

Vanishing Nations: Islands Battling to Stay Afloat

Abhilash Pattnaik and Mohit Dang¹

Abstract

This paper is divided into three parts – Part I enumerates the facts pertaining to the facets affected by Climate Change and its ramifications upon small island nations. It further delineates the vulnerability of the economic and socio-cultural aspects of these nations. It also deals with the increasing threat to the sustainable existence of these nations due to slow-onset events like increasing sea levels, ocean acidification etc.

Part II establishes the status quo in the existing political milieu insofar as the deliberations of various nation-states are concerned towards dealing with the climate-induced problems among small island nations. It further deals with the humanitarian problems arising out of climate change faced by these small island nations.

Part III deals with establishing a legal framework for the small island nations to take recourse to as to take climate action. The aforesaid climate action is to be taken in the form of ‘adaptation’, ‘mitigation’, and ‘Loss and Damage’.

The Paper highlights the reasons for the small island nations having qualms with the inefficacy of the existing legal framework and its failure in remedying the problems of climate victims and climate change refugees. It further deals with the United Nations Compensation Commission which functions as a funding mechanism to meet the needs of the small island nations. The functioning of the Small Island Rehabilitation Commission has also been highlighted. It further highlights legal frameworks that can be developed based on the principle of small island nations holding major climate change inducing nations accountable under principles of international law

¹Second Years, B.A. LL.B. (Hons.), Rajiv Gandhi National University of Law, Patiala.

Part I

Introduction

Climate Change has become one of the most pressing issues in the 21st Century. The Marxian extrapolation of an inevitable climate crisis in the coming centuries, one beleaguered with capitalism has been realized. Capitalists and developed nations lead the bandwagon of climate change oppressors. The United States pulling out of the Kyoto Protocol back in 1997 and the Trump Administration following a similar pattern by pulling out of the Paris Climate Agreement only exacerbate the status quo. However, climate change has affected everyone in a variegated capacity. This paper strives to effectively analyze and communicate the vulnerability and suffering of the most persecuted climate victims, the small island states.

The battle for preservation of lives and livelihoods of small island nations has been a long lasting one. It has been in existence for more than two decades and has reached the worst possible position today. These states are at the receiving end of the worst bearings of climate change. Formerly structured as the Alliance of Small Islands States (AOSIS), these small islands have been the point of the inception of a variety of novel and creative attitudes towards climate change governance and recourse within the United Nations Framework Convention on Climate Change (hereinafter UNFCCC). Owing to the unique vulnerability faced by the AOSIS, they have been exceedingly proactive and perpetually involved in managing an effective recourse to the climate crisis. The present-day world is witnessing the worst phase of the climate crisis and the ever-increasing emission rates has called for an imminent recourse to the climate-related loss in the form of a comprehensive mechanism. The paper later delineates the various slow-onset events which act as a major source of devastation of the small island states.

There have been persistent efforts on the part of the Small Island Developing States (SIDS) even before the drafting of the UNFCCC. The SIDS had prognosticated the need to address the climate change way before the same came to the forefront. The entire effort of the AOSIS can be summarized into two central demands.

Firstly, a robust approach by the international community to counter the burgeoning of the climate change induced phenomena, i.e. by reducing risk of upcoming loss and damage through effective risk management. This can be effectively realized by practicing climate change adaptation and mitigation alongside minimizing climate change impacts.

Secondly, an imminent requirement of the states to address the loss and damages as and when it occurs in the present and in the future. AOSIS's proposal as a reference in the UNFCCC is essentially formulating a specialized mechanism that deals with the vulnerable island states and grants them access to a funds immediately after being affected by these disasters. The same proposal also talks about disaster risk management and unavoidable, irreversible climate impacts. Compensation and rehabilitation as an effective recourse to such situations has also been discussed. These proposals of the AOSIS has been received with an unequivocal support by the developing countries and an ambiguous stand by the developed nations.

The compensation and rehabilitation part of the proposal has seen the least amount of response from both developed and developing countries. The paper delineates the various causes that have stifled the way ahead with the compensation and rehabilitation aspect of the proposal. The developed nations have been extremely vocal about resisting any proposal that might create an open-ended financial burden or liabilities of a legal nature. However, the paper discusses the various reasons that create a fecund ground for the developed countries to establish a compensation scheme.

Climate Crisis and Oasis

1. Affinity to Climate Change

The AOSIS countries are “coalition of small islands and low-lying coastal countries that share similar development challenges and concerns about the environment, especially their vulnerability to the adverse effects of global climate change.”²AOSIS functions as an ad hoc member, voicing the needs of the SIDS.³This includes 59 million citizens from 44 States and observer countries from around the world. The location of these states extends in and around the globe including the Pacific, Indian, and Atlantic oceans as well as the Mediterranean, Caribbean, and South China Seas. These states situated in the coastal areas face the collective challenge of sustainable economic development; including the geographical and demographical standpoint, limited availability of resources, heavy dependency on international trade and extreme affinity to natural disaster due to their location.⁴ Majority of these countries fall under the middle- or low-income countries, and five of them rank among

²*About AOSIS*, ALLIANCE OF SMALL ISLAND STATES, <http://aosis.org/about-aosis/> (last visited Jan. 5, 2018).

³*Id.*

⁴CLIMATE AND DEVELOPMENT KNOWLEDGE NETWORK, IPCC'S FIFTH ASSESSMENT REPORT – WHAT'S IN IT FOR SMALL ISLAND DEVELOPING STATES? (2005).

the least developed countries in the world.⁵

The vehemently vulnerable position of the AOSIS countries put them at the receiving end of some of the worst climate extremes. The Pacific islands lie at the heart of the most disaster-prone regions. In the Caribbean, the coastal population constitutes for 70% of the total population and will be forced to relocate eventually. These make them susceptible to floods, droughts and cyclones, *inter alia*. These changes also make these areas extremely prone to coral bleaching and inundation of the coasts and erosion – posing a serious threat to the indigenous community; forcing migration. The projected sea level rise of 3.3 feet by 2100 would cause economic damage that would do irreparable damage for these economically backward countries.⁶ For instance, the Marshall Islands are now facing high tides or “king tides,” *that surge over sea walls, repeatedly flooding its capital.*⁷ The myriad impact that the natural hazards leave on the local and national economic health of the nations are of irreparable nature. Most of the SIDS’ economic hub functions at the coastline. Jamaica is a prime example, as almost 91% of Jamaica’s GDP is generated in the coastal region.⁸ As per IPCC’s extensive data, it is well established that “*developing countries are economically vulnerable to climate extremes.*” The reason for this increased vulnerability is the dependence on “climate sensitive activities” such as cropping and fishing; lack of a preparation for physical hazards and the lack of an effective adaptability mainly due to the low levels of economic developments.⁹

Accordingly, developed countries in possession of highly industrialized structures possess the highest incomes and are well prepared to effectively deal with economic disaster. The fatality rates and losses as a proportion of GDP are much lesser in developed countries as compared to the SIDS. Thus, a single disaster has a far-reaching impact on the already fragile socio-economic structure of these small nation.

2. Slow-onset Events

⁵Erika J. Techera, *Climate Change, Legal Governance and the Pacific Islands: An Overview*, in CLIMATE CHANGE AND INDIGENOUS PEOPLES: THE SEARCH FOR LEGAL REMEDIES (Randall S. Abate ed., 2013).

⁶ IPCC, 2013: *Climate Change 2013: The Physical Science Basis. Contribution of Working Group I to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* (T.F. STOCKER, et.al , eds., Cambridge University Press).

⁷*Marshall Islands’ Capital Majuro Submerged by ‘King tides’*, CLIMATE HOME NEWS (Mar 3, 2014).

⁸ *#NEW YEARS’ MESSAGE – Continued Resolve to Make Jamaica Safe; New Legislation to Define a Transformed Police Service – PM Andrew Holness*, JAMAICA OBSERVER (Jan 1, 2018).

⁹ Ilona Millar et al., *Making Good the Loss: An Assessment of the Loss and Damage Mechanism under the UNFCCC Process*, in THREATENED ISLAND NATIONS: LEGAL IMPLICATIONS OF RISING SEAS AND A CHANGING CLIMATE (Michael B. Gerrard & Gregory E. Wannier eds., 2013).

The climatic prognosis for SIDS is alarming. Variations in “frequency, intensity, spatial extent, duration, and timing of climate extremes” can result in “unprecedented” events. Further, the stepping over of the bleakly defined climate thresholds coupled with the complexity of the climate systems is also a factor. Scientists have anticipated that the impacts that are yet to come will be extreme and *sui generis* in nature. IPCC’s special report discusses at length the human activities catalysing the climate extremes. One of such instances being that of the rise in sea level. It has been identified that some of the effects on the climate are inevitable. While a few impacts or effects can be avoidable through mitigation or adaptation, most of the impacts have reached a point of no return.¹⁰ It is the latter category that has become a topic of much concern as countless measures to avert such impact is futile. Loss of land due to sea-level rise, drought, increased heat events, collapse of fishing industry due to heat and ocean acidification – all are unavoidable damages that beleaguer SIDS. SIDS are also home extremely vulnerable indigenous people. Climate induced migrants have also become rife in these small island nations.

Thus, climate change impacts have already produced problems that can no longer be dealt with. There is no recourse to certain problems that has been created the climate crisis and no possible means to avert the same in the future. This is evidence of the utter futility that the human race might to have to encounter at the hands of nature in the future.

3. Impacts

The perpetual vulnerability largely due to the demographics of the AOSIS states propelled them to identify the wide range of possible resources to the climate change crisis. As established earlier, some inevitable ramifications have become immune to all forms of human resistance. The AOSIS states have strived to prevent the exacerbation of impacts that might eventually render them immune to all sorts of human intervention.

PART II

The Struggles and Setbacks of the Realpolitik

There has been a sizeable recommendation from academicians and practitioners in the past.

¹⁰WORLD WILDLIFE FUND, BEYOND ADAPTATION THE LEGAL DUTY TO PAY COMPENSATION FOR CLIMATE CHANGE DAMAGE(2008).

The range of urgency has also been felt on various occasions in the past, however, the same has been in vain. The developed countries have always exercised the grave imbalance in power in their favour. For instance, the Inuit petition at the Inter-American Commission on Human Rights (IACHR) which set out inflict liability upon the United States for the gross human rights violations brought upon by disproportionately contributing greenhouse gasses to the atmosphere. The petition reached no conceivable conclusion and was suppressed eventually. A similar instance by Tuvalu, when the nation threatened to sue the United States in the International Court of Justice for the inaction towards reduction of emission of gasses. The lack of a rightful jurisdiction among other things was largely liable for the futility of Tuvalu's claims.

The imbalance in power and resources has had multiple manifestations in the past. In most of the cases, the facts and figures have been on the side of the SIDS. The undiminished emissions produced by the highest emitters has visibly altered the atmosphere and has rendered the climate extremely unreceptive to the existence of small island nations. However, it can be safely assumed that the consequences of emissions were very well known to the highest since 1992, i.e. the inception of the UNFCCC. And this in itself is a strong case to pursue the wilful inaction exercised by the largest emitters. However, the geopolitical milieu of the world is erroneously tilted towards favouring the developed countries. This endless resources and capital on the part of the developed country renders any action against them from the SIDS futile. There are other aspects too. For instance, the capital and human resource ability of the SIDS to really pursue such claims also come into the picture. The inability to follow through litigation involving endless resources also plays an important part. Thus, the geopolitical milieu plays a very important role in ascertaining the tilting of the situation in such cases. There is evidence to rightfully point to the inability of these small nations in successfully pursuing such claims in the international fora.¹¹ However, the Republic of Palau stands out as an exception in the sea of futility.

Sponsored by affluent and powerful European nations, the Republic of Palau leads the coalition of states that are prone to the vulnerability of the climate change crisis. It seeks to request an advisory opinion from the International Court of Justice. The request seeks "*on an urgent basis . . . an advisory opinion from the ICJ on the responsibilities of States under international law to ensure that activities carried out under their jurisdiction or control that*

¹¹ Lisa Friedman, *Island States Mull Risks and Benefits of Suing Big Emitters*, E&E NEWS (NOV. 16, 2012), <http://www.eenews.net/public/climatewire/2012/11/16/1>.

emit greenhouse gases do not damage other States."¹² However, there is more to the similar angle, as reports claim that there is a sense of restraint in pursuing the matter with all rigour as it might cost losing out on billions in aid for non-climate needs.¹³ Ex-President of Palau, Johnson Toribiong, maintains that the advisory opinion would "complement and not conflict" with international negotiations.¹⁴ This action would conceivably "*renew our faith in a system of law that has guided States' actions in the past and gives them legitimacy today,*" according to President Toribiong.¹⁵

The realm of litigation has also been often explored and contemplated to hold the emitters liable, however to no resolve. A similar unbalanced shift also exists in litigation. Unites States is inevitably the defendant in almost all cases of litigation involving greenhouse emission, owing to its emission rates (second largest emitter in the world).

Displacement of people due to the Climate Crisis

One of the pressing ramifications of the climate crisis is the vehemently adverse effect on the people residing in these small island states. A 21st Century concept that has come to the forefront in the light of the recent environmental crisis is that of a Climate Change Refugee. The immediate instance of such refugees can be the example of the people of Tuvalu, who seek refuge from New Zealand and Australia.¹⁶ However, their request for refugee status has been in vain so far, as the term "environmental refugee," though conventionally these people mainly flee their countries largely due to the prevalent events that threaten their human rights and lives, however, them fleeing their countries for solely environmental reasons does not constitute or fall under the traditional legal definition of "refugees." Thus, it has been contemplated that though a legitimate concept in the international for a, it is more of a misnomer.

Lack of a mention of environmental displacement in traditional definitions of refugees

The definition of refugees does not fall under the framework of the 1951 UN Convention

¹² *Press Conference on Request for International Court of Justice Advisory Opinion on Climate Change*, UNITED NATIONS (Feb 3, 2012), http://www.un.org/press/en/2012/120203_ICJ.doc.htm .

¹³ *Supra* 10.

¹⁴ *Supra* 11.

¹⁵ *Id.*

¹⁶ *Tuvalu*, NATIONAL PUBLIC RADIO, INC. (NOV. 15, 2001), <http://www.npr.org/templates/story/story.php?storyId=1133294>.

Relating to the Status of Refugees (“Convention”).¹⁷ Over the course of the last few decades, these definitions have been adopted and implemented verbatim by most countries while dealing with refugees and granting refugee status.¹⁸ The definition requires (i) a fear, (ii) that is well-founded, (iii) of persecution (iv) based on reasons of race, religion, nationality, membership in a particular social group, or political opinion.¹⁹ The prevalent take on refugees is largely adhering to the boundaries laid down by the Convention. Once the status has been granted there are extensive and exhaustive rights and provisions that are guaranteed to these people. However, “environment” and “climate change” are not included in these definitions.

A Holistic Approach to defining “Climate Change Refugees”

Regardless of the fact whether these people fit into the legal framework of being rightfully classified as refugees or not, it cannot be ignored that indeed they have been displaced largely due to environmental reasons and scenarios. Famine to inundation, industrial tragedies to deforestation, environmental calamities form the basis for the displacement of these population. Often these events are interlinked, making it impossible for the refugees to single out the point of causation and effect, thus forcing them to be displaced. The current number of people displaced stands at 25 million.²⁰ Further the number is expected to reach 150 million by 2050.²¹ The sheer facts and figures that exist with regard to people displaced due to environmental reasons warrants a reevaluation in the international fora. Although these refugees fail to fall under the prescribed boundaries by conventions and protocols, the reality behind such displacement cannot be ignored.

A Humanitarian Take

The definitions that have been adopted by the governments has always been from a political standpoint, i.e. there has always existed a latent political motive behind every definition of refugee that has been adopted by various government. This political agenda has always garbed the economic, cultural and social aspect of the people and they have been subject to

¹⁷Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 150 (1954) [hereinafter Refugee Convention].

¹⁸Jessica B. Cooper, Student Article, *Environmental Refugees: Meeting the Requirements of the Refugee Definition*, 6 N.Y.U. ENVTL. L.J.

¹⁹*Supra* 16.

²⁰Dana ZartnerFalstrom, *Perspective: Stemming the Flow of Environmental Displacement: Creating a Convention to Protect Persons and Preserve the Environment*, 13 COLO. J. INT’L ENVTL. L. &POL’YY.B. 1, 4 (2002).

²¹*Id.*

gross violation. This kind of behaviour is especially confined to the European Government.²² Further, the rights of these people, rights to life, health, food/water, livelihood, culture, privacy and home life and property.

Human rights and environment exist concomitantly. The former needs the latter for a meaningful existence and vice versa. Most of the rights mentioned above are enormously susceptible to environmental calamities and safeguarding the environmental is the first order of business to realize the balance the between the two. In the refugee contemplation in case of Tuvalu, the United Nations Human Rights Committee stated:

*Tuvalu on its own is incapable of fully protecting the wide range of rights and freedoms directly implicated by climate change; even though those rights are guaranteed under national and international law. This is because the ultimate cause of climate change originates far beyond the borders of the country and far beyond its effective control. Thus, the international community, in particular the major emitting countries of the developed world, must themselves also take responsibility for promoting and protecting the human rights of Tuvaluans by arresting their dangerous interference with the global climate system.*²³

The most important task accomplished by adopting a humanitarian take on the entire issue is the shifting of the entire issue from a scientific occurrence to placing the onus on international human rights law to impose obligation upon emitters.²⁴ The human rights approach rightfully shifts the emphasis towards the individuals affected by the climate crisis. Likewise, “*human rights also introduce an accountability framework that is an essential element of the promotion and protection of human rights itself, by holding governments, the duty-bearers accountable to reducing the vulnerability . . . to global warming and assisting them in adapting to the consequences.*”²⁵

Most of the largest emitters have also ratified foundational human rights documents, including the including the Universal Declaration on Human Rights (“Universal

²²KAREN MUSALO et al., REFUGEE LAW AND POLICY: A COMPARATIVE AND INTERNATIONAL APPROACH(3d ed. 2007).

²³Marc Limon, *Human Rights and Climate Change: Constructing a Case for Political Action*, 33 HARV. ENVTL. L. REV 439, 465 (2009).

²⁴Kyung-wha Kang, Deputy High Commissioner for Human Rights, Office of the U.N. High Commissioner for Human Rights, *Address at the Conference of the Parties to the UNFCCC and its Kyoto Protocol* (Dec. 14, 2007), <http://www.unhcr.ch/hurricane/hurricane.nsf/view01/013DC0FAA475EC87C12573B10074796A?opendocument>.

²⁵*Id.*

Declaration”),²⁶the International Covenant on Civil and Political Rights (“ICCPR”),²⁷and the International Covenant on Economic, Social, and Cultural Rights (“ICESCR”).²⁸ These documents are capable of inflicting legal obligation upon these signatories.

Right to Life: The right to life forms the crux of human rights that are guaranteed to every individual. It is also considered to be a peremptory norm of international law.²⁹

Right to Health: Article 25 of the Universal Declaration states that the “*right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services . . .*”³⁰ Article 25 also talks about *Right to Food and Water*.

Right to Property: This rights takes into consideration the hapless condition of the individuals and the nation in its entirety. Article 17 of the Universal Declaration provides that “[e]veryone has the right to own property” and also that everyone the right not to be “arbitrarily deprived of his property.”³¹

Once violations of some of these basic human rights have been established, the U.N. Office of the High Commissioner for Human Rights (“OHCHR”) argues that States have legal obligations to:

- (1) *Refrain from interfering with the enjoyment of human rights in other countries;*^[1]
- (2) *Take measures to prevent third parties over which they hold influence from interfering with the enjoyment of human rights in other countries;*
- (3) *Take steps through international assistance and cooperation, depending on the availability of resources, to facilitate fulfilment of human rights in other countries, including disaster relief, emergency assistance, and assistance to refugees and displaced persons; and*

²⁶Universal Declaration of Human Rights, G.A. Res. 217A, ¶ 1, at 71, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948).

²⁷International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966, G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171 <http://www2.ohchr.org/english/law/ccpr.htm>.

²⁸International Covenant on Economic, Social, and Cultural Rights, *opened for signature* Dec. 16, 1966, G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., U.N. Doc. A/6316, 993 U.N.T.S. 3, <http://www2.ohchr.org/english/law/cescr.htm>.

²⁹SumuduAtapattu, *Global Climate Change: Can Human Rights (and Human Beings) Survive this Onslaught?*, 20 COLO. J. INT’L ENVTL. L. &POL’Y35, 45 (2008).

³⁰Universal Declaration, *supra* note 26, art. 25.

³¹Universal Declaration, *supra* note 26, art. 17.

(4) Ensure that human rights are given due attention in international agreements and that such agreements do not adversely impact upon human rights.³²

PART III

Having noted the dismal realpolitik extant in the geopolitical milieu, it follows naturally that the afore-highlighted despondency with regards to the power differentia between the largest emitters and the small island nations affects the formulation of an effective legal stratagem that can be executed by AOSIS for the purposes of initiating climate action. Climate action, which is to be implemented primarily in the forms of ‘adaptation’, ‘mitigation’, and ‘loss and damages’ requires the access to resources which the SIDS by way of their economic, along with other logistical predicaments cannot implement on their own. Climate action requires a concerted, global effort, something which has been lax, regardless of all the rhetoric and the fanfare surrounding recent developments. In such a scenario, by dint of the high stakes of survival associated, it becomes imperative for the SIDS to have recourse to a legal remedy so as to ensure their survival.

This section highlights the lack of a legal remedy in the current milieu. This lack of legal remedy makes the SIDS severely and disparately vulnerable, and unconscionably so, for fault is not entirely theirs. Simultaneously this section notes the various legal contraptions that can be implemented by the AOSIS nations so as to ensure remedies are available to them so that their sufferings are not exacerbated due to the emissions by other nation-states.

The Dearth of an Effective Battle Strategy and Prospective Strategies that can be Implemented

Climate change has been described as a threat multiplier which indubitably affects the human rights of the peoples not only of AOSIS nations, but nations throughout the world.³³

³²Office of the U.N. High Comm’r for Human Rights, Report of the Office of the United Nations High Commissioner for Human Rights on the Relationship Between Human Rights and Climate Change, para. 86, U.N. Doc. A/HRC/10/61 (Jan. 15, 2009).

³³OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS, TAKING ACTION ON HUMAN RIGHTS AND CLIMATE CHANGE (2016), <http://www.ohchr.org/Documents/Issues/ClimateChange/EM2016/TakingAction.pdf>.

Particularly affected are those living in the developing nations.³⁴ It also merits mention that of the extant level of the GHGs currently present in the atmosphere, most has historically been emitted by the developed nations. Moreover, it is also well documented that some of these countries which are most vulnerable to climate change are disparately affected as they are also low or moderate emitters of the GHGs.³⁵ In line with all these facts, it can be asserted that having the AOSIS nations bear the brunt of climate change for little fault of theirs is unconscionable.

1. Applying the Legal Treatises

International Environmental Law provides for various contraptions for enhancing climate action. Most notably, it is the COP21 Paris Agreement which added significantly to the existing literature. Heralded as the most ambitious project till date and agreeable by most nations, the Paris Agreement has also been chastised for providing little legal enforceability.³⁶ Such a similar distasteful result is evinced by most treatises in International Environmental Law.

The Paris Agreement provided for no enforcing authority. In contrast, the United Nations Convention on the Law of the Sea provides a panacea to this effect. The ‘Constitution for the seas’ the Convention comes to the rescue for the SIDS by way of its expansive dealings with marine pollution and protection and by providing for a tribunal which can be approached in the event state-parties need to challenge other state parties for violations of the principles documented in the Convention.³⁷

Because of its expansive definition of ‘pollution’³⁸, SIDS can hold state-parties accountable for failing to ensure “their duty to protect and preserve the marine environment”, as enumerated in Art 193. Moreover, the states have a duty to “prevent, reduce and control

³⁴Summary for Policymakers, In: Climate Change 2014: Impacts, Adaptation, and Vulnerability.

Part A: Global and Sectoral Aspects. Contribution of Working Group II to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change, Cambridge University Press, Cambridge, United Kingdom and New York, NY, USA.

³⁵Glenn Althor et. al., *Global Mismatch Between Greenhouse Gas Emissions And The Burden Of Climate Change*, 6 SCIENTIFIC REPORTS (2015),<https://www.nature.com/articles/srep20281>, also see D S Ward and N M Mahowald, *Contributions Of Developed And Developing Countries To Global Climate Forcing And Surface Temperature Change*, 9 Environmental Research Letters 7 (2014),<http://iopscience.iop.org/article/10.1088/1748-9326/9/7/074008>.

³⁶Timmons Roberts, *Is the Paris climate deal legally binding or not?* CLIMATE HOME NEWS (Nov.2, 2017), <http://www.climatechangenews.com/2017/11/02/paris-climate-deal-legally-binding-not/>.

³⁷ William C.G. Bums, *Potential Causes of Action for Climate Change Damages in International Fora: The Law of the Sea Convention*, 2 INT'L J. SUST. DEV. L.&POL'Y, (2006).

³⁸United Nations Convention on the Law of the Sea, Art. 1(4), Dec. to, 1982, 1833 U.N.T.S.397.

pollution of the marine environment from any source”,³⁹ and also to avoid "the release of toxic, harmful or noxious substances, especially those that are persistent... from land-based sources, [or] from or through the atmosphere."⁴⁰ Further, state parties are to ensure that activities conducted within their jurisdictions do not harm the other states or their environments.⁴¹ Moreover, Article 194(5) establishes a ‘protect and preserve’ mandate upon state-parties, which imposes a due diligence obligation upon them to “protect and preserve rare or fragile ecosystems as well as the habitat of depleted, threatened or endangered species and other forms of marine life.”⁴²

All of the aforesaid is enforceable by state parties in the International Tribunal for the Law of the Sea, and hence provides a recourse to AOSIS nations to approach the Tribunal for enforcement of these principles.

That being said, this method too has its limitations. The Convention falls short of bringing one of the key polluters, the United States of America, to the book as it is not a state party to this Convention, and even though the bulk of the principles enumerated in the Convention form a part of Customary International Law, it is difficult to enforce the same against the United States in any legal fora, particularly as the United States has made itself immune from such legal scrutiny in various foras such as the International Court of Justice. Further to this limitation, in spite of Article 194 enumerating various duties, they merely obligate due diligence, and such a ‘standard of care’ is hard to legally enforce.

Having enumerated these limitations, it can still be contended that due to its efficacy by having provided a dispute resolution mechanism, and also extensive principles to resort to, the use of UNCLOS by AOSIS to get the requisite resources, and also to inflict ‘reputational damage’ upon major polluters can be a viable recourse.

2. Resorting to Human Rights and other Principles of International Law

Another avenue that lies at the disposal of AOSIS nations is to climb on the Human Rights bandwagon and fight against climate change therefrom. Climate change indubitably affects human rights. Changing climate will affect the regarded right to life, right to adequate food, right to water, right to health, right to adequate housing, right to self-determination, among

³⁹*Id.* Art. 194(1).

⁴⁰*Id.* Art. 194 3(a).

⁴¹*Supra* 36.

⁴²*Supra* 37 Art. 194(5), also see, *Supra* 36.

many others⁴³. Climate change will also severely affect women, children, indigenous people, and will cause widespread displacement and issue new security and conflict risks⁴⁴. Such ramifications will, like emphasized earlier, will primarily and most devastatingly be borne by the developing nations, including the SIDS.

A particularly striking and worrying effect of climate change will be the resultant refugee crises arising thereby. At a moment when the world currently has the largest number of refugees in existence since the second world war, another crisis arising, one which seems imminent if small island nations continue suffering and the gloomy forecasts turn true⁴⁵, climate change refugees will start becoming more conspicuous, and that too at a time when the existing refugee laws are inadequate in dealing with them. The 1951 United Nations Convention on the Status of Refugees does not recognize the existence of refugees arising out of environmental displacement, that is, those who have been displaced due to changes in the environment. Article 1 of the Refugee Convention lays down the following grounds for a displaced individual to qualify as a refugee, namely -

- (i) A fear,
- (ii) that is well-founded,
- (iii) of persecution
- (iv) based on reasons of race, religion, nationality, membership in a particular social group, or political opinion.

Within the meaning of these requisites, climate change refugees are left bereft of any legal protection.

To achieve a solution for the same, it becomes imperative that a Human Rights-oriented approach is adopted, one in consonance with principles of international humanitarian law, and international law in general, so as to provide to the victims of climate change legal protection⁴⁶.

⁴³OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS, REPORT OF THE OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS, *The Relationship Between Climate Change And Human Rights*(2009).

⁴⁴*Id.*

⁴⁵*Supra* 3.

⁴⁶Tiffany T.V. Duong, *When Islands Drown: The Plight Of "Climate Change Refugees" And Recourse To International Human Rights Law*, 31U. PA. J. INT'L L.4 (2010).

Furthermore, when it comes to claiming resources for climate action, principles of international law like the Transboundary Rule, are imperative for collating the resources for adaptation and mitigation activities and for attaining compensation for loss and damage. The Transboundary Rule requires states to prevent or minimize the risk of damage to other states arising from their own actions. Also, helpful may be the principle of state responsibility, whereby a state is held to be responsible for committing a breach of its obligations under international law. These claims can be brought before international, or even domestic legal fora, and AOSIS can collectively claim these suits so as to make them more effective.⁴⁷

3. Knocking on the Doors of the International Court of Justice

At last, AOSIS nations, for effectuating climate action and to hold nations responsible for their emissions can approach the ICJ. The ICJ has the power to hear a case in light of its compulsory jurisdiction through the following ways:

(i) by mutual agreement;

(ii) through the "coincident existence" of applicant and respondent parties who had accepted compulsory jurisdiction of the ICJ; or,

(iii) through an independent treaty's dispute resolution clause specifying settlement before the ICJ.⁴⁸

Furthermore, the AOSIS nations can approach the ICJ via the General Assembly for seeking its advisory jurisdiction upon a matter in cases where the Court cannot exercise its compulsory jurisdiction.

By taking this recourse, the AOSIS nations have at their disposal a legal body which can assess the claims on the basis of various treaties and principles, providing remedy to the said nations and establishing more principles, ones favourable to the SIDS and to equally vulnerable nations and communities⁴⁹.

⁴⁷Maxine Burkett, *A Justice Paradox: On Climate Change, Small Island Developing States, and the Quest for Effective Legal Remedy*, 35 UNIV. HAW. L. REV. 2 (2013).

⁴⁸Statute of the International Court of Justice, Art. 64, June 26, 1945, 59 Stat. 1055, 33 U.N.T.S. 933.

⁴⁹Andrew Strauss, *Climate Change Litigation: Opening the Door to the International Court of Justice*, in ADJUDICATING CLIMATE CHANGE: STATE, NATIONAL, AND INTERNATIONAL APPROACHES (William C. G. Burns & Hari Osofsky eds. Cambridge University Press, 2009).

The limitations to this recourse, however, are proffered by the lack of an effective enforcement mechanism of the decisions by the ICJ. The Security Council is the body which possesses the requisite authority to enforce the decisions of the ICJ, however expecting the Council to take action against nations such as United States etc. would be overly optimistic, seeing as how the Security Council remains divided and inefficient encumbered by the power and influence of the States, and the veto that comes along with.

Conclusion

The legal contraptions as highlighted above are a far cry from being effective and cannot suffice to provide the much-needed remedies to the SIDS. The need is to attain an efficacious legal recourse which can be adopted by SIDS, either by ridding the extant recourses as have been highlighted above of their faltering, or if these faltering remain indelible, then by way of devising more efficient models which can assist SIDS in taking climate action by way of adaptation and mitigation, and also attain compensation for the loss and damage suffered due to the emissions of other nations, encompassing the various principles of international law involved. Such a legal solution is the only hope for these nations whose very existence stands threatened. Unless this solution comes to be, this daunting challenge looks well on its way to out-do these nations, causing them to vanish, whilst the rest of the developed world looks on imperturbably.