awareness-rising and dissemination of the relevant legal standards which have been identified and elucidated in this thesis, highlighting the common, shared and collective responsibility of the different actors of the IC in the prevention of the violation of the right of nationality of the populations of the SIS.

By developing and implementing such a two-pillar framework inspired by R2P, not only the content and protection that the international obligation to "prevent HRs violations" (in specific the prevention of climate statelessness) encompasses would be effectively preserved, but it would also help to perverse and enhance the sovereignty of the SIS and strengthen the meaning and content of the principle of equal sovereignty of States. By assisting the SIS in the discharge of their HRs obligations, and the development and implementation of mitigation and adaptation strategies, the IC would contribute to preserve their statehood and, consequently, their sovereignty. Far from being a threat to sovereignty, criticism to which R2P has been subjected recurrently, this framework would offer the IC a comprehensive and coherent scheme to join forces to assist the SIS, some of its smallest members, in the preservation of their equal sovereignty and value, therefore, reinforcing (and maintaining) their status as independent and sovereign States, members of the IC on equal footing.

However, should the proposed approach and framework of action be accepted, it is worth mentioning that its implementation would most likely require an imminent application of Pillar II because

the SIS are already implementing a considerable number of measures at their disposal to deal with the situation. Nevertheless, it is more than likely this will not be enough to prevent the violation of the right to nationality of their populations, which indicates the need to move from Pillar I to Pillar II. To return to the specific case of Tuvalu, for example, the Te Vaka Fenua o Tuvalu or National Climate Chance Policy 2021-2030 (CCD, 2021) offer a rich source of information from which to assess the efforts of Tuvalu's government in the fight against climate statelessness. Although the prevention of climate statelessness is not directly mentioned, Tuvalu's attempts to counter the impacts of CC should also be understood as attempts to prevent such violations of HRs.

At the policy level, multiple measures are being designed and implemented regarding the adaptation and mitigation of the effects of CC. The National Climate Change Policy was developed bearing in mind that the fight against CC and natural disasters would be one of the national priorities later identified in the National Strategy for Sustainable Development 2021-2030 *Te Kete* (CCD,2021) Thus, in a participatory and collaborative manner, Tuvalu's government created a policy framework in which it extensively identifies different actors, governmental and non-governmental, that can and should play an essential role in its effective implementation. The policy is accompanied by an implementation plan that identifies each of the agencies and entities responsible for each of the objectives and actions. Moreover, it is also connected to Tuvalu's National Determined Contributions and the National Adaptation Plan, which operationalize at the national level Tuvalu's international commitments under the UNFCCC (CCD, 2021).

Furthermore, the UNFCCC obligations have been enacted into Tuvalu's domestic law through the Climate Change Resilient Act 2019 (CCD, 2021). Nevertheless, in recent decades Tuvalu has established a whole national body of laws dealing with different aspects of CC as well as with adaptation to them:

> The Tuvalu Climate Change and Disaster Survival Fund Act 2015 and Regulations 2017; The Energy Efficiency Act and Regulations 2015; The Environmental Protection Act 2008 […] and the Environmental Protection Amendment Regulations 2017; the National Disaster Management Act 2008; The *Falekaupule* Act 2008; The National Energy Policy 2009-2023; the Master Plan for Renewable Electricity and Energy Efficiency 2012-2020, […] (CCD, 2021, p. 5).

Likewise, the National Climate Change Policy recognizes some deficiencies and loopholes in this legal framework, specifically concerning the management of water and sanitation (CCD, 2021, p. 11), which shows that the government of Tuvalu is aware of the current situation and its seriousness, and it is determinate to take all necessary measures at disposal to remedy it.

In addition, Tuvalu's government is aware of the need for a coherent and solid financial scheme to implement the legal and policy frameworks effectively. That is why, not only has it established a national fund to deal with CC, but it has accessed international funds such as the Green Climate Fund for coastal protection and the Adaptation Fund, financial sources to which it is hoping to attain greater access (CCD, 2021, p. 7) as it recognizes that more funds will be needed to cope with the ongoing and future impacts of CC on its islands, the HRs of its populations and its sovereignty.

The government and people of Tuvalu understand that even if all these funds are accessed, policies are implemented and laws are enacted and respected, and even if all this is combined with local and communal adaptation and mitigation strategies, it will probably not be enough to keep Tuvalu's territory from becoming uninhabitable.[37] For this reason, Tuvalu and other SIS have started to play a strong advocating role for their cause in the international arena. Simon Kofe's[38] knee-deep in-water speech at COP 26 in 2021 (Reporter, 2021) was a great example of this advocacy campaign, as it was also the 2009 underwater Cabinet Meeting in the Maldives ("Cabinet Makes Splash with Underwater Meeting," 2009). Moreover, Tuvalu is also part of different international and regional agreements and institutions aimed at, as a primary objective or as one of them, facing CC and other environmental issues, such as the UNFCCC, the Paris Agreement, the Framework for Resilient Development in the Pacific (FRDP) 2017-2030, SIDS Accelerated Modalities of Action (S.A.M.O.A) Pathway, Framework for Pacific Regionalism… (CCD, 2021, pp. 28-29) .

Therefore, from the holistic reading of Tuvalu's above-mentioned efforts to deal with the impact of CC at a policy, legal, and financial level, as well as resorting to national and international agreements, frameworks, funds, and measures, it could be concluded that, indeed, Tuvalu's government is taking all necessary, concrete, and (supposedly most) effective measures reasonably available to it to adapt and mitigate the impact of CC. However, the risk of climate statelessness, following the loss of statehood because of CC, is still very real and serious. This is why Pillar II of the proposed preventive model should

[37] Hence, managing human mobility and protecting national sovereignty are priority outcomes of the National Climate Change Policy (CCD, 2021).

[38] At the time, Simon Kofe was Tuvalu's minister of foreign affairs.

be implemented as soon as it is accepted if the effectiveness of the protection of HRs entailed in the international obligation to "prevent HRs violations" is to be preserved.

When it comes to developing the capacity of the SIS, the IC does not start completely from scratch but can use the legal, political, and financial tools already existing under the UNFCCC framework, such as the Adaptation Fund, combined with existing HRs protection tools, mechanisms, and agreements, such as a broad interpretation of the CRS and the CSSP that includes the prevention of climate statelessness set out in this thesis. However, suppose real effectiveness is to be achieved. In that case, new agreements and mechanisms on the specific issue must be developed and implemented so that the IC can put its complementary responsibility into practice. In this task, Pillar II of R2P, as explained and explored by Secretary-General Ban Ki-Moon in his report *Fulfilling our collective responsibility: international assistance and the responsibility to protect* (UNGA & Security Council, 2014) could serve as a basis for inspiration for the identification of relevant actors and existing networks which, working together, can help States to fulfil (UNGA & Security Council, 2014) their international legal obligation to "prevent HRs violations".

The implementation of such a model/framework for the prevention of climate statelessness would not be a matter of voluntary and well-intended commitment of the IC to deal with the impacts of CC on the smallest and most vulnerable of its members, the SIS, but a matter of fulfilling its international responsibility based on the existence of an international legal obligation to "prevent HRs violations". It is to say, a matter of accepting and fulfilling its legal responsibility on the issue.

Conclusion

Hanna Arendt identified statelessness as the loss of membership to a political community that grants, protects, respects and fulfils the rights of those individuals, which it considers to be part of it (Arendt, 1951). Already in 1951, she understood that lacking an effective nationality directly hinders access of individuals to rights supposedly inherent to their human nature. Undoubtedly, in 1951 the international HRs system, which has as one of its primary objectives the denationalisation of HRs as a means to safeguard their content and protection for all human beings, regardless of their nationality or absence of it, race, sex, language, or religion (van Wass, 2012), was far from being fully developed and its implementation was at a very early stage, leaving much to be desired. Certainly, seventy-three years later, the international HRs system has reached a considerable level of sophistication and evolution, allowing access to the protection it enshrines for a large percentage of the world's population. Yet stateless persons continue to face an immeasurable plight concerning the enjoyment of their HRs.

In addition to the above-mentioned gap in the international HRs system, the Triple Planetary Crisis is putting unprecedented pressure on it, challenging its boundaries and driving the reconsideration of the ways of approaching HRs issues each and every day. Moreover, it is also impacting directly the regular functioning of the International Community (IC) and the ordinary lives of individuals in such a way and with such intensity that the IC has been compelled to organise and structure an internationally coordinated response to deal effectively and efficiently with its impacts, and more specifically with the CC impacts. Thus, the TPC is advancing the development of new internationally institutionalised branches of the global sphere, while also fostering the identification of the "greener" facet of traditional HRs and the recognition of new environment/climate-related HRs (Argren, 2021, p.171). It is to this international attempt to respond to the threat posed by the TPC from a HRs perspective to which this thesis has sought to contribute through the study of the impact of CC on Hanna Arendt's "right to have rights" or, in the HRs jargon, "the right to nationality" (article 15 of the Universal Declaration of Human Rights).

In a manner completely unknown to date, the right to nationality of the citizens of the Small Island States (SIS) of Kiribati, Tuvalu, the Marshall Islands and the Maldives is being threatened by the impact of CC on the elements of statehood of the States, it is to say, CC is rendering the territory of these SIS impossible to inhabit, a situation that will force the *en masse* migration of their population, including their governments. The three elements of the customary notion of statehood, as enshrined in the Montevideo Convention (1933) and generally understood by international lawyers, are suffering from

intense pressure, facing the risk of, in a no so far future, simply ceasing to constitute elements strong enough to support the idea of the existence of the States. It might sound like science fiction, but according to the current state of scientific knowledge, the risk of becoming the first climate-related extinct States, with no State successor taking their place and, therefore, giving their citizens a new nationality, is a real one. Likewise, it is also very real the consequential risk of violation of the right to nationality of their populations that the disappearance of the SIS would bring about. It is not clear, however, whether the current international framework of protection of stateless people would apply to their them, as this framework does not envision CC or the extinction of the States for causes linked to its impacts as valid sources of statelessness. Indeed, climate statelessness, in the terms exposed in this thesis, is so far not considered neither a source of *de jure*, nor of *de facto*, statelessness.

Moreover, relying on the applicability of the statelessness international framework would not only mean giving a reactive response to a predictable HRs issue which could be avoided should proper mitigation and adaptation measures be implemented, but it would also amount to a breach of the international legal obligation to "prevent HRs violations" inherent to the HRs system and HRL. According to their current state of development, the existence of a real risk of violation of a HR gives rise to the legal (positive and negative) obligation to implement all necessary, concrete and effective preventive measures reasonably available (CAT, 1984; CEDAW, 1992, para. 24(e); *Öneryildiz v. Turkey*, 2004; HRC, 2015) so as to try to avoid such a violation before it takes place. Although sometimes overlooked, this legal obligation is deeply rooted in the system of HRs, identifiable both in the treaties that comprise HRL such as the Convention against Genocide, the CAT or the Palermo protocol; in the reading of them by the judicial (international courts) and quasi-judicial bodies (treaty bodies) that have been authorised to interpret them, as well as in the ultimate purpose and raison d'être of the entire international system. In addition, as part of this general obligation to "prevent HRs violations" inherent to the overall HRs system, from the specific international statelessness legal framework and its subsequent practice and implementation can also be deduced the international obligation to "prevent statelessness" regardless of its source, since statelessness is to be considered an anomalous situation under IL, therefore, one that should be avoided (Park, 2011).

Thus, there is a principle and a legal obligation to "prevent of HRs violations" which are overarching elements of the HRL and HRs system in general and with which the different actors and subjects of the international system and IL must comply. As with the rest of the obligations arising from HRL, the first and primary duty bearers are the States, normally understood as the States of nationality.

As the example of Tuvalu shows, the SIS are implementing all the necessary measures available to them at the international, regional and local level to mitigate and adapt to CC, attempting to retain their statehood or, at least, to delay its loss and, consequently, the climate statelessness of their populations (thus, fulfilling their obligation to "prevent HRs violations", since it is an obligation of conduct and not of result (*The Environment and Human Rights*, 2017; *Bosnia and Herzegovina v. Serbia and Montenegro*, 2007)). However, their status as Least Developed Countries, in the case of Tuvalu and Kiribati, and Small Islands Developing States, in the Maldives and Marshall Islands' case, hints that even when combating CC is a real possibility, as gloriously exemplified by the Netherlands, it is an expensive option, quite out of reach for these remote and small island states.

Nonetheless, articles 1, 55, and 56 of the UN Charter (1945), as well as the ICJ's jurisprudence on the obligation to prevent genocide, paragraphs 138 and 139 of the UNGA resolution 60/1 and, more widely, the R2P principle, constitute a solid legal source of the IC's complementary responsibility in the prevention of HRs violations. According to these sources, the UN and the States (collectively), as preeminent actors of the IC, bear the duty to act jointly and internationally to prevent violations of HRs, specifically when they know, or should know, that there is a risk of a HR violation taking place and that failing to act would render that HR in question voided of content and protection since the first-line duty bearers, in this case, the SIS, are unable to satisfactory discharge their international legal obligation to prevent such violation. Thus, if the international system of protection, promotion and respect for HRs wants to be truly denationalised so that these rights are genuinely inherent to the human nature of individuals instead of rights that are granted, respected, protected and fulfilled by each State towards its nationals, the IC needs to find a proper mechanism or scheme to operationalise and implement its subsidiary responsibility on the matter.

Taking R2P as a basis, this thesis has advocated for the development of a two-pillar implementation scheme that would allow the IC to comply with its international complementary responsibility to "prevent HRs violations" to preserve the content and protection enshrined in the HRs system, in the specific context of the risk of the violation of the right of nationality of the population of the SIS, which is to be understood as a borderline case, the reason that justifies the creation of such unprecedented scheme.[39] The decision to take the R2P principle as a basis is due to the fact that it

[39] Moreover, the number of States to which the framework would be applicable, i.e. the four SIS whose statehood is at risk, is a very limited one, a fact that could ease acceptance and development of such a proposal within the International Community.

constitutes the most sophisticated and widely accepted framework for the prevention of HRs violations in the international system (Ramcharan, 2010), as well as because it acknowledges that States do not always have the economic, structural or political capacity to fulfil their international legal obligations under HRL and, consequently, it advocates for the IC's subsidiary responsibility to assist States in the building of such capacity as an implicit oath to those individuals and populations to which it has granted HRs within the framework of the UN. Moreover, R2P was designed to always focus on the needs of those seeking support, protection and prevention of the violation of their HRs (Ramcharan, 2010), as well as to try to find the closest protective and preventive response to the local level, respecting and considering, as much as possible, the worldview and culture of the individuals, populations and communities meant to be protected (ICISS, 2001).

Thus, the first two pillars of the application of R2P provide a suitable source of inspiration and a basis for the development of an implementation scheme of the complementary responsibility of the IC in the legal obligation to "prevent HRs violations" in cases where States are unable to do so fully on their own, as it is the case of the SIS regarding the climate statelessness of their populations. The development of such a scheme would not only allow the IC to comply with its legal obligations and responsibilities under HRL and IL as elucidated in this thesis, but it would also contribute to avoiding the climate statelessness of the populations of the SIS before it materialises, giving to this HRs' challenge a proactive response and not a reactive one, thus, breaking the pattern of the field. Additionally, the design of this plan to assist SIS capacity building for mitigation and adaptation to CC can benefit from those international assistance structures that already exist in the HRs system (such as the framework for the protection of stateless persons, through the broad interpretation of statelessness) and other international and regional frameworks as the environmental one (e.g., adaptation and mitigation funds launched under the Paris Agreement and the UNFCCC). However, specific structures and agreements should also be developed to achieve the best level of protection and prevention of HRs violations.

In this way, the proposed framework will operationalise the discharge of the international legal obligation to "prevent HRs violations" at all levels: as in the case of R2P, pillar I would focus on its direct discharge by the SIS through the implementation of all necessary and available measures; pillar II would focus on the discharge of the subsidiary responsibility of the IC through the assistance to the SIS in their capacity building to mitigate and adapt to CC. Thus, not only pillar III of R2P would be left out of the equation (the most contested one of the source principle), but the proposed framework would help the SIS both to fully and satisfactorily implement their legal obligations under HRL and to preserve their

statehood and, consequently, their sovereignty. Far from challenging their recently acquired independence and sovereignty, this framework offers a way to protect and preserve them through international collaboration and assistance, giving a renewed meaning and strength to the principle of equal sovereignty of States. Likewise, the proposed framework contributes to realising the ultimate goal of the international system of HRs: the recognition, respect, protection and fulfilment of such rights for each and every individual on the planet, regardless of their nationality to a big or small State or their absence of nationality at all, their race, their sex, their language, or their religion; it places human beings in its centre and aims at fulfilling States (individual and collective) and IC's obligations under HRL and IL in a proactive manner while also respecting the culture, worldview and community ties of the populations at risk.

Undoubtedly, what is proposed in this thesis is something completely new, a challenge to the limits of the current HRs system and HRL, an unusual and innovative interpretation of what is known today to give an unparalleled response to an unprecedented situation. However, the History of Human Rights is one full of decisive moments in which unprecedented actions were taken and innovative measures were advanced to give answers to questions that no one dared to face or cared enough about before, at least not out of fiction. And that is exactly what this thesis has done. Whether or not the proposal made in its pages is accepted by the IC is beyond the author's control, who has simply limited herself to researching and presenting what would be a suitable response by the existing international law institutions to the unusual case at hand.

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