INTERNATIONAL LAW ASSOCIATION

ATHENS CONFERENCE (2024)

INTERNATIONAL LAW AND SEA LEVEL RISE

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FINAL REPORT

Part I: BACKGROUND

A. Establishment of the Committee, its mandate and focus in Phase One (2014–2018)

The ILA Committee on International Law and Sea Level Rise (hereinafter: Committee) was established by the ILA Executive Council in November 2012.[1] The Committee was tasked with a two-part mandate:

(1) to study the possible impacts of sea level rise and the implications under international law of the partial and complete inundation of State territory, or depopulation thereof, in particular of small island and low-lying States; *and*

(2) to develop proposals for the progressive development of international law in relation to the possible loss of all or of parts of State territory and maritime zones due to sea level rise, including the impacts on statehood, nationality, and human rights.

The Executive Council appointed Professor Davor Vidas (Norwegian branch) as the Chair of the Committee, and Professors David Freestone (British branch) and Jane McAdam (Australian branch) as Co-Rapporteurs.[2] The first meeting of the Committee was held at the 76th ILA Conference in Washington DC, USA, in April 2014.[3] At that meeting, the Committee adopted its work plan and defined three main areas of international law in relation to sea level rise it intended to focus on: (1) the law of the sea; (2) forced migration and human rights; and (3) issues of statehood under international law and international security.[4]

The Committee divided its work thematically into two main stages and first focused on priority areas in a relatively shorter-term (or 'near term') perspective.[5] This first stage (or phase one), which was implemented from 2014 to 2018, involved two parallel streams of study: one on the law of the sea issues of maritime limits and boundaries, and the other on the migration and human rights issues. The results of the study undertaken by the Committee in phase one and the proposals adopted by the Committee on that basis are contained in its 2018 Report which was presented at the 78th ILA Conference in Sydney, Australia, in August 2018,[6] as well as in two resolutions adopted by the ILA Conference: the ILA Resolution 5/2018, on maritime limits and boundaries, and the ILA Resolution 6/2018, which also contains the 'Sydney Declaration of Principles on the Protection of Persons Displaced in the Context of Sea Level Rise'.[7] With the 2018 Report and Resolutions adopted and published by the ILA, the Committee had completed a substantial part of its mandate. However, an important part of the mandate involving the study of international law issues prompted by the mid- to long-term predictions of sea level rise still remained to be addressed.

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[1] ILA, *Minutes of the Meeting of the Executive Council* (London, 10 November 2012), at 5.

[2] Ibid. In addition to the officers of the Committee, its membership was initially appointed during the course of 2013.

[3] ILA, *Report of the Seventy-sixth Conference, held in Washington D.C., April 2014* (London: ILA, 2014), at 877–881. At the time of the 76th ILA Conference, the Committee had 21 Members and four Alternates.

[4] For the initial proposal on structuring the work of the Committee through a division into those three main issue-areas, see *Letter of the Chair to the Members of the Committee*, 19 December 2013 (on file with the Committee).

[5] For a definition of a 'near term' (as well as a 'mid-term' and 'long term'), see n. 17 below.

[6] The 2018 Report, with all the amendments made in the follow-up of the August 2018 Sydney ILA Conference, is published in: ILA, *Report of the Seventy-eighth Conference, held in Sydney, 19–24 August 2018* (London: ILA, 2019), 866–915. Published also separately in an edited version as: D. Vidas, D. Freestone and J. McAdam (eds), *International Law and Sea Level Rise: Report of the International Law Association Committee on International Law and Sea Level Rise* (Leiden/Boston: Brill, 2019). Hereinafter: *Report of the ILA Committee (Sydney 2018)*; in further references to that report below, page numbers indicated relate to the ILA printed published version, and pages referred to in square brackets relate to the edited version published by Brill. Prior to that report, the Committee presented an interim report, published in: ILA, *Report of the Seventy-seventh Conference, held in Johannesburg, August 2016* (London: ILA, 2017), 842–875. Hereinafter: *Interim Report of the ILA Committee (Johannesburg 2016).*

[7] ILA Resolutions 5/2018 and 6/2018, in English and French, are published in: ILA, *Report of the Seventy-eighth Conference* (n. 6), at 29–40; also available online at ILA webpage, at: <https://www.ila-hq.org/index.php/committees>.

B. Extension of the Committee's term and focus in Phase Two (2019–2024)

In Resolution 6/2018, the 78th ILA Conference recommended that the Executive Council extend the term of the Committee in order to enable it to continue its work on the remaining aspects of its mandate beyond 2018. The focus for the second phase involved especially the study of the statehood question and the rights of affected populations, as well as other aspects of international law including the law of the sea and territory issues. In November 2018, the ILA Executive Council approved the extension of the term of the Committee, initially to 2022, to enable it to complete its mandate by addressing also those pending issues in the second stage (phase two) of its work;[8] and in May 2022 the term of the Committee was extended to 2024.[9]

At the beginning of phase two, the membership of the Committee partially changed. Several Members of the Committee who took part in phase one withdrew, and many new Members with the special expertise required to address the remaining aspects of the Committee's mandate in the second stage of its work joined the Committee.[10] As of 26 June 2024 (the date of this report), the Committee consists of 41 Members and five Alternates from 22 regional and national ILA branches, in addition to the Headquarters branch.

The composition of the Committee officers also partly changed at the beginning of phase two, as Professor Jane McAdam in January 2019 withdrew from her role as Co-Rapporteur and continued as a Member of the Committee. In May 2019, the ILA Executive Council approved the appointment of Professor Maxine Burkett as Co-Rapporteur. In May 2021, due to her appointment to a new function, Professor Burkett had to withdraw from serving as Co-Rapporteur and the ILA Executive Council approved at its semi-annual meeting in May 2021 the appointment of Professor Elisa Fornalé as Co-Rapporteur. Professor David Freestone has continued to serve as the other Co-Rapporteur, and Professor Davor Vidas as the Chair.

In approaching the phase two, the Committee was aware in particular that its study concerning the question of statehood and other issues of international law and international security prompted by the partial or complete inundation of State territory and/or its uninhabitability, as well as the gradual depopulation prior to this, involved a medium to long-term perspective, based on the scientific predictions of sea level rise. Scientific evidence, in addition to that taken into consideration in the 2018 Report of the Committee,[11] has become available in the course of phase two in the reports issued by the Intergovernmental Panel on Climate Change (IPCC) within its Sixth Assessment Report cycle, implemented from October 2015 to July 2023.[12]

Like phase one, phase two resulted in two reports of the Committee: an interim report, which the Committee presented at the 80th ILA Conference in Lisbon, Portugal, in June 2022;[13] and a final report, which the Committee presented at the 81st ILA Conference in Athens, Greece, in June 2024. The work of the Committee on the 2022 interim report has been detailed in that report.[14]

C. Work of the Committee after the 80th ILA Conference (Lisbon, June 2022) on this report

On 18 and 19 November 2022, the Committee met in Lisbon, Portugal, for an intersessional meeting co-organised by the University of Lisbon, Faculty of Law and the Fridtjof Nansen Institute (FNI) of Norway; the meeting was hosted by the Faculty of Law. At the Lisbon meeting, the Committee discussed and adopted two syllabi – syllabus 1, on statehood and the rights of affected populations, and syllabus 2, on the law of the sea – to guide its work towards the final report. The Committee, moreover, established an 'open ended' working group on statehood and the rights of affected populations (the themes of syllabus 1). The Committee defined key study areas and allocated tasks to the Committee officers and members of the working group in the form of the development of several short papers, designed to serve as the basis for the main part of the draft report, on statehood and the rights of affected populations.

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[8] ILA, *Minutes of the Meeting of the Executive Council* (London, 17 November 2018), at 3, and Annex 5.
[9] ILA, *Minutes of the Meeting of the Executive Council* (London, 7 May 2022), at 10.
[10] In 2019, ten members/alternates withdrew, while 20 new members/alternates joined the Committee since 2019.
[11] See the *Report of the ILA Committee (Sydney 2018)* (n. 6), at 868–873 [7–12].
[12] For the IPCC reports that resulted from AR6, see at: <https://www.ipcc.ch/assessment-report/ar6/>.
[13] The final version of the 2022 Interim Report is published in: ILA, *Report of the Eightieth Conference, held in Lisbon, 19–24 June 2022* (London: ILA, 2023), 506–557. Hereinafter: *Interim Report of the ILA Committee (Lisbon 2022)*.
[14] See ibid., at 509–510.

The working group met in Bern, Switzerland, on 9–10 June 2023, for a meeting co-organised by the World Trade Institute (WTI) at the University of Bern and the FNI; the meeting was hosted by the WTI. Members of the working group presented short papers.[15] These served as the basis for discussion at the meeting. Also, the structure for the part of the final report on statehood and the rights of affected populations was adopted.

Drawing on the discussions at the Bern meeting and the material contained in the short papers, edited and synthesized in the aftermath of that meeting by a drafting group consisting of the Co-Rapporteurs, the Chair and two further members, Professors Walter Kälin and Clive Schofield, a first draft of the report was produced and distributed within the Committee on 30 October 2023. Written comments were provided by the Members by December 2023 and served as the basis for revising the draft in January/early February 2024. An online session of the Committee was held on 12 February 2024 to discuss the conclusions of the report and additional comments have been exchanged in several iterations until arriving at this final version of the report. This report, including references to sources in the footnotes, is up to date as of 26 June 2024. An Annex containing a list of selected publications by the Committee Members on aspects of international law and sea level rise published during the mandated extent of the Committee (2012–2024) is annexed to this report and is its integral part.

Part II: STATEHOOD AND THE RIGHTS OF AFFECTED POPULATIONS

A. Introduction

In its 2022 Interim Report, the Committee identified the following key questions to be examined further in the context of climate change-induced sea level rise:

1. What are the implications for statehood of diminishing State capacity and diminishing resident populations?
2. What are the implications of different potential forms of State transformation – including confederation, federation, condominium, or leasehold – on the protection of affected populations?
3. Taking as a starting point the principle that all persons affected by sea level rise will, at all times, remain rights holders under international human rights law, what does existing international human rights law (and other relevant bodies/principles of international law, such as the law on statelessness) say about the distribution of obligations among States towards these persons as rights holders – especially under different scenarios likely to emerge during the process of sea level rise? Where are there gaps, and how might international law be developed to address such gaps?

In exploring these questions, for the purposes of this report the Committee decided to frame its work in a scenario-based approach. In doing so, the Committee has been guided by the following considerations: First, rather than looking separately at the issues of statehood, the rights of affected States and the rights of affected populations, the Committee opted to present a series of possible scenarios demonstrating how the impacts of sea level rise could affect statehood and, with it, the rights of affected populations. And second, rather than focusing on worst-case scenarios, the main intention was to identify legal tools and avenues that are available to affected States and populations to cope with the challenges associated with the gradually increasing impacts of sea level rise.

In implementing these approaches, the Committee was guided by the following considerations concerning the territorial, temporal and substantive scope of its work:

[15] Short papers on the following themes have been contributed by the members of the working group: geographical and geomorphological implications of coastal systems' processes in an era of sea level rise (by Clive Schofield); physical measures to safeguard territory in the face of sea level rise and their legal implications (by Clive Schofield and David Freestone); measures involving state transformation (by Alejandra Torres Camprubí); legal measures (by Emma Allen and Michael Strauss); self-determination of peoples affected by sea level rise (by Davorin Lapaš); international cooperation (by Patricía Galvão Teles and Duygu Çiçek); rights related to citizenship and political rights (by Jane McAdam); social rights and cultural rights (by Walter Kälin); housing and property rights (by Markus Beham); access to justice and non-discrimination (by Elisa Fornalé); and non-refoulement in the context of sea level rise (by Bruce Burson). Additional themes included in this final report were elaborated by the members of the drafting group.

As to the *territorial scope*, the Committee decided to focus on those coastal States for which the elements of statehood may be especially exposed and vulnerable to sea level rise. It has thus limited the territorial scope of its work to low-lying small island developing States (SIDS) – referred to in this report as 'affected States' – since their statehood may be adversely impacted by sea level rise.[16]

As to the *temporal scope*, the Committee decided to focus on possible scenarios in the *mid-term* and, to an extent, *long-term*. In accordance with the IPCC's definitions, 'mid-term' relates to the period from 2041 to 2060, which is the primary focus of this analysis.[17] A distinction between the short-term, mid-term and the long-term perspective has been an important aspect of the work of the Committee since its inception.[18]

As to the *substantive scope*, the Committee decided to examine how international law can help affected States safeguard their statehood and protect the rights of persons constituting their population in the context of the following three possible scenarios:

- **Scenario 1**: States that are able to maintain *substantial parts* of their habitable territory in the mid-term and, possibly, longer-term owing to geomorphological facts (such as topography) or processes (e.g., accretion),[19] or through human interventions (e.g., coastal management, artificial elevation of existing islands);
- **Scenario 2**: States able to maintain *small parts* of their habitable territory as a consequence of geomorphological facts and processes (e.g., existence of elevated atolls; accretion) or through human interventions (e.g., coastal management, artificial elevation of existing islands), allowing for a symbolic presence and, at the same time, able to create special relationships with (an)other State(s) (e.g., confederation, federation, etc.);
- **Scenario 3**: States no longer exercising sovereignty over any *habitable* territory in either the mid-term or the longer-term.

For each of those scenarios, it was important to distinguish between States that may create special (usually bilateral) relationships with (an)other State(s) where substantial numbers of affected people may live, on the one hand, and States that are unable to create such special relationships, on the other. The key question that the Committee wanted to address is the following: *What rules or measures, under the above-defined scenarios, are available to protect and safeguard the rights of States affected by sea level rise regarding their statehood, and the rights of persons constituting their population?*

To answer this question, in the following four sections the Committee examines four interrelated aspects. First, scientific data and knowledge on processes and elements underlying the three scenarios, in particular regarding the geomorphological implications for the territories of low-lying SIDS. Second, the overarching principles and objectives of continuing validity important for facing the challenge of sea level rise to statehood of affected States and the rights of affected populations, in particular legal certainty and stability, equity, and international cooperation. Third, the rules and measures to facilitate the safeguarding of statehood in the three scenarios, including both physical and legal measures. And fourth, the rules and measures to facilitate the safeguarding of the rights of affected persons belonging to, or constituting, the population of the affected low-lying SIDS in the three scenarios.

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[16] While defining the low-lying SIDS as the 'affected States' for the purposes of analysis in this report (in the context of statehood), the Committee was well aware that many other States may be affected by sea level rise, and that the actual number of persons affected by sea level rise may be overwhelmingly greater in many among coastal States that are not low-lying SIDS – especially in those with major population centres found on low-lying coast; and, moreover, that the human implications may not necessarily occur to be containable within the boundaries of each so affected coastal State.

[17] IPCC reports of both its WGI and WGII for the sixth assessment cycle (AR6) define the future reference periods for climate change projections of impacts and risks until 2040 as the 'near term', while those from 2041 to 2100 as 'mid to longer-term', with a distinction made between two reference periods: 2041–2060 as the 'mid-term', and 2081–2100 as the 'long-term'; IPCC: *Climate Change 2022: Impacts, Adaptation, and Vulnerability. Contribution of Working Group II to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change*, H-O Pörtner et al. (eds) (Cambridge University Press, 2022), 136. Available at: <https://www.ipcc.ch/report/sixth-assessment-report-working-group-ii/>.

[18] This distinction, which has recently been commended by some States in the UNGA Sixth Committee debates, has so far not been included in other studies of international law and sea level rise, such as that by the ILC Study Group. The Committee viewed this aspect as an opportunity to make a supplementary contribution.

[19] Geomorphology is the study of Earth's topographic features; see at: <www.britannica.com/science/geomorphology>.

B. Geomorphological and environmental characteristics underlying the three scenarios

Fundamental to any assessment of potential loss of land territory is an understanding of the functioning of coastal systems from a physical as well as ecological perspective. Coastlines are diverse as well as complex both in terms of their morphology and their associated coastal ecosystems. Thus, their responses to changing sea levels are similarly varied. While lithified (i.e., rocky) coastlines will likely remain largely static in response to rising sea levels, unlithified coasts composed of softer materials are dynamic in character. This dynamism relates not only to the morphology of the coast, but also coastal ecosystems such as coastal wetlands, lagoons and estuaries, dune systems, sea grass beds, mangroves and coral reefs. These ecosystems all commonly feature high biodiversity and valuable ecosystem services including coastal protection.

1. Coastal wetlands, mangroves and seagrass

Coastal wetlands, mangrove forests and seagrass beds occur where the land and sea meet; that is, where relative sea level is changing. They are therefore among the first ecosystems to be impacted by sea level rise, due primarily to their position within the intertidal zone. As a consequence of the variable interactions of marine and terrestrial processes in these ecosystems, their geomorphic response to sea level rise is complex.

Where coastal squeeze[20] prevents or hampers ecosystems responding to changing sea levels, these ecosystems may be lost. However, some coastal ecosystems, notably mangroves, have been found to have the capacity to autonomously adapt and increase their elevation *in situ*, for instance through sediment deposition and increased plant productivity, thereby counteracting some of the risk of being submerged.[21]

Adaptation planning that takes account of future relative sea level change is essential for limiting coastal squeeze and maintaining coastal ecosystem services, especially in highly contested (or 'squeezed') coastal landscapes. This approach requires realistic projections of the response of coastal ecosystems that consider not only the effect of global sea level rise, but also the geomorphic response of the coastal ecosystem to sea level rise, as well as other factors that may influence relative sea level, such as groundwater extraction.[22]

2. Corals reefs and reef islands

Coral atolls tend to comprise coralline rock and rubble, cemented to a volcanic rock foundation and often feature low-lying (1–4 m elevation) islands surrounding a shallow lagoon. They are commonly presented by the media (and sometimes in the literature) as especially fragile features that will increasingly and inevitably become less habitable and eventually inundated as a result of sea level rise.[23] Competing views point to the persistence of atolls despite climate change impacts with the critical consideration being the continued supply of sediment, which enables island-building processes to continue in the near-term and, perhaps, mid-term perspective.

In a longer-term perspective of climate change impacts, the capacity of coral features to respond to changing sea levels, especially considering ocean acidification, is not promising.[24] It has been estimated that a doubling

[20] The term 'coastal squeeze' is increasingly used to describe the collective compressing effects of sea level rise and impediments to tidal exchange related to development of coastal landscapes, for example through the construction of roads, buildings and other infrastructure on coastal ecosystems; see N. Pontee, 'Defining Coastal Squeeze: A Discussion' (2013) 84 *Ocean & Coastal Management* 204–207.
[21] See K.W. Krauss et al., 'How Mangrove Forests Adjust to Rising Sea Level' (2013) 202(1) *New Phytologist* 19–34.
[22] K. Rogers and N. Saintilan, 'Relationships between Surface Elevation and Groundwater in Mangrove Forests of Southeast Australia' (2009) 24 *Journal of Coastal Research* 63–69.
[23] See, e.g., E. Ainge Roy, '"One day we'll disappear": Tuvalu's sinking island', *The Guardian*, 16 May 2019, available online at: <https://www.theguardian.com/global-development/2019/may/16/one-day-disappear-tuvalu-sinking-islands-rising-seas-climate-change>; K. Almond, 'Rising sea levels are threatening this Pacific paradise', *CNN*, 2019, available online at: <https://edition.cnn.com/interactive/2019/05/world/tuvalu-climate-change-cnnphotos/>.
[24] See D. Vidas, J. Zalasiewicz, C. Summerhayes and M. Williams, 'Climate Change and the Anthropocene: Implications for the Development of the Law of the Sea', in E. Johansen et al. (eds), *The Law of the Sea and Climate Change: Solutions and Constraints* (Cambridge University Press, 2020), 22–48, on which this paragraph is based.

of pre-industrial CO_2 in the atmosphere could result in a 40 percent reduction in coral reef calcification,[25] with significant impacts on corals observed in experimental studies,[26] and potentially catastrophic losses for coral reefs if seawater pH should drop below 7.8 – which occurs at atmospheric levels of 750 parts per million (ppm) CO_2, thus within the range of climate scenarios for 2100.[27] As the impacts of acidification on coral reef systems intensify and are combined with the effects of elevated sea-surface temperatures, this produces coral bleaching (expelling of the symbiotic algae on which corals rely) and heat-induced coral death on reefs, such as has occurred on the Great Barrier Reef during 'marine heat waves',[28] which are a growing phenomenon of the emerging climate state.[29] These types of heat stresses, rare and local prior to the 1980s, have become widespread due to anthropogenic global warming during the past few decades.[30] Predictions of future climate change using IPCC scenarios RCP4.5 and RCP8.5 indicate that most coral reef systems will experience severe bleaching by the mid- to late 21st century.[31]

However, regarding the near- to, perhaps, mid-term changes, some scientific studies demonstrate that coral reefs and islands can be remarkably robust and enduring features, capable of natural adaptation to sea level rise over time. For example, Webb and Kench have provided a particularly instructive empirical study in which they reviewed and analysed 27 atoll islands in the central Pacific, comparing historical aerial photography with modern satellite imagery, in order to assess whether these features had in fact been subject to erosion.[32] Despite sea level change for the central Pacific of the order of 2.0mm yr^{-1}, nevertheless 86 percent of the islands analysed were either as large as (43 percent) or larger than (43 percent) they had been previously.[33] Indeed, studies by Kench and colleagues suggest that atoll islands are capable of dynamic evolution in the face of sea level rise, whereby coastlines may alter so that individual features may change shape, but the islands themselves remain persistent.[34] Further, as Webb has observed, there are examples of net-island growth that run counter to 'established thought, non-scientific reports in the popular media and modelling' and are suggestive of the complexity of shoreline responses to sea level rise.[35] This research further suggests that sediment transport between islands will be enhanced as sea levels rise, with positive implications for the persistence of reef features.[36]

Moreover, increased frequency and intensity in extreme weather events, whilst resulting in the erosion of parts of islands, simultaneously results in major supplements to sediment supply, essentially building islands up.[37] However, observations of island changes differ substantially between urbanized atoll islands and those features that are less disturbed by human intervention. Urban atolls, such as South Tarawa in Kiribati, are home to

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[25] O. Hoegh-Guldberg et al., 'Coral Reefs under Rapid Climate Change and Ocean Acidification' (2007) 318 *Science* 1737–1742.
[26] E.g., S. Comeau, R.C. Carpenter, C.A. Lantz et al., 'Ocean Acidification Accelerates Dissolution of Experimental Reef Communities' (2015) 12 *Biogeosciences* 365–372.
[27] K.E. Fabricius, C. Langdon, E. Uthicke et al., 'Losers and Winners in Coral Reefs Acclimatized to Elevated Carbon Dioxide Concentrations' (2011) 1 *Nature Climate Change* 165–169.
[28] T.P. Hughes, J.T. Kerry, M. Alvarez-Noriega et al., 'Global Warming and Recurrent Mass Bleaching of Corals' (2017) 543 *Nature* 373–377; and T.P. Hughes, K.D. Anderson and S.R. Connolly, 'Spatial and Temporal Patterns of Mass Bleaching in the Anthropocene' (2018) 359 *Science* 80–83.
[29] T.L. Frölicher, E.M. Fischer and N. Gruber, 'Marine Heatwaves Under Global Warming' (2018) 560 *Nature* 360–364.
[30] T.P. Hughes et al., 'Global Warming Transforms Coral Reef Assemblages' (2018) 556 *Nature* 492–496.
[31] R. van Hooidonk, J. Maynard, J. Tamelander et al., 'Local-Scale Projections of Coral Reef Futures and Implications of the Paris Agreement' (2016) 6 (39666) *Scientific Reports* 1–8. 'RCP' refers to the IPCC's 'Representative Concentration Pathway' scenarios.
[32] P. Kench, 'Understanding Small Island Dynamics: A Basis to Underpin Island Management', in H. Terashima (ed.), *Proceedings of the International Symposium of Islands and Oceans* (Ocean Policy Research Foundation: Tokyo, 2009), 24–28. See also A. Webb, 'Coastal Vulnerability and Monitoring in the Central Pacific Atolls', in ibid., at 33–38.
[33] A. Webb and P. Kench, 'The Dynamic Response of Reef Islands to Sea-level Rise: Evidence from Multi-decadal Analysis of Island Change in the Central Pacific' (2010) 72(3) *Global and Planetary Change* 234–246.
[34] See, e.g., P.S. Kench, M.R. Ford and S.O. Owen, 'Patterns of island change and persistence offer alternate adaptation pathways for atoll nations' (2018) 9 *Nature Communications* 1–7; and R. McLean and P.S. Kench, 'Destruction or persistence of coral atoll islands in the face of 20th and 21st century sea-level rise?' (2015) 6(5) *Wiley Interdisciplinary Reviews–Climate Change* 445–463.
[35] Webb, 'Coastal Vulnerability and Monitoring in the Central Pacific Atolls' (n. 32), at 37.
[36] Kench et. al., 'Patterns of island change and persistence' (n. 34).
[37] L. Bernard, M. Petterson, C. Schofield and S. Kaye, 'Securing the Limits of Large Ocean States in the Pacific: Defining Baselines, Limits and Boundaries amidst Changing Coastlines and Sea Level Rise' (2021) 11(9) *Geosciences*, at 11.

substantial populations and feature many man-made interventions on the coast, such as sea defences and land reclamation projects. Such interventions on the coast tend to disrupt sediment supply and transport, impairing the dynamic island-building system and causing 'knock-on' impacts elsewhere along the coast.

Consequently, although the scientific debate regarding the persistence of atoll island features remains unsettled, it is reasonable to conclude that numerous low-elevation atoll islands are at risk from sea level rise and in the context of climate change impacts, including substantial changes to their features and associated ecosystem services in a near to mid-term perspective, even if not full submergence.

C. Principles and objectives of continuing validity for facing the challenge of sea level rise to statehood of affected States and the rights of affected populations

1. Legal certainty and stability

1.1. The findings and recommendations of the Committee so far

The objective of facilitating legal certainty and stability has been at the core of options proposed by the Committee so far. The approach of the Committee from the outset was that, in responding to international law challenges posed by rising sea levels, 'the ultimate objective of any proposed solution … is to facilitate legal certainty as well as to facilitate orderly relations between States and contribute to the avoidance of conflicts.'[38]

This approach originates from the first meeting of the Committee, held in 2014 at the 76th ILA Conference in Washington D.C., when discussions began on the overall objectives of facilitating *legal certainty*, *stability*, and *predictability* – initially focused on impacts of sea level rise on maritime limits and boundaries.[39] In that connection, the Committee was mindful of the principal motivations that led to the UN Convention on the Law of the Sea (LOSC), such as the desire to contribute to the maintenance of peace and strengthening of security and cooperation.[40]

In its 2016 Interim Report, the Committee arrived at a preliminary conclusion in favour of certainty and stability of all maritime boundaries established by treaty notwithstanding sea level rise.[41] In its 2018 Report, the Committee took the view that the objective of certainty and stability of all such maritime boundaries – including also those beyond the territorial sea – would argue against the use of the *rebus sic stantibus* doctrine as a means for terminating a maritime boundary treaty on the grounds of physical changes arising from sea level rise.[42] Although well aware of the potential for major physical impacts on coastal geography resulting from sea level rise, the Committee deemed that the interests of the international community would not be well served by supporting a view that such treaties could be challenged due to impacts of sea level rise and that such view might well undermine existing agreed maritime boundaries.[43]

Moreover, drawing on the need to avoid uncertainty concerning the rights and duties of the States regarding the existing, lawfully determined maritime zones, the ILA Assembly in Resolution 5/2018 endorsed the proposal of the Committee that:

> on the grounds of legal certainty and stability, provided that the baselines and the outer limits of maritime zones of a coastal or an archipelagic State have been properly determined in accordance with the [LOSC], these baselines and limits should not be required to be recalculated should sea level change affect the geographical reality of the coastline.

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[38] *Report of the ILA Committee (Sydney 2018)* (n. 6), at 884 [26].

[39] See: ILA, 'International Law and Sea Level Rise: Minutes of the Open Session', in *Report of the Seventy-sixth Conference held in Washington D.C., April 2014* (n. 3), at 880–881: interventions by the Committee Member, Professor David Caron and the Committee Chair, Professor Davor Vidas.

[40] See Preamble to the LOSC, especially the first and seventh paragraphs.

[41] See *Interim Report of the ILA Committee (Johannesburg 2016)* (n. 6), at 862–863.

[42] *Report of the ILA Committee (Sydney 2018)* (n. 6), at 890–891 [35] and 895 [41].

[43] Ibid.

The views and practice of many States, including those not belonging to the low-lying SIDS and some of the major maritime nations, have increasingly developed in the intervening period along these lines (see further in Part III of this report), supporting the validity of Committee's findings and recommendations.

The paramount importance of preserving legal certainty and stability under international law has been affirmed in the 2020 *First Issues Paper* by the Co-Chairs of the ILC Study Group.[44] Many States have indeed highlighted this aspect as being an overarching concern.[45] The *First Issues Paper* uses the formulation of 'preserving legal stability, security, certainty and predictability' in its vocabulary. Similar to the 2018 Report and recommendations of this ILA Committee, the *First Issues Paper* related these concerns to the 'general purpose[s]' of the LOSC, 'as reflected *inter alia* in its preamble', not least regarding contributing to the 'peace, security, co-operation and friendly relations among all nations'.[46] The additional paper to the *First Issues Paper* issued by the Co-Chairs of the ILC Study Group in 2023 draws on this and focuses on 'legal stability', to which it devotes substantial space and attention.[47] It observes, in line with the 2022 Report of this ILA Committee, that States from various regions of the world have connected the meaning of legal stability with the solution of preserving maritime zones by fixing their baselines and the outer limits as they were before the effects of sea level rise.[48]

1.2. Legal certainty and stability in the context of statehood and the rights of affected populations

Since the initiation of debate on international law and sea level rise in the United Nations (UN), many States have referred, both in their interventions in the Sixth Committee and in submissions to the ILC, to the fundamental consideration of the need for legal certainty and stability under international law in connection with the effects of climate change and sea level rise. Initially, the need for 'stability' and 'certainty' in this context was related to the stability of maritime limits and boundaries of maritime zones.[49]

More recently, the consideration by States regarding legal certainty and stability has widened in scope to include the questions of statehood and the rights of affected populations. This trend can be observed from the 2022 debate in the UNGA Sixth Committee, as illustrated by statements of States belonging to different regions, such as Brazil, Philippines, Estonia and Jamaica.[50] The Philippines was of the view that:

> existential implications of the questions ... such as the possibility that the land area of the State could be completely covered by the sea or rendered uninhabitable; the progressive displacement of persons to the territories of other States, and the implications on nationality, diplomatic protection and refugee status; the legal status of the Government of a State affected by sea-level rise that had taken residence in the territory of another State; the preservation of the rights of States affected by the sea-level rise in

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[44] See *Sea-level rise in relation to international law: First issues paper by Bogdan Aurescu and Nilüfer Oral, Co-Chairs of the Study Group on sea-level rise in relation to international law*, UN Doc. A/CN.4/740 of 28 February 2020 (hereinafter: *First Issues Paper*), in paras 18 and 23, affirms this approach as being 'at the very heart of the topic' and an 'essential issue' in relation to it.
[45] Ibid., para. 220.
[46] Ibid., paras 27 and 220.
[47] See *Sea-level rise in relation to international law: Additional paper to the first issues paper (2020), by Bogdan Aurescu and Nilüfer Oral, Co-Chairs of the Study Group on sea-level rise in relation to international law*, UN Doc. A/CN.4/761 of 13 February 2023. On 'legal stability' see especially Part II, paras 16–98 (pp. 10–41), comprising approximately one third of the *Additional paper*. The paper does not attempt to define the notion of 'legal stability' (and in the concluding para. 98, it seems that the notion of 'legal stability' is assimilated to those of 'security, certainty and predictability'); rather, it is oriented on describing the views on 'legal stability' by the UN Member States in this context.
[48] Ibid., paras 83 and 86. Cf. *Interim Report of the ILA Committee (Lisbon 2022)* (n. 13).
[49] For the statements in the 2019 UNGA Sixth Committee, see especially those by Australia, Canada, Cuba, Israel, Jamaica, Norway (on behalf of Nordic countries), Micronesia, Papua New Guinea, Poland, Thailand, in UN Doc. A/C.6/74/SR.24–34; and full statements, as delivered, available at <https://www.un.org/en/ga/sixth/74/ilc.shtml>. For a detailed account, see D. Vidas and D. Freestone, 'Legal Certainty and Stability in the Face of Sea Level Rise: The Development of State Practice and International Law Scholarship on Maritime Limits and Boundaries' (2022) 37 *International Journal of Marine and Coastal Law* 673–725; also D. Vidas and D. Freestone, 'The Impacts of Sea Level Rise and the Law of the Sea Convention: Facilitating Legal Certainty and Stability of Maritime Zones and Boundaries' (2022) 99 *International Law Studies* 944–964.
[50] For the UN Secretariat summary of the 2022 debate in the UNGA Sixth Committee on Agenda Item 77, see UN Doc. A/C.6/77/SR.25–29; and full statements, as delivered, available at <https://www.un.org/en/ga/sixth/77/ilc.shtml>.

respect of the maritime areas; and the right to self-determination of the populations of affected States ... must be approached on the basis of legal stability, security, certainty, and predictability in international law.[51]

For Brazil, 'legal certainty is key in preventing disputes between Member States'.[52] The approaches indicated by the Member States on how to facilitate legal certainty and stability concerning the questions of statehood (including when the territory of a State becomes submerged by sea level rise or is rendered uninhabitable) range from 'the need to find possibilities to *interpret the main principles* of international law in the way that it corresponds to the need for stability in interstate relations' (Estonia);[53] to an 'effort to *develop rules and principles* in a manner that considers the position of all States and promotes stability and security in the international legal system' (Jamaica);[54] and to '*pragmatically approach* this in favour of stability and predictability in international law, mindful of specific circumstances' (Philippines).[55] Therefore, while the suggested ways of achieving the objective may at this stage differ, the objective itself – that is, of preserving legal certainty and stability in respect of the existing statehood of affected States and, relatedly, the protection of the rights of affected persons – is shared by the States who expressed their views so far.

2. Equity

In its 2018 Report, this Committee recommended that its approach of recognizing the right of coastal States to maintain their existing maritime entitlements in the face of shifting coastlines could be justified on the basis that 'coastal States would be shielded from these adverse impacts of climate change to which few contributed'.[56] As recognized in the 1994 Barbados Programme of Action for the Sustainable Development of Small Island Developing States,[57] SIDS are particularly vulnerable to global climate change. SIDS have a combined population of around 65 million people, who contribute to less than 1% of global GHG emissions.

The 1982 LOSC recognises in its preamble the desirability of establishing a legal order for the oceans that will promote *inter alia* the 'equitable and efficient utilization of their resources' and thereby contribute to 'the realization of a just and equitable international economic order'. Similarly, the 1992 United Nations Framework Convention on Climate Change (UNFCCC)[58] states in Article 3(1) that one of its underlying principles is that 'the Parties should protect the climate system for the benefit of present and future generations of humankind, on the basis of *equity* and in accordance with their common but differentiated responsibilities and respective capabilities' (emphasis added). The Decision of the UNFCCC COP adopting the 2015 Paris Agreement[59] enjoins Parties, when taking action to address climate change, to respect, promote and consider their respective obligations regarding *inter alia* 'intergenerational equity',[60] while the preamble of the Paris Agreement declares the Parties to the new Agreement to be acting '[*I*]*n pursuit* of the objective of the Convention, and being guided by its principles, including the principle of equity …'. Article 2(2) declares that the Agreement 'will be implemented to reflect equity …' and Article 4(1) also declares that 'the Parties aim to reach global peaking of greenhouse gas emissions as soon as possible, recognizing that peaking will take longer for developing country Parties… on the basis of equity'. Moreover the 'Global Stocktake' required by Article 14(1) is to take place in a 'comprehensive and facilitative manner … in the light of equity'.

The Preamble to the 2021 Pacific Island Leaders Declaration on Preserving Maritime Zones in the Face of Climate Change related Sea-Level Rise, '*further recognises* the principles of equity, fairness and justice as key legal principles *also* underpinning the [LOS] Convention'.[61] The Sixth Committee UNGA debates since 2021

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[51] Ibid., statement by the Philippines, 28 October 2022.
[52] Ibid., statement by Brazil, 27 October 2022.
[53] Ibid., statement by Estonia, 28 October 2022 (emphasis added).
[54] Ibid., statement by Jamaica, 1 November 2022 (emphasis added).
[55] Ibid., statement by the Philippines, 28 October 2022 (emphasis added).
[56] *Report of the ILA Committee (Sydney 2018)* (n. 6), at 882 [24].
[57] Available at: <https://www.un.org/esa/dsd/dsd_aofw_sids/sids_pdfs/BPOA.pdf>.
[58] United Nations Framework Convention on Climate Change, 1771 UNTS 107, 165 (9 May 1992).
[59] UNFCCC COP, Adoption of the Paris Agreement, Decision 1/CP.21, in COP Report No. 21, Addendum, at 2, UN Doc. FCCC/CP/2015/10/Add.1 (29 January 2016).
[60] FCCC/CP/2015/L.9/Rev.1 (12 December 2015).
[61] Available at: <https://forumsec.org/publications/declaration-preserving-maritime-zones-face-climate-change-related-sea-level-rise> (emphasis on 'also' is added here). Full text annexed to D. Freestone and C. Schofield, 'Pacific Islands

demonstrated that aspects of equity, fairness and justice figured somewhat less prominently, while the main emphasis was put on the principles of legal stability, security, certainty and predictability.[62]

Nonetheless, considerations of equity, fairness and justice continue to play an important role in the ongoing debates between States, in both regional and global fora, and remain highly relevant in the context of international law principles related to facing the challenges of sea level rise to statehood of affected States and the rights of their populations. For example, in the recent hearing on the application to the International Tribunal on the Law of the Sea (ITLOS) by the Commission of Small Island States on Climate Change and International Law (COSIS) for an Advisory Opinion on the question of whether emissions of greenhouse gases are covered by the prohibition on marine pollution in Part XII of the LOSC, the arguments of equity and fairness were prominent in the interventions of COSIS and of States and international organisations.[63]

3. International cooperation

The essence of the principle of cooperation can be found in Articles 1(1) and 1(3) of the UN Charter, which state that the purposes of the United Nations include achieving international cooperation in the maintenance of international peace and security, as well as solving international problems of an economic, social, cultural or humanitarian character.[64] The duty to cooperate is firmly established within international human rights law. The Universal Declaration of Human Rights states that everyone is entitled to the 'realization, through national effort and international cooperation (…) of the economic, social and cultural rights indispensable for [their] dignity and the free development of [their] personality', as well as to 'an international order in which the rights and freedoms set forth in th[e] Declaration can be realized'.[65]

States have reiterated their commitment to international cooperation on many occasions. The 1970 Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States refers to cooperation as one of the seven fundamental principles of international law. Cooperation has indeed been repeatedly framed as a global imperative. In 2015, international cooperation found also expression in the establishment of the Sustainable Development Goals, with the adoption of UNGA Resolution 70/1, in which States stressed the need for cooperation on the path towards sustainable development.[66] States once more acknowledged the need to strengthen international cooperation when commemorating the 75th anniversary of the UN in 2020.[67] Other instruments have proceeded to apply cooperation to specific contexts, including international economic relations,[68] the settlement of disputes,[69] and State responsibility[70].

The institutionalization of international cooperation in the legal framework of the UN reflects a consensus on the centrality of cooperation in international legal relations and confirms the existence of a general duty for States to engage with each other.[71] Moreover, in relevant specialized areas of international law, such as in the field of international disaster law, existing agreements specify the meaning of cooperation,[72] including the

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Countries Declare Permanent Maritime Baselines, Limits and Boundaries' (2021) 36 *International Journal of Marine and Coastal Law* 685–695.

[62] See discussion in Vidas and Freestone, 'Legal Certainty and Stability in the Face of Sea Level Rise' (n. 49).

[63] See ITLOS, Case No. 31, available online at: <https://www.itlos.org/en/main/cases/list-of-cases/request-for-an-advisory-opinion-submitted-by-the-commission-of-small-island-states-on-climate-change-and-international-law-request-for-advisory-opinion-submitted-to-the-tribunal/>.

[64] Charter of the United Nations, Arts. 1(1) and 1(3); see also P. Galvão Teles, C. Duval, and V. Tozetto da Veiga, 'International Cooperation and the Protection of Persons Affected by Sea-Level Rise: Drawing the Contours of the Duties of Non-Affected States' (2022) 3(1) *Yearbook of International Disaster Law Online* 213–237.

[65] Universal Declaration on Human Rights, 10 December 1948, Arts. 22 and 28.

[66] UNGA Res 70/1 (25 September 2015) UN Doc. A/RES/70/1.

[67] UNGA Res 75/1 (21 September 2020) UN Doc. A/RES/75/1.

[68] UNGA Res 3201 (1 May 1974) UN Doc. A/RES/S-6/3201.

[69] UNGA Res 37/10 (15 November 1982) UN Doc. A/RES/37/10.

[70] ILC, 'Yearbook of the International Law Commission', 2001, Vol. II (Part Two), 113–114, Art. 41. See also UNGA Res 56/83 (12 December 2001) UN Doc. A RES/56/83.

[71] ILC, 'Yearbook of the International Law Commission', 2001, Vol. II (Part Two), at 113; see also R. Wolfrum, 'Cooperation, International Law of' (2010) *Max Planck Encyclopedia of Public International Law*, para. 2.

[72] For an analysis of these obligations, see ILC, 'Fifth report on the protection of persons in the event of disasters, by Mr. Eduardo Valencia-Ospina, Special Rapporteur' (9 April 2012), UN Doc. A/CN.4/652, paras. 79–116.

commitment to exchange information and communicate with other States and relevant actors,[73] as well as to provide scientific and technical assistance.[74] Another type of cooperative conduct in this field relates to arrangements to facilitate the provision of the necessary relief personnel, supplies, and equipment, as well as the actual provision of assistance once a disaster has occurred.[75] The Sendai Framework,[76] for example, highlights international cooperation in the context of disasters, and specifically states that '[D]eveloping countries require an enhanced provision of means of implementation, including adequate, sustainable and timely resources, through international cooperation and global partnerships for development, and continued international support, so as to strengthen their efforts to reduce disaster risk'.[77] The Sendai Framework further highlights the significance of the support from international organizations for the implementation of the framework and its priorities including the UN and other international and regional organizations, international and regional financial institutions and donor agencies engaged in disaster risk reduction.[78]

International cooperation has been also enshrined in the field of international environmental law.[79] Over time, the duty to cooperate has evolved into a range of specific obligations under international environmental law including, *inter alia*, the exchange of information between States, the conduct of scientific research and systematic observations, prior notification,[80] consultation, prior informed consent, notification in the case of an emergency or emergency assistance, or conducting a joint environmental impact assessment.[81] The principle of common but differentiated responsibilities, which was included among the principles adopted by the 1992 UN Rio Conference on Environment and Development, has been instrumental in the implementation of cooperative efforts in this area.[82]

The 1992 UNFCCC and the international climate change regime in general has evolved around the idea for the international community taking collective responsibility in light of the principle of common but differentiated responsibilities.[83] The climate change regime has started to create 'institutional machinery' for international cooperation in this area.[84] The 2015 Paris Agreement has been particularly important in institutionalizing the duty to cooperate in important ways including through transparency and accountability systems as they become important tools for the implementation of cooperation.[85] Both the UNFCCC[86] and the 1997 Kyoto Protocol[87] feature international cooperation in several provisions.

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[73] See, e.g., Tampere Convention on the Provision of Telecommunication Resources for Disaster Mitigation and Relief Operations, 18 June 1998; Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency, 26 September 1986; Framework Convention on Civil Defence Assistance, 22 May 2000.

[74] One of the most detailed examples in that regard is the ASEAN Agreement on Disaster Management and Emergency Response (26 July 2005), Arts 18 and 19.

[75] For a useful list of these forms of 'cooperation in response to disaster' see ILC Draft Articles on the Protection of Persons in the Event of Disasters, and Commentary thereto, *Yearbook of the International Law Commission*, 2016, Vol. II (Part Two).

[76] World Conference on Disaster Reduction, Sendai Framework for Disaster Risk Reduction 2015–2030 (March 2015).

[77] Sendai Framework, paras 38, 40, 41, and 46 in particular.

[78] Sendai Framework, para. 48.

[79] See, e.g., *MOX Plant Case (Ireland v. United Kingdom)*, Provisional Measures, ITLOS Case No. 10, 3 December 2001, para 82. ITLOS has noted that '[t]he duty to cooperate is a fundamental principle in the prevention of pollution of the marine environment.'

[80] See, e.g., *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment [2010] ICJ Reports 14, para 77.

[81] See, for example, *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua) and Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)* [2015] ICJ Reports 665 (especially para. 168 regarding the obligation to notify and consult).

[82] See Rio Declaration on Environment and Development, Principles 6 and 7.

[83] L. Rajamani, 'The Changing Fortunes of Differential Treatment in the Evolution of International Environmental Law', (2012) 88 *International Affairs* 605.

[84] J. Rudall, 'The Obligation to Cooperate in the Fight against Climate Change' (2021) 23 *International Community Law Review* 184–196, at p. 191.

[85] Ibid., p. 196; Paris Agreement, see especially Preamble and Arts 6, 7, 8, 10, 11, 12 and 14.

[86] UNFCCC, Preamble and Arts 3, 4, 5, 6, 7 and 9.

[87] Kyoto Protocol to the United Nations Framework Convention on Climate Change, U.N. Doc FCCC/CP/1997/7/Add.1 (10 December 1997), see especially Arts 2, 10, and 13.

In addition to cooperation to enhance action on adaptation (including through adaptation finance), an important aspect of international cooperation under the climate regime is loss and damage.[88] While there is no consensus on, or legal definition of, the term 'loss and damage',[89] there are consistent elements across understandings of the terms, individually and together.[90] *Loss* generally refers to climate-related impacts for which restoration is not possible.[91] It can be economic or non-economic and, in many circumstances, these are overlapping or indistinguishable. Displacement in the context of climate change, loss of a State's productive territory, and/or culturally significant territory due to slow-onset processes such as desertification and sea level rise, and disruptions to society from permanent emergency situations, are among the most difficult impacts to resolve. *Damage*, by contrast, refers to negative impacts for which restoration is possible.[92] Together, according to a UNFCCC Secretariat proposed working definition, 'loss and damage' describe 'the actual and/or potential manifestation of impacts associated with climate change in developing countries that negatively affect human and natural systems.'[93] Both loss *and* damage interact with human systems,[94] exacerbating socio-economic vulnerability. Loss and damage intersect with human mobility, including in the context of sea level rise, in multiple and varied ways.

Article 8(3) of the Paris Agreement provides that Parties should 'enhance understanding, action and support … as appropriate, on a cooperative and facilitative basis with respect to loss and damage associated with the adverse effects of climate change.'[95] Cooperation in this context aims to enhance understanding, action and support in the areas of 'early warning systems, emergency preparedness, slow onset events, events that may involve irreversible and permanent loss and damage, comprehensive risk assessment and management, risk insurance facilities, climate risk pooling and other insurance solutions, non-economic losses, and resilience of communities, livelihoods and ecosystems.'[96] COP27 witnessed a breakthrough when Parties agreed to provide loss and damage funding for vulnerable countries that are hit hard by climate change impacts.[97] Funding arrangements would provide and assist 'in mobilizing new and additional resources' and as such 'complement and include sources, funds, processes and initiatives under and outside the UNFCCC and the Paris Agreement.[98] COP28 resulted in an agreement on the details of the new 'Loss and Damage Fund', which is designated as an entity entrusted with the operation of the Financial Mechanism of the UNFCCC, which also serves the Paris Agreement.[99]

Other international instruments include cooperation in relation to refugees and human mobility. The Preamble of the 1951 Convention relating to the Status of Refugees expressly acknowledges that 'the grant of asylum may place unduly heavy burdens on certain countries, and that a satisfactory solution of a problem of which the United Nations has recognized the international scope and nature cannot therefore be achieved without

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[88] See D. Freestone and D. Çiçek, *International Law Aspects of Sea Level Rise* (The World Bank, 2023) 60–73, available at: <https://openknowledge.worldbank.org/entities/publication/6625e029-01b8-48f6-9c28-ac07bede74e0>.

[89] There is no official definition of loss and damage, though a 2012 UNFCCC literature review on loss and damage provides some guidance. Compare the definition used in the Damage and Loss Assessment Methodology, available at: <https://www.gfdrr.org/en/damage-loss-and-needs-assessment-tools-and-methodology>.

[90] For a general discussion of varying definitions of 'loss and damage' and the limits of adaptation, see M. Burkett, 'Loss and Damage' (2014) 4 *Climate Law* 119.

[91] The key characteristic is the inability of communities to restore or repair. The total destruction of coastal infrastructure due to sea level rise or the total collapse of a fishery due to lower ocean pH, would constitute a loss.

[92] Damage to a coastal mangrove forest due to a storm surge would fall under this category. See, UNFCCC Subsidiary Body for Implementation, 'A literature review on the topics in the context of thematic area 2 of the work programme on loss and damage: A range of approaches to address loss and damage associated with the adverse effects of climate change', FCCC/SBI/2012/INF.14 (2012), at 3-4, available at: <unfccc.int/resource/docs/2012/sbi/eng/inf14.pdf>.

[93] Ibid.

[94] Ibid., at 5 (explaining that, for example, sea level rise and glacial melt result from climate change stimuli, and these shifts in natural systems in turn result in loss and damage in human systems, such as loss of habitable land or freshwater).

[95] Paris Agreement, Art. 8(3).

[96] Paris Agreement, Art. 8(4).

[97] Decision CP.27/CMA.4, 'Funding arrangements for responding to loss and damage associated with the adverse effects of climate change, including a focus on addressing loss and damage'.

[98] Ibid., para. 2.

[99] At COP28, it was decided that the World Bank would act as an interim trustee for an initial period of four years. See, Advance Draft decision -/CP.28 -/CMA.5.'Operationalization of the new funding arrangements, including a fund, for responding to loss and damage referred to in paragraphs 2–3 of decisions 2/CP.27 and 2/CMA.4' (13 December 2023).

international cooperation.'[100] More recently, on 19 September 2016, the UN General Assembly unanimously adopted the New York Declaration for Refugees and Migrants.[101] The New York Declaration highlights international cooperation on border control and management;[102] cooperation on the strengthening of search and rescue mechanisms;[103] and cooperation among Member States, UN entities and international financial institutions, where appropriate, on humanitarian financing to enable host countries and communities to respond to the immediate humanitarian and longer-term development needs.[104] Building on the New York Declaration, in 2018, two new instruments were adopted: the Global Compact on Refugees (Refugee Compact) and the Global Compact for Safe, Orderly and Regular Migration (Migration Compact).[105] Although not legally binding, they provide significant political commitments in this area. Unlike the Refugee Compact that builds on a more established legal framework, the Migration Compact was considered as the first intergovernmental instrument to cover all dimensions of international migration.[106] For migrants in particular, it highlights the commitment to cooperate 'to facilitate and ensure safe, orderly and regular migration'[107] (see section II.E.1, below). Finally, the Committee would like to reiterate Principle 4 of the ILA's Sydney Declaration[108] calling for stronger international cooperation among States and with relevant international organisations and agencies and its list of specific measures to assist States affected by sea level rise to prevent, avoid, and respond to displacement risks related to sea-level rise and displacement.

International cooperation, including the duty to cooperate, in the context of climate change-induced sea level rise has proven to be among the issues commanding widest support in the 2022 UN Member States debate in the Sixth Committee on the topic of sea level rise in relation to international law.[109]

D. Rules and measures to safeguard legal objectives and principles in the context of statehood of low-lying SIDS

1. International law as reflected in the Montevideo Convention and the UN Charter

In its 2018 Report, the Committee agreed that, in general, 'as guidance and as a starting point, there should be a presumption of continuing statehood',[110] including in cases where the land territory is lost. In the 2022 *Second Issues Paper*, the Co-Chairs of the ILC Study Group on sea-level rise in relation to international law indicated that, regarding small island developing States whose territory could be covered by the sea or become uninhabitable owing to exceptional circumstances outside their will or control, 'a strong presumption in favour of continuing statehood *should be considered*'.[111] However, as also observed by the Committee in its 2022 Interim Report,[112] 'reliance on a general presumption of the continuity of statehood (be it called 'strong' or not) ... would eventually cease to produce a legal effect' since a 'presumption is a legal device that operates in the absence of other proof' and 'is always weak in confrontation with facts'.[113] There is therefore a clear

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[100] Preamble para. 4.

[101] New York Declaration for Refugees and Migrants, Resolution adopted by the General Assembly on 19 September 2016, UN Doc. A/RES/71/1.

[102] New York Declaration, para. 24.

[103] New York Declaration, para. 28.

[104] New York Declaration, para. 38.

[105] Global Compact on Refugees, UN Doc. A/73/12 (Part II) (2 August 2018); Global Compact for Safe, Orderly and Regular Migration, UN Doc. A/RES/73/195 (19 December 2018).

[106] See, Refugee Compact, para. 33; Migration Compact, paras 7, 15.

[107] New York Declaration, para. 41.

[108] ILA Resolution 6/2018, Sydney Declaration of Principles on the Protection of Persons Displaced in the Context of Sea Level Rise, published in ILA, *Report of the Seventy-eighth Conference* (n. 6), Principle 4.

[109] See, e.g., statements by AOSIS (on behalf of its 37 UN Member States), Brazil, Croatia, Germany, India, Jamaica, Malaysia, the Netherlands, Pacific SIDS (on behalf of its 12 UN Member States), Papua New Guinea, and Sierra Leone, in UN Doc. A/C.6/77/SR. 25–29 (UN Secretariat summary); and full statements, as delivered, available online at: <https://www.un.org/en/ga/sixth/77/ilc.shtml>.

[110] *Report of the ILA Committee (Sydney 2018)* (n. 6), at 896 [42].

[111] *Sea-level rise in relation to international law: Second issues paper by Patrícia Galvão Teles and Juan José Ruda Santolaria, Co-Chairs of the Study Group on sea-level rise in relation to international law*, UN Doc. A/CN.4/752 of 19 April 2022 (hereinafter: *Second Issues Paper*), para. 194 (emphasis added).

[112] *Interim Report of the ILA Committee (Lisbon 2022)* (n. 13), at 538 and n. 125–126.

[113] Basically, a presumption is an assumption of fact required by law – but it is not evidence, and it may be rebutted if (factual) evidence to the contrary is produced; see *Black's Law Dictionary*, 6th edn (St. Paul, MN: West, 1990), at 1185.

limitation in pursuing a legal argument, not least the one regarding a fundamental issue such as the continuity of statehood, on the basis of a presumption. Importantly, the *Second Issues Paper* immediately added that: '[S]uch States *have the right* to provide for their preservation, and international cooperation will be of particular importance in that regard'.[114]

Rather than pursuing the discussion on a presumptive basis, the Committee considered that its contribution to the ongoing discussion concerning the continuation of statehood of low-lying, small island developing States affected by climate change-induced sea level rise could be best made by looking at the objectives and principles of international law, as well as the rights guaranteed on this basis, including those reflected in the 1933 Montevideo Convention on Rights and Duties of States.[115] Current international law, while addressing the demise of a State in the context of State succession triggered by political changes, does not explicitly address the particular situation of States the populations of which may be diminishing owing to the consequences of Earth system changes, such as sea level rise, and over time becoming increasingly resettled in another State (or other States) while the territory becomes less habitable and, in a longer-term perspective, possibly uninhabitable and eventually inundated.[116] However, even if not explicitly envisaged by international law, some guidance as to how to approach this type of challenge can be found in international law as reflected not only in the Montevideo Convention but also, and relatedly, in the UN Charter and other foundational treaties of the current international legal order.

The ultimate objective of international law to contribute to the maintenance of international peace[117] and security has been codified and stated in the major constitutive instruments of international law, such as the 1945 Charter of the United Nations,[118] the 1969 Vienna Convention on the Law of Treaties,[119] and the 1982 UN Convention on the Law of the Sea.[120] This overall objective of international law remains unchanged notwithstanding the consequences of climate change.[121] To assume the destabilisation of statehood as a consequence of climate change could bring challenges to international security,[122] and would be contrary to the principles of legal stability and certainty. The overriding importance of the constant and stable objective of international law regarding the maintenance of international peace and security, and facilitated by legal certainty and stability, demonstrates this.[123] Achieving it will, however, require an enhanced level of international cooperation, including a duty on States to cooperate to prevent destabilisation of the existing legal *status quo* concerning the statehood of the affected low-lying SIDS.[124]

Continuity of the international legal personality of a State also finds its expression in the rights and duties under international law, as reflected in the Montevideo Convention. In accordance with Article 6, the recognition of a State is 'unconditional and irrevocable'. The Montevideo Convention distinguishes between the 'political existence' of a State, which is 'independent of recognition',[125] on the one hand, and acceptance of its '[legal] personality … with all the rights and duties determined by international law',[126] which is signified

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[114] *Second Issues Paper* (n. 111), para. 194 (emphasis added).
[115] *League of Nations Treaty Series*, Vol. CLXV, 1936, No. 3802.
[116] The latter cases, however, as indicated in scenario 3 (section II.E.4, below) are very few, and the main challenge, already in a mid-term perspective, relates to the decreasing level of habitability (on which see further in section II.E below).
[117] The Montevideo Convention in Article 10 contains a statement of a preambulatory character, providing that '[T]he primary interest of States is the conservation of peace'.
[118] See especially Art. 1 of the Charter, regarding the Purposes of the United Nations.
[119] See the Preamble of the Vienna Convention on the Law of the Treaties.
[120] Preamble of the LOSC refers to the Convention in the light of its contribution to the maintenance of peace, and to the codification and development of law in it as a contribution to the strengthening of peace, security, and cooperation.
[121] See Vidas et al., 'Climate Change and the Anthropocene' (n. 24), at 45–47.
[122] See Concept note for the Security Council open debate on the theme 'Treats to international peace and security: sea-level rise – implications for international peace and security', Annex to the letter dated 2 February 2023 from the Permanent Representative of Malta to the United Nations addressed to the Secretary-General, UN Doc. S/2023/79.
[123] As recently manifested, e.g., in the UN Security Council open debate on the theme 'Sea-level rise – implications for international peace and security', held on 14 February 2023; see UN Doc. S/PV. 9260.
[124] As alluded to by the President of the UN General Assembly in the Security Council debate: 'I implore the Council to play its role. If not, I fear that the President of the General Assembly in 2100, or even in 2050, will represent fewer than 193 United Nations Member States'; UN Doc. S/PV. 9260, of 14 February 2023, at 5.
[125] As reflected in Art. 3 of the Montevideo Convention.
[126] As reflected in Art. 6 of the Montevideo Convention.

by recognition, on the other. The principle set out in Article 6 provides for and supports the objective of international law to facilitate legal certainty and stability. In the Committee's view, it should therefore be recognized as the key guidance for addressing the unprecedented challenge faced by low-lying SIDS in a mid- to long-term perspective, when most of their land territory may become uninhabitable or submerged in consequence of sea level rise. In that context, an affected State continues to hold a legitimate claim to its recognition as being unconditional and irrevocable.[127]

In addition to already being recognized as States, most of the low-lying SIDS (on which this report focuses) are UN Member States. As the Committee has already observed in its 2022 Interim Report, it is 'unlikely that other States will proactively push for striking such countries off the list of States as members of the international community'.[128] In this context, UN membership may prove to be an important indicator.

Membership in the United Nations is open only to States. In addition to the States signatories of the UN Charter who thereafter ratified it (and which are, under Article 3 of the Charter, considered the original Members of the UN), admission of other States to UN membership is governed by Article 4 of the Charter, which in paragraph 1 provides that:

> Membership in the United Nations is open to all other peace-loving States which accept the obligations contained in the present Charter and, in the judgment of the Organization, are able and willing to carry out these obligations.[129]

Admission to UN membership indeed does not 'create' a State. However, as observed by Conforti and Focarelli, the UN practice on admission of the so-called 'micro-States' has demonstrated that the understanding of 'States' for the purposes of Article 4 of the UN Charter does not differ from the understanding of 'States as a subject of international law'.[130]

The requirement of the UN Charter that the applicant be a State 'forges a link between the United Nations and statehood', which means that admission 'at the very least, is a certification by the Organisation as to the status of the entity as a State', a kind of 'collective recognition' of statehood, reinforced by the UN's move towards universality.[131] Such effect of admission to the UN on statehood prevails even if the membership status undergoes modifications, such as suspension from the exercise of rights or expulsion from the UN membership.

Suspension from the exercise of rights and privileges of the UN membership under Article 5 of the Charter (effected by the General Assembly upon the recommendation of the Security Council), does not revoke that status nor call into question the existence of the State suspended.[132] Indeed, suspension under Article 5 relates to a UN Member 'against which preventive or enforcement action has been taken by the Security Council',

[127] In this connection, Art. 5 of the Montevideo Convention also reflects general international law; it states that: '[T]he fundamental rights of States are not susceptible of being affected in any manner whatsoever'.

[128] *Interim Report of the ILA Committee (Lisbon 2022)* (n. 13), at 535 (with a reference to W. Kälin, 'Conceptualising Climate-Induced Displacement', in J. McAdam (ed.), *Climate Change and Displacement: Multidisciplinary Perspectives* (Hart: Cambridge, 2010), at 102).

[129] Moreover, in accordance with Art. 4(2) of the UN Charter: 'The admission of any such State to membership in the United Nations will be effected by a decision of the General Assembly upon the recommendation of the Security Council'. The admission process is also governed by Rules of Procedure Nos. 134–138. Besides, the criteria for UN membership were developed in UNGA Res. 1514/XV, 'Declaration on the Granting of Independence to Colonial Countries and Peoples', UN Doc. A/RES/1514 (XV) of 14 December 1960, as well as by the ICJ Advisory Opinions on *Conditions of Admission of a State to Membership in the UN*, ICJ Reports 1948, 57; and on *Competence of the General Assembly for the Admission of a State*, ICJ Reports 1950, 4.

[130] See B. Conforti and C. Focarelli, *The Law and Practice of the United Nations*, 5th edn (Brill/Nijhoff: Boston/Leiden, 2016), in Chapter 1, 'Membership of the Organization', at 31.

[131] T. Grant, 'International Responsibility and the Admission of States to the United Nations' (2009) 30 *Michigan Journal of International Law* at 1156; J. Dugard, *Recognition and the United Nations* (Grotius Publ.: Cambridge, 1987) 43–44. One should nonetheless recall that in the history of the UN also two federal units of the USSR, which are today independent States – Belarus and Ukraine – were UN Members while still a part of the USSR. There is no doubt, however, that all low-lying SIDS have been admitted to the UN membership as independent States.

[132] S. Murphy, 'Democratic Legitimacy and the Recognition of States and Governments', in G. Fox and B. Roth (eds), *Democratic Governance and International Law* (Cambridge University Press, 2000), at 129.

something difficult to see as related to the consequences of climate change-induced sea level rise upon the low-lying SIDS. Moreover, expulsion from the UN membership under Article 6 of the Charter (by the General Assembly upon the recommendation of the Security Council) – a measure which has so far never been applied – potentially relates to a Member 'which has persistently violated the Principles contained in the […] Charter'. It is possible that expulsion might be contemplated if the State is, 'in the judgment of the Organization', no longer 'able and willing to carry out [its UN] obligations'. It would, however, seem in direct contradiction to UN principles to expel from the UN membership a State due to the consequences of it being gravely affected by climate change-induced sea level rise. Rather, those consequences should trigger international cooperation (as further elaborated below in section II.E), also in the interest of facilitating legal certainty and stability.

In 1965, the Maldives became the first low-lying small island State to join the United Nations. To date, SIDS (many of which are also low-lying) constitute a significant group consisting of 37 UN Member States, thus making up around 20 percent of UN membership. Their UN membership is in itself an international law tool to uphold both their continued recognition and statehood. This has recently been confirmed also in the political approaches to the issue, such as in the US President's announcement of 25 September 2023, reiterated in the statement by the US representative in the Sixth Committee of the UN General Assembly, that the United States:

> considers that sea-level rise driven by human-induced climate change should not cause any country to lose its statehood or its membership in the United Nations, its specialized agencies, or other international organizations.[133]

Other provisions of the Montevideo Convention reflecting international law also may prove highly relevant to the affected low-lying SIDS, especially as those States are already vested with existing international legal personality. Article 3 provides that the State has 'the right to defend its integrity and independence, *to provide for its conservation and prosperity*, and consequently to organize itself as it sees fit…'; furthermore, Article 4 provides that State's rights 'do not depend upon the power which it possesses to assure its exercise, but upon *the simple fact of its existence as a person under international law*' (emphases added).

In this connection, the Committee found as highly pertinent the conclusion reached in the *Second Issues Paper*,[134] stating that:

> it is valid to hold that once a State exists as such, in that it meets the conditions set out in article 1 of the Convention on the [*sic*] Rights and Duties of States, it has full capacity to exercise its rights, in accordance with international law and with respect for the rights of other members of the international community. Those rights, which may not be impaired, undoubtedly include the right of the State to provide for its preservation; that is, to use the various means at its disposal – including international cooperation – to ensure its continued existence.

The Committee also noted the recognition of 'the fundamental rights of every State to survival' by the International Court of Justice. While made in the context of armed conflict and 'the right to resort to self-defence, in accordance with Article 51 of the Charter when its survival is at stake', this statement[135] must hold *a fortiori* where not only the political but also the physical existence of a State is threatened.

In November 2023, the leaders of the Pacific Island Forum (PIF) members, drawing on this conclusion, adopted the Declaration on the Continuity of Statehood and the Protection of Persons in the Face of Climate Change-related Sea-Level Rise, in which they recognized that 'under international law there is a general presumption that a State, once established, will continue to exist and endure, and maintain its status and effectiveness, and

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[133] See: Statement by the USA of 24 October 2023 in the UNGA Sixth Committee on Agenda Item 77, available online at: <https://www.un.org/en/ga/sixth/78/pdfs/statements/ilc/24mtg_us_1.pdf>; and, for the US President Biden's statement, see: White House, *Fact Sheet: Enhancing the U.S.–Pacific Islands Partnership*, of 25 September 2023, issued in connection with the US–Pacific Islands Forum meeting held at the White House, Washington DC, 25-26 September 2023, available online at: <https://www.whitehouse.gov/briefing-room/statements-releases/2023/09/25/fact-sheet-enhancing-the-u-s-pacific-islands-partnership/>.

[134] *Second Issues Paper* (n. 111), para. 158.

[135] *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Reports 1996, p. 226, para. 96

that international law does not contemplate the demise of statehood in the context of climate change-related sea-level rise'.[136] The PIF leaders declared that:

> the statehood and sovereignty of Members of the Pacific Islands Forum will continue, and the rights and duties inherent thereto will be maintained, notwithstanding the impact of climate change-related sea-level rise.[137]

The Committee further explored some of the measures to facilitate safeguarding the effectiveness of statehood (in the remaining part of this section) and the rights of affected populations (in section II.E, below).

2. Measures to safeguard the effectiveness of international legal personality of the affected States

2.1. Physical measures to safeguard territory

Accepting a retreat in the location of the coast in the face of inundation and erosion may be the most ecologically sound approach as it allows the coast to adapt naturally and achieve a new equilibrium with changing sea levels. However, where sea levels are rising, this generally means a landward movement or retreat in the location of the land/sea interface. Because of coastal 'squeeze'[138] and heavy investment in coastal urbanisation and infrastructure, as well as the location of important culturally sensitive sites, simply allowing the coast to retreat (and relocating population and infrastructure) is seldom an attractive or available policy option. In the majority of such cases defending or protecting is the initial policy approach or the favoured adaption choice, and such a policy presents a wide range of options, from minimal technical interventions[139] to so-called 'soft engineering' solutions to 'hard' defences or even land reclamation. This is not to suggest that these options are necessarily mutually exclusive. Indeed, efforts to protect the coast may be partial, episodic or incremental in character and involve multiple different approaches such that solutions can be hybrid, for instance blending hard and soft engineering features.[140] As it has been observed, however, '[e]ach adaptation pathway has a limit to their effectiveness or "tipping point" before which preparation to transition to a different track is advised'.[141]

(a) Hard defences

Hard engineering options such as the construction of sea walls, groynes and wave reduction structures (notably revetments, offshore breakwaters, rock armour and gabions) are generally designed to stabilise the location of the coast and protect key infrastructure located in the coastal zone.[142] While 'tried and tested', this type of approach has repeatedly demonstrated that such hard engineering coastal constructions can interrupt natural

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[136] Pacific Island Forum, Declaration on the Continuity of Statehood and the Protection of Persons in the Face of Climate Change-related Sea-Level Rise, made on 9 November 2023 (available at: <https://forumsec.org/publications/2023-declaration-continuity-statehood-and-protection-persons-face-climate-change>), para. 8.

[137] Ibid., para. 13. See also Art. 2(2) of the Australia–Tuvalu Falepili Union Treaty (signed 9 November 2023, not yet in force) at: <https://www.dfat.gov.au/geo/tuvalu/australia-tuvalu-falepili-union-treaty>. Also: Explanatory Memorandum – Falepili Union between Tuvalu and Australia, of 8 May 2024, available at: <https://www.dfat.gov.au/countries/tuvalu/explanatory-memorandum-falepili-union-between-tuvalu-and-australia>.

[138] On 'coastal squeeze', see n. 20 above.

[139] For example, installing 'lighthouses or similar installations' on low-elevation islands such that they retain their status as base points in systems of straight or archipelagic baselines in keeping with LOSC Arts 7(4) and 47(4) even if they are reduced to the status of low-tide elevations.

[140] For instance, in a regional program financed by the World Bank, West Africa Coastal Areas Resilience Investment Project (P162337), funding was provided to several countries in West Africa to support: (a) green infrastructure such as dune fixation to protect beaches from erosion using vegetation and shrubs to trap sand, wetland and mangrove restoration and beach replenishment; (b) grey infrastructure such as construction of breakwaters, seawalls, revetments, groynes, and dikes; (c) land claim and reclamation; and (d) management of natural habitats. See: *Benin, Cote d'Ivoire, Mauritania, Sao Tome and Principe, Senegal and West Africa Economic and Monitory Union - Coastal Areas Resilience Investment Project* (2018), available online at: <http://documents.worldbank.org/curated/en/280421523498466209/Benin-Cote-dIvoire-Mauritania-Sao-Tome-and-Principe-Senegal-and-West-Africa-Economic-and-Monitory-Union-Coastal-Areas-Resilience-Investment-Project>

[141] See, e.g., 'Adapting to rising sea levels in Marshall Islands' (22 October 2021), available at: <https://storymaps.arcgis.com/stories/8c715dcc5781421ebff46f35ef34a04d>.

[142] C. Schofield, 'Shifting Limits? Sea Level Rise and Options to Secure Maritime Jurisdictional Claims' (2009) 4 *Carbon and Climate Law Review*, 405, at 411.

sediment flows, restricting coastal dynamics and resulting in coastal squeeze whereby biodiversity and ecosystem services are compromised. Additionally, they can result in significant and problematic 'knock on' impacts in terms of unexpected erosion and/or deposition to other parts of the coast, often through interrupting natural sediments flows. This type of impact is an especially problematic issue in coral island contexts, which are dependent on uninterrupted sediment flows in order to sustain the island-building processes that maintain their integrity, especially so in the context of management of rocky and sedimentary oceanic islands.[143] Consequently, such approaches have often been dismissed as large scale, costly and disruptive, resulting in 'unfortunate and sometimes very serious unintended consequences'.[144] Instead, an ecosystem-based and sustainable management approach generally seems much more appropriate and is especially relevant in the management of coral cays and other islands associated with coral reefs.[145]

Despite these known drawbacks, hard engineering options may remain inevitable to preserve and protect especially valuable parts of the coast, such as cities, potentially as part of an above-mentioned hybrid solutions approach. Salient, though not necessarily ideal examples, include the sea wall surrounding Malé in the Maldives. In fact, the Maldives already spends around USD 10 million annually for coastal protection works but, according to a 2016 estimate by its environment ministry, it would need up to USD 8.8 billion to shield all its inhabited islands.[146]

(b) Soft engineering

Fundamental to efforts towards soft engineering coastal protection measures that aim to work with nature is the recognition that the coast is, and coastal ecosystems are, both complex and dynamic in character. In particular, this applies to soft coasts, estuaries and coastal wetlands.[147] Soft engineering approaches also recognize that coastal ecosystems are biodiversity rich and provide a range of ecosystem services, including coastal protection. An ecosystem-based approach to planning is therefore essential.

Manipulation of Sediment Flows. The construction and maintenance of sand dunes and the 'nourishment' of beaches to maintain their structure in the face of higher sea levels has been used for generations, particularly in the North Sea coasts of UK and the Netherlands and on the east coast of the USA. Such approaches can span scales, from the micro- (e.g., installation of textured materials designed to retain sediment), meso- (e.g., reef and oyster beds), to macro- (e.g., mangrove restoration) levels. At the mega-scale, the Dutch *Zand Motor* [Sand Motor] project provides an example of nourishment on a scale exceeding 20 million m^3, combined with the natural process of longshore transport influencing the morphology and stability of a long stretch of coast without significant hard infrastructure construction.[148] However, it is not clear whether this is a zero-sum gain – whether the sediment resources used in one part of a coast may diminish the resilience of other areas – across international boundaries.[149]

Replenishment can of course also include rebuilding depleted islands. For example, Pulau Nipa (or Nipah), one of many small islands in the Singapore Strait, had been reduced by sand mining to one hectare, but was

[143] See R. Kenchington, 'Maintaining Coastal and Lagoonal Ecosystems and Productivity', in *Proceedings of The International Symposium of Islands and Oceans*, H. Terashima (ed.) (2009), at 4 (available online at: <https://www.spf.org/en/_opri_media/publication/pdf/200903_ISBN978-4-88404-217-2.pdf>). See also P. Kench, 'Understanding Small Island Dynamics: A Basis to Underpin Island Management', in ibid., 23–24; and Schofield, 'Shifting Limits' (n. 142), at 411.

[144] Kenchington, 'Maintaining Coastal and Lagoonal Ecosystems and Productivity' (n. 143), at 4.

[145] Ibid., 5–9.

[146] World Economic Forum, 'Threatened by rising sea levels, the Maldives is building a floating city', 19 May 2021, available online at: <https://www.weforum.org/agenda/2021/05/maldives-floating-city-climate-change/>.

[147] Traditionally, arguments for conservation supported allowing wetland areas, such as those protected under the Ramsar convention, to adjust naturally; see D. Freestone and J. Pethick, 'Sea Level Rise and Maritime Boundaries: International Implications of Impacts and Responses', in G.H. Blake (ed.), *Maritime Boundaries*, in *World Boundaries Series*, Vol. 5 (Routledge: London, 1994), 73–90, at 86–87. The current scale of predicted sea level rise may, however, alter that view.

[148] The evaluation of the 10-year Sand Motor shows that the innovative Sand Motor pilot is a success. The area of 21.5 million m^3 of sand was constructed in 2011 off the coast of Kijkduin, The Hague, according to the 'Building with the Nature' principle. See Zandmotor Monitoring, 'Results of 10 years Sand Motor now available', 14 January 2022, available online at: <https://dezandmotor.nl/en/results-of-10-years-sand-motor-now-available/>.

[149] On this aspect see Freestone and Pethick, 'Sea Level Rise and Maritime Boundaries' (n. 147), at 83–84.

restored in 2004 to about 60 hectares, well above sea level.[150] However, this feature was of major strategic importance as it is a part of Indonesia's archipelagic baselines system, and also serves as a key basepoint for the construction of the western extension of the Indonesia–Singapore territorial sea boundary.[151]

Planting of Coastal Vegetation. Soft engineering can also include the planting of new mangrove forests as well as other vegetation that can offer coastal protection such as grasses, sea grapes, sea grass beds and so forth. Coastal developments can also be combined with compensation efforts where damage to coastal ecosystems has occurred.[152] On a smaller scale, on the coast of Kutubdia Island in Bangladesh, oyster reefs have been laid to provide living coastal protection systems as well as a food source. The oyster beds naturally provide sedimentation behind the reef structure that provides a more extensive foreshore and calmer waters.[153] Such types of intervention often require considerable time and effort to monitor, evaluate and manage to deliver successful outcomes, for example paying attention to the particular morpho-dynamics of the site, consideration of groundwater issues and attention to the establishment and succession of plant species involved.

(c) Advance and accommodate

Reclamation. A famous example of recent coastal land reclamation is Singapore. With limited land space and a burgeoning population, it has invested heavily in reclamation. Approximately 25 percent of Singapore is now reclaimed.[154] The costs of such activities are very high. Estimates for the filling and raising of land in lagoons in atoll islands run to many billions of USD. Whilst it is generally accepted that a coastal State may reclaim along its coast and so advance the location of its baselines, it can be observed that it is not necessarily the case that proximate neighbouring States will accept basepoints along reclaimed shorelines for the purpose of delimiting a maritime boundary. For example, Indonesia and Singapore agreed not to utilize Singapore's reclaimed coastline, located further seawards than in the past, in delimitation negotiations for the extension the two States' 1973 territorial sea boundary in 2009 and 2014.[155]

New artificial islands. At the extreme end of the spectrum is the construction of entirely new islands. Some of the world's largest artificial islands are in the Gulf in Dubai (UAE), designed as high-end tourist attractions. This approach has also been taken in the Maldives,[156] where several artificial islands – designed to provide new safe space for high end resorts – are under construction. The Maldives have built a large artificial island, Hulhumalé, close to the capital, Malé, on which a new city is being constructed.[157] Started in 1997, the project is being built in phases. It covers 4 km^2 rising to an elevation in excess of two metres above current sea level, to house a hospital, schools, government buildings – and in 2022 was already housing 100,000 people with a target population of 240,000. It has, however, been reported to require sizeable investment of funds.[158] The

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[150] For details and a map, see D. Freestone and C. Schofield, 'Sea Level Rise and Archipelagic States: A Preliminary Risk Assessment' (2021) 35 *Ocean Yearbook* 340–387.

[151] See C. Schofield, T.L. McDorman and A. Arsana, 'Treaty between the Republic of Indonesia and the Republic of Singapore relating to the delimitation of the Territorial Seas of the Two Countries in the Eastern Part of the Strait of Singapore', in C. Lathrop (ed.), *The International Maritime Boundaries of the World*, Vol. VII (American Society for International Law/Martinus Nijhoff: Leiden/Boston, 2016), 4,813–4,824; and Badan Informasi Geospasial [Agency for Geospatial Information] (BIG), *Peta Negara Kesatuan Republik Indonesia* [Map of the Unitary State of the Republic of Indonesia] (Cibinong, 2017).

[152] For example, where the Maasvlakte II project to extend the port of Rotterdam resulted in damage to dunes, a dune compensation effort was made through beach nourishment involving the 6 million m^3 Spanjaards Dune.

[153] A. Imtiaz, 'The unlikely protector against Bangladesh's rising seas', *BBC*, 1 September 2021, available online at: <https://www.bbc.com/future/article/20210827-the-unlikely-protector-against-rising-seas-in-bangladesh>.

[154] Lim Tin Seng, 'Land from Sand: Singapore's Reclamation Story', *Biblioasia*, National Library of Singapore, 4 April 2017, available online at: <https://biblioasia.nlb.gov.sg/vol-13/issue-1/apr-jun-2017/land-from-sand/#fn:51>.

[155] Schofield, McDorman and Arsana, 'Treaty between…' (n. 151).

[156] With ca 80 % of its land area at less than 1 m above sea level, the Maldives is the among world's lowest-lying States.

[157] See at: <https://hdc.com.mv/hulhumale/>. Freestone and Schofield comment: 'This artificial island has been created in a manner reminiscent of that employed by China in the South China Sea and, indeed, this development is being largely financed by Chinese sovereign guaranteed loans to the Maldivian State-owned company responsible for the development of Hulhumalé'; see Freestone and Schofield, 'Sea Level Rise and Archipelagic States' (n. 150). See also N.J. Dauenhauer, 'On the front line of climate change as Maldives fights rising seas', *New Scientist*, 20 March 2017.

[158] On the central role of Chinese funding in these projects, including also infrastructure such as the 2 km long China-Maldives Friendship Bridge for connecting the Maldivian capital with its international airport and Hulhumalé, see: 'The Maldives counts the cost of its debts to China', *Financial Times*, 11 February 2019, available online at: <https://www.ft.com/content/c8da1c8a-2a19-11e9-88a4-c32129756dd8>.

objective was to provide more land area for safe human habitation rather than to generate any extension of maritime zones – for it is within an existing lagoon.

Floating communities and islands. The construction of floating islands is also an approach which has been pioneered by the Netherlands. Several communities in Holland are constructed on floating structures – which can adjust to storm surges and changes in sea level.[159] Rotterdam, which is 90 percent below sea level and the site of Europe's biggest port, is home to the world's largest floating office building.[160] Low-cost floating housing has also been pioneered in the coastal city of Lagos, Nigeria, which is prone to massive flooding; and floating infrastructure is being piloted also in the city of Mindelo on the island of São Vicente, Cape Verde.[161]

The Maldives is already constructing an innovative floating city designed by a Netherlands-based firm.[162] It is composed of simply designed, affordable housing for 20,000 people with residence and services floating along a flexible functional grid across a 200-hectare lagoon. These are connected to a ring of barrier islands, which act as breakers below the water, thereby lessening the impact of lagoon waves and stabilizing structures on the surface. Underneath the hulls will be artificial reefs to help support marine life. The buildings will pump cold seawater from the deep to aid air-conditioning systems.[163]

Such initiatives are arguably harbingers of future challenges including the construction of large-scale floating installations or 'islands' providing permanent living spaces at sea and ultimately 'floating ocean cities' – a concept termed 'sea steading'.[164] While these initiatives may appear far-fetched, potential law of the sea issues are already arising, for instance regarding the status of maritime infrastructure associated with it.

However, as some developing States have observed in recent Sixth Committee debates in the UN, the very high cost of physical interventions and preservation measures such as the installation or reinforcement of coastal barriers or defences and dykes, 'underline the importance of international cooperation'.[165]

2.2. Legal measures concerning State territory in consequence of sea level rise

Beyond the preservation of existing territory with the assistance of physical measures, the legal measures adopted or foreseen by the affected States concerning State territory include: (a) the acquisition or use of land in another State's territory that do not involve the acquisition or transfer of a territorial title; (b) the acquisition of sovereign title over a part of another State's territory; (c) transformations of the constitutional and/or governmental organization of the affected State (with or without transfer of territorial titles; and with or without maintenance of distinct international legal personality); and (d) preservation of international legal personality with total loss of territory.

In this connection, a distinction must be made since territorial sovereignty is not the only type of entitlement that a State may have over a territory. The nature of State's *title* over a particular territory determines whether its rights and competences over it amount to full sovereignty, administration, or private land ownership.[166] Only an undisputed title of sovereignty confers on the State the right to dispose of the territory itself (including its cession), as well as to have sovereignty, sovereign rights or exclusive jurisdiction in maritime zones, based

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[159] S. Rubin, 'Why the Dutch embrace floating homes', *BBC Future Planet*, 8 February 2022, available online at: <https://www.bbc.com/future/article/20220202-floating-homes-the-benefits-of-living-on-water>.

[160] 'Largest floating office building in the world opens in Rotterdam', available online at: <https://www.themayor.eu/en/a/view/largest-floating-office-building-in-the-world-opens-in-rotterdam-8816>.

[161] A. Johnson, 'How Africa's largest city is staying afloat', *BBC Future Planet*, 22 January 2021, available online at: <https://www.bbc.com/future/article/20210121-lagos-nigeria-how-africas-largest-city-is-staying-afloat>.

[162] Maldives Floating City, available online at: <https://maldivesfloatingcity.com/>.

[163] World Economic Forum, 'The Maldives is building a Floating City', at: <https://www.weforum.org/videos/the-maldives-is-building-a-floating-city>.

[164] See, e.g., the website of the Seasteading Institute at: <https://www.seasteading.org/>.

[165] See, e.g., statement by Sierra Leone: UN Doc. A/C.6/77/SR.27 (UN Secretariat summary, debate of 28 Oct. 2022).

[166] See *Frontier Dispute (Burkina Faso/Mali)*, Judgement of 22 December 1986, ICJ Reports 1986, p. 554, para. 18; and *Land, Island and Maritime Frontier (El Salvador/Honduras: Nicaragua intervening)*, Judgement of 11 September 1992, ICJ Reports 1992, p. 351, paras. 44–45. See also M.N. Shaw, 'The International Court of Justice and the Law of Territory', in C. Tams and J. Sloan (eds), *The Development of International Law by the International Court of Justice* (Oxford University Press, 2013), 154.

on a land territory under its sovereignty. States with titles of administration over a territory only possess the specific rights and powers that the title itself confers, while *de jure* sovereignty over that territory remains with another sovereign title holder (i.e., another State).[167] Titles of private ownership over land (not 'territory') by definition generally do not confer any form of entitlements under international law to it and, as stated by the ICJ, must be distinguished from territorial sovereignty.[168]

(*a*) *The acquisition or use of land in another State's territory (without transfer of territorial title*)

In addition to deploying preservation strategies of their territory and territorial titles, affected States have adopted measures that involve the acquisition or use of *land* that can be instrumental to the protection of their population's basic needs. While these measures go beyond the territorial borders of the affected State, they constitute private-law transactions and do not involve the acquisition of a new territorial title over another State's territory.

The first of these measures concerns the *purchase of land* in another State's territory. This possibility was raised, for instance, in 2008 by former President of Maldives, H.E. Mohammed Nasheed, and was thereafter effectively implemented in 2014 by Kiribati which purchased 2,000 hectares of land from a private entity (the Church of England) in Fiji for USD 8.77 million.[169] This transaction indeed did not involve a treaty between Kiribati and Fiji bestowing Kiribati with sovereign rights over the purchased land; it was a private-law transaction between Kiribati and the Church of England, yet conducted with the authorisation of Fiji's government, which retained full sovereignty over that part of its territory. For the *purchased land* to become *purchased territory* of Kiribati, a treaty or agreement between the two States – whereby Fiji would consent to transfer the territorial title of such part of its territory – would be required.[170]

In addition, as already discussed by the Committee, affected States might also have recourse to *leases* of another State's territory, an option that gives limited sovereign rights to the leasing State over the other State's territory but does not involve transfer of the territorial title *per se*.[171] As noted by Dörr, when a State leases territory from another 'it simply receives the right to exercise the latter's territorial authority (*Gebietshoheit*) on the territory concerned, while full sovereignty remains as residual legal title with the original holder'.[172]

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[167] J. Crawford, *Brownlie's Principles of Public International Law*, 9th edn (Oxford University Press, 2019), at 191.

[168] *Sovereignty over Pedra Branca/Pulau Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)*, Judgement of 23 May 2008, ICJ Reports 2008, p. 80, para. 222 (stating that 'in law "ownership" is distinct from "sovereignty"', although 'in international litigation "ownership" over territory has sometimes been used as equivalent to "sovereignty"; see, e.g., *Territorial Sovereignty and Scope of the Dispute, Eritrea/Yemen* (1998) 22 RIAA, pp. 209, 219, para. 19 and pp. 317–318, para. 474)'.

[169] The parcel was located in Viti Levu (Fiji's main island), in a dense forest area, and funding was secured by Kiribati's Revenue Equalization Reserve Fund which had been set up in 1956 with the revenues from phosphate exploitation. While the purpose of this transaction was to develop coastal agriculture and therefore enhance food security in land spared from salt-water intrusion, the possibility that it may also become a relocation site for the 103,000 inhabitants of Kiribati was discussed. A few months before the purchase was concluded, Fiji's President, H.E. Ratu Epeli Nailatikau, publicly expressed the support of his country *to the people* of Kiribati, who 'would be able to migrate to Fiji with dignity if need arose'; see L. Caramel, 'Besieged by the Rising Tides of Climate Change, Kiribati Buys Land in Fiji', *Guardian*, 1 July 2014, available online at: <http://www.theguardian.com/environment/2014/jul/01/kiribati-climate-change-fiji-vanua-levu>. Also: 'Fiji Supports Kiribati on Sea-Level Rise', *Press Release* SUVA (Fiji), 11 February 2014, available online at: <http://www.climate.gov.ki/tag/government-of-kiribati/>.

[170] There have been some historical examples in the Pacific region of a purchase of territory between colonial powers, which did involve full transfer of sovereignty (e.g., in 1898, Prussia purchased the Marianas and Caroline Islands from Spain; and in 1942, the island of Rabi (Fiji) was purchased by the Western Pacific High Commission on behalf of the Banabans (of Banaba island in the present-day Kiribati), who were ultimately relocated there in 1945.

[171] *Interim Report of the ILA Committee (Lisbon 2022)* (n. 13), at 546–547 (Box 1). The lease is based on a treaty between two States, it establishes rights for one State to display elements of its sovereign authority in a specified territory where another State has, and retains, *de jure* sovereignty. While States commonly lease their territory for different purposes, the Committee is not yet aware that such a measure has been used by States affected by sea level rise. The rights that are transferred by a territorial lease 'can be defined as a sort of servitude that limits the active exercise of sovereignty by the lessor State and extends the sovereign competences of the lessee State in the area involved'; ibid.

[172] O. Dörr, 'Cession', *Max Planck Encyclopedia of Public International Law* (August 2019), at 1. On territorial leasing generally, see M.J. Strauss, *Territorial Leasing in Diplomacy and International Law* (Brill: Boston, 2015).

(*b*) *The acquisition of title over a part of another State's territory*

The *cession* or the transfer of a part of the territory from one State to another by virtue of a treaty is among the modes of acquisition and transfer of territory traditionally recognised as lawful under international law.[173] Historical examples can be found as part of peace treaties, in exchange for another part of territory, or as payment for outstanding debts. More recent cases are found for small portions of territories and result from rectification of border demarcation.[174] While there is little incentive for the host State to give up its sovereignty over parts of its own territory, to the extent that low-lying SIDS may find an adequate form of compensating the ceding State (for instance, through granting rights of exploration or exploitation of its maritime areas),[175] it cannot be ruled out as a possible option.

(*c*) *Transformations of the constitutional and/or governmental organization (with or without transfer of territorial titles or maintenance of distinct international legal personality)*

Affected States might also consider options in cooperation with other States which involve changes to their constitutional and/or governmental organization. Some of these changes may be limited to the transfer of competences from the affected State to another State with better capacity to exercise certain governmental functions (association with another State, confederation of States, condominium), while others may involve the total transfer of territorial sovereignty of the affected State, various changes of a constitutional order, and even the loss of its original international legal personality (creation of a federal State, unification/merger).

The *association with another State* may result from an agreement whereby one State transfers to another State the right to exercise some of its competences without involving the transfer of territorial title in any form.[176] Examples in the Pacific region include the compact of free association that The Federated States of Micronesia, the Marshall Islands and Palau have concluded with the United States (former trustee of the UN Pacific Trust Territory), and more recently the associations of the Cook Islands, Niue and Tokelau with New Zealand.[177] While political considerations are critical to the effectiveness of this measure, low-lying SIDS may consider having recourse to similar arrangements either with other island States (found in several regions, including the Pacific, the Indian Ocean, and the Caribbean) or with other regional powers to strengthen their governmental capacities while suffering slow-onset loss of land territory.

The creation of a *confederation* of States on the basis of an international treaty between two or more States, and regulated under the terms of that treaty, is an option that could offer to the most affected States the stability of being part of a broader political organization, while preserving all of their territorial titles of full and exclusive sovereignty over their original territory and maintenance of their international legal personality within the confederation.[178] This alternative, however, does not shed light on whether the member States of the confederation would recognize (either in the constituting agreement or afterwards) that the territorial titles and international legal personality of the affected member State(s) are preserved even after uninhabitability or full submergence of the affected State's territory takes place.

The *condominium* (or joint sovereignty model) is another (rare) option established by an international agreement whereby two (or more) States jointly exercise sovereignty over the same territory.[179] As with purchases of territory, the only historical precedent of this form in the Pacific region related to the colonial period.[180] This measure might become a useful tool for consideration by the affected States as they transition to a new decision on the continuity of their statehood, rather than as a permanent solution.

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[173] See Sir Robert Jennings, *The Acquisition of Territory in International Law*, 2nd edn (Manchester University Press, 2017), 20–21.
[174] O. Dörr, 'Cession' (n. 172), at 3.
[175] See R. Rayfuse, 'International Law and Disappearing States: Utilizing Maritime Entitlements to Overcome the Statehood Dilemma' (2010) 52 *University of New South Wales Legal Research Series* 1–13.
[176] As observed by James Crawford, this option 'has no legal consequences beyond those arising from the specific agreement or instruments in question', and has 'no direct bearing on the entity's legal status or lack of it as a state under the criteria referred to [in Article 1 of Montevideo Convention]'; J. Crawford, *The Creation of States in International Law*, 2nd edn (Oxford University Press, 2016), at 719.
[177] See *Interim Report of the ILA Committee (Lisbon 2022)* (n. 13), at 549; *Second Issues Paper* (n. 111), para. 205.
[178] See *Interim Report of the ILA Committee (Lisbon 2022)* (n. 13), at 548.
[179] F. Morrison, 'Condominium and Co-Imperium', *Max Planck Encyclopedia of Public International Law* (2006).
[180] In 1980, the Anglo-French condominium of the New Hebrides, which had been concluded in 1906, was dissolved and Vanuatu became an independent State.

Under the *federation* model, as noted by this Committee in its 2022 Interim Report, only the federal State has international legal personality; thus, upon joining the federation, the federated States (i.e., the federal units) will remain distinct constituent entities within it, but in principle will lose their independent international legal personality, as well as their sovereign title to their territory, which is transferred to the federal State.[181] The *Second Issues Paper* noted, however, that 'in some federal States, the individual units of the federation are recognized as having the capacity to carry out certain actions of an international character'.[182]

The *Second Issues Paper* also pointed out that the affected States may have recourse to *unification (including the possibility of a merger)*, which implies that one State is absorbed by another State, the former losing its international legal personality and all territorial titles. However, 'a degree of autonomy for the former nationals of the affected island State could be agreed upon beforehand, in order to preserve their cultural and group identity'.[183]

The above forms of transformation of political organization of the affected States do not constitute a closed list. Several 'hybrid schemes' would also be open to the affected States, including special administrative regions and *ad hoc* scenarios relating to citizenship and the right of peoples to self-determination.[184]

2.3. The right to self-determination of peoples affected by sea level rise

The right to self-determination, as enshrined in Articles 1 and 55 of the UN Charter, becomes particularly significant for peoples affected by sea level rise when most or all of the territory of low-lying SIDS becomes uninhabitable or submerged. In addressing this issue, it is at the outset important to keep in mind that the meaning of that right is multidimensional. It not only has a political element, but also includes the economic, social and cultural development of all peoples, as guaranteed by Article 1 common to the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).[185] Consequently, the specificity of the right to self-determination lies in the fact that it does not necessarily have the same meaning for peoples affected by sea level rise and other peoples, as well as in the fact that, even in terms of its political content, it is not a single right, but a scale of rights that may be applicable depending on the circumstances in which a particular people lives as a group. For instance, self-determination will have a very important cultural dimension as a means of preserving the national and cultural identity of affected peoples in the context of climate change-induced sea level rise, particularly (although not exclusively) in the case of cross-border relocation,[186] which may be implemented as 'an option of last resort'.[187]

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[181] See *Interim Report of the ILA Committee (Lisbon 2022)* (n. 13), at 547, footnote 148.
[182] *Second Issues Paper* (n. 111), para. 208.
[183] Ibid., para. 216.
[184] On the right of people to self-determination see further below in this section (under II.D..2.3); see also preliminary observations in *Interim Report of the ILA Committee (Lisbon 2022)* (n. 13), at 540. Also, *Second Issues Paper* (n. 111), paras 217–226.
[185] Common Article 1(1) International Covenant on Civil and Political Rights (ICCPR) 999 UNTS 171 and International Covenant on Economic, Social and Cultural Rights (ICESCR) 993 UNTS 3: 'All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development'.
[186] Thus, as Lixinski, McAdam and Tupou observed: 'taking culture seriously in this space enables unique insights into the meaning of self-determination, which goes to the heart of people's identity'; see L. Lixinski, J. McAdam and P. Tupou, 'Ocean Cultures, the Anthropocene and International Law: Cultural Heritage and Mobility Law as Imaginative Gateways' (2022) 23 *Melbourne Journal of International Law* 3.
[187] J. McAdam, '"Under Two Jurisdictions": Immigration, Citizenship, and Self-Governance in Cross-Border Community Relocations' (2016) 34(2) *Law and History Review* 281–333, at 284.

The drafters of the UN Charter did not define the right to self-determination or identify 'peoples'[188] as the beneficiaries of that right.[189] SIDS have been, and in some cases still are, subject to colonial, or similar, relationships with metropolitan States, and in this sense obvious addressees of the right to self-determination. Moreover, there is evidence that a broader definition of 'peoples', beyond the populations of trust territories and even the populations of non-self-governing territories, was intended to be encompassed.[190] In 1970, the UN General Assembly expanded the right to self-determination beyond colonialism in its Friendly-Relations Declaration.[191] At the same time, the Declaration clearly attempted to reconcile the right to self-determination with the territorial integrity or political unity of sovereign and independent States by stressing the inviolability of the 'territorial integrity or political unity of sovereign and independent states conducting themselves in compliance with the principle of equal rights and self-determination of peoples' and possessing 'a government representing the whole people belonging to the territory without distinction as to race, creed or color'.[192] Therefore, the right to self-determination, in accordance with Article 1(1) of the ICCPR and ICESCR, could not be considered as the right of peoples in the narrow meaning of *ethnos* as primarily individuals belonging to one particular ethnic group, but in the meaning of *demos* – thus, as the entire population of a State,[193] i.e., all the citizens of an affected low-lying SIDS. However, the right to self-determination of peoples in international law should not be understood as a uniformly shaped model, but rather as a scale of rights and duties, primarily dependent on the political and social circumstances in a particular State.[194] In other words, the right to self-determination for affected peoples is not automatically the 'right to statehood', nor the 'right to secession'. The right to self-determination should be understood as a 'variable right', depending on a combination of factors,[195] and consequently the legitimate needs of its beneficiaries.

For affected peoples (understood as *demos*) who have to relocate to the territory of another State (see scenarios in section II.E, below), self-determination might be exercised in some form of local autonomy or self-government, such as the right to elect their own authorities, and possibly some other rights that could be agreed upon with their host State. Moreover, some of the sovereign rights/entitlements in the maritime areas of the affected State could be recognized by international law. In addition, if affected peoples are recognized as non-territorial, semi-sovereign subjects of international law in the sense of 'climate deterritorialized nations' (CDNs) as discussed by some authors,[196] they may be able to retain some elements of their affected State's sovereignty (e.g., civil or criminal jurisdiction), subject to the legal regulation of their status in the host State (see scenario 3 in section II.E, below). Furthermore, some authors in this context speak of the right of a

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[188] A UNESCO Meeting of Experts included the following characteristics 'as inherent in a description (but not a definition)' of a 'people': 'a group of individual human beings who enjoy some or all of the following common features: a) a common historical tradition; b) racial or ethnic identity; c) cultural homogeneity; d) linguistic unity; e) religious or ideological affinity; f) territorial connection; g) common economic life'; see UNESCO, International Meeting of Experts of Further Study of the Concept of the Rights of Peoples, Paris, 27–30 November 1989, Final Report and Recommendations, SHS-89/CONF.602/7, of 22 February 1990, para. 22.

[189] See F.L. Kirgis, Jr., 'The Degrees of Self-Determination in the United Nations Era' (1994) 88(2) *American Journal of International Law* 304–310, at 304.

[190] Ibid., at 304–305. See also A. Rigo Sureda, *The Evolution of the Right of Self-Determination: A Study of United Nations Practice* (Sijthoff: Leiden, 1973), at 29–34.

[191] Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, UN Doc. A/RES/2625(XXV), of 24 October 1970.

[192] The principle of equal rights and self-determination of peoples, ibid.

[193] B. Vukas, 'States, Peoples and Minorities', *Recueil des cours de l'Académie de droit international de La Haye*, Vol. 231-VI, 1991, p. 322.

[194] See Kirgis, 'The Degrees of Self-Determination' (n. 189), at 308, observing that '[D]ismemberment is at the end of a scale of claims, ranging from modest to extremely destabilizing (…). Moreover, as there are degrees of claim, there are degrees of representative government, with absolute dictatorship and all-inclusive democracy at the opposite extremes. (…) If a government is at the high end of the scale of democracy, the only self-determination claims that will be given international credence are those with minimal destabilizing effect. If a government is extremely unrepresentative, much more destabilizing self-determination claims may well be recognized.'

[195] Ibid., at 310. Cf. also G. Pentassuglia, 'Self-Determination, Human Rights, and the Nation-State' (2017) 19 *International Community Law Review* 445–446. See also United Nations Declaration on the Rights of Indigenous Peoples, Resolution 61/295 (13 September 2007), UN Doc. A/RES/61/295, Arts 3–5 on the right to self-determination of indigenous peoples and its specific content.

[196] See D. Lapaš, 'Climate Change and International Legal Personality: "Climate Deterritorialized Nations" as Emerging Subjects of International Law?' (2021) 59 *Canadian Yearbook of International Law* 1–35, at 2.

population to extract the natural resources of their affected State,[197] the right to their 'underwater heritage',[198] or even the right to financial resources to build a navy in order to effectively control their affected territory.[199]

As noted by Willcox, the populations of affected low-lying SIDS, such as those of Tuvalu, Maldives, the Marshall Islands, and Kiribati 'count as self-determining peoples whose members share not just … attachment to land and colonial history, but also a history of participation in the common political institutions of their states'.[200] Even so, in seeking new territory on which to re-establish themselves as self-determining communities when most or all of their own territory has become uninhabitable or submerged (see scenarios 2 and 3 in section II.E, below), these peoples will inevitably encounter other peoples exercising their own rights to self-determination and territorial integrity.[201] As a result, if the population of the affected low-lying SIDS were to take such a position, it might raise concerns about their minority status in the host State including the international protection of their minority rights. This situation becomes even more complex in practice bearing in mind that a hypothetical extinction of an inundated island State under classic international law results in the *de jure* statelessness of its population unless its members are able to become citizens of the host State (see further discussion in section II.E, below). Although the right to self-determination belongs to peoples, and not States, i.e., not to the affected low-lying SIDS, their peoples however 'will need to be incorporated within the boundaries of any future host state, which situation will require further negotiation about the extent to which they can continue to exercise their collective autonomy'.[202]

International law faced with climate change-induced sea level rise, and consequently with the question of the legal status of the peoples from the affected States (including their right to self-determination) could offer at least three possible scenarios (some aspects of which could be combined in practice):[203]

a) The *de facto* and *de jure* preservation of the statehood of the affected low-lying SIDS including the right to self-determination of their population *within* their own country[204] could be possible by safeguarding habitable territory (see section II.B above regarding geomorphological processes, and section II.D.2.1, regarding physical measures). This scenario would maintain the *status quo* and probably be the best solution. Moreover, it would be in accordance with the declared readiness of the operating entities of the Financial Mechanism under the UNFCCC and the institutions serving the Paris Agreement to help those affected by climate change.[205] However, the support of the international community and, in particular, of international financial institutions would be required.

b) Acknowledging the status of national minorities in the host State would imply turning the population of the affected low-lying SIDS, which in today's democratic legal systems are bearers of sovereignty, into a group whose members enjoy only some collective human rights dependent on the legal system of the host State (regarding collective and individual human rights, see further discussion in section II.E). Although the legal status of the persons from affected States in the host States could be regulated within the concept of the protection of minorities in international law, bearing in mind that peoples enjoy the right to self-determination as recognized by Article 1(1) of the ICCPR, this solution could potentially deprive persons from affected States of some of the rights which they enjoyed as citizens of their States, if international law would permit that such States lose their statehood in consequence of climate change-induced sea level rise (on which see the discussion in section II.D.1, above).

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[197] J. Ödalen, 'Underwater Self-determination: Sea-level Rise and Deterritorialized Small Island States' (2014) 17(2) *Ethics, Policy & Environment* 233–234.
[198] E. Jiménez Pineda, 'The Disappearing Island States phenomenon. A challenge to the universality of the International Law of the Sea' (*European Society of International Law*, Conference Paper Series no. 11/2018, 13–15 September 2018), at 10.
[199] Ödalen, 'Underwater Self-determination' (n. 197), at 233.
[200] S. Willcox, 'Climate Change Inundation, Self-Determination, and Atoll Island States' (2016) 38(4) *Human Rights Quarterly* 1022-1037, at 1026.
[201] Ibid., at 1034.
[202] Ibid., at 1036.
[203] Moreover, on the status of individual members of affected peoples as refugees or migrants see in section II.E, below.
[204] Willcox, 'Climate Change Inundation' (n. 200), at 1033, notes that Tuvaluans have invoked their right to self-determination within their own country, claiming that relocation would lead to the loss of their sovereign rights and their identity.
[205] See also *Report of the ILA Committee (Sydney 2018)* (n. 6), at 906–907 [55].

c) The extinction of the affected low-lying SIDS would (even before the event) raise the question of the international legal status of their populations when their last islands become uninhabitable or, in a longer-term perspective, inundated. International law could respond with the recognition of CDNs as new entities, i.e., new subjects of international law (just as, e.g., international organisations emerged in the 1800s as new subjects of international law), which could retain or succeed the entitlements/rights held by their States, thus preserving their right to self-determination and regulating their status with the host States. As a result, the recognition of international legal personality for CDNs as a new non-territorial subjects of international law could not only provide them with international legal capacity (*capacitas iuridica*) and the capacity to produce legal consequences in international legal relations (*capacitas agendi*) like the treaty-making capacity (*ius contrahendi/ius tractandi*), or even the right to legation (*ius legationis*), but it could also preserve their national identity and the right to self-determination, including the right over the natural resources that were held by their States. Furthermore, unlike in the scenarios for minority, or climate refugee/migrant status, their right to self-determination would thereby acquire a very concrete content of a collective international legal entity retaining the rights/entitlements that belonged to their States.

In this regard, it is worth noting that if such a new subject of international law were to be recognized and if the individuals were granted citizenship of the host State, the right of these peoples to self-determination as successors of their State could be preserved. The 'list' of subjects of international law has never been a *numerus clausus*. And throughout history, international law has proved itself to be inventive enough to develop its existing concepts, such as international legal personality, without relinquishing their legal substance, but adapting them to new circumstances.

E. Measures to safeguard the rights of affected populations

1. Human rights obligations and legal certainty and stability

1.1. Key principles

In its 2018 Report and the Sydney Declaration of Principles,[206] the Committee already addressed those human rights that protect people affected by sea level rise who are evacuated, displaced and relocated or decide to migrate. Building on its 2022 interim report,[207] the following considerations address human rights more generally.

There is growing recognition that duties inherent in existing human rights obligations require States to safeguard the enjoyment of human rights of those affected by the adverse impacts of climate change.[208] While action to ensure the enjoyment of human rights for everyone in climate change contexts is demanding and

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[206] ILA Resolution 6/2018, Sydney Declaration of Principles (n. 108).

[207] *Interim Report of the ILA Committee (Lisbon 2022)* (n. 13).

[208] For instance, the Convention on the Rights of Persons with Disabilities (2006), 2515 UNTS 3 (entered into force 3 May 2008) (CRPD), Art. 11; and the African Charter on the Rights and Welfare of the Child (1990), OAU Doc. CAB//LEG/24.9/49 (entered into force 29 November 1999), Arts. 23 and 25. Two treaties explicitly address disaster relief. In 2015, the 109 States which endorsed the Nansen Initiative *Agenda for the Protection of Cross-Border Displaced Persons in the Context of Disasters and Climate Change* recognised the linkage (at 7). In the past few years, five Special Rapporteurs have devoted attention to issue in thematic reports submitted to the UN General Assembly and Human Rights Council. See *Promotion and Protection of Human Rights in the Context of Climate Change*, Report of the Special Rapporteur on the Promotion and Protection of Human Rights in the Context of Climate Change, UN Doc. A/77/226 (26 July 2022); *Providing Legal Options to Protect the Human Rights of Persons Displaced across International Borders Due to Climate Change,* Report of the Special Rapporteur on the Promotion and Protection of Human Rights in the Context of Climate Change, UN Doc. A/HRC/53/34 (18 April 2023); *Report on Ecological Crisis, Climate Justice and Racial Justice*, Report of the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance UN Doc. A/77/549 (25 October 2022); *Report on the Impacts of Climate Change and the Protection of the Human Rights of Migrants,* Report of the Special Rapporteur on the Human Rights of Migrants, UN. Doc. A/77/189 (19 July 2022); *Report on Violence Against Women and Girls in the Context of the Climate Crisis, including Environmental Degradation and Related Disaster Risk Mitigation and Response,* Report of the Special Rapporteur on Violence Against Women, UN Doc. A//77/136 (11 July 2022), *Report on Internal Displacement in the Context of the Slow-Onset Adverse Effects of Climate Change*, Report of the Special Rapporteur on the Human Rights of Internally Displaced Persons, UN Doc. A/75/207 (21 July 2020).

complex, international human rights law already provides a series of key principles that contribute to legal certainty and stability and ensure predictability as to who is obliged to protect the human rights of people affected by the adverse impacts of climate change.

First, persons affected by climate change will remain rights holders under international human rights law at all times. Human rights attach to individuals because they are human beings 'born free and equal in dignity and rights'[209] and, with only a few exceptions,[210] are universally enjoyed regardless of nationality. Rights may be held individually, or as individual members of specific groups, such as religious or minority groups.[211] Status as a rights holder is not lost when a person becomes a refugee or a migrant, although in that case limitations may be permissible in respect of some rights,[212] and additional rights – most notably guarantees derived from the principle of *non-refoulement*[213] – may also accrue. Peoples protected by the right to self-determination under common Article 1 to the two main general human rights Covenants, or indigenous communities, may also be holders of collective rights.[214]

Second, international human rights law determines at all times who the duty bearers are and, particularly in the context of migration and cross-border displacement, typically regulates the 'distribution' of human rights duties and responsibilities between States. Human rights are entitlements of persons against specific duty bearers who are accountable for addressing these protection needs. States are typically required to respect and protect the rights of persons in any territory under their jurisdiction, which can include foreign territory.[215] Thus, should a State other than the affected State exercise jurisdiction over territory where the persons are located, that State will assume certain obligations towards them. This means that, as a rule, there will be at least one State (or other entity with international legal personality) exercising jurisdiction over persons impacted by sea level rise.

Thus, understanding the dynamics of human mobility (including immobility or 'staying at home') in the context of climate change is critical to determine the distribution of human rights obligations between affected States, States that temporarily or permanently receive members of the population of affected States (hereafter host States), and the international community at large. At any given time, forced displacement and predominantly voluntary migration, internally and across borders, and in some cases planned relocation, will co-exist, and this, too, will influence the distribution of obligations between States. In the short-term, most duties vis-à-vis individual rights will attach to affected States, but States of transit and host States may have obligations arising from rights of those who already have left their State. The balance of obligations between affected and host States, as they relate to individuals, can be expected to adjust with changes in the distribution of at-risk populations between them.

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[209] Universal Declaration of Human Rights, UNGA Res 271A (III) (10 December 1948), Art. 1.

[210] See, in particular, International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR), Art. 25 whose guarantees are limited to 'citizens'.

[211] See, for example, ICCPR, Arts. 18(1) and 27(1), which, respectively, guarantee individuals the freedom to manifest religion and beliefs and to enjoy their own culture, to profess and practise their own religion, or to use their own language 'in community' with others.

[212] See, in particular, ICCPR, Arts. 12 and 25.

[213] See below, section II.E.3.2. These obligations may become increasingly important in relation to destination States at certain thresholds of climate change. See UN Human Rights Committee, *Teitiota v. New Zealand*, Communication No. 2728/2016, UN Doc. CCPR/C/127/D/2728/2016 (7 January 2020), para 9.11. See also the recent discussion by New Zealand Immigration and Protection Tribunal in *AW (Kiribati)* [2022] NZIPT 802085, at paras [114]-[115].

[214] See section II.D.2.3, above.

[215] This principle is clearly embedded in the jurisprudence of the UN Human Rights Committee (see *Lopez Burgos v. Uruguay,* UN Doc. CCPR/C/13/D/52/1979, of 29 July 1981; and *Casariego v. Uruguay*, CCPR/C/13/D/56/1979, of 29 July 1981); the UN Committee against Torture (see *General comment No. 2 [2007] on the implementation of article 2 by States parties* UN Doc. CAT/C/GC/2, at para 16: Article 2, paragraph 1, requires that each State party shall take effective measures to prevent acts of torture not only in its sovereign territory but also 'in any territory under its jurisdiction'; applied in *J.H.A v Spain,* UN Doc. CAT/C/41/D/323/2007, of 21 November 2008, at para. 8.2); the International Court of Justice (see *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004, p. 136, paras. 109–111); the Inter-American Commission on Human Rights (see, for example, *Coard and others v United States* Case No. 10.951, Report No. 109/99, of 29 September 1999); and the European Court of Human Rights (see *Öcalan v Turkey* Application 42221/99, of 12 May 2005).

Third, under international human rights law, States have duties to (i) respect, (ii) protect, and (iii) fulfil human rights,[216] *and (iv) to do so on a non-discriminatory basis*.[217] The obligation to *respect* human rights – a negative obligation – requires States to refrain from violating human rights guarantees. This includes the duty to respect rights without discrimination. Rising sea levels do not affect the ability of affected States to refrain from violations but may pose the risk of authorities restricting certain rights beyond what is permissible under international law, for instance by limiting liberty of movement during a disaster more than is necessary to protect public order or public health.[218]

The obligation to *protect* human rights – a positive obligation – requires States to take steps to protect against breaches of rights emanating from third parties or in specific situations. This duty becomes relevant not only for States affected by sea level rise, for instance when cultural heritage sites risk being destroyed by eroding coastlines or when the loss of territory triggers violent conflicts over land, but also for host States, for instance in the context of removals to affected States.[219] There is settled jurisprudence on the duty to protect and the due diligence obligations of States when the risk emanates from human actors,[220] but does it also exist when dangers arise from natural hazards? With regard to the duty to protect life from foreseeable natural hazards, the answer, according to the European Court of Human Rights, is yes.[221] At the global level, the Human Rights Committee (HRCttee) found a violation of ICCPR, Article 17, when a State party failed to protect an indigenous community by building sea-walls in a timely manner, considering 'that when climate change impacts, including environmental degradation on traditional (Indigenous) lands in communities where subsistence is highly dependent on available natural resources and where alternative means of subsistence and humanitarian aid are unavailable, have direct repercussions on the right to one's home, and the adverse consequences of those impacts are serious because of their intensity or duration and the physical or mental harm that they cause, the degradation of the environment may then adversely affect the well-being of individuals and constitute foreseeable and serious violations of private and family life and the home.'[222] The Committee on Economic, Social and Cultural Rights (CtteeESCR), while highlighting that 'the obligation to protect is to be understood as requiring States to take measures to prevent *third parties* from interfering in the exercise of rights' as enshrined in the International Covenant on Economic, Social and Cultural Rights (ICESCR),[223] has, for instance, urged a State party to take measures 'mitigating the impact of natural disasters and climate change on the population'.[224] However, the specific obligations, and the extent of the protective measures to be taken by authorities, may depend to some extent on the nature of the right whose current enjoyment is threatened.[225]

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[216] See, in particular, International Covenant on Civil and Political Rights (ICCPR) (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171; International Covenant on Economic, Social and Cultural Rights (ICESCR) (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3; American Convention on Human Rights 'Pact of San José, Costa Rica' (American Convention) (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 143; African Charter on Human and Peoples' Rights (African Charter) (adopted 27 June 1981, entered into force 21 October 1986) (1982) 21 ILM 58; Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4.XI.1950, as amended by Protocols Nos 11 and 14, supplemented by Protocols Nos 1, 4, 6, 7, 12, and 13 (European Convention on Human Rights).

[217] ICCPR, Art. 2(1); ICESCR, Art. 2(2).

[218] ICCPR, Art. 12(3). See section II.E.2.1, below.

[219] See section II.E.3.2, below, on non-refoulement.

[220] See, e.g., European Court of Human Rights, *Osman v The United Kingdom*, Reports 1998-VIII, para. 116, and many others.

[221] See, in particular, European Court of Human Rights, *Budayeva and Others v Russia*, Applications Nos 15339/02, 21166/02, 20058/02, 11673/02, and 15343/02 (2008) and ECtHR (Grand Chamber), *Öneryildiz v Turkey*, Reports 2004-XII. For a summary of the policy and operational requirements flowing from this jurisprudence, see B. Burson et al., 'The Duty to Move People Out of Harm's Way in the Context of Climate Change and Disasters' (2018) 37(4) *Refugee Survey Quarterly* 379–407, at 387.

[222] UN Human Rights Committee, *Daniel Billy et al. v Australia*, Communication No. 624/2019, views adopted on 21 July 2022, UN Doc. CCPR/C/135/D/3624/2019, para. 8.12.

[223] CtteeESCR, General Comment No. 21: Right of everyone to take part in cultural life (Art. 15, para. 1(a) of the International Covenant on Economic, Social and Cultural Rights) (2009), para. 50 (emphasis added).

[224] CtteeESCR, *Concluding Observations on the Initial Report of Cabo Verde,* UN Doc. E/C.12/CPV/CO/1 (27 November 2018), para. 9.

[225] See *Budayeva and Others v Russia* (n. 221), para. 174, where the Court found that 'positive obligations as regards the protection of property from weather hazards do not necessarily extend as far as in the sphere of dangerous activities of a

The positive obligation to *fulfil* human rights requires 'the State to create the legal, institutional and procedural conditions that rights holders need in order to realise their rights in full'.[226] While limited in practical terms, positive obligations also exist with regard to certain civil and political rights.[227] For instance, key elements of a human-rights based approach to evacuations or planned relocation are the obligation to respect the right to freedom of expression, which includes the right to receive information[228] and requires authorities to take measures to ensure the participation of affected people, including women[229] and marginalized groups.[230] The hallmark of economic, social and cultural rights are obligations to make relevant goods and services *available* in sufficient quantity and quality; *accessible*, and thus not only within physical reach and free from de facto or legal barriers to access, but also economically affordable; as well as *acceptable*, that is, respectful of cultural traditions of people and communities, as well as gender-responsive.[231] Fulfilling these obligations can become particularly challenging. The salinization of groundwater and soil and the potential loss of habitable territory may vastly increase the needs and numbers of affected persons.[232] State capacity to address these needs may dramatically decline if authorities have to address a multitude of increasingly serious environmental, economic and social crises. However, even in times of disasters,[233] an affected State continues to have the 'minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights', meaning that a State party in which, for instance, 'a significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic housing, or the most basic forms of education is, *prima facie*, failing to discharge its obligations under the Covenant'.[234] To the extent that an affected State party does not possess the resources and capacity to implement necessary measures, it is obliged to appeal to other States and the international community in accordance with the obligation under ICESCR, Article 2(1) to progressively realize relevant rights not only individually but also 'through international assistance and cooperation.'[235]

The obligation of States to refrain from both *direct*[236] and *indirect discrimination*,[237] as well as to effectively prevent, protect against, and provide remedies for discrimination[238] and take positive measures to address its structural causes through special measures, such as 'affirmative action' aimed at ensuring the achievement of

man-made nature', but noted in para. 175 that this distinction between human-made and natural hazards does not apply to the right to life.

[226] W. Kälin and J. Künzli, *The Law of International Human Rights Protection*, 2nd edn (Oxford University Press, 2019), at 104.

[227] See, e.g., ICCPR, Art. 10(3) and Art. 14(3)(d). See also below, section II.E.3.2, regarding ICCPR, Art. 27.

[228] ICCPR, Art. 19(2).

[229] The UN Committee on the Elimination of Discrimination against Women (CEDAW) has called on States to ensure the representation of women 'in decision-making processes …, including with regard to policies concerning disaster risk reduction, post-disaster management and climate change' (*Concluding Observations on Argentina*, UN Doc. CEDAW/C/ARG/CO/7, 2016, para. 39(d)) and to strengthen 'a gender-sensitive approach to … disaster risk reduction, preparedness and response, and the mitigation of the negative impacts of climate change' (*Concluding Observations on Honduras*, UN Doc. CEDAW/C/HND/CO/7-8, 2016, para. 43(a)).

[230] See, for example, Paris Agreement, Arts 7(5) and 12.

[231] See the references in Kälin and Künzli (n. 226), at 106–112 and 290–309.

[232] For the relevance of positive obligations in disaster situations more generally see Committee on Economic, Social and Cultural Rights, *General Comment No 12: The Right to Adequate Food (Art. 11)* (1999), para. 15; *General Comment No. 15 (2002): The Right to Water*, para. 16(h), and *General Comment No. 14 (2000): The right to the highest attainable standard of health (article 12 of the International Covenant on Economic, Social and Cultural Rights)*.

[233] As highlighted by CtteeESCR, *General Comment No 12* (n. 232), para. 8, States Parties have 'a core obligation to take the necessary action to mitigate and alleviate hunger … even in times of natural or other disasters'.

[234] CtteeESCR, *General Comment No 3: The Nature of States Parties' Obligations (Art. 2, para. 1 of the Covenant)* (1990), para. 10.

[235] ICESCR, Art. 2. See also International Law Commission, 'Draft Articles on the Protection of Persons in the Event of Disasters', *Report of the International Law Commission: Sixty-Eighth Session (2 May–10 June and 4 July–12 August 2016)*, UN Doc. A/71/10, Supplement No 1, Art. 11 on the duty to seek international assistance in disaster situations.

[236] 'In the environmental context, direct discrimination may include, for example, failing to ensure that members of disfavoured groups have the same access as others to information about environmental matters, to participation in environmental decision-making, or to remedies for environmental harm', UN Doc. A/77/2990.

[237] 'Indirect discrimination may arise, for example, when measures that adversely affect ecosystems, such as mining and logging concessions, have disproportionately severe effects on communities that rely on the ecosystems', UN Doc. A/HRC/37/59, Annex I, paras 8 and 9.

[238] ICCPR, Art. 2; ICESCR, Art. 2; CRC, Art. 2; CERD, Art. 1; CEDAW, Arts 1 and 2; CRPD, Art. 2.

de facto, substantive equality[239] is particularly important in the context of sea level rise[240] because, as widely recognized, environmental crises exacerbate pre-existing vulnerabilities and discrimination and intersect with social inequalities along the lines of class, gender and race.[241] Moreover, due to poverty, discrimination and systemic marginalization, groups, communities and individuals could be in a weaker position in terms of their ability to anticipate and respond to environmental change, resulting in the paradox that particularly vulnerable individuals, such as persons with disabilities or chronic illnesses and older people, and the poorest and most marginalized communities, could be the least able to move[242]. In a similar vein, the UN Special Rapporteur on Violence against Women in her 2022 report provided a critical assessment of how climate change risks disproportionately affect women and girls. The Special Rapporteur warned that the escalating effects of sea level rise could deepen gender inequality, including violence or exclusion from meaningful participation 'which are exacerbated by discriminatory legal systems and governance structure and unequal power distribution' and affect older women, adolescent girls or women with disabilities in particularly serious ways due to their intersecting vulnerabilities.[243] Intersectionality can also become an issue should affected populations face discrimination due to their ethnic, national or social origin when they decide to migrate to other countries to cope with the effects of sea level rise, or if they are displaced because their place of habitual residence has become uninhabitable.[244]

[239] As highlighted by Chinkin, 'temporary special measures are provided under a number of international human rights treaties for the purpose of redressing disadvantage'; C. Chinkin, *The Protection of Economic, Social and Cultural Rights Post-Conflict*, 2007, available at: <https://www2.ohchr.org/english/issues/women/docs/Paper_Protection_ESCR.pdf>. Several affected countries have already taken important steps in this regard. For instance, the Government of Fiji highlighted in 2017 the development of local measures (e.g., regional training facility for women) to empower rural women as 'agents of change in building a more climate-resilient Fiji', together with the need to draft gender-responsive relocation plans that take into account women's needs (UN Doc. CEDAW/C/SR.1578, 2018, para. 8). Also the 2017 National Climate Change Policy includes Goal 5 (Gender Equality) to empower women by adopting a 'whole-of-economy approach' (Asian Development Bank, Women's resilience in Fiji, How laws and policies promote gender equality in climate change and disaster risk management, August 2022). Kiribati in 2019 adopted a Climate Change Act that mainstreams the rights of women, children and persons with disabilities (UN Doc. A/HRC/44/15). The Marshall Islands adopted in 2019 the Gender Equality Act to achieve women's participation and gender responsive development. The Palau National Gender Mainstreaming Policy (2018–2023) was endorsed in 2018. Samoa has also a 'Gender in Disaster Risk Management Policy' which focuses on involving women across all phases of Disaster Risk Management. Vanuatu adopted key gender policies measures that include the Vanuatu National Gender Equality Policy 2015–2019.

[240] The Convention on the Elimination of All Forms of Discrimination against Women offers the most extensive articulation of the right of women to equality and non-discrimination by requiring States to take all appropriate measures, including temporary special measures, to prohibit and eliminate discrimination against women and girls in all fields. The CEDAW Committee addressed the complex women-environmental nexus with the adoption in 2016 of the General Recommendation No. 34 that made a significant link between the rights of rural women and environmental degradation, and in 2018 with adoption of the General Recommendation No. 37 on 'the gender-related dimension of disaster risk reduction in the context of climate change'. UN Special Rapporteurs have also addressed the issue; see *The right to a Clean, Healthy and Sustainable Environment: Non-toxic Environment,* Report of the Special Rapporteur on the issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable environment, UN Doc. A/HRC/49/53, 12 January 2022 and *Report on Ecological Crisis, Climate Justice and Racial Justice,* UN Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance, UN Doc. A/77/2990, 25 October 2022; *Report on Women, Girls and the Right to a Clean, Healthy and Sustainable Environment*, UN Doc. A/HRC/52/33, 5 January 2023.

[241] C. Albertyn, M. Campbell, H. Alviar Garcia and S. Fredman (eds.), *Feministic Frontiers in Climate Justice, Gender Equality, Climate Change and Rights* (Edward Elgar: Cheltenham, 2023).

[242] See C. Zickgraf, 'Chapter 5: Immobility', in R. McLeman and F. Gemenne (eds), *Routledge Handbook of Environmental Displacement and Migration* (Routledge: New York, 2018). See also *Report of the ILA Committee (Sydney 2018)* (n. 6), at 901 [47–48] and ILA Resolution 6/2018, Sydney Declaration of Principles (n. 108), Principle 5; also J. McAdam and T. Wood*, Kaldor Centre Principles on Climate Mobility* (UNSW Law & Justice 2023), Principle 1.

[243] *The Report on Violence against Women and Girls in the Context of the climate crisis, Including Environmental Degradation and Related Disaster Risk Mitigation and Response,* Report of the UN Special Rapporteur on Violence Against Women, UN Doc. A//77/136, 11 July 2022, para. 23.

[244] E. Fornalé, 'Slow Violence, Gender and Climate Agency in Times of Polycrisis' (2023) *Revista de Derecho Europeo,* at n. 61; S. De Vido, 'Climate Violence and Gendered Migration in International Law', in A. Di Stasi et al. (eds), *Migrant Women and Gender Based Violence in the International and European Legal Framework* (Editoriale Scientifica: Napoli, 2023), 137–171.

Fourth, States may limit the exercise of certain rights and derogate from certain human rights obligations in the context of climate change, but the threshold for doing so is high. International human rights law generally permits States to subject certain rights to limitations, provided that they are provided for by law and necessary, i.e. proportionate, for the protection of national security, public order, public health and morals or the rights and freedoms of others proportionate.[245] Proportionality requires that the limitation is only in place for the shortest possible time and less intrusive measures are not available. The ICCPR also allows States parties to derogate from certain civil and political rights obligations in a proclaimed 'public emergency which threatens the life of the nation'.[246] States have at times invoked this possibility to suspend the right of liberty of movements during the emergency phase of a disaster.[247] However, derogation measures must be non-discriminatory as well as proportional, and in this regard, not last longer than strictly required by the circumstances.[248] Thus, permanent derogations would be impermissible even in the face of sea level rise.

Fifth, the role of the duty to cooperate for the realization of human rights (see section II.C.3, above) is becoming increasingly significant, particularly where climate change impacts undermine the capacities of affected States to discharge their enduring obligation to respect, protect and fulfil rights. The duty to cooperate is firmly established within international human rights law. Article 28 of the Universal Declaration of Human Rights states that everyone is entitled to the 'realization, through national effort and international cooperation … of the economic, social and cultural rights indispensable for [their] dignity and the free development of [their] personality', as well as to 'an international order in which the rights and freedoms set forth in th[e] Declaration can be realized'. ICESCR, in Article 2, requires each State party to take steps 'individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means'. Articles 11 and 15 of the ICESCR further emphasize the obligation to cooperate in the scientific and cultural fields as well as to ensure the right to be free from hunger and provide a non-exhaustive list of ways in which international assistance and cooperation may be provided, thereby indicating the minimum positive action expected under its ambit.

In the context of sea level rise and its impacts on human mobility, the role of cooperation becomes particularly important (see also section II.C.3, above). For instance, the Global Compact for Safe, Orderly and Regular Migration (GCM) aims to 'facilitate safe, orderly and regular migration, while reducing the incidence and negative impact of irregular migration through international cooperation'[249] and enhance 'international cooperation among all relevant actors on migration, acknowledging that no State can address migration alone'.[250] Such cooperation takes various forms, including cooperation to develop research, studies and surveys;[251] cooperation to minimize the adverse drivers and structural factors that compel people to leave their country of origin (e.g., by strengthening information-sharing, preparing for early warning as well as contingency and evacuation planning, and harmonizing/developing approaches to address the vulnerabilities of persons affected by natural disasters by ensuring they have access to adequate humanitarian assistance with full respect for their rights);[252] and cooperation to enhance availability and flexibility of pathways for regular migration. Such efforts may include measures such as developing human rights-based and gender-responsive bilateral, regional and multilateral labour mobility agreements; facilitating regional and cross-regional labour mobility through international and bilateral cooperation arrangements; and strengthening solutions for migrants compelled to leave their countries of origin due to slow-onset natural disasters, the adverse effects of climate change, and environmental degradation including by devising planned relocation and visa options, in cases where adaptation in or return to their country of origin is not possible.[253] Objective 23 focuses on

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[245] See, e.g., ICCRP, Art. 12(3), on the right to liberty of movement and freedom to choose one's residence.
[246] ICCPR, Art. 4(1).
[247] See, e.g., 'Guatemala, Notification under Article 4(3)', Depositary Notification C.N.839.2016.TREATIES-IV.4 (30 September 2016).
[248] HRCttee, General Comment No. 29: States of emergency (Art. 4) (2001), para. 3.
[249] 'Global Compact for Safe, Orderly and Regular Migration' (GCM), UNGA Res /73/195 (19 December 2018) UN Doc A/RES/73/195, Annex, para. 11. The Global Compact is a non-legally binding cooperative framework that recognizes that no State can address migration on its own (see GCM, para. 7).
[250] GCM, para. 7. Progress on the implementation of the Migration Compact will be evaluated through the International Migration Review Forum (see paras 45, 49).
[251] GCM, para. 17(k).
[252] GCM, para. 18.
[253] GCM, para. 21.

strengthening international cooperation and global partnerships for safe, orderly and regular migration, including through 'the provision of financial and technical assistance, in line with national priorities, policies action plans and strategies, through a whole-of-government and whole-of-society approach'.[254]

1.2. Human rights obligations and the preservation of statehood

The willingness of a State to prioritise human rights protection and its capacity to effectively implement it are, in themselves, a strong indicator that the statehood of an affected State is not in jeopardy even if its territory is shrinking. When an affected State reaches the limits of its ability to protect and fulfil human rights due to the effects of global warming, to which it has contributed the least, support and cooperation from other States and the international community at large becomes crucial.

Sections 2–4 below survey a range of human rights guarantees that are particularly relevant in the context of sea level rise to illustrate how the distribution of human rights obligations between States affected by sea level rise, host States, and the international community more generally changes when criteria of statehood are weakening over time. To illustrate the respective obligations in different scenarios, the Committee addressed a selection of civil and political as well as economic, social and cultural rights that become particularly relevant when the territory of affected States becomes increasingly uninhabitable and the population, incrementally, has to move elsewhere.

2. Scenario 1: States able to secure substantial parts of habitable territory

2.1. Obligations of affected States

States affected by sea level rise will face adverse impacts of climate change that are likely to undermine the enjoyment of human rights even if they are able to secure substantial parts of habitable territory in a mid-term perspective. Such States remain responsible for respecting, protecting and fulfilling human rights, but their ability to meet these obligations may be undermined by environmental and socio-economic impacts triggered by such changing climatic conditions.

In the area of *civil and political rights*, the right to choose one's place of residence,[255] for instance, will need to be subject to limitations where permanent relocations away from eroding coastlines becomes necessary. Forced relocations are only permissible if such relocations are undertaken as a measure of last resort to safeguard the lives and safety of those affected, are based on national law and implemented in accordance with relevant international legal standards.[256] Diminishing territory and negative impacts on livelihoods may trigger social unrest that must be addressed in line with relevant human rights standards regarding the use of coercive measures by agents of the State,[257] the deprivation of liberty[258] and criminal trials.[259] Affected States must also meet their negative and positive *non-discrimination* obligations discussed above.[260]

The main impact of sea level rise is likely to be on the enjoyment of *economic, social and cultural rights*.[261] As regards social rights, the IPCC has stated with high confidence that 'food and water insecurities … are

[254] GCM, para. 39(a).
[255] ICCPR, Art. 12.
[256] ILA Resolution 6/2018, Principle 6(2). This presupposes that, despite the provision of adequate information and consultation, a full, free and informed consent cannot be obtained; see also Principle 6(1), ibid.
[257] ICCPR, Arts 6 and 7.
[258] ICCPR, Art. 9.
[259] ICCPR, Arts 14 and 15.
[260] See in section II.E.1, above.
[261] Economic and social rights are enshrined in Arts 11–14 of the IESCR; Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13; Convention on the Rights of the Child (CRC) (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3; Convention on the Rights of Persons with Disabilities (CRPD) (adopted 13 December 2006, entered into force 3 May 2008) 2515 UNTS 3; and nternational Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (adopted 18 December 1990, entry into force 1 July 2003) 2220 UNTS 93, as well as in several regional conventions. The right to water and sanitation, while only implicit in the IESCR (see CtteeESCR, General

likely to become more acute in many places'.[262] Climate change may give rise to new disease vectors, coastal erosion and storms may destroy health infrastructure, and new services and facilities may be needed to meet demand in order to ensure that the affected population has access to adequate services and treatment that are core elements of the right to the highest attainable standard of health.[263] Increased food and water insecurity, negative health impacts and the possible destruction of water and sanitation infrastructure or health and education services reduce the availability and – depending on the circumstances – also the accessibility of such goods and services. While ICESCR social rights require authorities of affected States parties to address these challenges, negative impacts of climate change, such as declining revenues from fishery, or shrinking tax revenues as a result of economic downturns, reduced government resources and thus the capacity to act at a time when other pressing climate-related demands (e.g., coastal protection measures) will likely be growing. In such situations, affected States parties may be obligated to seek international assistance, an obligation that arises if they are unable to fulfil their obligations without international support.[264]

In the case of SIDS, economic and cultural rights are often closely related. Eroding coastlines, high tides and other adverse impacts of sea level rise, particularly where they trigger the loss of habitable land, will not only lead to loss of property[265] and livelihoods but will also jeopardize the right to take part in cultural life,[266] or the cultural component of 'home' and 'family',[267] particularly where land remains integral to identity and provides intimate connection between the community and ancestors even if it becomes uninhabitable. The finding of the Special Rapporteur in the field of cultural rights that States have to take 'appropriate measures for monitoring the impacts of climate change on cultural heritage and adapting to the adverse consequences thereof'[268] also applies *mutatis mutandis* to economic rights related to property and livelihoods. Maintaining habitable territory through human intervention, as a means to cope with climate change-related hazard, would be tantamount to partially fulfilling the obligation to protect economic and cultural rights.

With regard to the *rights of minorities and indigenous peoples*, the UN Human Rights Committee has highlighted that, 'in the case of indigenous peoples, the enjoyment of culture may relate to a way of life which is closely associated with territory and the use of its resources, including such traditional activities as fishing or hunting', finding that Article 27 of the ICCPR requires States 'to adopt timely adequate adaptation measures', such as avoiding the delays in the ongoing project of construction of sea walls to protect the ability of the members of such communities 'to maintain their traditional way of life, to transmit to their children and future generations their culture and traditions and use of land and sea resources' when they are threatened by sea level rise.[269]

Access to justice is of fundamental importance for the persons whose rights have been violated. It is an essential component of the system of protection and enforcement of human rights and is well-established in international

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Comment No. 15: The Right to Water [Arts 11 and 12 of the Covenant] [2003]), has been explicitly recognized by General Assembly Resolution 70/169 (2015).

[262] IPCC, AR6, WG II – Impacts, Adaptation and Vulnerability, Fact sheet–Small Islands (November 2022), 1.

[263] ICESCR, Art. 12; CESCR, *General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12)* E/C.12/2000/4 (11 August 2000), paras 12 and 43.

[264] ICESCR, Art. 2(1). See below, section II.E.2.3.

[265] Article 17 of the Universal Declaration of Human Rights (UDHR) provides for the right to own property and prohibits arbitrary deprivation of one's property. A number of core human rights conventions of the United Nations at least prohibit discrimination with regard to property, e.g., Art. 5(d)(v) and (vi) ICERD, Art. 15(2) and 16(1)(h) CEDAW as well as Art. 12(5) CRPD. Hence, States must ensure freedom from discrimination with regard to property rights of vulnerable groups. Finally, Art. 15 ICMW reflects the customary international law minimum standard, prohibiting discriminatory takings and requiring that expropriations must be subject to compensation.

[266] ICESCR, Art. 15. As many affected States have rather homogeneous populations and are not a State party to the ICCPR, the right of members of minorities to enjoy their own culture enshrined in its Art. 27 only plays a minor role. This provision is, however, relevant for affected States with minorities that have ratified the ICCPR such as the Maldives. See the recommendations in 'Visit to Maldives - Report of the Special Rapporteur in the field of cultural rights', UN Doc. A/HRC/43/50/Add.2 (21 February 20201), paras 93(i) and 99(b).

[267] ICCPR Art. 17; ICESCR, Art. 15.

[268] Report of the Special Rapporteur in the field of cultural rights, Karima Bennoune, UN Doc. A/75/298 (10 August 2020), para 81(g).

[269] UN Human Rights Committee, *Daniel Billy et al. v Australia* (n. 222), paras 8.13 and 8.14.

human rights law.[270] However, in the context of sea level rise, *de facto* access is likely to become even more difficult unless affected States take positive measures – with the support of the international community, if necessary – to strengthen the judiciary and support traditional conflict resolution mechanisms and facilitate access to them.[271]

2.2. Obligations of host States

Many affected States, particularly SIDS in the Pacific, have long histories of emigration.[272] Even if they are able to safeguard substantial parts of habitable territory, migration is likely to increase when life becomes more difficult as a consequence of sea level rise impacts. While host States are not obliged as a matter of international law to admit such persons, and the principle of *non-refoulement* (section II.E.3.2) is unlikely to provide protection to many in such scenarios, they must respect, protect, and fulfil the human rights of all migrants under their jurisdiction.[273]

2.3. Obligations of the international community

Do other States and international humanitarian or development organizations and donors or international financial institutions have a legal obligation to support a specific State affected by sea level rise that asks for assistance? While it is correct that, in general, 'States have a joint and individual responsibility, in accordance with the Charter of the United Nations, to cooperate in providing disaster relief and humanitarian assistance in times of emergency',[274] one cannot but agree with authors highlighting that the reference to international cooperation in Article 2(1) of the ICESCR 'cannot be interpreted as imposing "a legally binding obligation upon any particular state to provide any particular form of assistance."'[275]

The absence of any legal rule stating such a specific duty, and the ongoing lack of consensus among States on the exact meaning of 'loss and damage' and ensuing legal obligations of the main emitters to pay compensation, support this conclusion. The lack of State practice and the unwillingness of States to recognize a comprehensive or absolute duty to provide assistance requested by an affected State is reflected in Article 7 of the ILC Draft Articles on the 'Protection of Persons in the Event of Disasters',[276] which states that 'States shall, *as appropriate*, cooperate among themselves'.[277] In the absence of a bilateral or multilateral treaty creating such duty, States have a large degree of discretion whether or not to respond to requests for support.

Thus, affected States face a dilemma. At a time when climate change impacts are dramatically increasing food-, water-, health- and education-related needs of their populations and their capacity to respond is likely to decrease, they cannot count firmly on getting the support they need. In practical terms, present international human rights law has clear limitations with regard to safeguarding the economic, social and cultural rights of affected populations living in countries that have least contributed to global warming. Since it is very unlikely that international law will recognise a strict legal obligation to provide support on request, other instruments must be found to better meet the demands of climate justice. Two sets of tools are in the foreground. One relates to increasing the availability of, and facilitating access to *climate adaptation and loss and damage*

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[270] M.J. Wewerinke-Singh, 'Remedies for Human Rights Violations Caused by Climate Change' (2019) 9(3) *Climate Law*. See ICCPR, Art. 2(3); CEDAW, Art. 2(c); CRC, Art. 4; CRPD, Art. 13.

[271] S. De Vido and E. Fornalé, 'Achievements and Hurdles Towards Women's Access to Climate Justice', in E. Fornalé and F. Cristani (eds), *Women's Empowerment and Its Limits. Interdisciplinary and Transnational Perspectives Toward Sustainable Progress* (Palgrave, 2023), 33–53.

[272] B. Burson, R. Bedford and C. Bedford, 'In the Same Canoe: Building the Case for a Regional Harmonisation of Approaches to Humanitarian Entry and Stay in "Our Sea of Islands"' (Platform on Disaster Displacement, 2021), 34 ff.

[273] See, in particular, the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, which however, is still not widely ratified by States of destination.

[274] CtteeESCR, General Comment No. 12: The Right to Adequate Food (Art 11) (1999), para. 38.

[275] F. Zorzi Giustiniani, *International Law in Disaster Scenarios – Applicable Rules and Principles* (Springer, 2021), at 129, quoting P. Alston and G. Quinn, 'The Nature and Scope of States Parties' Obligations under the International Covenant' (1987) 9 *Human Rights Quarterly* 159, 191 (footnote omitted).

[276] See R. Urueña and M. Angelica Prada-Uribe, 'Disasters, Inter-State Legal Obligations, and the Risk Society: The Contribution of the ILC's Draft Articles' (2018) 1 *Yearbook of International Disaster Law* 86.

[277] Emphasis added.

funding and financing[278] in ways that enable affected States to meet their human rights obligations. The other is developing and adopting *bilateral or sub-regional agreements* between affected States and States having the capacity to provide necessary goods and services (e.g., treaties addressing huma-nitarian assistance in disaster situations; the inclusion of citizens of affected States in the health insurance systems of the supporting State; cooperation in the water and sanitation sector; and similar measures).[279]

3. Scenario 2: States able to maintain small parts of habitable territory

3.1. Obligations of affected States

Affected States able to keep small parts of habitable territory in the mid-term period that allow for at least a symbolic presence with a small population continue to exercise exclusive jurisdiction over persons present there and remain responsible for respecting, protecting, and fulfilling their human rights. However, their capacity to give effect to this obligation may be limited. For example, in order to ensure a fair trial and provide due process guarantees,[280] a functioning judicial system must be maintained and financed. Yet, under this scenario, there will likely be little, if any, capacity to give effect to this type of obligation. The ability to protect and realize socio-economic rights, such as the right to work,[281] is also likely to be limited with respect to persons residing in the territory of affected States. The progressive realization of the right to adequate housing, water and food (as elements of the right to an adequate standard of living),[282] and some or all elements of the right to the highest standard of physical and mental health, will likely face serious capacity constraints. Nevertheless, as with the previous scenario, the duty to seek international cooperation will remain extant.

In the case of planned relocation of whole communities (comprising some but not all of the national population) beyond the territory of the affected State, where they retain 'important characteristics of the original community, including its social structures, legal and political systems, cultural characteristics and worldviews',[283] the government of the affected State may, depending on the arrangements made with the host State, continue to exercise a certain degree of jurisdiction, for instance with regard to citizenship issues.[284] In cases of shared responsibility, the scope of the role of the government of the affected State may depend on whether it decides to enter into some form of association with another (host) State (see section II.D.2.2).

Nationality has been described as 'an indirect, but necessary, condition for the existence of States because "there is no statehood without a nation consisting of nationals"'.[285] The possibility to allow persons from affected States who live abroad to *remain their citizens* arises as a possible tool available to affected States to preserve their population even if many or most of its members have left their territory.[286] Retention of nationality enables people to not only maintain their formal legal ties with their home country but also remain directly engaged with its public affairs and political future, wherever they live. As observed by the Inter-American Court of Human Rights, nationality entails 'rights and obligations inherent in membership in a

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[278] COP27 (2022) created a fund to compensate for loss and damage. See 2/CP.27 *Funding arrangements for responding to loss and damage associated with the adverse effects of climate change, including a focus on addressing loss and damage*.
[279] Existing bilateral treaties on cooperation in disaster situations can be found at: <https://disasterlaw.ifrc.org/disaster-law-database/treaties>.
[280] ICCPR, Art. 14.
[281] ICESCR, Art. 6.
[282] ICESCR, Art. 11.
[283] J. Campbell, 'Climate-Induced Community Relocation in the Pacific: The Meaning and Importance of Land', in J. McAdam (ed.), *Climate Change and Displacement: Multidisciplinary Perspectives* (Oxford University Press, 2010), 58–59.
[284] See, e.g., Human Rights Committee, *El Ghar v Libyan Arab Jamahiriya*, Communication No 1107/2002 (2004), paras 7.1 ff., finding that the refusal to issue a passport to a citizen residing abroad violated her rights under ICCPR, Art. 12.
[285] A. Peters, 'Extraterritorial Naturalizations: Between the Human Right to Nationality, State Sovereignty and Fair Principles of Jurisdiction' (2010) 53 *German Yearbook of International* 625, citing K. Hailbronner, 'Nationality in Public International and European Law', in R. Bauböck et al. (eds), *Acquisition and Loss of Nationality: Volume 1: Comparative Analyses* (Amsterdam University Press, 2006), at 35.
[286] See M. Foster, N. Hard, H. Lambert and J. McAdam, *The Future of Nationality in the Pacific: Preventing Statelessness and Nationality Loss in the Context of Climate Change* (Kaldor Centre for International Refugee Law, Peter McMullin Centre on Statelessness and UTS, 2022), at 24.

political community.'[287] For small island States, in particular, large-scale loss of citizenship over time could have significant ramifications when it comes to the retention of a 'population' and the ability to preserve a 'government'.[288] When combined with loss of territory, this could have profound implications for the continuation of statehood (or maintenance of some other form of international legal personality). That is why it is potentially important for affected States to safeguard against loss of citizenship and associated rights.[289]

The right to a nationality is a core rule of international human rights law. The Universal Declaration of Human Rights provides that '[e]veryone has the right to a nationality'[290] and that '[n]o one shall be arbitrarily deprived' of it nor 'denied the right to change' it. This rule is reflected in a more limited form in the International Covenant on Civil and Political Rights, which guarantees the right of children 'to acquire a nationality'[291] and is echoed in several other conventions.[292] International law thus presumes that every individual should receive a nationality from birth, and that they should retain a nationality throughout their lives (whether it is the same one, or a new one is acquired).[293]

As long as affected States are able to grant citizenship to persons constituting their population, statelessness is not primarily a consequence of sea level rise. However, at least in the foreseeable future, a potential risk is statelessness resulting from an affected State's domestic law when its people move abroad.[294] Such domestic law may provide that citizenship is only granted to persons who were born on the territory of the affected State, or to children of parents who were born there, thereby imposing impediments to the acquisition of the affected State's citizenship for children of citizens who emigrate abroad or are resettled in another State. Absent being able to acquire the affected State's citizenship, such children risk becoming stateless unless the host State provides for the acquisition of citizenship under *ius soli*. Moreover, if an affected State's domestic law prohibits dual nationality,[295] then persons wishing and able to acquire the nationality of the host State will be forced to give up the nationality of the affected State. Such domestic provisions of an affected State may thus contribute to a rapid decline in the number of its citizens over only a few generations. Consequently, allowing citizens living abroad to pass nationality to their descendants regardless of where they are born and permitting dual (or multiple) nationality may be essential for preserving a citizenry and thus statehood. At the same time, affected States would be well advised to already consider these measures in scenario one to ensure that descendants of diaspora members can retain their nationality as an essential element of continued belonging to the culture and country where their parents and grandparents have roots.

A key benefit of citizenship is the right to vote, which enables citizens to participate in the political life of their State. If citizenship is lost, then voting rights are usually lost as well. Similarly, if citizens living abroad are

[287] Inter-American Court of Human Rights, *Case of the Girls Yean and Bosico v Dominican Republic*, Judgment of 8 September 2005, para. 137 (fn omitted).

[288] B. Burson, W. Kälin and J. McAdam, 'Statehood, Human Rights and Sea-Level Rise: A Response to the International Law Commission's Second Issues Paper on Sea-Level Rise in Relation to International Law' (2021) 4 *Yearbook of International Disaster Law* 265, 273: 'Arguably, the ensuing decline and loss of capacity to exercise the functions of a State will become the key challenge long before most or all of the territory disappears.'

[289] See further J. McAdam, 'Preserving Statehood through Population and Government: Safeguarding Nationality and Franchise in the Context of Sea-Level Rise and Mobility' (2022) 20 *New Zealand Yearbook of International Law* (forthcoming 2024).

[290] UDHR, Art. 15.

[291] ICCPR, Art. 24(2).

[292] Convention on the Rights of the Child, Art. 7(1), Art. 8; Convention on the Elimination of All Forms of Discrimination against Women, Art. 9; Convention on the Rights of Persons with Disabilities, Art. 18(1) and 18(2)(a); and International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) (adopted 7 March 1966, entered into force 4 January 1969) 660 UNTS 195, Art. 5(d)(iii).

[293] Von Rütte's recent, comprehensive analysis of nationality in international law concludes that the right to nationality is 'clearly a legal human right, protected at the international as well as at the regional level': B. von Rütte, *The Human Right to Citizenship: Situating the Right to Citizenship within International and Regional Human Rights Law* (Brill: Boston, 2022), at 398. However, Rubio-Marín argues that there is no right to a specific nationality, 'no matter how close the ties or links between the individual and the national community': see R. Rubio-Marín, 'Transnational Politics and the Democratic Nation-State: Normative Challenges of Expatriate Voting and Nationality Retention of Emigrants' (2006) 81 *New York University Law Review* 117, 135 (fn omitted).

[294] See generally Foster et al., *The Future of Nationality in the Pacific* (n. 286).

[295] Foster et al., *The Future of Nationality in the Pacific* (n. 286) at 19f mention the examples of Federated States of Micronesia, the Marshall Islands, Papua New Guinea and Vanuatu.

denied the right to vote, then they will also lose the capacity to directly shape their State's government. If the law prevents them from passing down their citizenship to their children or grandchildren, then they, too, will be unable to participate in the political life of the original State.[296]

The rights to 'take part in the conduct of public affairs, directly or through freely chosen representatives' as well as to 'vote and be elected', enshrined in Article 25 of the ICCPR, does not guarantee a right of citizens living abroad to take part in elections of their affected State or be represented in parliament. However, maintaining these rights becomes possible if affected States provide for absentee ballot and diaspora representation in the affected State's parliament,[297] and the host State permits the exercise of these rights on its territory.[298] This arrangement can be an important element of the relations between the two States in the case of formal association of an affected State and a host State (see section II.D.2.2). In other cases, close cooperation between affected and host States, including the conclusion of agreements, would be required.

Such arrangements do not just serve the interests of affected citizens. If a State's long-term habitability is in question, then the retention of a 'population' that is able to vote for a 'government' (and, potentially, serve in it) may have significance for the State's continuing legal personality.[299] Crawford views 'government' as 'the most important single criterion of statehood, since all the others depend upon it.'[300] While external voting has been criticized as a challenge to 'the congruence of territory and polity',[301] Bauböck argues that citizens abroad should not be seen 'as individuals outside the jurisdiction whose interests are affected', but rather 'their interests must be seen to place them inside the demos that is represented in all political decisions taken in their country of origin.'[302] As evidenced by the 141 States that today enfranchise citizens living abroad,[303] the *demos* does not have to be territorially determined, but should rather be based on a 'stakeholder' link: those with 'a claim to participate in collective decision-making processes that shape the shared future of this political community.'[304]

3.2. Obligations of host States

If an affected State loses most of its habitable territory, most of its population will have to move elsewhere – to the territory of other States. People may migrate to a range of States or to one main host State. The cardinal principle of human rights law that States as duty-bearers have obligations vis-à-vis individuals under their jurisdiction ensures that such migrants continue to be rights-bearers, now with claims against the host State. Depending on their own capacities and level of development, host States may need the support of the international community to permanently accommodate the newcomers and take the necessary measures to discharge their own obligations towards the realization of their economic, social and cultural rights.

In cases of planned relocation of communities to the territory of another State, as well as in cases of State transformation (see section II.D.2.2), both of which will be based on agreements between the two States, human rights obligations will be a shared responsibility of the two States involved. It will be very important to clarify respective allocations of powers and responsibilities in bilateral treaties and/or the laws of the

[296] See McAdam, 'Preserving Statehood through Population and Government' (n. 289).
[297] A particularly interesting example is the Banabans, who were relocated to Fiji from what today is Kiribati. According to the Constitution of Kiribati, as persons of I-Kiribati descent, Banabans are entitled to acquire citizenship by registration and are permitted to hold dual nationality. Their land rights and interests on Ocean Island are preserved, and they have a right to enter and reside in Kiribati. The Constitution of Kiribati also stipulates that two seats in the Kiribati Parliament must be reserved for Banabans, who do not have to be citizens of Kiribati. They have a power of veto over any proposed amendments to the Banaban provisions in the Constitution. See Constitution of Kiribati, sections 23, 24, 29(1)(a), 117–119 and 124.
[298] See B. Lacy, 'Host Country Issues', in *Voting from Abroad – The International IDEA Handbook* (International Institute for Democracy and Electoral Assistance, 2007) at 137–138, on the right of host countries to restrict out-of-country voting on their territory and the ensuing need to have an agreement with them before the voting takes place.
[299] McAdam, 'Preserving Statehood through Population and Government' (n. 289).
[300] Crawford, *The Creation of States in International Law* (n. 176), at 56.
[301] P.J. Spiro, *At Home in Two Countries: The Past and Future of Dual Citizenship* (New York Univ. Press, 2016), 98.
[302] R. Bauböck, 'Stakeholder Citizenship and Transnational Political Participation: A Normative Evaluation of External Voting' (2007) 75 *Fordham Law Review* 2421.
[303] E. Iams Wellman, N.W. Allen and B. Nyblade, 'The Extraterritorial Voting Rights and Restrictions Dataset (1950–2020)' (2023) 56 *Comparative Political Studies* 897, 910. The scope of the right varies.
[304] Bauböck, 'Stakeholder Citizenship and Transnational Political Participation' (n. 302), at 2422.

respective States. Such regulations are necessary as a plethora of questions and challenges can be expected in practice.

As regards the obligations of the host State in the area of civil and political rights, protection from forcible return to the affected State is also relevant while it retains most of its land territory, but becomes particularly pertinent when this territory becomes largely uninhabitable. The *principle of non-refoulement,* which operates as a prohibition of expulsion/deportation/extradition (hereinafter 'removal') in specific situations of anticipated or future harm, is enshrined in Article 33 of the 1951 Refugee Convention, as well as in human rights law. In refugee law, it prohibits the removal of anyone who has a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of nationality or usual habitual residence, and is unable or, owing to such fear, unwilling to return to that country.[305] In human rights law, it prohibits the removal of any person who faces a real risk of being arbitrarily deprived of life, or subjected to torture or other cruel, inhuman or degrading treatment in the country of destination.[306] Whether categorized as a principle of customary international law or not,[307] the largely non-derogable and absolute nature of this prohibition[308] means that it applies under any of the climate scenarios. The issue is how far it can properly extend into the humanitarian circumstances generated by these scenarios, all of which will have some impact upon the enjoyment of various human rights held by affected persons. Similarly, it does not strictly impose to an obligation on the duty-bearing State to grant stay on its territory and beneficiaries of the obligation may be removed to the territory of another State. To be lawful, however, the person must not be in danger of being subjected to specified harm in the State/territory to which they are to be removed, and there must be a process with sufficient procedural guarantees for determining any outstanding claim to an international protection-related status in order to avoid a situation of indirect *refoulement*.[309]

In *Teitiota v New Zealand*, a case involving a citizen of Kiribati who (unsuccessfully) claimed that returning him to his country of origin would violate his right to life on account of the impacts of climate change, including sea level rise, the UN Human Rights Committee acknowledged, as a matter of principle, as had the New Zealand authorities before it, that without 'robust national and international efforts, the effects of climate change … may expose individuals to a violation' of their right to life, thus precluding their removal.[310] While this is an important statement in terms of domestic accountability, there are problems in operationalising this *non-refoulement* obligation. First, the right to life 'does not guarantee human existence as such. Rather, it protects against deprivation of life by state action or as a consequence of its omissions'.[311] Many States undertake efforts to mitigate the impacts of sea level rise by adopting disaster risk management/reduction and climate change adaptation polices and plans, protection on the basis of the 'right to life' may be of limited benefit to many claimants as long as conditions in the country of origin have not yet reached a degree that makes survival difficult. That said, from a protection standpoint, the critical issue is not so much the existence

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[305] Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954), 189 UNTS 137. As highlighted by Goodwin-Gill and McAdam: Art. 33 'encompasses non-rejection at the frontier, since protection begins with the ability of the refugee to secure admission to territory. While some States seek to avoid the principle through measures such as interception, pushbacks, and border closures, this does not absolve them of legal responsibility'; G.S. Goodwin-Gill and J. McAdam, *The Refugee in International Law*, 4th edn (Oxford University Press, 2021), 245, referring to UNHCR, 'Note on International Protection', UN Doc. A/AC.96/1145 (2 July 2015), para. 39; UNHCR, 'Note on International Protection', UN Doc. A/AC.96/1098 (28 June 2011), para. 30.

[306] In particular ICCPR, Arts 6 and 7, and ECHR, Art. 3.

[307] See W. Kälin, M. Caroni and L. Heim, 'Article 33, para. 1 (Prohibition of expulsion or return ('refoulement') /Défense d'expulsion et de refoulement)', in: A. Zimmermann and T. Einarsen (eds.) and F. Hermann (assistant ed.), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol - A Commentary*, 2nd edn (Oxford University Press 2023), pp. 1488–1492.

[308] The non-derogable nature of Art. 33 has been confirmed, e.g., by UNHCR ExCom, Conclusion No. 79 (1996), (i); UNGA Res. 51/ 75 of 12 February 1997, para. 3; and UNGA Res. 52/ 132 of 27 February 1998, Preamble. On the absolute and non-derogable nature of the human rights prohibition of refoulement see, e.g., European Court of Human Rights (Grand Chamber), *Chahal v The United Kingdom*, Application no. 22414/93, Reports 1996-V, para. 80.

[309] Called 'safe third country' practices, these are one of the most controversial asylum-related Global North State practices.

[310] HRCttee, *Teitiota v New Zealand*, Communication No. 2728/2016 (7 January 2020) para. 9.11.Confirming NZ Immigration and Protection Tribunal in *AF (Kiribati)* [2013] NZIPT 800413 at paras [81]–[88]. See J. McAdam, 'Protecting People Displaced by the Impacts of Climate Change: The UN Human Rights Committee and the Principle of *Non-refoulement*' (2020) 114(4) *American Journal of International Law* 708.

[311] Kälin and Künzli, *The Law of International Human Rights Protection* (n. 226), at 265.

of such policies, but rather whether a State is taking of action towards their effective implementation in terms of reducing risks. Second, while the UN Human Rights Committee has in recent years asserted that the right to life means a right to life 'with dignity', this language is problematic too in terms of operationalising the non-refoulment obligation. To the extent this relies on the bundle of goods and services to which ICESCR rights relate, this may, in effect, convert the substantive content of rights which are subject to progressive realization and other limitations into an absolute right. An over-extension of Article 6, being of an absolute nature, risks rendering these rights futile.[312] Therefore, it might be asked whether it may be better to recognize that, not just in the particular circumstances of climate change, breaches of ICESCR-related rights with life-threatening consequences can fall within the ambit of the *non-refoulement* principle *on their own terms.*[313] Here, the established jurisprudence of the UN Human Rights Committee on Economic, Social and Cultural Rights in relation to minimum core obligations of States in relation to ICESCR rights can be leveraged. A minimum core obligation describes what things States parties must do to immediately realize the right.[314]

Another right relevant for persons arriving from an affected State in a host State is Article 27 of the ICCPR on the *protection of members of minorities*. This provision applies not only to persons belonging to traditional minorities in a State where they have existed for a long time, but also to persons who are either citizens of other States or stateless.[315] According to the definition used by the UN Human Rights Committee, people who have emigrated or been resettled from affected States and now live as a group in the State that has received them qualify as members of a minority provided that they live in community with others, share a common culture and language,[316] and are outnumbered by the majority population.[317] Article 27 is the key provision to safeguard the cultural identity of such persons. While this guarantee is formulated as an individual right, it has a strong collective component to ensure that minorities can preserve their cultural identity and resist dynamics that would assimilate them into the mainstream culture. Hence Article 27 prohibits all forms of coercive integration and assimilation. As this provision is directed towards ensuring 'the survival and continued development of the cultural, religious and social identity of the minorities concerned,' the rights set out in Article 27 have a specific content that is not identical with relevant individual rights such as the freedom of religion.[318] This is particularly true for the right to use one's own language, a right that exceeds the scope of the freedom of expression inasmuch as it protects not only individual speakers of minority languages or their use in mass media[319] but also their very existence.[320] The entitlement to protection of their *own* culture is also a cultural right that goes beyond the sum of culture-related rights set out in the Covenant. Such protection requires from States to not only refrain from infringements but also to take positive measures that are necessary to protect the cultural identity of such people and their right 'to enjoy and develop their culture and language.'[321] Exactly what these measures are depends very much on the context, the degree of difference between the cultural practices of relocated communities and those of the local populations, the specific legitimate needs of affected persons, and the degree or absence of already existing legal measures addressing cultural diversity in the host State. Particularly in the case of planned relocation or statehood transformation (in options as elaborated above, under II.D.2.2) but also where substantial numbers of people decide to migrate to the same State, the determination of positive measures and the allocation of powers and responsibilities will require agreements between the affected State and the host State receiving members of its population.

Finally, access to justice could be a major issue of concern in case of cross-border mobility if migrants are considered to be irregular migrants. In such cases, 'it becomes critical to ensure that their human rights are

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[312] See also the recent discussion by NZ Immigration and Protection Tribunal in *AW (Kiribati)* [2022] NZIPT 802085 at paras [124]–[125].
[313] See M. Foster, *International Refugee Law and Socio-Economic Rights: Refuge from Deprivation* (Cambridge University Press, 2007); A. Anderson, M. Foster, H. Lambert and J. McAdam, 'Imminence in Refugee and Human Rights Law: A Misplaced Notion for International Protection' (2019) 68 *International and Comparative Law Quarterly* 111–140.
[314] See section II.E.1 above; see also A. Chapman and S. Russell (eds), *Core Obligations: Building a Framework for Economic Social and Cultural Rights* (Intersentia: Antwerp, 2002), at 9.
[315] HRCttee, General Comment No. 23: Article 27 (Rights of Minorities) (1994), para. 5.2.
[316] See HRCttee, General Comment No. 23: Article 27 (Rights of Minorities) (1994), para. 5.1.
[317] See HRCttee, *Ballantyne and Others v Canada*, Communications Nos 359/1989 and 385/1989 (1993).
[318] HRCttee, General Comment No. 23: Article 27 (Rights of Minorities) (1994), para. 9.
[319] HRCttee, *Mavlonov and Sa'di v Uzbekistan*, Communication No. 1334/2004 (2009), para. 8.7.
[320] See HRCttee, General Comment No. 23: Article 27 (Rights of Minorities) (1994), para. 5.3.
[321] Ibid., para. 6.1 f.

respected, protected and fulfilled.'[322] In this regard, the Special Rapporteur on the human rights of migrants urged States to take measures to ensure 'access to justice, accountability and access to remedies for human rights harms caused by climate change'.[323]

3.3. Obligations of the international community

In the case of States affected by sea level rise that lose most of their habitable territory, their authorities continue to be the duty-bearers with regard to respecting, protecting, and fulfilling the social rights of the (small) population living on the remaining State territory. Here, the considerations on international cooperation discussed in the previous section fully apply.

4. Scenario 3: States losing all their habitable territory

States affected by sea level rise that risk losing all of their habitable territory in the mid- or long-term (i.e., until the end of this century) are few. Only the Maldives and Tuvalu have all of their territory at elevations of less than five meters above present sea levels, while Marshall Islands and Kiribati have, respectively, 99% and 96% of their territory at elevations of less than five meters above present sea levels.[324] Moreover, the percentage of population living within 5 metres above sea level for those States is similar: 100% for Maldives and Tuvalu, 99% for Marshall Islands,[325] and over 99% for Kiribati.[326] Some of those States are already implementing or planning to implement measures to build up islands which might allow them to keep at least a symbolic presence with all the implications discussed in the previous section. However, even if a State loses its habitable territory but retains its statehood (see section II.D.1, above) or elements thereof under scenarios of transformation of the constitutional and/or governmental organization (see section II.D.2.2, above), it, as well as host State(s), continue to be bound by relevant human rights obligations to the extent that they exercise jurisdiction over affected individuals (see section II.E.3, above).

Part III: THE LAW OF THE SEA

A. Introduction

ILA Resolution 5/2018 endorsed the 'interpretation of the 1982 Law of the Sea Convention' as proposed by the Committee, that 'on the grounds of legal certainty and stability, once the baselines and the outer limits of maritime zones of a coastal or an archipelagic State have been properly determined in accordance with the 1982 Law of the Sea Convention, these baselines and limits should not be required to be recalculated should sea level change affect the geographical reality of the coastline'. The need to avoid uncertainty about the extent and limits of maritime zones as a consequence of climate change-related sea level rise has been a dominant concern of the Committee. It had proposed the same approach to agreed or adjudicated maritime boundaries; ILA Resolution 5/2018 endorsed the Committee's proposal that 'the interpretation of the 1982 Law of the Sea Convention in relation to the ability of coastal and archipelagic States to maintain their existing lawful maritime entitlements should apply equally to maritime boundaries delimited by international agreements or by decisions of international courts or tribunals'. The support for this approach, as manifested in the views and

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[322] *Human Rights of Migrants*, Report of the Special Rapporteur on the Human Rights of Migrants, UN Doc. A/67/299 (2012), para. 55.

[323] *The Report on the Impacts of Climate Change and the Protection of the Human Rights of Migrants,* Report of the UN Special Rapporteur on the Human Rights of Migrants, UN Doc. A/77/189, 9 July 2022, para. 90.

[324] UN Office of the High Representative for the Least Developed Countries, Landlocked Developing Countries and Small Island Developing States (UN-OHRLSS), *Small Island Developing States in Numbers – Updated Climate Change Edition 2017* (United Nations: New York, 2017), at 21, Table 2.

[325] Ibid., Table 3.

[326] As already observed by the Committee in its 2022 Interim Report, the topography of Kiribati is somewhat specific in this respect: while its land territory is predominantly composed of low elevation coral atolls and consists of 32 such atolls, it also has one raised island feature, Banaba (Ocean) Island, with the highest elevation of 81 m; see *Interim Report of the Committee (Lisbon 2022)* (n. 13), at 513 (fn 25) and 535 (fn 106). Banaba Island has a land area of 6 km^2, which is less than 1 percent of Kiribati's total land area of 811 km^2 (i.e., ca. 0.75 percent), and some 300 inhabitants out of 133,500 total population of Kiribati (i.e., around 0.25 per cent of Kiribati's current population).

practice of States that the Committee analysed in its 2022 Interim Report, led to the following preliminary conclusions contained in that report:[327]

First, based on its study of rapidly evolving State practice and the publicly expressed views of States regarding baselines and maritime zone limits, the Committee concluded that there was increasingly widespread and strong support among States for the approach to the *interpretation* of the UN Convention on the Law of the Sea (LOSC). This approach was also proposed in the Committee's 2018 recommendations and endorsed by the ILA in Resolution 5/2018. The Committee observed, however, that it was still arguable as to whether the support for such a view constituted sufficient evidence to amount to 'subsequent practice in the application' of the LOSC which establishes the agreement of the parties regarding its interpretation (Article 31(3)(b) of the Vienna Convention on the Law of Treaties (VCLT)). It also questioned whether there was the potential support for a 'subsequent agreement' among the parties to the LOSC regarding the interpretation of the Convention or the application of its provisions (Article 31(3)(a), VCLT). Some members of the Committee took the view that if, for example, the UN General Assembly were to adopt a Resolution to this effect unanimously – or even in the UNCLOS III style, by consensus – this could be a significant step towards meeting the requirements of such an 'agreement' of the States Parties as to the interpretation of the Convention.

Second, the Committee noted that, based on the publicly expressed positions of States and their practice to the date of the 2022 Interim Report,[328] there seemed to be strong evidence to support the finality of treaties establishing maritime boundaries and of decisions of international courts and tribunals on boundary delimitation as well as their possible binding nature vis-à-vis third States despite the physical changes in coastlines precipitated by climate change-related sea level rise. In the various statements made by States up to that point, no State had questioned the finality of agreed or adjudicated maritime boundaries, notwithstanding the possible physical coastline changes resulting from climate change-related sea level rise. Moreover, the views of States appeared to have converged on a common interpretation of the meaning of the terms in the VCLT Article 62(2)(a) on fundamental change of circumstances. They appeared to agree that the expression 'treaty [which] establishes a boundary' includes not only land but also maritime boundaries – without making a distinction between the boundaries of a State's sovereign territory (which would be limited to the territorial sea), and the delimitation of maritime zones beyond it, in which the coastal State has certain sovereign rights and exclusive jurisdiction (the EEZ and the continental shelf).

The Committee agreed that rapidly emerging State practice appeared, even by late 2021, to have already introduced significant elements of clarity about proposed solutions. When completing the 2022 Interim Report, the Committee considered it was likely that there would be additional developments in the practice and views of States in the coming years and decided to examine these developments and their implications in this final report.[329]

B. Baselines and limits of maritime zones

As expected, important developments in the views and practice of States have indeed occurred since the 2022 Interim Report. In that report, the Committee had been able to point to the 'evidence of rapidly evolving State practice and a certain level of consolidation or uniformity of practice of some of the States concerned', referring primarily to the PIF Members but noted that 'there are indications also of a similar practice among several other low-lying and small island developing States in different regions'.[330] The Committee examined whether the Declarations adopted in August and September 2021 by, respectively, the PIF and the Alliance of Small Island States (AOSIS)[331] attracted any support or opposition from States not associated with those

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[327] See *Interim Report of the ILA Committee (Lisbon 2022)* (n. 13), at 533–534. As stated in section I.B. above, the 2022 Interim Report was presented at the ILA Conference in Lisbon on 20 June 2022. The report, when presented, reflected the status as of 22 April 2022. See n. 13 above and the *Interim Report of the ILA Committee (Lisbon 2022)*, at 511 and 558.

[328] Ibid.

[329] *Interim Report of the ILA Committee (Lisbon 2022)* (n. 13), at 532.

[330] Ibid., at 531.

[331] See further in ibid., at 523–526. AOSIS has a membership of 39 – mostly SIDS but also some low-lying coastal States – which are spread across different maritime regions: in the Atlantic, Indian, and Pacific Oceans, as well as in the Caribbean region and the South China Sea. From the *Pacific Ocean*, AOSIS includes 14 of in total 18 PIF Members (i.e., all except Australia, New Zealand, French Polynesia and New Caledonia). Other Member States of AOSIS are: in the

organisations. The Committee's analysis indicated a broad level of initial support from many States across different regions, including Asian, African, European, and South American States.[332]

However, from around mid-2022 (i.e., after the Interim Report), a new trend emerged. Several major maritime nations and industrially developed States began to clarify their views and/or adopt policies specifically addressing the legal stability of baselines and the limits of maritime zones in the context of physical changes to coastlines as a result of climate change-related sea level rise. This trend included the adoption of new policy approaches or legal interpretations by some coastal States, including those that were traditionally considered as adhering to the so-called 'ambulatory' baselines approach.

First, some States have become more explicit that their practice or legislation concerning 'ambulatory' baselines was not designed for the *specific context* of sea level rise. In a statement similar to the one made by Romania in the 2021 Sixth Committee debate,[333] Ireland specifically confirmed in the 2022 debate that its 'practice [re. ambulatory baselines] has not been formulated expressly in contemplation of sea-level rise.'[334] In Ireland's view, as further elaborated in a 2023 statement, 'baselines established in accordance with the Convention are to be regarded as permanently settled', since 'only such an arrangement can achieve the legal stability necessary to avoid conflict in the future'.[335]

Second, there have also been major developments in the *adoption of new policies*. This began with the announcement by the United States of its new policy on sea level rise and maritime zones, which was adopted in September 2022. As stated by the USA in the Sixth Committee in 2022:

> Under this policy, which recognizes that new trends are developing in the practices and views of States on the need for stable maritime zones in the face of sea-level rise, the United States will work with other countries toward the goal of lawfully establishing and maintaining baselines and maritime zone limits and will not challenge such baselines and maritime zone limits that are not subsequently updated despite sea-level rise caused by climate change.[336]

The USA explicitly confirmed that its new policy reflects the approach taken by the PIF and AOSIS.[337] While reiterating in a later 2023 statement 'its own commitment not to challenge lawfully established baselines', the USA urged 'States that have not made similar commitments to do so to promote the stability, security, certainty, and predictability of maritime entitlements that are vulnerable to sea-level rise'.[338] At the same time, the USA encouraged coastal States potentially affected by sea level rise that have not yet done so to take steps to 'determine, memorialize, and publish their coastal baselines in accordance with the international law of the

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Atlantic Ocean, three African States: Cape Verde, Guinea-Bissau, and San Tomé and Príncipe; in the *Indian Ocean*: Comoros, Maldives, Mauritius, and Seychelles; in the *Caribbean* region: Antigua and Barbuda, Bahamas, Barbados, Belize, Cuba, Dominica, Dominican Republic, Grenada, Guyana, Haiti, Jamaica, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Suriname, and Trinidad and Tobago; and in the *South China Sea*: Singapore.

[332] *Interim Report of the ILA Committee (Lisbon 2022)* (n. 13), at 526–530. Also the 2023 *Additional paper* by the Co-Chairs of the ILC Study Group noted 'the progressive and remarkable extension of awareness among States *from various regions of the world* of the need to find solutions in the context of the law of the sea to the negative impact of sea-level rise on coasts and maritime zones'; see *Additional paper* (n. 47), at 33 (emphasis added).

[333] *Interim Report of the ILA Committee (Lisbon 2022)* (n. 13), at 529: footnote 88 and the related text.

[334] See statement by Ireland at the Sixth Committee, 77th session, 27th meeting, 28 October 2022, available at: <https://www.un.org/en/ga/sixth/77/pdfs/statements/ilc/27mtg_ireland_2.pdf>.

[335] Statement by Ireland, Sixth Committee, 78th session, 25th meeting, 25 October 2023. This statement, and all other statements by the UN Member States at the 78th session of the Sixth Committee (23rd to 28th meeting, 23–27 October 2023), that are referred to below, are available, as delivered, at: <https://www.un.org/en/ga/sixth/78/summaries.shtml>.

[336] Statement by the United States, Sixth Committee, 77th session, 27th meeting, 28 October 2022, available at: <https://www.un.org/en/ga/sixth/77/pdfs/statements/ilc/27mtg_us_2.pdf>. For the origin and background of this new policy adopted by the United States, see: Declaration on U.S.–Pacific Partnership of 29 September 2022 (available at: <https://www.whitehouse.gov/briefing-room/statements-releases/2022/09/29/declaration-on-u-s-pacific-partnership/>), and the White House Fact Sheet: Roadmap for a 21st-Century U.S.–Pacific Island Partnership, 29 September 2022 (at: <https://www.whitehouse.gov/briefing-room/statements-releases/2022/09/29/fact-sheet-roadmap-for-a-21st-century-u-s-pacific-island-partnership/>).

[337] Statement by the USA in the UN Security Council, UN Doc. S/PV.9260, 14 February 2023, at 15.

[338] Statement by the USA, Sixth Committee, 78th session, 24th meeting, 24 October 2023.

sea as set out in the Convention', as such actions will 'assist other States in implementing their policies on sea-level rise'.[339]

A new official position was adopted by Japan, in February 2023. As the Foreign Minister of Japan stated: '[W]ith regard to climate-change-related sea-level rise, Japan has decided to take the position that it is permissible to preserve the existing baselines and maritime zones established in accordance with [LOSC], notwithstanding the regression of coastlines'.[340] This new position, as further explained by Japan in the Sixth Committee debate in October 2023, takes fully into account, *inter alia*, 'State practices such as the PIF declaration on preserving maritime zones'.[341] Indeed, as Japan stated in the UN Security Council, 'such an interpretation is legitimate and will ensure legal stability and predictability, in particular for SIDS'.[342]

The European Union (EU), acting also on behalf of its 27 Member States, stated in the Sixth Committee in October 2023 that it can agree with the view of an 'increasing number of States' that 'the Convention does not forbid or exclude the preservation of baselines and the outer limits of maritime zones in the context of climate change-induced sea-level rise once established and deposited with the Secretary-General in accordance with UNCLOS, as a legal way to ensure the preservation of maritime zones and their legal stability'.[343] Several EU Member States gave additional statements, supporting and further specifying this general position adopted by the EU.[344] Similar views have been expressed by several Asian UN Member States (including, in addition to Japan, also Bangladesh, Indonesia, Malaysia, Philippines, Singapore, South Korea), South American (Argentina, Chile, Cuba) and others.[345]

This overall trend has been well summarised by New Zealand in its October 2023 statement given in the UN:

> … in the two years since the [2021 PIF] Declaration was issued *over one hundred states have endorsed the approach* of not updating baselines. This marked support from a wide range of geographically diverse states reinforces the importance of the principles of legal stability and equity that underpin the UN Convention on the Law of the Sea. Preserving maritime zones is important not only for our neighbours in the Pacific but for the international community as a whole.[346]

Having considered this broad and increasing level of support for the approach contained in the 2021 PIF and AOSIS declarations, the Committee considered that it may be in the interest of legal certainty for States to consider adopting, at the global level – perhaps in the form of a UN General Assembly resolution or even (as suggested by Ireland) a Decision of the States Parties to the LOSC[347] – their agreement about the interpretation of international law as reflected in the relevant provisions of the LOSC, yet applicable only to the specific context of climate change-related sea level rise. The Committee had already cited with approval the 2021 statement by Germany in the Sixth Committee, stating its readiness to 'support the process and work together with others to preserve their maritime zones and the rights and entitlements that flow from them in a manner consistent with the Convention, including through a *contemporary reading and interpretation of its intents and purposes*, rather than through the development of new customary rules'.[348]

Such an approach would be advantageous for several reasons. First, in the words used by the EU and its Member States, 'the precise way in which the Convention ought to be interpreted and how the objective of legal stability is to be secured legally and in practice may require … consideration and agreement of States'.[349]

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[339] Ibid.
[340] Ministry of Foreign Affairs of Japan, 'Foreign Minister Hayashi's Meeting with the Delegation of the Pacific Islands Forum', 6 February 2023, available at: <https://www.mofa.go.jp/press/release/press1e_000369.html>.
[341] Statement by Japan, Sixth Committee, 78th session, 28th meeting, 27 October 2023.
[342] Statement by Japan in the UN Security Council, UN Doc. S/PV.9260, 14 February 2023, at 18.
[343] 'Statement of the European Union and its Member States on Sea Level Rise in Relation to International Law', Sixth Committee,78th session, 23rd meeting, 23 October 2023.
[344] See, e.g., the statements by Bulgaria, Cyprus, Germany, Greece, Hungary, Ireland, Italy, Portugal, Romania, Slovenia and Spain, at the Sixth Committee,78th session, 23rd to 28th meeting, 23–27 October 2023.
[345] See in ibid.
[346] Statement by New Zealand, Sixth Committee, 78th session, 25th meeting, 25 October 2023 (emphasis added).
[347] See below.
[348] See *Interim Report of the ILA Committee (Lisbon 2022)* (n. 13), at 528: footnote 86 and the related text.
[349] 'Statement of the European Union and its Member States', Sixth Committee, 78th session, 23 October 2023.

Second, there are still some States that have not yet expressed or specified their views on this issue. The UK, for example, asked for 'caution when interpreting the silence of some States' or the 'absence of contest', since these 'should not be interpreted as agreement' with any view or position.[350] Nonetheless, the UK did state in the Sixth Committee in October 2023 that it is 'open to legitimate interpretations and applications of UNCLOS, including in principle adaptive interpretations',[351] and confirmed in its statement in the UN Security Council in February 2023 that it was 'open to pragmatic and creative solutions' regarding the question of whether maritime baselines should be fixed in the context of sea level rise.[352]

Ireland, while also confirming its openness to developing pragmatic solutions, pointed out that:

> the absence from the [LOSC] of an express obligation on states to regularly resurvey straight baselines, or to deposit with the Secretary-General of the United Nations revised charts or lists of coordinates, is helpful in developing a pragmatic legal solution. The question of how to fix baselines formed by the low-water line along the coast is more problematic but even here Ireland believes that a pragmatic solution can be found.[353]

Given the important developments that occurred after its 2022 Interim Report, including the adoption of new policies and positions by several States concerning preserving the stability of baselines and limits of maritime zones, and the calls for an agreement on pragmatic solutions, the Committee considers that an explicit recognition of a solution at a globally agreed level would significantly contribute to facilitating legal certainty concerning the stability of baselines and maritime limits in the context of sea level rise.

One possibility, as recently suggested by Ireland, would be to adopt a Decision of the States Parties to the LOSC (SPLOS). In Ireland's view, a Decision of States Parties could state that 'in consequence of rising sea-levels, the baselines established by a State Party in accordance with the Convention on the date on which it entered into force for that State are to be regarded as permanent'.[354]

Another approach, initially suggested in the 2022 Interim Report, would be a Resolution of the UN General Assembly. This might be a better option insofar as it would include those UN Member States that are not parties to the LOSC. It would have the advantage of confirming customary international law as reflected in the LOSC, clarifying its contemporary interpretation, and therefore apply to all States.

The Committee considers that its recommendations, as contained in ILA Resolution 5/2018, may assist the UN Member States in agreeing upon and adopting the wording for an instrument at a global level, whatever the format or forum for this might be agreed upon. The proposal of the Committee, based on ILA Resolution 5/2018, is to confirm in such a globally agreed instrument the following:

1) On the grounds of legal certainty and stability, provided that the baselines and the outer limits of maritime zones of a coastal or an archipelagic State have been properly determined in accordance with the 1982 United Nations Convention on the Law of the Sea, these baselines and limits should not be required to be redetermined should climate change-related sea level rise affect the geographical reality of the coastline.

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[350] Statement by the UK, Sixth Committee, 78th session, 23rd meeting, 23 October 2023.

[351] Ibid. In a 2022 report, the House of Lords stated: 'The Government should take a formal position that baselines should remain fixed in their current position. This would ensure that no states, including the UK and its Overseas Territories, lose their current maritime entitlements. The Government should work with partners to advance agreement amongst States Parties to UNCLOS and create supplementary legal mechanisms that secure maritime baselines and entitlements'; see House of Lords: International Relations and Defence Committee, *UNCLOS: the law of the sea in the 21st century*, HL Paper 159, 1 March 2022 Report, at 37 and 82 (reference to para. 126).

[352] Statement by the UK in the Security Council, UN Doc. S/PV.9260, 14 February 2023, at 22.

[353] Statement by Ireland, Sixth Committee, 78th session, 25th meeting, 25 October 2023. See also Art. 7 of the Irish Maritime Jurisdiction Act 2021, available at: <https://www.irishstatutebook.ie/eli/2021/act/28/enacted/en/pdf>.

[354] Statement by Ireland, Sixth Committee, 78th session, 25th meeting, 25 October 2023. It could be questioned, however, whether the SPLOS may have the mandate to adopt such a decision on substance.

2) The maintenance of existing maritime entitlements is conditional upon the coastal State's existing maritime claims having been made in compliance with the requirements of the 1982 United Nations Convention on the Law of the Sea and deposited with the Secretary-General of the United Nations as required by the relevant provisions of the Convention.

The Committee also recommended that, in view of legal certainty, coastal States deposit with the UN Secretary General information specifying also those baselines and the outer limits for which the deposit is not strictly required by the Convention.

C. Maritime boundaries

As the Committee observed in its 2022 Interim Report:

> No State questioned the finality of agreed and/or adjudicated maritime boundaries notwithstanding the possible changes resulting from climate change-related sea level rise. Indeed, statements by many States were explicit on the need to consider the finality of land *and* all maritime boundaries alike, including without distinguishing between these under Article 62(2) of the [VCLT].[355]

There have, in the meantime, been no changes to this approach. Indeed, several States,[356] including, in particular, those who still maintain a practice or legislation concerning their baselines being 'ambulatory', explicitly confirmed their views concerning the stability of maritime boundaries notwithstanding the changes in the baselines.

The USA 'does not view changes in the coastal baselines due to sea-level rise as requiring modification to its maritime boundary treaties' and 'does not have a practice of modifying its maritime boundary delimitation agreements based on changes due to sea-level rise'.[357]

For Ireland, 'normal baselines are ambulatory'; nonetheless, regarding the maritime delimitation agreements concluded for establishing the EEZ and the continental shelf boundaries, 'none of these agreements would be affected by changes to baselines'.[358]

According to the EU and its Member States, 'there are major legal and policy reasons to recognise the stability provided for by the maritime delimitations established either by treaty or by adjudication'.[359]

States appear to widely share the view that, as summarised by Poland, 'the issue of intangibility of boundaries, whether of national territory or maritime areas, is of fundamental importance because it concerns the much broader question of maintaining international peace and security'.[360]

That view seems now to be widely shared by States and there have been no contradictory views presented. Nevertheless, an explicitly agreed recognition of this at a global level would contribute to facilitating legal certainty concerning the stability of maritime boundaries in the context of sea level rise. The Committee considers that its recommendation, as contained in ILA Resolution 5/2018, may assist UN Member States in agreeing upon and adopting the wording of an instrument at a globally agreed level. The proposal of the Committee, based on ILA Resolution 5/2018, is to confirm in such an instrument the following:

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[355] *Interim Report of the ILA Committee (Lisbon 2022)* (n. 13), at 530.
[356] The views expressed recently by the UN Member States include South American States (Argentina, Chile, Peru), European States (Austria, Bulgaria, Cyprus, Estonia, France, Greece, Italy, Malta, Poland, Spain), Asian States (Iran, Singapore, Thailand, Viet Nam), some African States such as Cameroon, and others; see statements by the UN Member States at the 78th session of the Sixth Committee (23rd to 28th meeting, 23–27 October 2023), as delivered, available at: <https://www.un.org/en/ga/sixth/78/summaries.shtml>.
[357] Submission from the United States to the International Law Commission on 'Sea-level rise in relation to international law', 1 December 2022, available at: <https://legal.un.org/ilc/guide/8_9.shtml>.
[358] 'Comments by Ireland on Sea-Level Rise in relation to the Law of the Sea', submission to the ILC, 29 June 2022, available at: <https://legal.un.org/ilc/guide/8_9.shtml>.
[359] 'Statement of the European Union and its Member States', 23 October 2023. This is thus the view of all 27 EU States.
[360] Statement by Poland, Sixth Committee, 78th session, 24th meeting, 24 October 2023.

> The interpretation of the 1982 United Nations Convention on the Law of the Sea in relation to the ability of coastal and archipelagic States to maintain their existing lawful maritime entitlements in the context of climate change-related sea level rise should apply equally to maritime boundaries delimited by international agreements or by decisions of international courts or arbitral tribunals.

D. Relevance for statehood of low-lying SIDS

The Law of the Sea does not provide a framework for assessing the existence or not of a State; the rules and principles relevant for that issue and the need for their interpretation or adjustment in the context of sea level rise have already been discussed in Part II of this report. Once a coastal State exists on the basis of the relevant rules and principles of international law, the law of the sea determines the spatial extent and substantive content of its sovereignty, sovereign rights and exclusive jurisdiction in certain maritime areas.

While the law of the sea considerations in the preceding sections of this Part potentially relate to all coastal States, the Committee has decided (see Part II.A. above) to limit the territorial scope of its work, insofar as statehood is concerned, to low-lying SIDS – referred to in this report as 'affected States' – since it is their elements of statehood that may be especially exposed and vulnerable to the impacts of sea level rise. In this context, several considerations drawing on the law of the sea are nonetheless relevant:

First, a distinction must be made between the situation where the islands (i.e., land territory) remain above water but have become uninhabitable from the situation where they are fully submerged. The Committee has observed in its 2022 Interim Report that in the situation where parts of the territory are above water but uninhabitable, it is relatively less challenging to argue for the continuation of at least certain maritime entitlements, such as the right to a territorial sea in accordance with the currently applicable law of the sea regime.[361]

Second, the scenario-based analysis in Part II of this report has shown that low-lying SIDS affected by sea level rise that risk losing all of their (habitable) territory in the mid- or even long-term (i.e., until the end of this century) are very few – and that some of those States are already implementing or planning to implement measures to build up islands which might allow them to keep at least a symbolic presence or habitability.

And third, the sovereignty of a State extends to the outer limit or boundary of the *territorial sea* – and this is thus *de lege lata* a boundary of a State at sea. As such, it is a significant component of a 'defined territory'; indeed, the statehood criterion under international law that has been reflected also in the text of the Montevideo Convention is not limited to the 'land territory' but relates to a 'defined territory' of a State.

In view of the most recent developments – with States such as the USA having adopted policies according to which 'sea-level rise driven by human-induced climate change should not cause any country to lose its statehood or its membership in the United Nations, its specialized agencies, or other international organizations', and the growing support to the PIF Leaders 2023 Declaration according to which 'the statehood and sovereignty of Members of the Pacific Islands Forum will continue, and the rights and duties inherent thereto will be maintained, notwithstanding the impact of climate change-related sea-level rise'[362] – the understanding that a 'defined territory' of low-lying SIDS seems likely to persist in a mid to even longer-term perspective is a factor in support of legal stability and certainty.

The issue of the maintenance of full maritime entitlements in the event of coastal changes brought about by sea level rise has already been extensively discussed above. However, questions of the maritime zones beyond the outer limit of the territorial sea (the EEZ and the continental shelf) are *per se* not determinant or even directly relevant for the issue of statehood; a coastal State has only certain, strictly specified and limited sovereign rights and exclusive jurisdiction in those maritime areas, but they are in no way constitutive for the question of statehood of the coastal State.

The 2022 Interim Report nonetheless highlighted the point that, 'many Committee members also felt that the automatic loss of maritime entitlements – even in the event of total inundation – was inequitable and that the

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[361] *Interim Report of the ILA Committee (Lisbon 2022)* (n. 13), at 541.
[362] See section II.D.1 above.

Committee should further explore alternative interpretations or approaches to the issue. The Committee was in agreement that, at this early point, a wide variety of approaches and options *de lege ferenda* were available for discussion. However, the Committee also agreed that feasible approaches will ultimately depend on the overarching reaction of the international community to this issue'.[363]

The Committee did not venture into adopting conclusions about a hypothetical issue of whether the concept of 'territory' might be extended *de lege ferenda* to include submerged lands which have become inundated by sea level rise. The development of this argument would mean that the presence of submerged lands might be used to justify the maintenance of marine resources zones – such as the EEZ or the continental shelf.[364] As already stated in the 2022 Interim Report, the Committee at this stage considers it to be premature to be proposing legal solutions *de lege ferenda* regarding the issue of persistence of maritime entitlements following the *full* submergence of the entire land territory of some of the present-day States in a rather long-term (end of the century, or beyond) perspective.

This being said, the Committee notes that several UN Members States have most recently pointed to the importance of further exploring the issue of *submerged territories*, as an issue that is potentially related to both the law of the sea and to statehood.[365] In Malta's view, 'sovereignty refers to the whole territory under the State's control and not solely to the land territory', therefore, 'territory that becomes partially inundated or fully submerged due to sea-level rise should not be considered a non-existent territory'.[366] According to Liechtenstein, it would be appropriate to consider '*sui generis* status for territories submerged owing to sea-level rise, in particular because sea-level rise is not a natural phenomenon, but human-caused'.[367]

The Committee took the view that potential future legal rights based on *fully submerged* territories will ultimately have to be decided in the policy sphere and on a background of factual changes conceivable in a rather long-term perspective, as demonstrated by the scenario-based analysis in Part II of this report. The Committee has therefore not ventured into making *de lege ferenda* proposals in that respect. The Committee did agree, however, following its 2022 Interim Report, to the two propositions concerning the maritime entitlements of the affected low-lying SIDS *in the process* of the diminishing habitability and gradual submergence of their land territory in consequence of climate change-related sea level rise, and reiterates these in this final report:

1) The Committee confirmed the approach recommended in its 2018 Report and ILA Resolution 5/2018 so that baselines and limits of maritime zones that are in compliance with the LOSC and deposited with the UN Secretary General, and have not met with objection by other States, should continue in place even if the territory involved gradually changes as a result of climate change-related impacts including sea level rise in the process or submergence.

2) The Committee also confirmed the approach recommended in its 2018 Report and ILA Resolution 5/2018 regarding the finality of maritime boundaries agreed by treaty or settled by judicial decisions, so that existing maritime boundaries should continue in force and represent the legal extent of maritime zones, even if the territory from which the agreed or adjudicated boundaries were originally calculated gradually changes in the process of submergence.

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[363] *Interim Report of the ILA Committee (Lisbon 2022)* (n. 13), at 541.
[364] In the 2022 Interim Report, the Committee made it clear that '*de lege lata* ... the key concept under the LOSC is that rights over maritime areas emanate not from territory in general but, more specifically, from the "land territory" of a coastal State', and had examined Articles 2(1), 76(1), 121 and 298(1)(a)(i) LOSC. *Interim Report of the ILA Committee (Lisbon 2022)* (n. 13), at 542–543.
[365] See in particular the statements of Germany and of Nordic countries (delivered by Denmark, also on behalf of Finland, Island, Norway and Sweden) in the Sixth Committee, 78th session, 23rd and 24th meetings, 23–24 October 2023. Also some other UN Member States in the Sixth Committee debate in October 2023, such as Spain and Sierra Leone (at 27th meeting, 27 October 2023), pointed to the importance of a further study of the issue of submerged territories.
[366] Statement by Malta, Sixth Committee, 78th session, 27th meeting, 27 October 2023.
[367] Statement by Liechtenstein, Sixth Committee, 78th session, 23rd meeting, 23 October 2023.

Part IV: CONCLUSIONS

The Committee, mindful of the human dimension of the impacts of sea level rise, at the outset decided to examine the issue of statehood and the rights of affected populations as an inseparable whole. The question of statehood in the context of sea level rise is not an abstract legal issue nor is it just a matter of academic discourse. Rather, since States bear the important responsibility to ensure the protection of their population,[368] the question of statehood is fundamentally linked to that duty of protection and its continuous implementation. While all coastal States are potentially affected by sea level rise, low-lying small island developing States (SIDS) are disproportionally impacted in the context of statehood, owing to their different geographical and geomorphological conditions. Due to the decrease or loss of (habitable) land territory, substantial parts of their populations may have to move abroad and build new lives in other States that admit them. The Committee has thus decided to limit the territorial scope of its study concerning statehood and the rights of affected populations to low-lying SIDS (referred to in this report as 'affected States'), since their statehood may be adversely impacted by sea level rise.

To address this unprecedented challenge, the principles and objectives of legal certainty and stability, equity, and international cooperation are valid foundations for addressing the implications of sea level rise for the statehood of affected States and the rights of their population. While views may differ about how to achieve the objective of legal certainty and stability in respect of the existing statehood of affected States and, relatedly, the protection of the rights of affected persons, the objective itself is uniformly shared by all States that have expressed their views to date. Moreover, considerations of equity, fairness and justice continue to play an important role in ongoing discussions among States, in both regional and global fora, and remain highly relevant in the context of applying international law principles to the challenges of sea level rise. International cooperation, including the duties to cooperate, has proven to be among the most widely supported approaches among the UN Member States. In the context of climate change-induced sea level rise, this approach reflects the purposes of the United Nations, which include achieving international cooperation in the maintenance of international peace and security, and solving international problems of an economic, social, cultural or humanitarian character.

In the context of the statehood of low-lying SIDS, and in order to identify legal avenues that are available to them and their populations to address the challenges associated with the gradually increasing impacts of sea level rise, the Committee focused on possible scenarios in the mid-term (2041–2060) and, to some extent, long-term, and explored rules and measures to safeguard these legal objectives and principles.

With regard to the challenge of safeguarding statehood in the face of sea level rise, the Committee concurred with the Co-Chairs of the ILC Study Group that continuity of statehood should be presumed[369] – a view supported by many States in recent debates held in the UN Sixth Committee – but also looked beyond the sphere of presumption to explore the rights of the affected States under international law. Affected States not only have the right but to some extent also the duty to provide for their own preservation using the various means at their disposal – including through international cooperation. Such duty can be derived from States' human rights obligation to protect the life, security and health of affected members of their population, guarantees that may require taking physical measures[370] to safeguard territory.[371] The principle set out in Article 6 of the Montevideo Convention, that the recognition of a State is 'unconditional and irrevocable', provides for and supports the objective of international law to facilitate legal certainty and stability. In the Committee's view, it should therefore be recognized as the key guidance for addressing the unprecedented challenge faced by low-lying SIDS in a mid- to long-term perspective, when most of their land territory may become uninhabitable or submerged in consequence of sea level rise. In that context, an affected State, once

[368] As acknowledged, e.g., by the 2023 PIF Declaration (n. 136), paras 11 and 14.
[369] See *Second Issues Paper* (n. 111), at 39 and 48.
[370] See above, section II.D 2.1.
[371] See UN Human Rights Committee, *Daniel Billy et al. v Australia* (n. 222) para. 8.12, concluding that under the circumstances of the case the failure to construct sea walls amounted to a violation of the State's 'positive obligation to implement adequate adaptation measures to protect the authors' home, private life and family' under article 17 ICCPR. See also European Court of Human Rights, *Budayeva and Others v Russia* (n. 221), paras. 147 ff. The case concerned the death of persons killed by a foreseeable mudslide in a mountainous area; the Court concluded that the failure to carry out necessary repairs of a mud retention collector and protective dam amounted to a violation of the duty to protect life.

recognized as a person under international law, continues to hold a legitimate claim to its recognition as being unconditional and irrevocable. In this regard continued membership of the United Nations is one of the crucial indicia of the continuing existence of affected States. As recognized by some States, climate change-related sea level rise should not cause the loss of statehood of any State nor its membership in the United Nations, its specialized agencies, or other international organizations.

The Committee also identified a series of measures to safeguard the effectiveness of the international legal personality of the affected States, including by exploring: physical measures to safeguard territory and their legal implications; legal measures concerning State territory in consequence of sea level rise; and the right to self-determination of peoples affected by sea level rise.

Regarding physical measures, the typical result of sea level rise is that coastlines recede. The fact is, however, that coasts are commonly areas with the densest population, important cultural sites and critical infrastructure. To defend vulnerable coasts, States have used hard defences (e.g., sea walls, groynes) or soft engineering using vegetation or the manipulation of sediments. Some States have opted to reclaim land, to build artificial or floating islands. Implementing such measures at scale requires strong support to low-lying SIDS and cooperation from the international community.

Among the legal options available is acquiring territory by a formal acquisition of territorial title by treaty, or acquisition or use of land in another State through a private law transaction. The Committee also explored the options for States forming associations with other States, or even entering into a condominium or a federation.

The Committee moreover considered the right to self-determination of affected peoples to be an important element that should help to shape decisions on the choice of the tools necessary for the *de facto* and *de jure* preservation of statehood and the protection of the rights of the population.

People living in States affected by sea level rise and their governments face complex challenges in the area of human rights. On the one hand, the adverse impacts of sea level rise undermine the enjoyment of human rights, including: the right to life and other civil and political rights; social rights, such as the rights to adequate food, water and health; economic rights; and cultural rights. Effective protection and fulfilment of such rights requires, on the other hand, positive action by the affected States at a time when their capacity to do so may be considerably diminished as a consequence of the loss of habitable territory and associated problems. The fact that affected individuals and communities may be displaced or decide to migrate to other States adds a further dimension to the challenge of implementing measures to respect, protect and fulfil the human rights of those affected.

In relation to the responsibility of affected States and third States, it is important to recognise the following principles of international human rights protection to address these challenges and to act in accordance with them. *First*, individuals affected by sea level rise are always rights holders under international law. In conformity with their obligations under international law, States are always obligated to respect, protect and fulfil such rights without discrimination to anyone under their jurisdiction. Thus, international human rights law typically regulates the ‘distribution’ of human rights duties and responsibilities among States, particularly in situations of migration and cross-border displacement.

Second, as long as affected States are able to safeguard substantial parts of habitable territory, the primary responsibility to respect, protect and fulfil the human rights of the members of their population remains with them. To the extent that their ability to meet these obligations is undermined by the impacts of by sea level rise, they should, as envisaged in Article 2(1) of the International Covenant on Economic, Social and Cultural Rights, request assistance from other States and the international community, which are, as appropriate, called upon to respond positively to such calls in accordance with the principle of international cooperation. To make such cooperation predictable and effective, States with the capacity to provide support are exhorted to increase the availability of, and facilitate access to, funding and financing for both climate adaptation and for loss and damage, in ways that enable affected States to meet their human rights obligations; to the same end, cooperating States should develop and adopt bilateral or sub-regional agreements with affected States. Retaining and even strengthening the ability of affected States to meet their human rights obligations will be a significant aspect of their ability to govern and exercise authority – in turn, one of the crucial indicia of statehood.

Finally, at the point where an affected State has lost most of its habitable territory, and most of its population has moved abroad, but still retains its statehood, the primary responsibility to respect, protect and fulfil the human rights of those affected shift to the State(s) where they now live. In some situations, this might raise complex questions of overlapping jurisdictions. Depending on their own capacities and level of development, States may need the support of the international community to permanently host the newcomers and discharge their own obligations towards the realization of their economic, social and cultural rights. In the area of civil and political rights, the prohibition under international law of removing persons to States where their life or freedom would be threatened, or where there are substantial grounds for believing that they would be in danger of torture or of being exposed to cruel, inhuman or degrading treatment, becomes particularly important in this scenario. To the extent that hosted communities become a minority group within another State, human rights rules protecting their members also become relevant. Laws of both affected and host States that allow dual nationality and absentee voting are recommended measures to help affected States retain a population capable of shaping political life, and thus the exercise of State authority as criteria of statehood, even in conditions of large-scale loss of habitable territory.

The Committee did not venture into adopting conclusions about a hypothetical issue of whether the concept of 'territory' might be extended *de lege ferenda* to include submerged lands which have become inundated by sea level rise and took the view that potential future legal rights based on *fully submerged* territories will ultimately have to be decided in the policy sphere and on a background of factual changes conceivable in a rather long-term perspective, as demonstrated by the scenario-based analysis in Part II of this report. The Committee has therefore not ventured into making *de lege ferenda* proposals in that respect. The Committee did agree, however, to the two propositions concerning the maritime entitlements of the affected low-lying SIDS *in the process* of the diminishing habitability and gradual submergence of their land territory in consequence of climate change-related sea level rise. First, that baselines and limits of maritime zones that are in compliance with the LOSC and deposited with the UN Secretary General should continue in place even if the territory involved gradually changes as a result of climate change-related impacts including sea level rise in the process or submergence. And second, that existing maritime boundaries, whether agreed or adjudicated, should continue in force and represent the legal extent of maritime zones, even if the territory from which the boundaries were originally calculated gradually changes in the process of submergence.