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Sea-level rise in relation to international law

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Introduction

I. Purpose and structure of the second issues paper

1. The present issues paper is preliminary in nature. It is intended to serve as a basis for discussion in the Study Group and may be complemented by contribution papers prepared by members of the Study Group. It covers the subtopics of statehood and the protection of persons affected by sea-level rise, and is divided into an introduction and four parts.

2. The introduction addresses certain general matters: the inclusion of the topic in the Commission's programme of work and the consideration of the topic by the Commission so far; the positions of the Member States during the debates in the Sixth Committee in the previous years; the level of support from Member States for the subtopics addressed in the present issues paper; and outreach undertaken by the Co-Chairs of the Study Group. It also includes a brief summary of scientific findings and prospects of sea-level rise that are relevant to the subtopics of statehood and the protection of persons affected by sea-level rise; and an update regarding the consideration of these subtopics by the International Law Association.

3. Part One recalls the scope and outcome of the topic, the issues to be considered by the Commission, the final outcome to be reached, as well as the methodology to be used by the Study Group.

4. Part Two, entitled "Reflections on statehood", starts with an introduction, followed by a presentation regarding the following issues: criteria for the creation of a State; some representative examples of actions taken by States and other subjects of international law; references to concerns expressed relating to the phenomenon of sea-level rise and some measures that have been taken in that regard; and the formulation of possible alternatives for the future in respect of statehood.

5. Part Three addresses the subtopic of the protection of persons affected by sea-level rise. It begins with introductory considerations and continues with a mapping exercise of the existing legal frameworks potentially applicable to the protection of persons affected by sea-level rise. A preliminary mapping exercise of State practice and the practice of relevant international organizations and bodies regarding the protection of persons affected by sea-level rise is then presented.

6. Part Four presents preliminary observations, guiding questions for the Study Group and the future programme of work.

7. A bibliography will be submitted as an addendum to the present issues paper.

II. Inclusion of the topic in the Commission's programme of work; consideration of the topic by the Commission

8. At its seventieth session (2018), the Commission decided to recommend the inclusion of the topic "Sea-level rise in relation to international law" in its long-term programme of work.[1]

9. Subsequently, in its resolution 73/265 of 22 December 2018, the General Assembly noted the inclusion of the topic in the long-term programme of work of the Commission, and in that regard called upon the Commission to take into consideration

[1] *Official Records of the General Assembly, Seventy-third Session, Supplement No. 10* (A/73/10), para. 369.

the comments, concerns and observations expressed by Governments during the debate in the Sixth Committee.

10. At its 3467th meeting, on 21 May 2019, the Commission decided to include the topic in its current programme of work. The Commission also decided to establish an open-ended Study Group on the topic, to be co-chaired, on a rotating basis, by Mr. Bogdan Aurescu, Mr. Yacouba Cissé, Ms. Patrícia Galvão Teles, Ms. Nilüfer Oral and Mr. Juan José Ruda Santolaria.

11. At its 3480th meeting, on 15 July 2019, the Commission took note of the joint oral report of the Co-Chairs of the Study Group. At a meeting on 6 June 2019, the Study Group had considered an informal paper on the organization of its work containing a road map for 2019 to 2021. The discussion of the Study Group had focused on its composition, its proposed calendar and programme, and its methods of work.

12. At the same meeting, the Study Group had decided that, of the three subtopics identified in the syllabus prepared in 2018,[2] it would examine the first – issues related to the law of the sea – in 2020, under the co-chairpersonship of Mr. Aurescu and Ms. Oral, and the second and third – issues related to statehood and issues related to the protection of persons affected by sea-level rise – in 2021, under the co-chairpersonship of Ms. Galvão Teles and Mr. Ruda Santolaria.

13. The Study Group had agreed that, prior to each session, the Co-Chairs would prepare an issues paper, which would be edited, translated and circulated as an official document to serve as the basis for the discussions and for the annual contribution of the members of the Study Group. It would also serve as the basis for subsequent reports of the Study Group on each subtopic. Members of the Study Group would then be invited to put forward contribution papers that could comment upon, or complement, the issues paper prepared by the Co-Chairs (by addressing, for example, regional practice, case law or any other aspects of the subtopic). Recommendations would be made at a later stage regarding the format of the outcome of the work of the Study Group. At the end of each session of the Commission, the work of the Study Group would be reflected in a substantive report, taking due account of the issues paper prepared by the Co-Chairs and the related contribution papers by the members, while summarizing the discussion of the Study Group. That report would be agreed upon in the Study Group and subsequently presented by the Co-Chairs to the Commission, so that a summary could be included in the annual report of the Commission.[3]

14. The Study Group also examined and decided upon a number of other organizational matters.[4]

15. Owing to the outbreak of the coronavirus disease (COVID-19) pandemic, and the ensuing postponement of the seventy-second session of the Commission, the

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[2] *Ibid.*, annex B.

[3] *Official Records of the General Assembly, Seventy-fourth Session, Supplement No. 10* (A/74/10), paras. 270–271.

[4] *Ibid.*, paras. 272–273: "The Study Group also recommended that the Commission invite the comments of States on specific issues that are identified in chapter III of the report of the Commission. The possibility of requesting a study from the Secretariat of the United Nations was discussed in the Study Group as well. The knowledge of technical experts and scientists will continue to be considered, possibly through side events organized during the next sessions of the Commission … [W]ith the assistance of the Secretariat, the Study Group will update the Commission on new literature on the topic and related meetings or events that might be organized in the next two years."

initial calendar for the discussion of the first and second issues papers was delayed by one year.

16. At its seventy-second session (2021), the Commission reconstituted the Study Group on sea-level rise in relation to international law, chaired by the two Co-Chairs on issues related to the law of the sea, namely Mr. Aurescu and Ms. Oral.

17. In accordance with the agreed programme of work and methods of work, the Study Group had before it the first issues paper on the topic,[5] which was issued together with a preliminary bibliography,[6] prepared by Mr. Aurescu and Ms. Oral.

18. The Study Group held eight meetings, from 1 to 4 June and on 6, 7, 8 and 19 July 2021.[7]

19. At its 3550th meeting, on 27 July 2021, the Commission took note of the joint oral report of the Co-Chairs of the Study Group.[8]

20. Chapter IX of the 2021 annual report of the Commission contains a summary of the work of the Study Group during that year on the subtopic of the law of the sea.

21. With regard to the future programme of work, it was decided that during the seventy-third session of the Commission (2022), the Study Group would, in line with the 2018 syllabus, address issues related to statehood and to the protection of persons affected by sea-level rise, under the co-chairpersonship of Ms. Galvão Teles and Mr. Ruda Santolaria, who would prepare a second issues paper as a basis for the discussion in the Study Group at that session.

22. For the purposes of the subtopics to be addressed in 2022, the Commission indicated in chapter III of its 2021 annual report[9] that it would welcome receiving, by 31 December 2021, any information that States, relevant international organizations and the International Red Cross and Red Crescent Movement could provide on their practice and other relevant information regarding sea-level rise in relation to international law, including on:

(a) practice with regard to the construction of artificial islands or measures to reinforce coastlines, in each case in order to take into account sea-level rise;

(b) instances of cession or allocation of territory, with or without transferral of sovereignty, for the settlement of persons originating from other States, in particular small island developing States, affected by sea-level rise;

(c) regional and national legislation, policies and strategies, as applicable, regarding the protection of persons affected by sea-level rise;

(d) practice, information and experience of relevant international organizations and the International Red Cross and Red Crescent Movement regarding the protection of persons affected by sea-level rise;

(e) measures taken by third States with regard to small island developing States, in particular those affected by sea-level rise, including: (i) modalities for cooperation or association with such States, including the possibility of persons travelling to, as well as establishing residency and developing professional activities in, such third States; (ii) maintenance of the original nationality and/or access to the

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[5] A/CN.4/740 and Corr.1.

[6] A/CN.4/740/Add.1.

[7] *Official Records of the General Assembly, Seventy-sixth Session, Supplement No. 10* (A/76/10), para. 250.

[8] See A/CN.4/SR.3550.

[9] A/76/10, para. 26.

nationality or citizenship of the third State; and (iii) conservation of the cultural identity of such persons or groups.

III. Debate in the Sixth Committee of the General Assembly; level of support from Member States; outreach efforts

23. In addition to the details given in the first issues paper with regard to Member States' expression of support for or interest in the topic, or otherwise, during the debates in the Sixth Committee since 2018,[10] it is worth setting forth in the present issues paper the positions expressed by Member States on the subtopics of statehood and the protection of persons affected by sea-level rise.[11]

24. In their statements in the Sixth Committee of the General Assembly delivered in October 2018, various States expressed concerns about the subtopic of statehood. For instance, Papua New Guinea said that it was essential to maintain statehood in order to preserve jurisdictional maritime zones, and that statehood was interrelated with questions regarding maritime zones and raised a potential issue of statelessness, including *de facto* statelessness.[12]

25. Cyprus emphasized the difficulties that the International Law Commission had faced over the years in defining statehood.[13] Fiji noted that one of the criteria for statehood under article 1 of the Convention on the Rights and Duties of States[14] was that of a permanent population, and remarked the absence of guiding principles and regulations as to what happened when a State became uninhabitable and lost its entire population because of sea-level rise.[15]

26. The United States of America raised concerns about whether the issues of statehood and protection of persons as specifically related to sea-level rise were at a sufficiently advanced stage of State practice.[16] Greece referred to the risk of the Commission embarking on an exercise that was primarily *de lege ferenda*, as reflected in the speculative scenarios, such as "possible transfers of sovereignty" and "mergers", mentioned in the 2018 syllabus.[17]

27. In statements by States delivered in the Sixth Committee in October and November 2021, Samoa, speaking on behalf of the Pacific small island developing States, said that the issues relating to statehood, statelessness and climate-induced migration were directly relevant to the Pacific region, in view of the possibility that the territories of small island States could be entirely submerged owing to climate change-related sea-level rise. Under international law, there was a presumption that a State, once established, would continue to exist, particularly if it had a defined territory and population, among other factors.[18]

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[10] A/CN.4/740 and Corr.1, paras. 8–16.

[11] The plenary debate in the Sixth Committee as pertains to the subtopic is reflected in the summary records contained in the documents cited in the following footnotes, which contain a summarized form of the statements made by delegations. The full texts of the statements made by delegations participating in the plenary debate are available from the Sixth Committee's web page, at https://www.un.org/en/ga/sixth/.

[12] Papua New Guinea (A/C.6/73/SR.23, para. 36).

[13] Cyprus (A/C.6/73/SR.23, para. 51).

[14] Convention on the Rights and Duties of States (Montevideo, 26 December 1933), League of Nations, Treaty Series, vol. CLXV, No. 3802, p. 19.

[15] Fiji (A/C.6/73/SR.23, para. 63).

[16] United States (A/C.6/73/SR.29, para. 27).

[17] Greece (A/C.6/73/SR.21, para. 68).

[18] Samoa (on behalf of the Pacific small island developing States) (A/C.6/76/SR.19, para. 71).

28. Iceland, speaking on behalf of the Nordic countries (Denmark, Finland, Iceland, Norway and Sweden), said that some countries might be disproportionately affected by the issue. Apart from the possibility that the territory of some States would be partially or fully submerged, sea-level rise could, for example, also contribute to land degradation, periodic flooding and freshwater contamination. It was therefore a threat on multiple levels. The Nordic countries reaffirmed their support for the Commission's consideration of the topic through the study of three subtopics, the results of which would be included in a finalized substantive report on the topic as a whole.[19]

29. Singapore said that, like other small, low-lying island States, it faced an existential threat from rising sea levels.[20]

30. Liechtenstein appreciated in particular the decision to include subtopics on the protection of persons affected by sea-level rise and on statehood in the work of the Study Group, thus reflecting the importance of a person-centred and human rights-focused approach. The right to self-determination of the peoples most immediately affected, including its manifestation through statehood, must always be taken into consideration. In any discussion of statehood in the context of rising sea levels, it should be noted that there was in practice a strong presumption of the persistence of States, and that the extinction of any State or country should therefore be disfavoured.[21]

31. For Cuba, great caution was needed in considering the possible loss of statehood in relation to sea-level rise, owing to the loss of territory, and it was vital to uphold the principle that if an effect of that scale was produced in a small island State, that State would not lose its status as an international subject, with all the attributes thereof. International cooperation would play an essential role in that regard.[22]

32. Maldives said that sea-level rise was not a distant theoretical concern. Low-lying coastal and small island States, such as itself, were particularly vulnerable to the effects of sea-level rise. As they could not afford to mitigate the effects of sea-level rise on their own, the cooperation of the international community was essential to ensure adequate, predictable and accessible assistance to those States.[23]

33. For Thailand, each region faced unique challenges caused by sea-level rise. States might adopt different coastal protection measures to suit their specific conditions. Sea-level rise affected not just States and statehood, but also has a direct impact on populations, which might have to migrate or be displaced as a consequence thereof.[24]

34. Argentina noted that rising sea levels represented one of the greatest threats to the survival and growth prospects of many small island developing States, including for some, through the loss of territory. There were cases where small island developing States might find themselves in a highly vulnerable situation, where their survival as a State might be in play owing to the impact of rising sea levels. Adequate and effective responses should be considered to ensure that the members of the international community could cooperate and coordinate with each other in specific situations.[25]

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[19] Iceland (on behalf of the Nordic countries, namely Denmark, Finland, Iceland, Norway and Sweden) (A/C.6/76/SR.19, paras. 87–88).

[20] Singapore (A/C.6/76/SR.20, para. 22).

[21] Liechtenstein (A/C.6/76/SR.21, paras. 3–4).

[22] Cuba (A/C.6/76/SR.21, para. 32).

[23] Maldives (A/C.6/76/SR.21, para. 139).

[24] Thailand (A/C.6/76/SR.22, para. 4).

[25] Argentina, A/C.6/76/SR.22, para. 31.

35. For Papua New Guinea, those were critically important matters in the context of the daily reality experienced in the Pacific region.[26] Latvia, in the light of its experience of continued statehood since its founding in 1918 and its membership of the League of Nations, endorsed the view that factual control over territory was not always a necessary criterion for the juridical continuity of the existence of States.[27]

36. For Solomon Islands, the protection of persons and statehood in the context of sea-level rise were vitally important topics for small island developing States. It urged delegations to consider those topics in terms that could help in finding an international solution to what had become a global problem. On the topic of statehood, Solomon Islands supported the strong presumption in favour of continuing statehood, as the continued existence of States was foundational to the current international framework. State practice supported the notion that States could continue to exist despite the absence of criteria under the Convention on the Rights and Duties of States. The principles of stability, certainty, predictability and security also buttressed the presumption of continuing statehood. Sea-level rise could not serve as justification for denying vulnerable States vital representation in the international order. Solomon Islands called on the International Law Commission to consider the positions of small island developing States, as especially affected States.[28]

37. With regard to questions of Statehood, Cyprus highlighted that Judge James Crawford had noted that a State was not necessarily extinguished by substantial changes in territory, population or Government, or even, in some cases, by a combination of all three.[29]

38. Tonga also recognized the implications of sea-level rise for statehood, statelessness, the exacerbation of disasters and climate change-induced migration. It noted that yet, a defined territory and population were key indicia of statehood under international law, but that for small island developing States, that was a question of survival. Tonga therefore stressed the need to quickly address the international law implications of those emerging issues.[30]

39. Tuvalu said it acknowledged that several of the requirements for effective statehood were referred to in article 1 of the Convention on the Rights and Duties of States. However, it said that a comprehensive policy review was important, considering the argument that the criteria set out in the Convention were only for the determination of the birth of a State. The response of international law must reflect the interests of small island developing States, which were especially affected by sea-level rise yet least responsible for its causes.[31]

40. By contrast, according to Belarus, in the context of international law, it is more relevant to consider sea-level rise in relation to the law of the sea than in relation to issues of loss or reduction of territory. Belarus pointed out that although the consequences for a State's existence of the loss of all or some of its land territory was a matter of scholarly and practical interest, such situations were unlikely to arise in the near future.[32]

41. Regarding the subtopic of the protection of persons affected by sea-level rise, delegations have generally supported its inclusion as part of the topic and have noted

[26] Papua New Guinea (A/C.6/76/SR.22, para. 35).
[27] Latvia (A/C.6/76/SR.22, para. 75).
[28] Solomon Islands (A/C.6/76/SR.22, para. 81).
[29] Cyprus (A/C.6/73/SR.23, para. 48; A/C.6/74/SR.30, para. 102; and A/C.6/76/SR.22, para. 101); see also James Crawford, *The Creation of States in International Law*, 2nd ed. (Oxford, Oxford University Press, 2006).
[30] Tonga (A/C.6/76/SR.22, paras. 119–120).
[31] Tuvalu (A/C.6/76/SR.23, paras. 4–5).
[32] Belarus (A/C.6/76/SR.20, para. 63).

the human impacts of sea-level rise. See, for instance, the statements delivered between 2018 and 2021 by the delegations of Argentina,[33] Bangladesh,[34] Belize (on behalf of the Alliance of Small Island States),[35] Brazil,[36] Canada,[37] Chile,[38] China,[39] Colombia,[40] Costa Rica,[41] Cuba,[42] Cyprus,[43] Egypt,[44] El Salvador,[45] Estonia,[46] the European Union (in its capacity as observer; also on behalf of the candidate countries Albania, Montenegro, North Macedonia and Serbia; the stabilization and association process country Bosnia and Herzegovina; and, in addition, Georgia, the Republic of Moldova and Ukraine),[47] Fiji (on behalf of the Pacific Islands Forum),[48] France,[49] Hungary,[50] Iceland (on behalf of the Nordic countries, namely Denmark, Finland, Iceland, Norway and Sweden),[51] India,[52] Ireland,[53] Israel,[54] Italy,[55] Jamaica,[56] Japan,[57] Jordan,[58] Latvia,[59] Lebanon,[60] Liechtenstein,[61] Malaysia,[62] Maldives,[63] Mexico,[64] Micronesia (Federated States of),[65] the Netherlands,[66] Norway (on behalf of the Nordic countries, namely Denmark, Finland, Iceland, Norway and Sweden),[67]

[33] Argentina (A/C.6/74/SR.29, para. 35).
[34] Bangladesh (A/C.6/74/SR.31, para. 49).
[35] Belize (on behalf of the Alliance of Small Island States) (A/C.6/75/SR.13, para. 24).
[36] Brazil (A/C.6/76/SR.21, para. 26).
[37] Canada (A/C.6/73/SR.22, para. 65).
[38] Chile (A/C.6/76/SR.21, para. 57).
[39] China (A/C.6/74/SR.27, para. 92).
[40] Colombia (A/C.6/74/SR.30, para. 113, and A/C.6/76/SR.23, para. 24).
[41] Costa Rica (A/C.6/76/SR.23, para. 15).
[42] Cuba (A/C.6/76/SR.21, para. 33).
[43] Cyprus (A/C.6/73/SR.23, para. 48; A/C.6/74/SR.30, para. 102; and A/C.6/76/SR.22, para. 101).
[44] Egypt (A/C.6/74/SR.30, para. 30, and A/C.6/76/SR.20, para. 59).
[45] El Salvador (A/C.6/76/SR.20, para. 70).
[46] Estonia (A/C.6/74/SR.30, para. 61).
[47] European Union (in its capacity as observer; also on behalf of the candidate countries Albania, Montenegro, North Macedonia and Serbia; the stabilization and association process country Bosnia and Herzegovina; and, in addition, Georgia, the Republic of Moldova and Ukraine) (A/C.6/76/SR.19, para. 73).
[48] Fiji (on behalf of the Pacific Islands Forum) (*ibid.*, para. 74).
[49] France (A/C.6/76/SR.20, para. 47).
[50] Hungary (A/C.6/76/SR.21, para. 67).
[51] Iceland (on behalf of the Nordic countries, namely Denmark, Finland, Iceland, Norway and Sweden) (A/C.6/76/SR.19, para. 88).
[52] India (A/C.6/76/SR.23, para. 10).
[53] Ireland (A/C.6/74/SR.29, para. 43).
[54] Israel (A/C.6/73/SR.23, para. 32).
[55] Italy (A/C.6/74/SR.28, para. 29, and A/C.6/76/SR.20, para. 87).
[56] Jamaica (A/C.6/74/SR.27, para. 2).
[57] Japan (A/C.6/74/SR.30, para. 34).
[58] Jordan (A/C.6/76/SR.24, para. 126).
[59] Latvia (A/C.6/76/SR.22, para. 75).
[60] Lebanon (*ibid.*, para. 134).
[61] Liechtenstein (A/C.6/74/SR.30, para. 95, and A/C.6/76/SR.21, para. 3).
[62] Malaysia (A/C.6/74/SR.30, para. 83, and A/C.6/76/SR.21, para. 153).
[63] Maldives (A/C.6/76/SR.21, paras. 137–139).
[64] Mexico (A/C.6/74/SR.29, para. 114).
[65] Micronesia (Federated States of) (A/C.6/76/SR.21, para. 150).
[66] Netherlands (A/C.6/74/SR.28, para. 79).
[67] Norway (on behalf of the Nordic countries, namely Denmark, Finland, Iceland, Norway and Sweden) (A/C.6/74/SR.27, para. 86).

Papua New Guinea,[68] the Philippines,[69] Peru,[70] Portugal,[71] Republic of Korea,[72] Romania,[73] Samoa (on behalf of the Pacific small island developing States),[74] Sierra Leone,[75] Slovenia,[76] Solomon Islands,[77] South Africa,[78] Thailand,[79] Tonga,[80] Tuvalu,[81] the United Kingdom of Great Britain and Northern Ireland,[82] Viet Nam[83] and the Holy See.[84]

42. Belarus,[85] the Islamic Republic of Iran,[86] the Russian Federation[87] and the United States[88] have expressed reservations as to the inclusion of the subtopic of the protection of persons affected by sea-level rise, mainly citing a lack of State practice. Further, Czechia[89] has taken the view that the subtopic of the protection of persons affected by sea-level rise is the only one suitable for consideration by the Commission, while Germany[90] has noted that the issue is of particular urgency.

43. The Co-Chairs of the Study Group have continued to undertake a series of outreach efforts to explain the progress of the work of the Commission on the topic, and the proposed steps and methodology. Some of the events organized or attended by the Co-Chairs were used also to highlight the need for the Commission to receive as much as information as possible on relevant State practice.[91]

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[68] Papua New Guinea (A/C.6/73/SR.23, para. 33; A/C.6/74/SR.30, para. 18; A/C.6/75/SR.13, para. 39; and A/C.6/76/SR.22, para. 38).

[69] Philippines (A/C.6/74/SR.31, para. 9, and A/C.6/76/SR.23, para. 17).

[70] Peru (A/C.6/74/SR.31, para. 5).

[71] Portugal (A/C.6/74/SR.29, para. 108, and A/C.6/76/SR.21, para. 10).

[72] Republic of Korea (A/C.6/75/SR.13, para. 67).

[73] Romania (A/C.6/74/SR.28, para. 15, and A/C.6/76/SR.21, para. 20).

[74] Samoa (on behalf of the Pacific small island developing States) (A/C.6/76/SR.19, para. 71).

[75] Sierra Leone (A/C.6/76/SR.20, para. 29).

[76] Slovenia (A/C.6/74/SR.29, para. 146, and A/C.6/76/SR.21, para. 97).

[77] Solomon Islands (A/C.6/76/SR.22, para. 79).

[78] South Africa (A/C.6/73/SR.23, para. 15, and A/C.6/76/SR.20, para. 77).

[79] Thailand (A/C.6/73/SR.22, para. 18; A/C.6/74/SR.29, para. 99; and A/C.6/76/SR.22, para. 3).

[80] Tonga (A/C.6/73/SR.22, para. 63, and A/C.6/76/SR.22, para. 120).

[81] Tuvalu (A/C.6/76/SR.23, para. 5).

[82] United Kingdom (A/C.6/76/SR.21, para. 146).

[83] Viet Nam (*ibid.*, para. 85).

[84] Holy See (Observer) (A/C.6/76/SR.23, para. 28–29).

[85] Belarus (A/C.6/74/SR.28, para. 22, and A/C.6/76/SR.20, para. 63).

[86] Iran (Islamic Republic of) (A/C.6/76/SR.20, para. 38).

[87] Russian Federation (A/C.6/76/SR.22, para. 95).

[88] United States (A/C.6/73/SR.29, para. 27, and A/C.6/74/SR.30, para. 126).

[89] Czechia (https://www.un.org/en/ga/sixth/74/pdfs/statements/ilc/czech_republic_2.pdf; A/C.6/74/SR.28, para. 66).

[90] Germany (A/C.6/76/SR.21, para. 81).

[91] The following events, *inter alia*, were organized or attended by the Co-Chairs of the Study Group in 2020 and 2021: interactive dialogues with the Sixth Committee (28 October 2020 and 27 October 2021); side event organized by Fiji, Jamaica, Mauritius and Singapore during International Law Week 2020 (28 October 2020); panels during the annual meetings of the American Society of International Law on sea-level rise and the law of the sea (2020) and the protection of people in the context of climate change and disasters (2021); series of workshops organized by the Liechtenstein Institute on Self-Determination, at Princeton University, on sea-level rise and self-determination (2020 and 2021); webinar as part of a series on the theme “Rising sea levels: promoting climate justice through international law” on the role of the Commission, organized by the British Institute of International and Comparative Law (3 March 2021); virtual interactive discussion with the Alliance of Small Island States on the protection of persons affected by sea-level rise (22 April 2021); panel organized by the Asian Society of International Law on the theme “Rising sea levels and international law: Asia and beyond” (26 May 2021); briefing to European Union Working Party on Public International Law (3 June 2021); twenty-first meeting of the United Nations Open-ended Informal Consultative Process on Oceans and the Law

44. The Co-Chairs of the Study Group have also continued to publish papers related to the topic.[92]

IV. Scientific findings and prospects of sea-level rise relevant to the subtopics

45. In accordance with the 2018 syllabus and as stated the first issues paper,[93] the Commission will consider the present topic on the premise that sea-level rise is a fact, already proved by science. As stated in the syllabus, more than 70 States are or are likely to be directly affected by sea-level rise, a group which represents more than one third of the States of the international community. Indeed, this phenomenon is already having an increasing impact upon many essential aspects of life for coastal areas, for low-lying coastal States and small island States, and especially for their populations. Another quite large number of States is likely to be indirectly affected (for instance, by the displacement of people or the lack of access to resources). Sea-level rise has become a global phenomenon and thus creates global problems, with an impact on the international community as a whole.[94] The available scientific data, briefly outlined below, shows that the phenomenon is already affecting a large number of States, either directly or indirectly.

46. The Special Report of the Intergovernmental Panel on Climate Change on the Ocean and Cryosphere in a Changing Climate (2019) is of particular relevance to understand the impacts of sea-level rise on affected populations and States, and therefore merits further attention, in addition to the references made to it in the first issues paper.[95]

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of the Sea, on the theme “Sea-level rise and its impacts”, and side event entitled “Sea-level rise and implications for international law: a dialogue with the ILC Study Group” (15 June 2021); webinar organized by the University of Trento on the theme “Climate change and sea-level rise: legal consequences from the law of the sea, statehood and affected persons perspectives” (1 October 2021); expert meeting organized by Roma Tre University on the theme “Is international disaster law protecting us?” (4 and 5 October 2021); Freshfields Public International Law Seminar on the theme “Sea-level rise: what are the implications for international law?” (26 October 2021); informal discussion on the theme “Why is it urgent to register and publish maritime zone information in view of rising seas?”, organized by the Alliance of Small Island States, the Pacific Islands Forum and the Asian-African Legal Consultative Organization (29 October 2021); and side event during International Law Week 2021 entitled “Question-and-answer session with the Study Group on sea-level rise in relation to international law of the International Law Commission” (1 November 2021).

[92] Patrícia Galvão Teles, “Sea-level rise in relation to international law: a new topic for the International Law Commission”, in Marta Chantal Ribeiro, Fernando Loureiro Bastos and Tore Henriksen (eds.), *Global Challenges and the Law of the Sea* (Springer International, 2020); Patrícia Galvão Teles, Nilüfer Oral *et al*., remarks on “Addressing the law of the sea challenges of sea-level rise”, *American Society of International Law Proceedings*, vol. 114 (2020), pp. 385–396; Patrícia Galvão Teles, remarks on “Protecting people in the context of climate change and disasters”, *American Society of International Law Proceedings* vol. 115 (2021), pp. 158–161; and Patrícia Galvão Teles, Claire Duval and Victor 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”, *Yearbook of International Disaster Law*, vol. 3 (2020), pp. 213–237.

[93] A/73/10, annex B, paras. 1–4, and A/CN.4/740 and Corr.1, para. 28.

[94] A/73/10, annex B, para. 1.

[95] Intergovernmental Panel on Climate Change, *The Ocean and Cryosphere in a Changing Climate: A Special Report of the Intergovernmental Panel on Climate Change* (forthcoming); and A/CN.4/740 and Corr.1, paras. 29–32.

47. On the basis of the 2019 Special Report's summary for policymakers[96] and chapter 4, on sea-level rise and implications for low-lying islands, coasts and communities,[97] the following of the Panel's main findings deserve to be highlighted:

(a) human communities in close connection with coastal environments and small islands (including small island developing States) are particularly exposed to sea-level rise and extreme sea levels. Other communities further from the coast are also exposed to changes in the ocean such as those resulting from extreme weather events;

(b) the low-lying coastal zone – that is, at less than 10 metres above sea level – is currently home to 680 million people (nearly 10 per cent of the 2010 global population), a figure that is projected to reach more than 1 billion by 2050. Small island developing States are home to 65 million people;

(c) many low-lying cities (such as New York City and Shanghai and Rotterdam), large agricultural deltas (such as the Mekong, Ganges and Nile Deltas) and small islands (including small island developing States such as Fiji, Tuvalu, Kiribati and Maldives) are at risk in the context of sea-level rise;

(d) some island nations are likely to become inhabitable owing to climate-related ocean and cryosphere change;

(e) there are lower risks under low-emissions scenarios and higher risks under high-emissions scenarios;

(f) sea-level rise (and thus its impacts) is not globally uniform and varies regionally;

(g) the risks related to sea-level rise, such as erosion, land loss, flooding and salinization, affect access to water, food security, health and livelihoods, such as in the tourism and fisheries sectors;

(h) people with the highest exposure and vulnerability are often with the lowest capacity to respond, particularly in low-lying islands and coasts.

48. With regard to the observed impacts on people in coastal communities, the relevant findings by the Panel in its 2019 Special Report are as follows:[98]

(a) coastal communities are exposed to multiple climate-related hazards, including tropical cyclones, extreme sea levels and flooding, and marine heatwaves. A diversity of responses has been implemented worldwide, mostly after extreme events, but also some in anticipation of future sea level rise;

(b) coastal protection through hard measures, such as dykes, sea walls and surge barriers, is widespread in many coastal cities and deltas. Ecosystem-based and hybrid approaches combining ecosystems and built infrastructure are becoming more popular worldwide. Coastal retreat, which refers to the removal of human occupation of coastal areas, is also observed, but is generally restricted to small human communities or occurs to create coastal wetland habitat;

(c) where the community affected is small, or in the aftermath of a disaster, reducing risk by coastal planned relocations is worth considering if safe alternative

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[96] "Summary for policymakers", in Intergovernmental Panel on Climate Change, *The Ocean and Cryosphere in a Changing Climate* (see footnote 95 above).

[97] Michael Oppenheimer *et al.*, "Sea-level rise and implications for low-lying islands, coasts and communities", in Intergovernmental Panel on Climate Change, *The Ocean and Cryosphere in a Changing Climate* (see footnote 95 above).

[98] "Summary for policymakers", in Intergovernmental Panel on Climate Change, *The Ocean and Cryosphere in a Changing Climate* (see footnote 95 above), paras. A.9, A.9.2 and C.3.2.

localities are available. Such planned relocation can be socially, culturally, financially and politically constrained.

49. Regarding projected changes and risks for affected communities, the most relevant findings by the Panel in its 2019 Special Report may be summarized as follows:[99]

(a) increased mean and extreme sea level, alongside ocean warming and acidification, are projected to exacerbate risks for human communities in low-lying coastal areas;

(b) in urban atoll islands, risks are projected to be moderate to high even under a low-emissions scenario.

(c) under a high-emissions scenario, delta regions and resource-rich coastal cities are projected to experience moderate to high risk levels after 2050;

(d) many nations will face challenges to adapt, even with ambitious mitigation. Adaptive capacity continues to differ between as well as within communities and societies;

(e) responses to sea-level rise and associated risk reduction present society with profound governance challenges, resulting from the uncertainty about the magnitude and rate of future sea-level rise;

(f) intensifying cooperation and coordination among governing authorities can enable effective responses to sea-level rise;

(g) regional cooperation, including treaties and conventions, can support adaptation action. Institutional arrangements that provide strong multiscale linkages with local and indigenous communities benefit adaptation.

50. In a recent report, published in August 2021,[100] the Panel furthermore refers to the following important data concerning future projections of sea-level rise:

(a) the global mean sea level increased by 0.20 metres between 1901 and 2018. The average rate of sea-level rise was 1.3 millimetres per year between 1901 and 1971, increasing to 1.9 millimetres per year between 1971 and 2006, and further increasing to 3.7 millimetres per year between 2006 and 2018. Human influence was very likely the main driver of these increases since at least 1971;

(b) the global mean sea level has risen faster since 1900 than over any preceding century in at least the past 3,000 years. Heating of the climate system has caused global mean sea-level rise through ice loss on land and thermal expansion from ocean warming;

(c) global mean sea-level rise above the likely range – approaching 2 metres by 2100 and 5 metres by 2150 under a very high greenhouse gas emissions scenario – cannot be ruled out, owing to deep uncertainty in ice-sheet processes. In the longer term, sea level is expected to rise for centuries to millennia owing to continuing deep-ocean warming and ice-sheet melt and will remain elevated for thousands of years;

(d) it is very likely to virtually certain that regional mean relative sea-level rise will continue throughout the twenty-first century, except in a few regions with substantial geologic land uplift rates. Approximately two thirds of the global coastline has a projected regional relative sea-level rise within plus or minus 20 per cent of the global mean increase. Owing to relative sea-level rise, extreme sea-level events that

[99] *Ibid*., paras. B.9, B.9.2, C.1.4, C.3.3, C.4.1 and C.4.2.

[100] Intergovernmental Panel on Climate Change, *Climate Change 2021: The Physical Science Basis – Summary for Policymakers. Working Group I Contribution to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge, Cambridge University Press, 2021).

occurred once per century in the recent past are projected to occur at least annually at more than half of all tide gauge locations by 2100. Relative sea-level rise contributes to increases in the frequency and severity of coastal flooding in low-lying areas and to coastal erosion along most sandy coasts;

(e) in coastal cities, the combination of more frequent extreme sea-level events (owing to sea-level rise and storm surges) and extreme rainfall or river-flow events will make flooding more probable;

(f) if global net negative emissions of carbon dioxide were to be achieved and be sustained, the global increase in carbon dioxide-induced surface temperature would be gradually reversed, but other climate changes would continue in their current direction for decades to millennia. For instance, it would take several centuries to millennia for the global mean sea level to reverse course even under large net negative emissions of carbon dioxide.

51. The relationship between these scientifically proven facts and the topic included in the Commission's programme of work was set forth in the 2018 syllabus in defining the scope of the topic: the Commission will only deal with "the legal implications of sea-level rise", and not with "protection of environment, climate change *per se*, causation, responsibility and liability".[101] Notwithstanding these limitations, and as emphasized in the syllabus in outlining the method of work of the Commission on this topic, the Study Group's efforts "could contribute to the endeavours of the international community to respond to [the] issues"[102] provoked by sea-level rise, and the topic "reflects new developments in international law and pressing concerns of the international community as a whole".[103]

V. Consideration of the topic by the International Law Association

52. The topic of sea-level rise was initially examined by the Committee on Baselines under the International Law of the Sea of the International Law Association, whose report was considered at the Association's Sofia Conference in 2012.[104] The 2012 report recognized "that substantial territorial loss resulting from sea-level rise is an issue that extends beyond baselines and the law of the sea and encompasses consideration at a junction of several parts of international law".[105]

53. As a consequence, the International Law Association established the Committee on International Law and Sea-level Rise in 2012. That Committee decided to focus its work on three main issue areas: the law of the sea; forced migration and human rights; and issues of statehood and international security. An interim report of that Committee, which was presented at the 2016 Johannesburg Conference,[106] focused on issues regarding the law of the sea and migration/human rights. Another report was considered at the 2018 Sydney Conference, in which the Committee recommended that the International Law Association adopt a resolution containing two *de lege ferenda* proposals, on the law of the sea and migration/human rights. The report and

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[101] A/73/10, annex B, para. 14.
[102] *Ibid.*, para. 18.
[103] *Ibid.*, para. 25.
[104] Final report of the Committee on Baselines under the International Law of the Sea, in International Law Association, *Report of the Seventy-fifth Conference, Held in Sofia, August 2012*, vol. 75 (2012), p. 385, at p. 424.
[105] Resolution 1/2012, para. 7, *ibid.*, p. 17.
[106] Interim report of the Committee on International Law and Sea-Level Rise, in International Law Association, *Report of the Seventy-seventh Conference, Held in Johannesburg, August 2016*, vol. 77 (2017), p. 842.

resolution 5/2018 adopted at the Sydney Conference partially endorsed these proposals, while maintaining their general conceptual orientation.[107] Furthermore, the 2018 report proposed a set of principles with commentary comprising the Sydney Declaration of Principles on the Protection of Persons Displaced in the Context of Sea-level Rise.[108]

54. The Sydney Declaration of Principles, contained in resolution 6/2018, consists of nine principles based on and derived from relevant international legal provisions, principles and frameworks. The purpose of the Sydney Declaration is to provide guidance to States in averting, mitigating and addressing displacement of persons occurring in the context of sea-level rise.

55. The nine principles in the Sydney Declaration relate to:

(a) the primary duty and responsibility of States to protect and assist affected persons;

(b) the duty to respect the human rights of affected persons;

(c) the duty to take positive action;

(d) the duty to cooperate;

(e) evacuation of affected persons;

(f) planned relocations of affected persons;

(g) migration of affected persons;

(h) internal displacement of affected persons;

(i) cross-border displacement of affected persons.

56. With regard to issues of statehood and international legal personality in the case where a State loses its territory entirely or where the territory becomes permanently uninhabitable, in its report on the 2018 Sydney Conference of the International Law Association, the Committee on International Law and Sea-Level Rise took the view that the international law rules on the acquisition and loss of territory were clear and well established and that there had been numerous situations in the past where Governments had existed without physical control of territory – as for example in the cases of Governments in exile. The Committee was, however, conscious of the fact that there had been no precedents for the situation which might initially be faced by a small number of island States if sea-level rise reached existential proportions for them.[109]

57. While it is generally agreed that, as guidance and as a starting point, there should be a presumption of continuing statehood in cases where land territory was lost, the Committee on International Law and Sea-Level Rise is of the opinion that the exact modalities for the continuation of statehood, or perhaps some other form of international legal personality, as well as other solutions for the problem (e.g., merger with another State), are questions of great sensitivity that the Committee should approach with considerable caution.[110]

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[107] Final report of the Committee on International Law and Sea-Level Rise, in International Law Association, *Report of the Seventy-eighth Conference, Held in Sydney, 19–24 August 2018*, vol. 78 (2019), p. 866.

[108] Final report of the Committee on International Law and Sea-level Rise, *ibid*., pp. 897 *ff*., and resolution 6/2018, annex, *ibid*., p. 33.

[109] Final report of the Committee on International Law and Sea-Level Rise, in International Law Association, *Report of the Seventy-eighth Conference* (see footnote 107 above), p. 25.

[110] *Ibid*., pp. 25–26.

58. In resolution 6/2018,[111] the Conference recommended that the Executive Council extend the mandate of the Committee on International Law and Sea-level Rise in order to enable it to continue its work on the remaining aspects of its mandate, namely the question of statehood and the rights of affected populations, and other aspects of international law including issues related to the law of the sea and territory. The Executive Council extended the Committee's mandate until November 2022.

59. The Committee is due to present a further report at the International Law Association Conference in Lisbon in June 2022. It is possible that the mandate of the Committee may be extended further.

Part One: General

I. Scope and outcome of the topic

60. The present topic concerns the issue of "Sea-level rise in relation to international law". In accordance with the 2018 syllabus, the Study Group will examine the possible legal effects or implications of sea-level rise in three main areas: (a) law of the sea; (b) statehood; and (c) protection of persons affected by sea-level rise.[112] The syllabus also indicates that "[t]hese three issues reflect the legal implications of sea-level rise for the constituent elements of the State (territory, population and Government/statehood) and are thus interconnected and should be examined together".[113]

61. The 2018 syllabus emphasizes that the topic "does not intend to provide a comprehensive and exhaustive scoping of the application of international law to the questions raised by sea-level rise, but to outline some key issues" in the above-mentioned three areas.[114] The syllabus is also clear as to the fact that these "three areas to be examined should be analysed only within the context of sea-level rise notwithstanding other causal factors that may lead to similar consequences".[115] Another clear limit set forth by the syllabus is that "[t]his topic will not propose modifications to existing international law".[116] At the same time, the syllabus does not exclude that, in relation to the topic, "[o]ther questions may arise in the future requiring analysis".[117]

A. Issues to be considered by the Commission

62. As already mentioned, the Study Group will examine the possible legal effects or implications of sea-level rise in three main areas: (a) law of the sea; (b) statehood; and (c) protection of persons affected by sea-level rise.

63. The law of the sea was the subject of the first issues paper,[118] which was presented by the Co-Chairs in 2020 and discussed by the Study Group, the Commission and the Sixth Committee in 2021. A summary of the discussions of the Commission can be found in chapter IX of the 2021 Commission's annual report[119]

[111] Resolution 6/2018, in International Law Association, *Report of the Seventy-eighth Conference* (see footnote 108 above), p. 33.

[112] A/73/10, annex B, para. 12.

[113] *Ibid.*, para. 13.

[114] *Ibid.*, para. 14.

[115] *Ibid*.

[116] *Ibid*.

[117] *Ibid*.

[118] A/CN.4/740, Corr.1 and Add.1.

[119] A/76/10.

and the plenary debate on the topic in the Sixth Committee is summarized in the relevant summary records.[120] Work on this subtopic will continue at a later stage.

64. On statehood, the issues to be examined are listed in the 2018 syllabus as follows: (a) analysis of the possible legal effects on the continuity or loss of statehood in cases where the territory of island States is completely covered by the sea or becomes uninhabitable; (b) legal assessment regarding the reinforcement of islands with barriers or the erection of artificial islands as a means to preserve the statehood of island States against the risk that their land territory might be completely covered by the sea or become uninhabitable; (c) analysis of the legal fiction according to which, considering the freezing of baselines and the respect of the boundaries established by treaties, judicial judgments or arbitral awards, the continuity of statehood of the island States could be admitted due to the maritime territory established as a result of territories under their sovereignty before the latter become completely covered by the sea or uninhabitable; (d) assessment of the possible legal effects regarding the transfer – either with or without transfer of sovereignty – of a strip or portion of territory of a third State in favour of an island State whose terrestrial territory is at risk of becoming completely covered by the sea or uninhabitable, in order to maintain its statehood or any form of international legal personality; and (e) analysis of the possible legal effects of a merger between an island developing State whose land territory is at risk of becoming completely covered by the sea or uninhabitable and another State, or of the creation of a federation or association between them, regarding the maintenance of statehood or of any form of international legal personality of the island State.[121]

65. On the protection of persons affected by sea-level rise, the issues to be examined are listed in the 2018 syllabus as follows: (a) the extent to which the duty of States to protect the human rights of individuals under their jurisdiction applies to consequences related to sea-level rise; (b) whether the principle of international cooperation may be applied to help States cope with the adverse effects of sea-level rise on their population; (c) whether there are any international legal principles applicable to measures to be taken by States to help their population to remain *in situ*, despite rising sea levels; (d) whether there are any international legal principles applicable to the evacuation, relocation and migration abroad of persons owing to the adverse effects of sea-level rise; and (e) possible principles applicable to the protection of the human rights of persons who are internally displaced or who migrate owing to the adverse effects of sea-level rise.[122]

B. Final outcome

66. According to the 2018 syllabus, the Study Group will perform "a mapping exercise of the legal questions raised by sea-level rise and its interrelated issues … This effort could contribute to the endeavours of the international community to respond to these issues and to assist States in developing practicable solutions in order to respond effectively to the issues prompted by sea-level rise."[123]

67. The syllabus indicates that the final outcome will be a final report of the Study Group, accompanied by a set of conclusions on its work. After the presentation of the

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[120] A/C.6/76/SR.17 to A/C.6/76/SR.24. The full texts of the statements are available from the Sixth Committee's web page, at https://www.un.org/en/ga/sixth/.

[121] A/73/10, annex B, para. 16.

[122] *Ibid.*, para. 17.

[123] *Ibid.*, para. 18.

final report, “it could be considered whether and how to pursue further the development of the topic or parts of it within the Commission or other [forums]”.[124]

II. Methodological approach

68. According to the 2018 syllabus, the Study Group will analyse the existing international law, including treaty and customary international law, in accordance with the mandate of the Commission, which is to undertake progressive development of international law and its codification.[125] The work of the Study Group will be based, using a systemic and integrative approach, on the practice of States, international treaties, other international instruments, judicial decisions of international and national courts and tribunals, and the analyses of scholars.[126]

69. Other methodological and organizational matters were addressed in chapter X of the 2019 annual report of the Commission[127] and in chapter IX of its 2021 annual report.[128]

70. State practice is essential for the work of the Commission, including for the work of the Study Group on the present topic. The Co-Chairs would like to express their deep gratitude to those States, international organizations and other relevant bodies that have responded to the requests by the Commission, in chapter III of the 2019 and 2021 annual reports of the Commission, for such practice with regard to the subtopics covered in the present issues paper.[129] The Co-Chairs would also like to express their gratitude to the Secretariat for its assistance in researching State practice and the practice of relevant international organizations and bodies.

71. The Co-Chairs encourage States, international organizations and other relevant bodies to continue engaging with the Study Group and the Commission on a formal and informal basis, in order to share their practices and experience with regard to sea-level rise in relation to international law.

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[124] *Ibid.*, para. 26.
[125] *Ibid.*, para. 18.
[126] *Ibid.*, para. 20.
[127] A/74/10, paras. 263–273.
[128] A/76/10, paras. 245–246.
[129] A/74/10, paras. 31–33, and A/76/10, para. 26. Submissions have been received from Belgium (23 December 2021), Fiji (on behalf of the members of the Pacific Islands Forum, namely Australia, Fiji, Kiribati, Marshall Islands, Micronesia (Federated States of), Nauru, New Zealand, Palau, Papua New Guinea, Samoa, Solomon Islands, Tonga, Tuvalu and Vanuatu) (31 December 2021), Liechtenstein (12 October 2021), Morocco (22 December 2021), the Russian Federation (17 December 2020) and Tuvalu (on behalf of the members of the Pacific Islands Forum) (30 December 2019), and from the Economic Commission for Latin America and the Caribbean (ECLAC) (3 January 2022), the Food and Agriculture Organization of the United Nations (FAO) (30 December 2021), the International Maritime Organization (IMO) (11 October 2021), the United Nations Environment Programme (UNEP) (6 December 2021) and the United Nations Framework Convention on Climate Change (30 December 2021). The submissions are available at https://legal.un.org/ilc/guide/8_9.shtml#govcoms.

Part Two

Reflections on statehood

I. Introduction

72. As highlighted by the delegation of Viet Nam in its statement delivered in the Sixth Committee of the General Assembly in October 2018, sea-level rise is a global phenomenon and thus creates global problems, impacting the international community as a whole.[130]

73. However, sea-level rise is not a uniform phenomenon, since it varies from one region of the world to another;[131] it is, for example, more serious in the Western Pacific. Low-lying coastal States and, in particular, small island developing States, which are home to about 65 million people, suffer directly from the effects of the phenomenon. As Samoa and Seychelles pointed out in the Sixth Committee, small island developing States face the risk of erosion, flooding and salinization, with a notable impact on the storage of drinking water and on the economic activities of the population.[132]

74. Similarly, the General Assembly has noted that sea-level rise poses a serious and real threat for the survival of small island developing States,[133] as evidenced by the cases of Kiribati, Maldives, Marshall Islands, Nauru, Palau and Tuvalu, whose land surface area may become covered by the sea or become uninhabitable.[134]

II. Criteria for the creation of a State

A. Under the 1933 Convention on the Rights and Duties of States

75. While there is no generally accepted notion of "State", the reference is usually the requirements or criteria that a State has to meet to be considered a subject ("person") of international law in accordance with article 1 of the 1933 Convention on the Rights and Duties of States: (*a*) permanent population; (*b*) defined territory; (*c*) government; and (*d*) capacity to enter into relations with the other States. In this issues paper, we take these requirements into consideration, except that, given the existence of international organizations and other entities with international legal personality, we prefer to refer to the fourth requirement as the capacity to enter into relations with the other States and other subjects of international law.

76. The Convention on the Rights and Duties of States is an outcome of the Seventh International Conference of American States, held in the Uruguayan capital in December 1933, and where the issue on which the participants focused their attention was the manner in which the principle of non-intervention was to be addressed, at a time when brand new "good neighbour" policy towards Latin America of President of the United States Franklin D. Roosevelt was being launched, and following a series

[130] Viet Nam (A/C.6/73/SR.30, para. 48).

[131] Submission of FAO.

[132] Samoa (A/C.6/73/SR.23, para. 65) and Seychelles (A/C.6/73/SR.24, para. 11).

[133] General Assembly resolution 72/217 of 20 December 2017, eleventh preambular para.

[134] Jane McAdam *et al.*, *International Law and Sea-Level Rise: Forced Migration and Human Rights* (Lysaker, Fridtjof Nansen Institute, 2016), pp. 7–9; Mariano J. Aznar Gómez, "El Estado sin territorio: La desaparición del territorio debido al cambio climático", *Revista Electrónica de Estudios Internacionales*, No. 26 (2013), pp. 6–7; and Susin Park, "El cambio climático y el riesgo de apatridia: La situación de los Estados insulares bajos" (Geneva, Office of the United Nations High Commissioner for Refugees (UNHCR), 2011), p. 11.

of prior experiences of intervention by the United States in the region in the nineteenth century and at the beginning of the twentieth century.[135] An important detail that emerges from the review of the Conference proceedings is that the content of article 1 of the Convention was not discussed more extensively, since it reflected principles common to the American States and was adopted unanimously by the delegations of the States represented at the Conference.[136]

1. Permanent population

77. Regardless of the size of its population, a State must have a permanent population that has settled in its territory. Such population comprises both nationals and aliens, although the majority of the people in a State are generally nationals of that State.

78. Nationality, as the legal bond between those individuals and the State, is determined in accordance with the domestic law of the State, although in some cases nationality issues may be the subject of treaties between the States concerned.

79. Nationality can be original – based on the operation of *jus soli* or *jus sanguinis*, depending on the stipulations of the law of each State – or supervening – as per the criteria and requirements contemplated by the domestic law of each State, or by treaties on the subject that may have been concluded between some States.[137]

80. Situations may arise where there is a concurrence of more than one original nationality in respect of the same individual if, for example, the individual acquires the nationality of a State *jus soli* and, at the same time, the nationality of another State *jus sanguinis*; such conflict may also arise when a person acquires the nationality of a State, as a supervening nationality, without losing or having to renounce his or her original nationality.

81. The State exercises personal jurisdiction over its nationals. As indicated in paragraph 79 *supra*, it is the State's domestic law that determines both who are its nationals and the manner in which that nationality is acquired – original or supervening. The State has exclusive jurisdiction in this domain, although the opposability of the nationality of a State against third States may depend on the ability to show an effective bond between the person and the State.

82. In that regard, with respect to diplomatic protection, the International Court of Justice, in the *Nottebohm* case, distinguished between the effects of having acquired nationality inside the State that conferred it, from the effects that said acquisition may have in terms of its opposability against another State.[138]

83. The personal jurisdiction of the State can be exercised over both nationals who are inside its territory, who are also, of course, subject to the territorial jurisdiction of

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[135] Final Act of the Seventh International Conference of American States (Montevideo, 19 December 1933); and Report of the Second Subcommittee on Rights and Duties of States to the Second Commission of the Seventh International Conference of American States, *Actas y Antecedentes de la Segunda Comisión* (Montevideo, December 1933), pp. 177–178.

[136] Final Act of the Seventh International Conference of American States (see footnote 135 above), p. 82; Report of the Second Subcommittee on Rights and Duties of States to the Second Commission of the Seventh International Conference of American States, *Actas y Antecedentes de la Segunda Comisión* (Montevideo, December 1933); and Record of the Third Plenary Session of the Seventh International Conference of American States, *ibid.*, p. 57.

[137] Paras. (1)–(3) of the commentary to article 4 of the draft articles on diplomatic protection, *Yearbook of the International Law Commission*, *2006*, vol. II (Part Two), para. 50.

[138] *Nottebohm Case (second phase), Judgment of April 6th, 1955: I.C.J. Reports 1955*, p. 4, at pp. 21–24.

that State,[139] since it may restrict the possibility of holding certain public posts to its nationals, or even only to those with original nationality, and nationals who are outside the territory. Concerning the latter, the territorial State undoubtedly also has jurisdiction, although the State of nationality carries out various actions in their respect, including those relating to civil registration, forwarding of documents, consular assistance and protection, and diplomatic protection.

84. It is also important to consider cases, such as that of the European Union, where nationals of each member State – an issue determined under the domestic law of each State – also have the status of citizens of the European Union. As a consequence of that status, they enjoy, among other rights, the right to move and reside freely in any of the member States; the right to vote and to stand as candidates in elections to the European Parliament and in municipal elections in their member State of residence; and the right to enjoy, in the territory of a third country in which the member State of which they are nationals is not represented, the protection of the diplomatic and consular authorities of any member State on the same conditions as the nationals of that State.[140]

85. In the cases of persons with more than one nationality, according to the 2006 articles on diplomatic protection adopted by the International Law Commission, any State of which a dual or multiple national is a national may exercise diplomatic protection in respect of that national against a State of which that person is not a national, with the particularity that, in addition, two or more States of nationality may jointly exercise diplomatic protection in respect of such person.[141] At the same time, a State of nationality may not exercise diplomatic protection in respect of a person against a State of which that person is also a national unless the nationality of the former State is predominant, both at the date of injury and at the date of the official presentation of the claim.[142] Examples of this can be found in the cases of Raphael Canevaro,[143] Florence Strunsky Mergé[144] and of Iran-United States dual nationals.[145]

86. Under article 15 of the Universal Declaration of Human Rights of 1948, everyone has the right to a nationality.[146] It is therefore worthwhile highlighting the efforts of the international community to avoid situations of statelessness through the adoption of various provisions, such as article 24 of the 1966 International Covenant on Civil and Political Rights,[147] paragraph 3 of which stipulates that every child has

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[139] *Yearbook of the International Law Commission*, 1997, vol. I, p. 12, para. 45 (United Nations publication, 2002); *Yearbook of International Law Commission, 1952*, vol. II, p.7, para. 2.

[140] See Consolidated version of the Treaty on European Union, Official Journal of the European Union (2016/C 202/01), art. 35; Consolidated version of the Treaty on the Functioning of the European Union, Official Journal of the European Union (2016/C 202/01), arts. 20–24; and Charter of Fundamental Rights of the European Union, Official Journal of the European Union (2016/C 202/02), arts. 44–46. Available at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:C:2016:202:FULL&from=ES (accessed on 25 February 2022).

[141] Article 6 of the articles on diplomatic protection, *Yearbook of the International Law Commission, 2006*, vol. II (Part Two), para. 49; and General Assembly resolution 62/67 of 6 December 2007.

[142] Article 7 of the articles on diplomatic protection, *Yearbook of the International Law Commission, 2006*, vol. II (Part Two), para. 49.

[143] *Canevaro Case (Italy v. Peru), Award of 3 May 1912*, Arbitral Tribunal, Permanent Court of Arbitration, United Nations, *Reports of International Arbitral Awards*, vol. XI, pp. 397–410.

[144] *Mergé Case, Decision No. 55 of 10 June 1955*, Italian-United States Conciliation Commission, United Nations, *Reports of International Arbitral Awards*, vol. XIV, pp. 236–248.

[145] *Islamic Republic of Iran v. United States of America*, Iran-United States Claims Tribunal, Decision, Case No. A/18, 6 April 1984. Available at https://iusct.com/cases/a18-decision-no-32-6-april-1984/ (accessed on 25 February 2022).

[146] Universal Declaration of Human Rights, General Assembly resolution 217 A (III), of 10 December 1948.

[147] International Covenant on Civil and Political Rights (New York, 16 December 1966) United Nations, *Treaty Series*, vol. 999, No. 14668, p. 171.

the right to acquire a nationality, and instruments on the subject, such as the 1961 Convention on the Reduction of Statelessness,[148] which contemplates, for example, the granting of nationality by any contracting State to a person who would otherwise be stateless, including situations of foundlings born in the territory of a State, who, unless proven otherwise, are children of parents possessing the nationality of the said State, as well as for those not born in the territory of a contracting State if the nationality of one of his or her parents at the time of the person's birth was that of that State. At the same time, a national of a contracting State who seeks naturalization in a foreign country shall not lose his or her nationality, unless he or she acquires or has been accorded assurance of acquiring the nationality of that foreign country, and a contracting State shall not deprive a person of his or her nationality if such deprivation would render him or her stateless.

87. Lastly, the articles on diplomatic protection adopted by the Commission explicitly contemplate the possibility of a State exercising diplomatic protection in respect of a stateless person or of a person who that State recognizes as a refugee, in accordance with internationally accepted standards, if that person, at the date of the injury and at the date of the official presentation of the claim, is lawfully and habitually resident in that State.[149]

2. Defined territory

88. Territory is the concrete physical scope – whatever its size – over which the State exercises its sovereignty and jurisdiction, and comprises continental and insular areas, the sea adjacent to its coast, including its internal waters, generated using straight baselines, its archipelagic waters, if any, and its territorial sea, as well as the airspace over them.

89. The territory can be vast, small or even narrow; it can also be continuous or discontinuous, in the sense that there is no geographic contiguousness between the parts of the territory of a State, as is the case with the states of Alaska and Hawaii in the United States or is completely surrounded by the territory of another State, as is the case with Lesotho, San Marino and the Vatican City.

90. The territory or the boundaries of a State may be the subject of a dispute with other States, because a State does not need to have defined boundaries for it to be considered to exist.[150] Similarly, the territory of a State cannot be lost or disappear as a result of its total or partial occupation during a conflict. In that connection, article 42 of the Regulations concerning the Laws and Customs of War on Land, annexed to the Convention respecting the Laws and Customs of War on Land, of 1907, states that territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised.[151]

91. The State also has rights of sovereignty and jurisdiction over maritime spaces, such as the exclusive economic zone and the continental shelf, as defined in the 1982

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[148] Convention on the Reduction of Statelessness (New York, 30 August 1961), United Nations, *Treaty Series*, vol. 989, No. 14458, p. 175.

[149] Article 7 of the articles on diplomatic protection, *Yearbook of the International Law Commission, 2006*, vol. II (Part Two), para. 49.

[150] Crawford, *The Creation of States* (see footnote 29 above), pp. 46–47 and 48–52; and Juan José Ruda Santolaria, *Los Sujetos de Derecho Internacional: El Caso de la Iglesia Católica y del Estado de la Ciudad del Vaticano* (Lima, Fondo Editorial de la Pontificia Universidad Católica del Perú, 1995), pp. 38–39.

[151] Convention (IV) respecting the Laws and Customs of War on Land, and its annex, Regulations concerning the Laws and Customs of War on Land (The Hague, 18 October 1907), James Brown Scott (ed.), *The Hague Conventions and Declarations of 1899 and 1907*, 3rd ed. (New York, Oxford University Press, 1918), p. 100.

United Nations Convention on the Law of the Sea, several norms of which are also part of customary international law.[152]

92. The State also exercises extraterritorial jurisdiction in respect of vessels or aircraft flying its flag that are registered or matriculated in the State, even when they are outside the geographical spaces under its sovereignty or in which it exercises sovereign rights and under its jurisdiction, as is the case on the high seas.[153]

93. The State also has jurisdiction in respect of aliens in its territory. The territorial State has two fundamental attributes: fullness and exclusivity, both pursuant to the principle of equality among States and the principle of non-intervention, in relation specifically to the exercise of territorial jurisdiction by the State. The State has, in its territory, full and exclusive jurisdiction in the executive, legislative and legal spheres, without third States being able to take any type of action, unless they have the authorization or consent of the relevant territorial State, or unless such action is backed by international law. This does not exclude the possibility of condominium over a defined territory based on treaties between the States concerned, as occurred, for example, between France and Spain in connection with Pheasant Island, also called Conference Island, which sits on the Bidasoa river and the administration of which switches between the two parties for six-month periods.[154]

94. One issue to take into consideration is that the State can exercise jurisdiction in geographic areas or spaces that are not strictly part of its territory, as illustrated by the case of colonies that are under the jurisdiction and administration of colonial powers, without that implying that they are part of the territories of such powers.[155]

95. Lastly, the State can authorize the existence of military bases of third States in its territory. This often occurs pursuant to a treaty, which spells out the conditions for the operation of such bases, the time of the concession, the possible amount of economic compensation or leasing for this concept, and the legal regime to which the military and civilian personnel – national or foreign – would be subjected in the spaces comprising such bases.

3. Government

96. Government refers to the political organization that governs the State and performs executive, legislative and judicial functions. In that regard, it is vital for the State to have its own legal order, under which it organizes itself; the legal order governs both nationals and aliens in the territory of the State, over whom the courts of the State also have jurisdiction.

97. The form that the political organization takes will depend on the characteristics and reality of each State, to the extent that said form could change following a decision taken freely by the State, without that affecting its international legal personality. Accordingly, a State may be a monarchy or a republic, or have a unitary or complex structure, as is the case with a federation, without any limitation as to its being able to adopt another form of political organization. At the same time, the State

[152] See United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982), United Nations, *Treaty Series*, vol. 1833, No. 31363, p. 3, arts. 55–56 and 76–77.

[153] See United Nations Convention on the Law of the Sea, art. 91.

[154] Treaty delimiting the frontier from the mouth of the Bidasoa to the point where the Department of Basses-Pyrenees adjoins Aragon and Navarra (France and Spain) (Bayonne, 2 December 1856), United Nations, *Treaty Series*, vol. 1142, No. 838, p. 317; and Convención entre España y Francia, reglamentando la jurisdicción en la Isla de los Faisanes (Bayonne, 27 March 1901), *Gaceta de Madrid*, No. 290, 17 October 1902, p. 201.

[155] Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, General Assembly resolution 2625 (XXV) of 24 October 1970, annex.

retains its international personality despite changes in its name over time, as can be seen in the cases of Benin, the Plurinational State of Bolivia, Burkina Faso, Cambodia and Eswatini.[156]

98. The existence of a government which also exercises real control over the territory and the population is especially significant in considering whether a State exists as such, and consequently, to recognize it. Nonetheless, in some circumstances, such as when a new State is created through the exercise of the right to self-determination of its population, there may be a case where the Government's actions are backed or supported by other friendly States and international organizations that make it possible for the State to function and to perform its principal functions in respect of the population living in its territory. In such situations, by the very singular nature of the circumstances, the existence of the State is not called into question, even though the Government is not able to perform or accomplish all its tasks by itself. However, the actions taken in such cases by other States and international organizations – such as the United Nations – is temporary in nature and do not undermine the sovereignty and integrity of the State nor the ability of its Government to make its own decisions.[157]

99. It should also be noted that while in some treaties reference is made to Governments when referring to the parties, the subjects of international law involved in such instruments are States, whose political structure comprises Governments, which act on behalf of the State and make binding undertakings on its behalf at the international level.

100. In addition, it is very important to point out that, in exceptional situations where the territory of a State has been occupied by a third power, the representation of said State may fall on Governments in exile.[158] As shown below, such a situation occurred in some States during the First and Second World Wars, as well as in the cases of Cambodia – at the time referred to as Democratic Kampuchea – following the Vietnamese invasion of December 1978 and the establishment of a Government under the control of the occupying forces in January 1979; and of Kuwait, between 1990 and 1991, following the invasion and annexation by Iraq.[159]

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[156] Crawford, *The Creation of States* (see footnote 29 above), pp. 679–680.

[157] *Ibid.*, pp. 55–58.

[158] Crawford, *The Creation of States* (see footnote 29 above), pp. 97–99 and 106–107; Thomas D. Grant, "Defining statehood: the Montevideo Convention and its discontents", *Columbia Journal of Transnational Law*, vol. 37, No. 2 (1999), pp. 403–457, at p. 435; Jenny Grote Stoutenburg, "When do States disappear? Thresholds of effective statehood and the continued recognition of 'deterritorialized' island States", in Michael B. Gerrard and Gregory E. Wannier (eds.), *Threatened Island Nations: Legal Implications of Rising Seas and a Changing Climate* (Cambridge, Cambridge University Press, 2013), pp. 59 and 72–76; Park, "El cambio climático y el riesgo de apatridia" (see footnote 134 above), p. 11; and Stefan Talmon, "Who is a legitimate government in exile? Towards normative criteria for governmental legitimacy in international law", in Guy S. Goodwin-Gill and Stefan Talmon (eds.), *The Reality of International Law. Essays in Honour of Ian Brownlie* (Oxford, Oxford University Press, 1999), pp. 499–537.

[159] Crawford, *The Creation of States* (see footnote 29 above), pp. 97–99; Grote Stoutenburg, "When do States disappear?" (see footnote 158 above), pp. 59, 69–70 and 74–75; John Hiden, Vahur Made and David J. Smith (eds.), *The Baltic Question during the Cold War* (New York, Routledge, 2008); Lauri Mälksoo, "Professor Uluots, the Estonian Government in exile and the continuity of the Republic of Estonia in international law", *Nordic Journal of International Law*, vol. 69, No. 3 (March 2000), pp. 289–316; Park, "El cambio climático y el riesgo de apatridia" (see footnote 134 above), pp. 11–13; and Romain Yakemtchouk, "Les Républiques baltes en droit international. Echec d'une annexion opérée en violation du droit des gens", *Annuaire francais de droit international*, vol. 37 (1991), pp. 259–289.

4. Capacity to enter into relations with the other States and other subjects of international law

101. The capacity of the State to enter into relations with the other States and other subjects of international law is linked to its sovereignty, the external expression of which is independence. The State is independent and not subordinated to the power of any other power; it governs itself and is subjected directly to international law. In that sense, the State's capacity is only limited by the sovereignty of the other States and by respect for the rules and principles of international law.

102. The State has its own international legal personality in that it is the direct possessor of rights and obligations rooted in international law. As a consequence of their sovereign and independent character, States are legally equal among themselves and no possibility for acts that entail intervention or interference in their internal affairs is allowed.

103. The capacity of the State to enter into relations with the other subjects of international law is embodied in, among other things, the active and passive right of legation, the foundation of diplomatic relations; the active and passive right of consulate, membership in international organizations; conclusion of treaties; international responsibility for wrongful acts committed by the State and its agents; enjoyment of immunities and privileges in accordance with international law; and dispute settlement through political or diplomatic means, or through jurisdictional means, as dictated by the international order. At the same time, the State has the capacity to exercise self-defence, in accordance with international law, and to preserve its integrity and independence, including against other States that do not recognize it.

B. Under the 1936 resolution of the Institut de Droit International

104. Article 1 of the resolution concerning the recognition of new States and new Governments, adopted by the Institut de Droit International in April 1936, states as follows:

> "The recognition of a new State is the free act by which one or more States acknowledge the existence on a definite territory of a human society politically organized, independent of any other existing State, and capable of observing the obligations of international law, and by which they manifest therefore their intention to consider it a member of the international Community.
>
> Recognition has a declaratory effect;
>
> The existence of a new State with all the juridical effects which are attached to that existence, is not affected by the refusal of recognition by one or more States."[160]

105. As can be seen, there are indisputable coincidences with the requirements contained in article 1 of the Convention on the Rights and Duties of States, in that it stipulates that the new State comprises a politically organized society existing in a defined territory, and that the State is independent of any other existing State and is capable of observing the obligations of international law. An important detail to noted is that it refers to a new State, which at the time of its creation or establishment has to meet criteria or requirements to achieve that status. It is also worth noting that the recognition of a new State is declaratory in nature, and its existence, with all the

[160] Institut de Droit International, "Resolutions concerning the recognition of new States and new Governments" (Brussels, April 1936), *The American Journal of International Law*, vol. 30, No. 4, Supplement: Official Documents (October 1936), pp. 185–187.

juridical effects attached thereto, is not affected by the refusal of recognition by one or more States.

C. Under the 1949 draft Declaration on Rights and Duties of States

106. In its resolution 375 (IV) of 6 December 1949, the General Assembly took note of the draft Declaration on Rights and Duties of States, developed by the International Law Commission at its first session.[161] While not containing a notion of State or describing per se the criteria or requirements for the establishment of a State, the draft Declaration incorporates, in its first two articles, elements which undoubtedly reflect the nature of the State. The articles stipulate as follows:

> "*Article 1*
>
> Every State has the right to independence and hence to exercise freely, without dictation by any other State, all its legal powers, including the choice of its own form of government.
>
> *Article 2*
>
> Every State has the right to exercise jurisdiction over its territory and over all persons and things therein, subject to the immunities recognized by international law."

107. In that connection, it refers to the right of any State to exercise jurisdiction over its territory and over all persons and things found therein, which encompasses the population and the living and non-living resources of the territory. It also refers to the right to independence, hence the right of every State to freely exercise its legal powers and to elect its form of government, without being subjected to the will of any other State, but at the same time without prejudice to the immunities recognized by international law.

D. Under the 1956 draft articles on the law of treaties

108. The draft articles on the law of treaties, presented in 1956 to the International Law Commission by Special Rapporteur Sir Gerald Fitzmaurice, included a draft article 3, entitled "Certain related definitions", which stated as follows:

> For the purposes of the present Code:
>
> (a) In addition to the case of entities recognized as being States on special grounds, the term "State":
>
> (i) Means an entity consisting of a people inhabiting a defined territory, under an organized system of government, and having the capacity to enter into international relations binding the entity as such, either directly or through some other State; but this is without prejudice to the question of the methods by, or channel through which a treaty on behalf [of] any given State must be negotiated – depending on its status and international affiliations;
>
> (ii) Includes the government of the State …."[162]

109. Despite the fact that this definition was ultimately not included in the work of the Commission on the topic or in the 1969 Vienna Convention on the Law of Treaties

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[161] *Yearbook of the International Law Commission 1949*, p. 287.

[162] *Yearbook of the International Law Commission, 1956*, vol. II, document A/CN.4/101, para. 10, at pp. 107–108.

[163] and that, considering the time when it was introduced, it also refers to "protected States", it contains some elements that accord with article 1 of the Convention on the Rights and Duties of States. In that connection, it is worth highlighting the reference to an entity consisting of a people inhabiting a defined territory, under an organized system of government, and having the capacity to enter into international relations binding the entity as such, as well as that it is explicitly mentioned, in conjunction with the point made above, that that includes the Government of the State.

E. In the opinions of the Arbitration Commission of the 1991 International Conference on the Former Yugoslavia

110. In its opinion No. 1 of 29 November 1991, in response to the letter from the Chair of the International Conference on the Former Yugoslavia, Lord Carrington, dated 20 November 1991, the Arbitration Commission of the Conference (Badinter Commission) noted that "the State is commonly defined as a community which consists of a territory and a population subject to an organized political authority; that such a State is characterized by sovereignty".[164]

111. As can be seen, the definition that the Badinter Commission used as a reference is fully consonant with the provisions of article 1 of the Convention on the Rights and Duties of States, in that it conceives the State as a community with a territory and a population, subjected to an organized political authority, characterized by sovereignty.

III. Some representative examples of actions taken by States and other subjects of international law

112. To date, there has not been a situation of a State whose land territory has been completely covered by the sea or that has become inhabitable for its population. Nonetheless, there have historically been cases, such as those of the Holy See and the Sovereign Order of Malta, where entities that exercised jurisdiction over defined territories – the Pontifical States and the Island of Malta, respectively – were deprived of said territories, but nonetheless maintained their international legal personality. At the same time, there have also been different situations where, owing to an exceptional internal circumstance or total or partial occupation of the territory of the State by a foreign power, a Government was set up in exile in the territory of a third State on behalf of the State affected by such exceptional circumstance or by the foreign occupation of its territory.

A. Holy See[165]

113. The Catholic Church is a religious confession whose faithfuls around the world recognize the spiritual authority of the Pope as the head of the Church. The Catholic

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[163] Vienna Convention on the Law of Treaties (Vienna, 23 May 1969), United Nations, *Treaty Series*, vol. 1155, I-18232, p. 331.

[164] Maurizio Ragazzi, "Conference on Yugoslavia Arbitration Commission: opinions on questions arising from the dissolution of Yugoslavia", *International Legal Materials*, vol. 31, No. 6 (November 1992), pp. 1488–1526, at p. 1495.

[165] This section is based on the following works by the Co-Chair: Ruda Santolaria, *Los Sujetos de Derecho Internacional* (see footnote 150 above); Juan José Ruda Santolaria, "La Iglesia Católica y el Estado Vaticano como Sujetos de Derecho Internacional", *Archivum Historiae Pontificiae – Pontificia Universidad Gregoriana*, No. 35 (1997), pp. 297–302; Juan José Ruda Santolaria,

Church therefore has a universal dimension and has a structure of government and international representation, comprising the Holy See or the Apostolic See, which in turn includes the Pope and the Roman Curia.[166] The Roman Curia includes a dicastery, the Secretariat of State, whose Second Section is responsible for relations with the States.[167]

114. The Catholic Church is autonomous and independent in relation to any other power or authority in the world. It therefore has its own legal order – canon law – which stems from its organs and is applicable directly to its faithful on matters that it addresses.

115. For various centuries and until 1870, the Pope served as both head of the Catholic Church and Head of State of the Pontifical States, which covered approximately one third of the Italian peninsula, whose capital was Rome. At that time, the Holy See exercised the active and passive right of legation, as part of a practice that dates back to the Byzantine Empire, when the Holy See accredited representatives to States, which in turn started accrediting permanent diplomatic representatives to the Holy See at the end of the fifteenth century. In that connection, the Regulation Concerning the Relative Ranks of Diplomatic Agents, incorporated into the Protocol to the Treaty of Paris, adopted at the meeting of 19 March 1815 of the Vienna Congress,[168] contains provisions formalizing the status of nuncios and legates as ambassadors or first-class agents, and offering the possibility of granting precedence to Papal representatives, in terms that could make them the dean of the diplomatic corps in States to which they were accredited.

“Relaciones Iglesia-Estado: Reflexiones sobre su marco jurídico”, in Manuel Marzal, Catalina Romero and José Sánchez (eds.), *La Religión en el Perú al filo del milenio* (Lima, Fondo Editorial de la Pontificia Universidad Católica del Perú, 2000), pp. 59–86; and Juan José Ruda Santolaria, “Vatican and the Holy See”, in Anthony Carty (ed.), *Oxford Bibliographies in International Law* (New York, Oxford University Press, 2016). The following publications in particular have also been taken into consideration: Hyginus Eugene Cardinale, *The Holy See and the International Order* (Gerrards Cross, Smythe, 1976); Carlos Corral Salvador, *La relación entre la Iglesia y la comunidad política* (Madrid, Biblioteca de Autores Cristianos, 2003); Julio A. Barberis, “Sujetos del Derecho Internacional vinculados a la actividad religiosa”, *Anuario de Derecho Internacional Público* (Buenos Aires, Universidad de Buenos Aires, Facultad de Derecho y Ciencias Sociales, Instituto de Derecho Internacional Público), vol. 1 (1981), pp. 18–33; and Pío Ciprotti, “Santa Sede: su función, figura y valor en el Derecho Internacional”, *Concilium – Revista Internacional de Teología* (Madrid, Ediciones Cristiandad), No. 58 (1970), pp. 207–217. The following lecture may also be useful: Juan José Ruda Santolaria, “La Santa Sede y el Estado de la Ciudad del Vaticano a la luz del derecho internacional”, Audiovisual Library of International Law, audio and video files, 16 May 2018; available at https://legal.un.org/avl/ls/RudaSantolaria_IL.html.

[166] Canon 361 of the *Codex Iuris Canonici*, Rome, 25 January 1983, at http://www.vatican.va/archive/ESL0020/_INDEX.HTM (accessed on 25 February 2022); Canon 48 of the *Codex Canonum Ecclesiarum Orientalium,* Rome, 18 October 1990, at http://w2.vatican.va/content/john-paul-ii/la/apost_constitutions/documents/hf_jp-ii_apc_19901018_index-codex-can-eccl-orient.html (accessed on 25 February 2022).

[167] Articles 39 to 47 of the Apostolic Constitution “Pastor Bonus”, Rome, 28 June 1988, at https://www.vatican.va/content/john-paul-ii/en/apost_constitutions/documents/hf_jp-ii_apc_19880628_pastor-bonus.html (accessed on 25 February 2022). After the present issues paper had been prepared, Pope Francis issued the Apostolic Constitution “Praedicate Evangelium”, on 19 March 2022, abrogating and substituting the Constitution “Pastor Bonus” on 5 June 2022. Articles 44 to 52 address the issue of the Secretariat of the State, conceived as the Papal Secretariat, which includes three sections. One of these is the Section for Relations with States and International Organizations. The text of the new Apostolic Constitution may be consulted at https://press.vatican.va/content/salastampa/it/bollettino/pubblico/2022/03/19/0189/00404.html.

[168] See articles 1 and 2 of Regulation Concerning the Relative Ranks of Diplomatic Agents, Congress of Vienna (March 19, 1815), *Yearbook of International Law Commission*, 1956, vol. II, p. 133.

116. The Holy See also signed treaty-like instruments – which it calls concordats – covering matters relating to the legal status of the Catholic Church in the territory of the relevant State, as well as topics of common interest to the Church and the State; and the Pope intervened in the settlement of disputes between Christian monarchs and formalized the rights of those monarchs over defined territories, as was the case, for example, with the Papal bulls issued by Pope Alexander VI in 1493 following the discovery of America by Christopher Columbus and served as the basis for the Treaty of Tordesillas between Spain and Portugal the following year. The Holy See also exercised the active and passive right of consulate on behalf of the Pontifical States.

117. When the troops of King Victor Emmanuel II captured Rome on 20 September 1870 and the city was declared the capital of Italy, the Holy See was deprived in fact of the territory over which it had exercised sovereignty and jurisdiction. As a sign of protest, the Pope locked himself inside the Vatican, giving rise to what became known as the "Roman Question", which culminated in the Lateran Treaty between the Holy See and Italy, which was signed on 11 February 1929 and became effective on 7 June of that same year, for Italy to recognize the sovereignty and ownership of the Holy See over the Vatican City.[169]

118. In the meantime, the Italian Parliament passed Act No. 214, of 13 May 1871, on guarantees of the prerogatives of the Sovereign Pontiff and the Holy See, and on relations between the State and the Church,[170] which was rejected by the Holy See for many reasons, including the fact that it was unilateral in nature and only recognized a right of usufruct for the Holy See over the Vatican and certain buildings. However, in relation to the present topic, the "law of guarantees" contained provisions whereby Italy recognized the maintenance of the active and passive right of legation of the Holy See, granting to diplomatic representatives accredited to the Holy See the same privileges and immunities as those granted to diplomatic representatives accredited to Italy, and conferring on Papal legates treatments and privileges equivalent to those established for their Italian counterparts on one-way or return travel.

119. One issue that is particularly relevant is that the Holy See exercised the active and passive right of legation uninterruptedly during the period between 1870 and 1929, the only difference being that the number of States that had diplomatic relations with the Holy See rose during that time. In the case of a State like France, for example, the diplomatic relations continued until 1904 and were interrupted for 17 years, but were restored in May 1921, 8 years before the entry into force of the Lateran Treaty.

120. During the period in question, the Holy See signed some concordats with countries such as Portugal in 1886, Colombia in 1887, Poland in 1925 and Lithuania in 1927. It is also worth highlighting the mediation of Pope Leo XIII in 1885 in connection with the dispute between Spain and Germany for the Caroline Islands, as well as the efforts and representations of Pope Benedict XV for an end to the First World War.

121. With regard to the exercise of the right of consulate, given the conception whereby it is linked to the survival of territorial sovereignty, while the Holy See did not insist on the sending and receiving of consuls, there was no formal withdrawal of exequatur from Papal consuls. In this regard, some cases are worth highlighting, including that of the Papal consul in New York, who continued to be considered as such by the Government of the United States until his death in 1895, and that of the

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[169] See articles 2 and 3 of the Trattato fra la Santa Sede e l'Italia (1929), at https://www.vaticanstate.va/phocadownload/leggi-decreti/TrattatoSantaSedeItalia.pdf (accessed on 25 February 2022).

[170] Sulle prerogative del Sommo Pontefice e della Santa Sede, e sulle relazioni dello Stato con la Chiesa (071U0214), at https://www.gazzettaufficiale.it/eli/gu/1871/05/15/134/sg/pdf (accessed on 25 February 2022).

Papal consul in Antwerp, who had been granted exequatur by the Government of Belgium in 1872, but who resigned without assuming the post, while maintaining the position that the Pope must retain his usual powers.[171]

122. The Pope has held the position of both head of the universal Catholic Church and Head of State of the Vatican City since the entry into force of the Lateran Treaty of 1929. In the majority of cases where the Holy See undertakes international action, it does so in its capacity as agent of the Government and as representative of the Church. The Holy See exercises the active and passive right of legation, taking into consideration the 1961 Vienna Convention on Diplomatic Relations in respect of nuncios and internuncios as first- and second-class diplomatic agents, respectively, as well as the possibility of recognizing the precedence of the representative of the Holy See, as an exception to the general seniority criterion.[172]

123. The Holy See signs concordats and agreements of that nature with States,[173] but is also party to a series of multilateral treaties, such as the 1961 Vienna Convention on Diplomatic Relations, the 1963 Vienna Convention on Consular Relations[174] and the 1969 Vienna Convention on the Law of Treaties. It also participates in the work of international organizations,[175] as a member – this is the case with the International Atomic Energy Agency, of which it is also a founder – or as an observer, as is the case with the United Nations. Drawing on its peace mission, it undertakes actions aimed at the peaceful settlement of disputes, as happened during the pontificate of John Paul II, with the provision of good offices, first, and then, with mediation in the southern dispute between Argentina and Chile that led to the Treaty of Peace and Friendship, signed by both States in the Vatican City on 29 November 1984[176] and placed under the "moral protection" of the Holy See.

124. On the other hand, the Vatican City meets the criteria of the Convention on the Rights and Duties of States to be considered a State, in that it has a territory, pursuant to the provisions of the Lateran Treaty of 1929; a population (comprising persons residing in the Vatican or holding Vatican citizenship empowered to perform tasks of responsibility for the Holy See or the Vatican City itself, and the cardinals residing in Rome or the Vatican City); a Government and political organization (taking into consideration the Vatican City with its government organs and its legal order, which includes canon law, but also Vatican rules proper); and the capacity to enter into relations with the other States and subjects of international law.[177] On the international plane, it is worth noting that, under the Lateran Treaty, and as evidenced during the Second World War, Vatican territory is neutral and inviolable, and that, in accordance with the provisions of its Fundamental Law, the Vatican City State is

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[171] Cardinale, *The Holy See and International Order* (see footnote 165 above), pp. 183, 283–284 and 288; and Adolfo Maresca, *Las Relaciones Consulares* (Madrid, Aguilar, 1974), p. 34.

[172] See Article 14 of the Vienna Convention on Diplomatic Relations (Vienna, 18 April 1961) United Nations, *Treaty Series*, vol. 500, No. 7310, p. 95.

[173] See the list of States with which the Holy See maintains diplomatic relations, at https://www.vatican.va/roman_curia/secretariat_state/index_attivita-diplomatica_it.htm (accessed on 25 February 2022).

[174] Vienna Convention on Consular Relations (Vienna, 24 April 1963), United Nations, *Treaty Series*, vol. 596, I-8638, p. 261.

[175] See participation of the Holy See in International Organizations, at https://www.vatican.va/roman_curia/secretariat_state/org-intern/documents/rc_segstat_20100706_org-internaz-2009_it.html (accessed on 25 February 2022).

[176] United Nations, *Treaty Series*, vol. 1399, No. 23392, p. 89.

[177] See Nuova Legge Fondamentale dello Stato della Città del Vaticano (Rome, 26 November 2000), at https://www.vaticanstate.va/phocadownload/leggi-decreti/LanuovaLeggefondamentale.pdf (accessed on 25 February 2022).

represented through the Secretariat of State of the Holy See.[178] Concretely, in the case of some treaties and international organizations that are of a technical nature, such as the Universal Postal Union and the International Telecommunications Union, the Holy See acts on behalf of the Vatican City State.[179]

125. The Vatican City is not an end in itself, but is, in practice, an instrument or means to ensure the independence of the Holy See in relation to any State or earthly authority. Nonetheless, as noted above, the fundamental weight of international action falls on the Holy See, as organ of government and representation of the Catholic Church, and not on the Vatican City. As proof, during the period between 1870 and 1929, when it was deprived in practice of sovereignty over any territory, the Holy See continued to exercise the active and passive right of legation, signing treaty-like agreements and acting with regard to the peaceful settlement of disputes.

B. Sovereign Order of Malta[180]

126. The Sovereign Order of Malta emerged in the eleventh century with the establishment of a hospital for pilgrims in Jerusalem, on the initiative of a few merchants from Amalfi, on the southern Italian peninsular. Thereafter, an order of knights was formed, dedicated to Saint John the Baptist; the Order was approved by the Holy See in 1113.

127. In addition to its charity work, the Order also served a military purpose, with its active participation in the defence of Christian presence in the Holy Land, until the capture of Saint-Jean-d'Acre by the Muslims in 1291. Thereafter, the Order moved first to the island of Cyprus, and soon after, from 1310, it moved to the island of Rhodes. The Order exercised jurisdiction over that territory until the end of 1522, when it was conquered by the Ottoman Turks.

128. In 1530, Charles I of Spain and V of the Sacred Roman-Germanic Empire, at the request of the Pope, gave the islands of Malta and Gozo and the city of Tripoli to the Order. From then and until 1798, the year of the invasion and occupation of Malta by the French troops headed by Napoleon Bonaparte, this island was under the jurisdiction of the Order. At the time, the Order acted on the international stage, to all intents and purposes, in a manner equivalent to that of States.

129. Following the loss of the island by the knights to the French, the British evicted them from Malta. Then, despite the provisions of the Treaty of Amiens of 1802,[181] regarding the return of Malta to the knights of the Order, Great Britain maintained control over the island.

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[178] See Trattato fra la Santa Sede e l'Italia (1929), at https://www.vaticanstate.va/phocadownload/leggi-decreti/TrattatoSantaSedeItalia.pdf (accessed on 25 February 2022).

[179] See International Organizations where the Vatican City State participates as a member, at https://www.vaticanstate.va/it/stato-governo/rapporti-internazionali/partecipazioni-ad-organizzazioni-internazionali.html (accessed on 25 February 2022).

[180] For this section, the following publications in particular have been taken into account: Ruda Santolaria, *Los Sujetos de Derecho Internacional* (see footnote 150 above), pp. 70–74; Piero Valentini, *L'ordine di Malta. Storia, giurisprudenza e relazioni internazionali* (Rome, De Luca Editori d'Arte, 2016); Charles d'Olivier Farran, "La Soberana Orden de Malta en el Derecho Internacional" (Lima, Ed. Lumen S.A., 1955). Relevant information on the official website of the Sovereign Order of Malta has also been consulted: see https://www.orderofmalta.int/es/orden-de-malta/ (accessed on 25 February 2022).

[181] Tratado Definitivo de Paz entre el Rey de España y las Repúblicas Francesa y Bátava de una parte, y el Rey del Reino Unido de la Gran Bretaña y de Irlanda de la otra (Amiens, 27 de marzo de 1802), Alejandro del Cantillo (ed.), *Tratados de paz y de comercio desde el año 1700 hasta el día*, Madrid, Imprenta de Alegria y Charlain, 1843, p. 702.

130. Considering the information provided by the Russian Federation, the following piece is worth highlighting in that regard:

> … there was a period in Russian history when the State continued to maintain international relations with a State-like entity that had lost its territory. After the seizure of Malta by Napoleon in 1798, the Russian [S]tate continued to maintain relations with the Order of Malta for several more decades until 1817.[182]

131. The Order established its seat in 1834 in Rome, where it remains to this day, without exercising jurisdiction over any territory.

132. An important detail, as indicated in the decision of the cardinalitial tribunal of 24 January 1953 and the 1961 Constitution of the Order,[183] is the dual status of the Order as both a subject of international law and a religious order authorized by the Holy See. As a subject of international law, the Order maintains relations with the Holy see through the Secretariat of State, while as a religious order, it maintains relations with the Holy See through the dicasteries and bodies of the Roman Curia responsible for religious orders.

133. Following the loss of Malta in 1798, the Order no longer performed a military function, focusing its work on charitable endeavours, providing valuable support in situations of natural disaster, emergency, humanitarian relief and conflict. The Order concluded agreements to that end with various States where it carried out said charitable and humanitarian work.

134. The Order of Malta has its own government structure, headed by a Grand Master resident in Rome, and its own legal order, the law of the Order of Malta, highlighted by the Constitution of 1961 and the Code of 1966, with their respective amendments. Unlike other orders of knights established centuries before in some European countries, which were embedded in those countries, the Order of Malta, has historically had a presence in States on different continents – and still does – but is not subordinate or subject to any of those States.

135. The Order of Malta, also known as the Sovereign Military Hospitaller Order of Saint John of Jerusalem of Rhodes and Malta, to reflect the various places where it has had its seat throughout its history, exercises both the active and the passive right of legation, maintaining diplomatic relations with more than 100 States, as well as with the European Union. Specifically, as shown in the Russian Federation piece cited above, the Russian Federation restored its official relations with the Order of Malta via a protocol dated 21 October 1992.[184]

136. The Order of Malta also has permanent missions to the United Nations and its specialized agencies, as well as delegations or missions to other international organizations. The Order of Malta also concludes treaties with various States on issues pertaining primarily to its humanitarian assistance work and receives assistance from some international organizations to that end.

137. Lastly, it should be noted that the administrative and judicial organs of Italy, where the Order has had its seat since the nineteenth century, have, in various pronouncements, confirmed the character of the Order as a subject of international law, in addition to the inviolability of its premises and other immunities and privileges attaching thereto, as well as to the persons who perform the highest functions in its

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[182] Submission of the Russian Federation, para. 35.

[183] Constitutional Charter and Code of the Sovereign Military Hospitaller Order of Saint John of Jerusalem of Rhodes and of Malta, promulgated 27 June 1961, revised by the Extraordinary Chapter General, 28–30 April 1997, published in the Official Gazette of the Order, special issue, 12 January 1998.

[184] Submission of the Russian Federation, p. 13.

government structure and who act on its behalf. Of particular relevance are the rulings of 10 March 1932[185] of the Single Section of the Court of Cassation; and of 13 March 1935[186] of the First Civil Section of the Court of Cassation and, more recently, the ruling of 13 February 1991, of the Civil Section of the Supreme Court of Cassation.[187]

C. Governments in exile

138. With regard to exceptional situations where the territory of a State is occupied by a third power or that give rise to circumstances that seriously undermine institutional order inside the State, there have been cases at different times in history where, without having control over the territory of the State or a good portion of said territory, Governments in exile have assumed international representation of such State.

139. The Governments of States affected by such exceptional circumstances relocate to territories under the jurisdiction of third States, from where they exercise the right of legation, conclude treaties, participate in international organizations, assist their nationals, and carry out timely actions to preserve the assets, properties, rights and interests of their States abroad.

140. It is relevant to note that despite not exercising control over all or part of the territory, which may be under the occupation of a State or a group of States, the affected State maintains its status as such, and retains its international legal personality, despite the exceptional situation that led to the loss of control over the territory. Of particular note is that the existence a Government in exile that represents the State constitutes evidence of the continuity of the State.

141. As Stefan Talmon rightly noted, concurring with this:

> According to the predominant view in the legal literature a "government in exile" is not a subject of international law but the "representative organ" of the international legal person 'State' and, as such, the depository of its sovereignty. There can thus logically be no "government", either in exile or in situ, without the legal existence of State which the government represents."[188]

142. It is worth recalling, for example, the case of the Government of Belgium during the First World War. On 11 October 1914, Raymond Poincaré, the French President, assured King Albert I that "the Government of the Republic … will immediately arrange for the necessary measures to guarantee the stay in France of His Majesty and his ministers in full Independence and sovereignty".[189] While King Albert I remained in Veurne, behind the Yser Front, the only part of Belgian territory that was not under occupation, between 1914 and 1918, there was a functioning Government of Belgium in exile operating out of the municipality of Sainte-Adresse, in the French city of Le

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[185] Sezioni unite: Udienza 10 marzo 1932, Pres. Barcellona P., Est. Casati, P. M. Giaquinto (concl. conf.); S. O. Gerosolimitano, detto di Malta (Avv. Chiovenda, Gozzi) c. Brunelli (Avv. Scialoja, Massari, Fanna), Tacoli (Avv. Carnelutti, Donatelli, Troiani), Tiepolo (Avv. Persico, Zironda) e Medina (Avv. De Notaristefani, Tagliapietra, Landi), *Il Foro Italiano,* vol. 57, Part One (1932), pp. 543–547.

[186] Sezione I civile: Udienza 13 marzo 1935, Pres. ed est. Casati, P. M. Dattino (concl. diff.); Nanni (Avv. Merolli) c. Pace (Avv. Astorri) e Sovrano Militare Ordine di Malta, *Il Foro Italiano,* vol. 60, Part One (1935), pp. 1485–1493.

[187] Sezione I civile: Sentenza 5 novembre 1991, n. 11788, Pres. Corda, Est. Senofonte, P.M. Donnarumma (concl. diff.); Sovrano militare Ordine di Malta (Avv. Marini) c. Min. Finanze (Avv. dello Stato Olivo). Cassa Comm. trib. centrale 17 ottobre 1987, n. 7334, *Il Foro Italiano,* vol. 114, Part One (1991), pp. 3335–3337.

[188] Talmon, "Who is a legitimate government in exile?" (see footnote 158 above), p. 501.

[189] Cited in Talmon, "Who is a legitimate government in exile?" (see footnote 158 above), p. 518.

Havre, headed by Baron Charles de Brouqueville, as Prime Minister and Head of Cabinet.

143. It is also relevant to cite the example of Emperor Haile Selassie I, following the Italian invasion of Ethiopia in 1936, who first moved to Jerusalem, British Mandate of Palestine at the time, and then settled in Bath, United Kingdom.[190] It is also worth citing the examples of some other Governments in exile during the Second World War, such as that of Belgium, the Netherlands and Norway, based in London; that of Luxemburg, based in Montreal and London; that of Greece, based first in Cairo, then in London; that of Yugoslavia, based in Jerusalem, London, Cairo and again London;[191] and that of Poland, based in London.[192]

144. With regard to the examples mentioned, it is particularly important to consider how the matter was handled by the United Kingdom, which embraced the majority of governments in exile during the Second World War by granting them immunities and privileges on British territory in accordance with the Diplomatic Privilege (Extension) Act 1941 and the Diplomatic Privilege (Extension) Act 1944.[193] Concretely, in the *Amand* case, the Attorney General of Great Britain and Northern Ireland highlighted the criteria for invitation, acceptance and recognition, when, in referring to the Government in exile of the Netherlands, said that:

> It was stated in court by the Attorney-General that the Government of the Netherlands was a government for the time being allied with His Majesty the King of Great Britain and Northern Ireland and established in the United Kingdom; that it was established and exercised its functions in the United Kingdom with the assent and on the invitation of His Majesty's Government in the United Kingdom, and that His Majesty's Government recognized Her Majesty Queen Wilhelmina and her Government as … exclusively competent to carry out the legislative, administrative and other functions appertaining to the Sovereign and Government of the Netherlands.[194]

In that case, it was also recognized that the government in exile of the Netherlands in London had full authority over a Netherlands national domiciled in England.[195]

145. It is worth noting that the same Government in exile of the Netherlands was also recognized by the United States, as evidenced in the communication from the Department of State to the Secretary of the Treasury referring to Netherlands legation note No. 4934 of 14 June 1940, where it was stated that "[t]he Government of the United States continues to recognize as the Government of the Kingdom of the Netherlands the Royal Netherlands Government, which is temporarily residing and exercising its functions in London."[196]

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[190] Lutz Haber, "The Emperor Haile Selassie I in Bath, 1936–1940", in Trevor Fawcett (ed.), *Bath History*, vol. 3 (Gloucester, Alan Sutton Publishing, 1990).

[191] Maurice Flory, *Le statut international des gouvernements réfugiés et le cas de la France libre, 1939–1945* (Paris, Pedone, 1952), p. 5.

[192] George V. Kacewicz, *Great Britain, the Soviet Union and the Polish Government in Exile (1939–1945)*, Studies in Contemporary History, vol. 3 (The Hague, Martinus Nijhoff Publishers, 1979), p. IX.

[193] Flory, *Le statut international* (see footnote 191 above), p. 21.

[194] *In re Amand*, King's.Bench Division, *Law Reports of the Incorporated Council of Law Reporting, 1941*, vol. II (London, 1941), p. 239; cited in Flory, *Le statut international* (see footnote 191 above), p. 36.

[195] *Ibid.,* p. 208.

[196] *Ibid.*, p. 36. Letter from the Assistant Secretary of the United States Department of State, Washington D.C., dated 27 June 1940, addressed to the Secretary of the Treasury. This communication refers to a Royal Decree of the Netherlands dated 24 May 1940; a note from the Department of State, dated 13 June 1940, addressed to the Royal Netherlands Legation in

146. Similarly, it was made clear in the case *Lorentzen v. Lydden*,[197] that the Government in exile of Norway was recognized by the United Kingdom as "the de jure government of the entire Kingdom of Norway."[198]

147. With regard to the situation of Poland during the Second World War, it is worth recalling that the courts of the United States of America held in the cases *Re Skewrys' Estate, Re Murika*[199] and *Re Flaum's Estate*[200] that:

> Although Poland is occupied by the enemy, its sovereignty remains unimpaired, and existing mutual treaty obligations, including consular rights, are accorded full recognition by the United States of America. The terms of the treaty between the Republic of Poland and the United States of America (Treaty of Friendship, Commerce and Consular Rights, dated June 15, 1931, ratified and confirmed July 10, 1933; 48 U.S. Stat. 1507) are therefore binding and subject to enforcement in all courts of this State. (*Matter of Schurz*, 28 N.Y.S.2d 165.)[201]

148. A more recent example worth noting is the case of Cambodia, following the invasion by Viet Nam in December 1978 and the proclamation on 7 January 1979 of the so-called People's Republic of Kampuchea, which led the Credentials Committee and the General Assembly of the United Nations to refuse, over successive years, to allow the representatives of that purported Government to take the place of Cambodia in the Organization, on the understanding that, in practice, the Cambodian territory or a large part of it was under the control of the Vietnamese army. Rather, with the support of the majority of members of the Credentials Committee and the States Members of the Organization in the General Assembly maintained that in those circumstances, the representation of Cambodia at the United Nations was exercised by the Governor of Democratic Kampuchea.[202]

149. In respect of that case, it is especially relevant to cite Tommy Koh, the then Permanent Representative of Singapore, who, in his statement in the General Assembly on18 December 1981, pointed out that:

> The last argument that has been adduced in support of the proposed amendment is that the Government of Democratic Kampuchea does not control the entire territory or population of Kampuchea. I concede that in normal circumstances

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Washington, D.C.; and Note No. 4934, dated 14 June 1940, in which the Royal Netherlands Legation in Washington, D.C., responded to the Department of State. Available at https://fraser.stlouisfed.org/files/docs/historical/eccles/049_11_0005.pdf. In addition, this reference is quoted in Anderson v. N.V. Transandine Handelsmaatschappij (289 N.Y. 7; Annual Digest, 1941-2, Case No. 4), cited by Whiteman, Marjorie (director), Digest of International Law, vol. 2, Washington, D.C.: Department of State Publication 7553, 1963, p. 475.

[197] *Lorentzen v. Lydden*, *The Law Reports 1942*, vol. II, p. 202.

[198] *Lorentzen v. Lydden* ([1942] 2 K.B. 202), cited in Marjorie Whiteman (ed.), *Digest of International Law*, vol. 2 (Washington, D.C., Department of State Publication 7553, 1963), p. 475. See also Flory, *Le statut international* (see footnote 191 above)., p. 37.

[199] *Re Skewrys' Estate, Re Murika*, 46 N.Y.S. 2d 942 (reproduced in *International Law Reports*, vol. 12, p. 424).

[200] *Re Flaum's Estate*, 42 N.Y.S. 2d 539 (reproduced in *International Law Reports*, vol. 12, p. 425).

[201] S. Griffiths, "Matter of Skewrys", Opinion, 21 February 1944; available at https://casetext.com/case/matter-of-skewrys. See also H. Lauterpacht (ed.), *Annual Digest and Report of Public International Law Cases*, vol. 12 (London, Butterworth, 1949), pp. 424–425.

[202] See memorandum to the Under-Secretary-General for Political and General Assembly Affairs entitled "Question of representation of Democratic Kampuchea at the resumed thirty-third session of the General Assembly. Provisional seating of challenged representatives of a Member State. Majority required for reconsideration of representatives' credentials already accepted by the General Assembly. The General Assembly is not bound by other United Nations organs' decisions regarding representation", *United Nations Juridical Yearbook 1979*, p. 166. See also A/34/500 and A/34/PV.4 and Corr.1; A/35/484 and A/35/PV.35; A/36/517 and A/36/PV.3; A/37/543, A/37/PV.42 and A/37/PV.43; A/38/508; A/39/574; A/40/747; A/41/727; A/42/630; A/43/715; and A/44/639.

> two of the criteria by which we decide whether or not to recognize a Government are control of territory and control of the habitual obedience of the population. This general rule is, however, not applicable when a country is invaded and occupied by another. In support of my proposition I merely need to remind delegations that during the Second World War the Governments of several allied countries occupied by Nazi Germany took refuge abroad. They continued to function overseas and were recognized by other countries as the legal and legitimate Governments of those occupied countries. In the same way, Kampuchea is today a country under foreign armed occupation. The legal and legitimate Government of that country is waging a war of resistance against the occupying army. The normal criteria of control of territory and of the population do not apply in this case.[203]

150. The following year, the then Prince Norodom Sihanouk, head of the Government Coalition Government of Democratic Kampuchea, delivered a statement at the General Assembly on 25 October 1982, noting that there were liberated areas in the north-west, south-east and north-east of the country, but that the main cities of Cambodia remained under the control of the occupation forces.[204] On the same day, in defending the position of Singapore supporting that fact that the Government of Democratic Kampuchea will continue to act on behalf of Cambodia in the Organization, Permanent Representative Tommy Koh recalled specifically the cases of Governments in exile of the States occupied by Nazi Germany during the Second World War.[205]

151. Another situation worth mentioning occurred between August 1990 and February 1991, when, owing to the invasion and occupation of the territory of Kuwait by Iraq, the Government of Kuwait took up residence in Saudi Arabia, from where it continued to act on behalf of the State of Kuwait. Kuwait also continued to be represented in the United Nations and the specialized agencies of the United Nations system, such as the International Civil Aviation Organization.[206]

152. It is also worth considering the situation that occurred following the coup d'état of 30 September 1991 against the then President of Haiti, Jean-Bertrand Aristide, who, with the help of a multinational force, returned to the country in October 1994 and was able to complete the term for which he had been democratically elected. On that score, particular attention should be drawn to the joint efforts of the United Nations and the Organization of American States to address such circumstances, including through such measures as United Nations General Assembly resolution 47/20, of 24 November 1992, concerning the situation of democracy and human rights in Haiti, where the Assembly reaffirmed as unacceptable any entity resulting from that illegal situation and demanded the restoration of the legitimate Government of President Jean-Bertrand Aristide, together with the full application of the National Constitution and hence the full observance of human rights in Haiti.

153. Similarly, regarding the case of Haiti, it is worth noting that in 1992 the International Monetary Fund accepted the credentials of the delegation appointed by the Government in exile of Haitian President Jean-Bertrand Aristide, instead of the credentials of the delegation appointed by the Government in Port au Prince, which

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[203] A/36/PV.3, para. 117.
[204] A/37/PV.42, paras. 23 and 30–31.
[205] A/37/PV.43, para. 67.
[206] International Civil Aviation Organization Assembly resolution A28-7, on aeronautical consequences of the Iraqi invasion of Kuwait, *United Nations Juridical Yearbook 1990*, at p. 176.

was effectively controlling the territory and the administration of the Member State. The Fund held that position in 1993 and 1994.[207]

154. In addition, as noted above, there are cases that cannot be described as Governments in exile, in the strict sense, because in those situations there is no State on whose behalf they could act. A case in point is Tibet, whose territory and population form part of China, and whose spiritual leader, the Dalai Lama, has, over the past few years, been demanding Tibetan autonomy inside that State.

D. Some relevant issues in certain international instruments

155. When considering sea-level rise and the threat that it poses to the maintenance of statehood, in particular for small island developing States, it is worth bearing in mind that the Convention on the Rights and Duties of States itself provides that the rights of a State derive from the simple fact of its existence as a "person" or subject of international law, and that the fundamental rights of States are not susceptible of being affected in any manner whatsoever (articles 4 and 5, respectively). This becomes even more in light of article 3, which provides that every State has the right to defend its integrity and independence and to provide for its conservation and prosperity, and that the exercise of those rights has no other limitation than the exercise of the rights of other States according to international law.

156. Similarly, it is stated in articles 10 and 12 of the Charter of the Organization of American States that the rights of each State depend upon the mere fact of its existence as a "person" or subject of international law and that the fundamental rights of States may not be impaired in any manner whatsoever. In Article 13 of the Charter, it is stated that the State has the right to defend its integrity and independence and to provide for its preservation, and that the exercise of those rights is limited only by the exercise of the rights of other States in accordance with international law.[208]

157. Article III of the Charter of the Organization of African Unity (OAU) affirms the adherence of its member States to principles such as "respect for the sovereignty and territorial integrity of each State and for its inalienable right to independent existence",[209] while one of the objectives of the African Union, as set out in article 3 of its Constitutive Act, is to "defend the sovereignty, territorial integrity and independence of its Member States".[210]

158. On that basis, 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 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.

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[207] *United Nations Juridical Yearbook 1992*, p. 269; *United Nations Juridical Yearbook 1993*, p. 266; and *United Nations Juridical Yearbook 1994*, p. 174.

[208] Charter of the Organization of American States (Bogota, 30 April 1948), United Nations, *Treaty Series*, vol. 119, No. 1609, p. 3, arts 10, 12 and 13.

[209] Charter of the Organization of African Unity (Addis Ababa, 25 May 1963), United Nations, *Treaty Series*, vol. 479, No. 6947, p. 39, art. III.

[210] Constitutive Act of the African Union (Lomé, 11 July 2000), United Nations, *Treaty Series*, vol. 2158, No. 37733, p. 3, art. 3.

IV. Concerns relating to the phenomenon of sea-level rise and some measures that have been taken in that regard

159. The statements concerning statehood delivered by small island developing States in the Sixth Committee of the General Assembly of the United Nations in October 2018 are quite enlightening.

160. The delegation of the Marshall Islands, speaking on behalf of the members of the Pacific Islands Forum, said that:

> Issues relating to statehood, statelessness and climate-induced migration were also directly relevant to the region, particularly in view of the possibility of whole atolls being entirely submerged.[211]

161. The delegation of Fiji, referring to article 1 of the Convention on the Rights and Duties of States, highlighted the significance of a population as one of the fundamental requirements of statehood and underlined the risks, in terms of the preservation of the population, that could arise as a result of migration if the territories of island States were to become uninhabitable. It said that:

> Sea-level rise is also contributing to the movement of people in coastal communities and low-lying atolls. One of the elements of statehood described in article 1 of the 1933 Montevideo Convention on the Rights and Duties of States is a permanent population. It is expected that populations will not all move at once due to sea-level rise and there will be gradual and random movement. Also, the population will slowly disintegrate and present a set of challenges such as legal, economic, financial, education, cultural, and many more.[212]

162. Papua New Guinea drew attention to the fact that the preservation of the maritime rights of States is closely linked to the preservation of their statehood, since only States can generate jurisdictional maritime zones. In that connection, it said that:

> As only States could generate maritime zones, it was essential for island States to maintain statehood in order to preserve their maritime zones. Thus, statehood was a threshold issue that was interrelated with questions regarding maritime zones.[213]

163. Papua New Guinea raised another very important point to be considered when addressing statehood issues, namely that situations of *de facto* statelessness could arise. In that regard, it said that:

> Statehood raised a potential issue of statelessness, including *de facto* statelessness. The principle of prevention of statelessness in international law was a corollary to the right to a nationality, and reference should be made to the 1961 Convention on the Reduction of Statelessness as one of the legal instruments to be considered by the Commission.[214]

164. When analysing the phenomenon of sea-level rise with a particular focus on the issue of statehood, it is worth considering, *inter alia*, the following aspects:

(*a*) The possibility of a State's territory being completely covered by the sea or becoming uninhabitable, or there being an insufficient supply of drinking water for the population.

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[211] Marshall Islands (on behalf of members of the Pacific Islands Forum) (A/C.6/73/SR.20, para. 41).

[212] Fiji (https://www.un.org/en/ga/sixth/73/pdfs/statements/ilc/fiji_1.pdf; A/C.6/73/SR.23, para. 63).

[213] Papua New Guinea (A/C.6/73/SR.23, para. 36).

[214] *Ibid.*

(*b*) The resulting displacement of persons to the territories of other States. This raises a number of concerns with regard to the rights and legal status of nationals of States particularly affected by sea-level rise, including questions about:

(i) The maintenance of original nationality or citizenship, the acquisition of another nationality or the granting of dual nationality or a common citizenship to more than one entity, in order to avoid situations of *de facto* statelessness;

(ii) The ways in which diplomatic protection and assistance and consular protection and assistance could be provided to persons who have their rights violated or require assistance in third States; and

(iii) The possibility of treating such displaced persons as refugees;

(*c*) The legal status of the Government of a State that has to take up residence in the territory of another State, including with regard to that Government's enjoyment of immunities and privileges and the exercise of international rights on behalf of the State affected that attest to the maintenance of its international legal personality. The possible use of different mechanisms and forms of "digital government" should also be explored, as should ways in which the Government of the State affected by such circumstances could act on behalf of its people residing in the State hosting the Government or in the territories of other States;

(*d*) The preservation of the rights of States affected by the phenomenon of sea-level rise in respect of the maritime areas under their jurisdiction and the living and non-living resources therein. In this regard, it is also worth taking into account the need to preserve maritime boundaries established pursuant to agreements with other States or decisions of international courts and tribunals;

(*e*) The right to self-determination of the populations of States affected by sea-level rise, including the right of those populations to preserve their national, cultural, group and other identities.

165. Measures being applied in different States to address sea-level rise include the installation or reinforcement of coastal barriers, coastal defences and polders. This has been taking place in States in different parts of the world, not only in small island developing States. Belgium[215] and Morocco[216] have provided the International Law Commission with information on the work they are carrying out in this field, and the

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[215] Belgium (https://legal.un.org/ilc/sessions/73/pdfs/english/slr_belgium.pdf).

[216] Morocco (https://legal.un.org/ilc/sessions/73/pdfs/english/slr_morocco.pdf).

Commission has obtained additional information concerning Australia,[217] Belgium,[218] France,[219] Germany,[220] Singapore,[221] the United Kingdom[222] and the United States.[223]

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[217] Australia, Department of the Environment, New South Wales Coastline Management Manual, September 1990, at https://www.environment.gov.au/archive/coasts/publications/nswmanual/index.html (accessed on 25 February 2022); and Environment Agency, "Coastal Adaptation Project: Review of international best practice", Halcrow Group Ltd., November 2008, pp. 25–31, at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/292911/geho0409bpwi-e-e.pdf (accessed on 25 February 2022).

[218] European Environment Agency, "10 case studies. How Europe is adapting to climate change", Climate-ADAPT, European Climate Adaptation Platform, (Luxembourg: Publications Office of the European Union, 2018), available at https://climate-adapt.eea.europa.eu/about/climate-adapt-10-case-studies-online.pdf (accessed on 25 February 2022).

[219] Ministry of Ecological Transition, "Adaptation des territoires aux évolutions du littoral", at https://www.ecologie.gouv.fr/adaptation-des-territoires-aux-evolutions-du-littoral (accessed on 25 February 2022); GIP Littoral 2030, "Stratégie Régionale de Gestion de la Bande Côtière", at https://www.giplittoral.fr/ressources/strategie-regionale-de-gestion-de-la-bande-cotiere (accessed on 25 February 2022); Loi No. 2021-1104 du 22 août 2021 portant lute contre le dérèglement climatique et renforcement de la résilience face à ses effets", published in Journal Officiel de la République Française, JORF n°0196 du 24 août 2021, at https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000043956924 (accessed on 25 February 2022); "Fait du jour. Une digue à Fourques pour ne plus avoir peur du Rhône", *ObjectifGard*, at https://www.objectifgard.com/2019/07/09/fait-du-jour-une-digue-a-fourques-pour-ne-plus-avoir-peur-du-rhone/ (accessed on 25 February 2022); Seasteading Institute, Recueil d'intentions réciproques entre La Polynésie française et The Seasteading Institute, at https://static.actu.fr/uploads/2017/01/Memorandum-of-Understanding-MOU-French-Polynesia-The-Seasteading-Institute-Jan-13-2017-1.pdf (accessed on 25 February 2022); and Adapto, "Adapto, un projet LIFE", project partly financed by the European Union through the Life programme, at https://www.lifeadapto.eu/adapto-un-projet-life.html (accessed on 25 February 2022).

[220] The Federal Government, "German Strategy for Adaptation to Climate Change", adopted by the German Federal cabinet on 17 December 2008, at https://www.preventionweb.net/files/27772_dasgesamtenbf1-63.pdf (accessed on 25 February 2022); Adaptation Action Plan of the German Strategy for Adaptation to Climate Change, adopted by the German Federal Cabinet on 31 August 2011, at https://www.bmuv.de/fileadmin/bmu-import/files/pdfs/allgemein/application/pdf/aktionsplan_anpassung_klimawandel_en_bf.pdf (accessed on 25 February 2022); J.-T. Huang-Lachmann and J. C. Lovett, "How cities prepare for climate change: Comparing Hamburg and Rotterdam", *Cities*, 54 2015 pp. 36–44; Bob Berwyn, "Hamburg's Half-Billion-Dollar Bet", *Hakai magazine*, 05 May 2017, at https://hakaimagazine.com/news/hamburgs-half-billion-dollar-bet/(accessed on 25 February 2022); "Up a notch: Hamburg takes on sea level rise", *Euronews*, 26 July 2017, at https://www.euronews.com/2017/07/26/up-a-notch-hamburg-takes-on-sea-level-rise (accessed on 25 February 2022); HafenCity, Central innovation theme of the city of tomorrow, Infrastructure, at https://www.hafencity.com/en/urban-development/infrastructure (accessed on 25 February 2022); and European Environment Agency, "10 case studies. How Europe is adapting to climate change", Climate-ADAPT, European Climate Adaptation Platform, (Luxembourg: Publications Office of the European Union, 2018), available at https://climate-adapt.eea.europa.eu/about/climate-adapt-10-case-studies-online.pdf (accessed on 25 February 2022).

[221] National Climate Change Secretariat Singapore, Strategy Group Prime Minister's Office, "Coastal Protection", at https://www.nccs.gov.sg/singapores-climate-action/coastal-protection/ (accessed on 25 February 2022); and Audrey Tan, "National Day Rally 2019: Land reclamation, polders among ways S'pore looks to deal with sea-level rise", The Straits Times, at https://www.straitstimes.com/politics/national-day-rally-2019-land-reclamation-polders-among-ways-spore-looks-to-deal-with-sea (accessed on 25 February 2022).

[222] Environment Agency, "Managing flood risk through London and the Thames estuary", Thames Estuary 2100 Plan, November 2012, at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/322061/LIT7540_43858f.pdf (accessed on 25 February 2022); Houses of Parliament, Parliamentary Office of Science and Technology, "Sea Level Rise", *Postnote*, No. 363, September

166. With regard to small island developing States, the case of Maldives is worth mentioning. In response to the phenomenon of sea-level rise, it has built the new artificial island of Hulhumalé, close to the capital, Male', which is on Male' Island. It has also constructed coastal barriers to address the serious threat that sea-level rise poses to the country.[224]

167. In the information paper dated 31 December 2021 that the Pacific Islands Forum presented to the Commission on the subtopics of sea-level rise in relation to statehood and the protection of persons affected by sea-level rise, some members of the Forum transmitted information on their practice with regard to the construction of artificial islands and the establishment or reinforcement of coastal barriers as part of their strategies to address sea-level rise.[225]

168. The Cook Islands has no artificial islands and is not currently planning to construct any. However, according to the information paper:

> There are some coastal reinforcement measures used in the capital of Rarotonga, which are intended to protect against erosion, including erosion caused by sea-level rise. These are mostly hard structures such as concrete sea walls, groynes and rock walls. There is currently one pilot project at a coastal site, using sand-filled geotextile bags as a coastal protection measure. Vetiver grass and other vegetation were planted behind the sandbags, so that by the time the sandbags fail, the vegetation will be well established. This semi-nature-based solution may become more popular in Rarotonga and on outer islands in future. The Cook Islands Joint National Action Plan identifies construction and upgrade of coastal protection structures as a priority action for prevention of flooding and protection against erosion.[226]

169. The Federated States of Micronesia explained that its Government's jurisdiction with regard to the establishment and use of artificial islands, installations and structures was recognized in the Code of the Federated States of Micronesia, and that there was an ancient practice in some parts of the country of building artificial islands and similar structures as seats and projections of political power and authority. Those structures, off the island of Pohnpei, were now a United Nations Educational, Scientific and Cultural Organization World Heritage Site and had recently been added to the List of World Heritage in Danger, in part because of the threats posed by sea-level rise.[227]

2010, at https://www.parliament.uk/globalassets/documents/post/postpn363-sea-level-rise.pdf (accessed on 25 February 2022); Environment Agency, "Thames Estuary 2100: 10-Year Review monitoring key findings", Policy Paper, Updated 22 February 2021, at https://www.gov.uk/government/publications/thames-estuary-2100-te2100/thames-estuary-2100-key-findings-from-the-monitoring-review#conclusion (accessed on 25 February 2022); and North West and North Wales Coastline, "Shoreline Management", at https://www.mycoastline.org.uk/shoreline-management-plans/(accessed on 25 February 2022). See also references to the Polder2C's programme: Interreg 2 Seas Mers Zeeën, European Regional Development Fund, at https://polder2cs.eu/activities (accessed on 25 February 2022).

[223] See, for instance, the case of measures for the coastal protection of Louisiana, United States of America: Coastal Protection and Restoration Authority, at https://coastal.la.gov/our-plan/ and http://coastal.la.gov/wp-content/uploads/2017/04/2017-Coastal-Master-Plan_Web-Book_CFinal-with-Effective-Date-06092017.pdf (accessed on 25 February 2022).

[224] Emma Allen, "Climate change and disappearing island States: pursuing remedial territory", *Brill Open Law* (2018), p. 5.

[225] Submission of Fiji (on behalf of the members of the Pacific Islands Forum, namely Australia, Fiji, Kiribati, Marshall Islands, Micronesia (Federated States of), Nauru, New Zealand, Palau, Papua New Guinea, Samoa, Solomon Islands, Tonga, Tuvalu and Vanuatu) (31 December 2021). Available at https://legal.un.org/ilc/guide/8_9.shtml#govcoms.

[226] *Ibid.*, para. 17.

[227] *Ibid.*, para. 18.

170. In Fiji, “the Fijian Government has constructed sea walls in local communities that have been challenged by sea-level rise. These include hybrid sea walls built recently in Viro village, Ovalau, using an ingenious combination of human-made and nature-based solutions to provide protection that is more effective and less expensive than a concrete wall.”[228]

171. In the Marshall Islands, there is no consistent practice with regard to the construction of artificial islands:

> [B]ut coastal and island strengthening through “hard” structural interventions is one planning consideration of national adaptation strategies, including in urban areas, as the atoll nation has an average of between one of two metres (in the range of long-term sea-level rise projections). Measures to reinforce coastlines would be addressed in part through the Coast Conservation Act 1998 as well as the Ministry of Environment Act 2018. The practice of modern-era coastal reinforcement or structural alternation dates back to the early [post-Second World War] era and [United States] military actions, and has since been a consistent factor in the subsequent growth of population centres. However, such structural measures can also result in a range of negative environmental impacts. As a general observation, sea-level rise poses complex planning, implementation and policy challenges in an atoll environment.[229]

172. With regard to Solomon Islands, a permanent concrete seawall has been constructed in Tulagi to protect the coastline from the effects of sea-level rise, and individuals have built semi-permanent seawalls on privately own parts of the seafront throughout the country. The construction of artificial islands as a means of coastal protection is a common practice in the province of Malaita, particularly in parts of Lau Lagoon in the north, Walande in the south, East ‘Are’are in the east and Langalanga Lagoon in the west of the province. Tree and mangrove planting is being encouraged where appropriate.[230]

173. It is worth highlighting that building artificial islands for people affected by the phenomenon of sea-level rise and constructing polders is very costly, and that the environmental impact of such measures (for example, on coral reefs) must also be assessed.[231] The international community needs to provide responses that can be delivered in a predictable manner, through cooperation, to the States most affected by sea-level rise. The focus should not be on the short term but rather on finding lasting and environmentally sustainable solutions.

174. This was reflected clearly in the statement delivered by Maldives in the Sixth Committee in late October 2021:

> Maldives has undertaken extensive adaptation measures to combat the effects of sea-level rise, including sea walls and beach replenishments. However, our efforts to preserve coastlines through artificial means is extremely costly, and yet only maintains the status quo. Adaptation alone cannot provide a sustainable solution to ongoing sea-level rise. Our resilience-building and fortification efforts are consuming an ever-increasing share of our limited fiscal space, a challenge that has been exacerbated by the strain that COVID-19 has placed on our national budgets. As many small islands and coastal States cannot afford to mitigate the effects of sea-level rise on their own, it is essential that the international community cooperates to ensure adequate, predictable and

[228] *Ibid.*, para. 21.
[229] *Ibid.*, para. 29.
[230] *Ibid.*, pp. 6–7, para. 33.
[231] Emma Allen, “Climate Change and Disappearing Island States…” (see footnote 224 above), pp. 5–6.

> accessible assistance to our States. Simultaneously, we must focus on reducing greenhouse gas emissions to prevent global warming, which eventually leads to sea-level rise.[232]

V. Possible alternatives for the future concerning statehood

175. No situation has yet arisen in which the entire land territory of a State has been covered by the sea or become uninhabitable, but the evolution of sea-level rise and the perception of the phenomenon by affected States, in particular those for which the threat is nearest and most tangible, make it necessary to consider the foundations in international law of the options that could be implemented at some point.

176. Given the gravity of the scenario, it does not seem appropriate to wait for a situation to occur before thinking about it. It would therefore be worth laying out some alternatives as a basis for discussions and exchanges of views that could contribute to the identification of the best approaches. Such an exercise will be useful in assessments conducted by Member States, in particular States that might be most directly affected by sea-level rise. States could consider the various options, or possibly combine elements of different options, in the analyses that they conduct as groups or individually, taking into account their particular circumstances and the decisions that their populations may take with respect to the right to self-determination.

177. Iceland, in a statement delivered in the Sixth Committee on behalf of the Nordic countries (Denmark, Finland, Iceland, Norway and Sweden) on 28 October 2021, specifically drew attention to the situation of certain States that are disproportionately affected by the phenomenon of sea-level rise, in the following terms:

> Apart from the possibility of [the] territory of States going partially or fully under water, sea-level rise can for instance increase land degradation, periodic flooding, and contamination of fresh water. It is a threat on multiple levels, not least for small island developing States, [which] have done little to cause climate change but are likely to suffer the most from it.[233]

178. In its statement in the Sixth Committee delivered on 29 October 2021, Singapore said that "[l]ike other small, low-lying island States, the threat posed by rising sea levels is an existential one for Singapore. We strongly support efforts to identify possible solutions for the plight of vulnerable island States."[234]

179. On the same day, Maldives said that:

> Sea-level rise is not a distant theoretical concern. It is something we are experiencing now. Low-lying coastal States and small island States, such as … Maldives, are especially vulnerable to the effects of sea-level rise.[235]

180. The Pacific Islands Forum indicated in the information paper submitted to the International Law Commission on 31 December 2021 that a collective position on the

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[232] Maldives (https://www.un.org/en/ga/sixth/76/pdfs/statements/ilc/21mtg_maldives_2.pdf; A/C.6/76/SR.21, para. 139).

[233] Iceland (on behalf of Denmark, Finland, Iceland, Norway and Sweden) (https://www.un.org/en/ga/sixth/76/pdfs/statements/ilc/19mtg_nordic_2.pdf; A/C.6/76/SR.19, para. 87).

[234] Singapore (https://www.un.org/en/ga/sixth/76/pdfs/statements/ilc/20mtg_singapore_2.pdf; A/C.6/76/SR.20, para. 22).

[235] Maldives (https://www.un.org/en/ga/sixth/76/pdfs/statements/ilc/21mtg_maldives_2.pdf; A/C.6/76/SR.21, para. 137).

matter had not yet been adopted. However, that has not prevented some of its members from expressing their own positions or preferences.[236]

181. For instance, Papua New Guinea has stated that "[t]hese are also issues of critical importance to us in the context of the ongoing daily lived reality of our people in the Pacific region."[237] Solomon Islands, referring to the topics of protection of persons and statehood in the context of the work of the International Law Commission Study Group on sea-level rise in relation to international law, has said that "[t]hese topics are of great importance to small island developing States, like Solomon Islands …. We strongly encourage delegations to engage [on] these topics so that we may find an international solution to what is already becoming a global problem."[238]

182. A number of alternatives are set out below. These are by no means intended to be conclusive or to preclude the possibility of considering other options.

A. Presumption as to the continuity of the State concerned

183. One alternative, which is in line with the preliminary approach taken by the International Law Association at its meeting held in Sydney in 2018, and also by some States, is that there should be a strong presumption as to the continuity of the State.

184. In that connection, Samoa, in its statement in the Sixth Committee delivered on 28 October 2021 on behalf of the Pacific small island developing States, said that:

> Under international law, there is a presumption that a State, once established, will continue to be a State, particularly if it has a defined territory and population, among other factors.[239]

185. Incidentally, the delegation of Solomon Islands urged the International Law Commission to consider the views of small island developing States, as particularly affected States, stating that:

> Solomon Islands supports the strong presumption in favor of continuing statehood. The continued existence of States is foundational to our current international order. State practice supports the notion that States may continue to exist despite the absence of Montevideo Convention criteria. The principles of stability, certainty, predictability and security also underly the presumption of continuing statehood. Sea-level rise cannot be a justification for denying a vulnerable State's vital representation in the international order.[240]

186. Tonga said:

> Yet, a defined territory and population were key indicia of statehood under international law. For small island developing States, that was a question of

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[236] Submission of Fiji (on behalf of the members of the Pacific Islands Forum, namely Australia, Fiji, Kiribati, Marshall Islands, Micronesia (Federated States of), Nauru, New Zealand, Palau, Papua New Guinea, Samoa, Solomon Islands, Tonga, Tuvalu and Vanuatu).

[237] Papua New Guinea (https://www.un.org/en/ga/sixth/76/pdfs/statements/ilc/22mtg_papuanewguinea_2.pdf; A/C.6/76/SR.22, para. 35).

[238] Solomon Islands (https://www.un.org/en/ga/sixth/76/pdfs/statements/ilc/22mtg_solomonis_2.pdf; A/C.6/76/SR.22, para. 78).

[239] Samoa (on behalf of the Pacific small island developing States) (https://www.un.org/en/ga/sixth/76/pdfs/statements/ilc/19mtg_psids_2.pdf; A/C.6/76/SR.19, para. 71).

[240] Solomon Islands (https://www.un.org/en/ga/sixth/76/pdfs/statements/ilc/22mtg_solomonis_2.pdf; A/C.6/76/SR.23, para. 4).

survival. Tonga therefore stressed the need to quickly address the international law implications of those emerging issues.[241]

187. Tuvalu made the following important point:

> We acknowledge that several of the requirements for effective statehood are referred to in article 1 of the Montevideo Convention. For my country, although we are still conducting a comprehensive review of our policy, we notice that the argument is growing [that] the criteria provided by the Montevideo Convention [apply] only for the determination of the birth of a State rather than [for the determination of] a State's [continued existence].[242]

188. Cuba maintained a cautious position, saying that:

> "Great caution was needed in considering the possible loss of statehood in relation to sea-level rise. It was vital to uphold the principle that, in the event that a small island State were to lose its territory as a result of sea-level rise, it would not lose its status as an international subject, with all the attributes thereof. International cooperation would play an essential role in that regard."[243]

189. Drawing on its own experience, Latvia said that:

> In light of its experience of continued statehood since its founding in 1918 and its membership of the League of Nations, Latvia endorsed the view that factual control over territory was not always a necessary criterion for the continued juridical existence of States.[244]

190. Cyprus, quoting the distinguished judge and jurist James Crawford in his well-known work entitled *The Creation of States in International Law*,[245] said that:

> [A]s regards … questions of statehood, we wish to highlight that the late Judge James Crawford … noted that "[a] State is not necessarily extinguished by substantial changes in territory, population or government, or even, in some cases, by a combination of all three".[246]

191. Liechtenstein, emphasizing the importance of respect for the right to self-determination, said that:

> Legal challenges to the persistence of particular States and countries have in the past arisen in situations of the loss of control over territory or over the population belonging to that State or residing in that territory. Instead, a different State or Government assumes control over the aforementioned territory and population. Such a challenge to State persistence rests on the failure of the first State to fulfil the first three Montevideo criteria, of a permanent population, a defined territory and a Government. Situations of territorial inundation due to sea-level rise differ in this respect, as the territory and the population residing therein does not necessarily fall under the control of a different State or Government. Instead, in situations of sea-level rise, it can be presumed at the very least that the population, and thus the Government with control over it, persists at the point of inundation.
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> … Any discussion of statehood in the context of rising sea-levels should note that there is in practice a strong presumption of State persistence and

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[241] Tonga (A/C.6/76/SR.22, para. 120).
[242] Tuvalu (https://www.un.org/en/ga/sixth/76/pdfs/statements/ilc/23mtg_tuvalu_2.pdf; A/C.6/76/SR.23, para. 4).
[243] Cuba (A/C.6/76/SR.21, para. 32).
[244] Latvia (A/C.6/76/SR.22, para. 75).
[245] Crawford, *The Creation of States* (see footnote 29 above).
[246] Cyprus (https://www.un.org/en/ga/sixth/76/pdfs/statements/ilc/22mtg_cyprus_2.pdf).

> disfavouring of the extinction of any State or country, including its rights and obligations under international law, for example in situations of belligerent occupation. Such a presumption should also apply to a situation of the full or partial inundation of the territory of a State or country, or of the relocation of its population.[247]

192. In that regard, it should be noted that the criteria of the Convention on the Rights and Duties of States are applicable when considering a State constituted as such, i.e. when determining whether a State has been established as a subject of international law and, more generally, its status thereafter. However, there are exceptional situations where, for example, the territory may be totally occupied by another State or a group of States without this entailing the disappearance of the State, in particular if, as mentioned above, there is a Government in exile acting on behalf of the affected State. In such cases, the State continues to exist and maintains its international legal personality.

193. Even when a State experiences serious situations of internal violence or non-international conflict that continue for several years, during which time there is no Government exercising control over most of the territory and the population, or the Government is not recognized by other members of the international community, it is assumed, in principle, that the State has not ceased to exist.

194. With regard to 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. Such States have the right to provide for their preservation, and international cooperation will be of particular importance in that regard.

195. The preservation of statehood is also linked to the preservation of the rights of States affected by the phenomenon of sea-level rise in respect of the maritime areas under their jurisdiction and the living and non-living resources therein.

196. The problems or difficulties that may arise in practice with this option include the possibility of the populations of affected States becoming stateless and potential difficulties in providing diplomatic protection and assistance and consular protection and assistance to nationals of States affected by sea-level rise; ineffectiveness of the Government; and difficulties of the State affected by sea-level rise in exercising its rights over the maritime areas under its jurisdiction and the living and non-living resources therein.

B. Maintenance of international legal personality without a territory

197. Another possibility that could be explored would be for the State whose land territory is completely covered by the sea or becomes uninhabitable to maintain its international legal personality, as the Holy See did between 1870 and 1929, and as the Sovereign Order of Malta is doing today. In this scenario, the subject of international law concerned would be able to exercise both the active and the passive right of legation, and would have treaty-making capacity. It would continue to be a member of some international organizations, act on behalf of its population or some of its nationals and ensure the proper use of State resources for the benefit of its population.

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[247] Liechtenstein (https://www.un.org/en/ga/sixth/76/pdfs/statements/ilc/21mtg_liechtenstein_2.pdf; A/C.6/76/SR.21, paras. 3–4).

C. Use of some of the following modalities:

1. Ceding or assignment of segments or portions of territory to other States, with or without transfer of sovereignty

With transfer of sovereignty

198. One option would be for a State to transfer sovereignty over a portion of its territory to the developing island State whose territory is at risk of being completely covered by the sea. However, while this is a valid alternative from a legal perspective, it would be very difficult to achieve in practice.

Without transfer of sovereignty

199. Another option would be the ceding of a portion of territory without transfer of sovereignty, for example under an agreement between the States concerned which, in addition to providing for the transfer of territory, addresses matters relating to the establishment of the population and Government of the State affected by sea-level rise in the geographical area concerned.

200. Such an agreement could include provisions concerning the nationality of the people of the affected island State who, while retaining their nationality of origin, would also acquire the nationality of the ceding State or be granted a new common citizenship that may be created for nationals of both States, to ensure that they do not become stateless in practice; they would also enjoy broad autonomy to preserve their national, cultural and group identities.

201. The agreement could also address matters related to the establishment of the Government of the affected island State in the ceded part of the territory, including issues regarding its enjoyment of immunities and privileges and questions concerning the exercise of rights – such as the right of legation and the right to conclude treaties – in the name of the affected State and the performance of actions for the benefit of its population, which the Government would continue to represent.

202. It is worth highlighting two examples in connection with this alternative, although they concern the granting or recognition of rights in contexts unrelated to sea-level rise. The first concerns relations between Peru and Ecuador, while the second relates to relations between the Holy See and Italy.

203. The first example involves 1 km^2 of territory, at the centre of which is a place known as Tiwinza. The land is in Peruvian territory and under Peruvian sovereignty, but the property rights have been transferred free of charge to the Government of Ecuador, without the possibility of revocation. Ecuador has property rights over the land in accordance with the national private law of Peru, but it cannot transfer the property or have military or police personnel in the area; only commemorative acts conducted in coordination with the Government of Peru may be carried out, and no weapons of any kind may be transported from one country to the other.[248]

204. The second example concerns the Lateran Treaty of 1929 between the Holy See and Italy, in which the sovereignty and ownership of the Holy See over the Vatican City was recognized and provision was made for special treatment of a number of immovable properties that are owned by the Holy See but are located in the territory of Italy. These include the patriarchal basilicas of Saint John Lateran, Saint Mary

[248] Binding View issued by the Heads of State of the Guarantor Countries of the Protocol of Rio de Janeiro, of 13 October 1998, with the elements to conclude the setting up of a common land border, which forms an integral part of the Presidential Act of Brasilia, signed by the Presidents of Peru and Ecuador on 26 October 1998, paragraph 2, at https://planbinacional.org.pe/wp-content/uploads/2018/07/BIN-Acuerdos-Brasilia-Per%C3%BA-Ecuador-1998.pdf (accessed on 25 February 2022).

Major and Saint Paul, with their annexed buildings; the premises in Rome that house the dicasteries of the Roman Curia; and the Papal Palace and Villa Barberini in Castel Gandolfo. The Treaty provides that, in addition to enjoying the immunities and privileges of diplomatic premises as recognized under international law, the premises shall never be subject to liens or to expropriation for reasons of public utility, except by prior agreement with the Holy See, and shall be exempt from all taxes, whether ordinary or extraordinary, payable to the State or to any other entity.[249]

2. Association with other State(s)

205. The following examples, involving some small island developing States, can serve as references in relation to this option:

(a) The case of the Cook Islands and New Zealand, where the Joint Centenary Declaration of the Principles of the Relationship between the Cook Islands and New Zealand, signed on 11 June 2001 shows clearly that these are two independent and sovereign States sharing New Zealand citizenship.[250] The Cook Islands engages in activities in the sphere of international relations, including the conclusion of treaties and its membership in international organizations, such as the South Pacific Regional Fisheries Management Organization, of which both New Zealand and the Cook Islands are members.[251]

(b) The cases of the Federated States of Micronesia, the Marshall Islands and Palau, which have signed agreements with United States of America that do not provide for the inhabitants of those island States to obtain United States citizenship or permanent residency, but do provide for United States assistance to those States and the recognition of the right of their nationals to live and work in the United States and even to serve in the United States armed forces.

3. Establishment of confederations or federations

206. Although the examples of confederations – the United States in its early years of existence, before the entry into force of the federal Constitution of 1787, Switzerland until 1848 and the German Confederation between 1815 and 1867 – are historical,[252] the confederation model may still be useful when considering the situation of small island developing States affected by sea-level rise. Confederations are established through agreements between the States concerned, which retain their sovereignty and participate in the confederation on an equal footing in order to achieve or pursue certain common objectives. Populations and territories do not have a direct or immediate relationship with the confederation, only with the relevant member State.

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[249] Art. 13–16 of the Trattato fra la Santa Sede e l'Italia (1929), at https://www.vaticanstate.va/phocadownload/leggi-decreti/TrattatoSantaSedeItalia.pdf (accessed on 25 February 2022).

[250] Joint Centenary Declaration of the Principles of the Relationship between the Cook Islands and New Zealand (Rarotonga, 11 June 2001), at https://www.mfat.govt.nz/assets/Countries-and-Regions/Pacific/Cook-Islands/Cook-Islands-2001-Joint-Centenary-Declaration-signed.pdf (accessed on 25 February 2022).

[251] South Pacific Regional Fisheries Management Organization, Participation, Commission Members, at https://www.sprfmo.int/about/participation/ (accessed on 25 February 2022).

[252] François Aubert, "The historical development of confederations", in European Commission for Democracy through Law (Venice Commission), "The modern concept of confederation", Santorini, 22–25 September 1994, Science and technique of democracy No. 11, document CDL.STD (1994)011, at https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-STD(1994)011-e (accessed 25 February 2022).

207. Another possibility would be for States to form or join an existing federation. A federation is governed by a Constitution, has sovereignty vested in it and, together with the relevant substate entities, has a direct relationship to the population and the territory. In federations, the subject of international law is the federal State, although, as stated in the Commission's draft articles on the law of treaties of 1966:

> States members of a federal union may possess a capacity to conclude treaties if such capacity is admitted by the federal constitution and within the limits there laid down.[253]

208. A detail that could be taken into account when considering the advisability of forming a federation or joining an existing one is 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, as described below.

Germany

209. A particularly interesting example is that of the "reserved rights" ("*Reservatrechte*") of the Kingdom of Bavaria during the time of the German Empire (1871–1918), which concerned matters such as the right of legation and the conclusion of treaties.[254]

210. In the present Federal Republic of Germany, responsibility for conducting relations with foreign States lies with the Federation, pursuant to article 32, paragraph 1, of the Basic Law. However, it is worth highlighting that in the other paragraphs of article 32, it is stipulated that the Länder may, with the consent of the Federal Government, conclude with foreign States treaties concerning matters falling within the scope of their legislative powers, and that there must be coordination between the Federal Government and the Länder on foreign policy matters that are of interest to or concern the Länder.[255]

211. An example of this practice is the treaty between the French Republic and the Länder of Baden-Württemberg, the Free State of Bavaria, Berlin, Freie Hansestadt Bremen, Freie und Hansestadt Hamburg, Hesse, Lower Saxony, North Rhine-Westphalia, Rhineland-Palatinate, Saarland and Schleswig-Holstein on cultural matters, which was signed in Berlin on 2 October 1990 and has been in force since 11 July 1992.[256]

Switzerland

212. While it is expressly stated in article 54 of the Federal Constitution of Switzerland that foreign relations are the responsibility of the Confederation, articles 55 and 56 address the participation of the cantons in foreign policy decisions and relations between the cantons and foreign States, respectively.[257]

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[253] Article 5 (2) of the draft articles on the law of treaties, *Yearbook of the International Law Commission, 1966*, vol. II, document A/6309/Rev.1, part II, para. 38, at p. 178.

[254] B. Poloni, "La Bavière et l'empire", in G. Krebs and G. Gérard Schneilin (eds.), *La naissance du Reich* (Paris: Presses Sorbonne Nouvelle, 1995), pp. 60–74.

[255] Basic Law for the Federal Republic of Germany in the revised version published in the Federal Law Gazette Part III, classification number 100-1, as last amended by Article 1 of the Act of 29 September 2020 (Federal Law Gazette I, p. 2048), at https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html#p0019 (accessed on 25 February 2022)

[256] Treaty concerning the European Cultural Channel (with statement) (Berlin, 2 October 1990), United Nations, *Treaty Series*, vol. 1705, No. 29477, p. 9.

[257] Art. 54–56 of the Federal Constitution of the Swiss Confederation of 18 April 1999 (Status as of 7 March 2021), at https://www.fedlex.admin.ch/eli/cc/1999/404/en?print=true (accessed on 25 February 2022).

Belgium

213. The rights of the regions and linguistic communities are spelled out as part of the federal arrangement of the State. For instance, the Walloon Region has the capacity to establish a delegation in and conclude agreements with France. Examples of such agreements include the cooperation agreement between the Government of the French Republic and the Walloon Region of Belgium, which was signed in Brussels on 10 May 2004 and has been in force since 1 February 2006,[258] and the agreement between the Government of the French Republic and the Government of the Walloon Region of the Kingdom of Belgium on access for persons with disabilities, which was signed in Neufvilles, Belgium, on 21 December 2011 and has been in force since 1 March 2014.[259]

Canada

214. Canadian practice allows the provinces of Canada to conclude agreements on matters within their jurisdiction with foreign States. An illustrative example is the cooperation agreement on international adoption entered into in 2002 between the Government of Peru and the Government of Quebec that enables residents of the Canadian province to adopt children from Peru.[260]

Former Soviet Union

215. Under the Constitutions of the Union of Soviet Socialist Republics, the constituent republics of the Union had the capacity to carry out international actions. In that regard, it is worth recalling the cases of the then Soviet Republics of Ukraine and Belarus, which were members of the United Nations and parties to multilateral treaties.[261]

4. Unification with another State, including the possibility of a merger

216. In case of a merger, the island State affected by sea-level rise would be absorbed by another State. The population of the island State would be incorporated into the population of the other State and take on the nationality of that State. 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.

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[258] Décret No. 2009-281 du 11 Mars 2009 portant publication de l'accord de coopération entre le Gouvernement de la République française et la région wallonne de Belgique, signé à Bruxelles le 10 mai 2004, published in Journal Officiel de la République Française, 14 March 2009, at https://www.legifrance.gouv.fr/download/pdf?id=A3wJUVkMYZxmy8At3EmqcEY0JMRNZGyVDKF_N-r7shY= (accessed on 25 February 2022).

[259] Décret No. 2014-316 du 10 mars 2014 portant publication de l'accord-cadre entre le Gouvernement de la République française et le Gouvernment de la region wallonne du Royaume de Belgique sur l'accueil des personnes handicapés, signé à Neufvilles le 21 décembre 2011, published in Journal Officiel de la République Française, 12 March 2014, at https://www.legifrance.gouv.fr/download/pdf?id=OCqqBWszkTNKfQ5XVejd-vCwQ8RhV7Mt8a-smbCOZxc=.

[260] Convenio de Cooperación en materia de Adopción Internacional entre el Gobierno de Quebec y el Gobierno de la República del Perú (6 May 2002), at https://www2.congreso.gob.pe/sicr/cendocbib/con4_uibd.nsf/1E73222FE2DD397F05257ECB006826E0/$FILE/4_DSN%C2%BA068-2002-RE.pdf (accessed on 25 February 2022).

[261] Rosalyn Cohen, "The concept of statehood in United Nations practice", *University of Pennsylvania Law Review*, vol. 109, No. 8 (June 1961), pp. 1131–1132.

5. Possible hybrid schemes combining elements of more than one modality, specific experiences of which may be illustrative or provide ideas for the formulation of alternatives or the design of such schemes

Joint sovereignty model

217. In addition to the above-mentioned case of Pheasant Island, or Conference Island, involving Spain and France, it is worth bearing in mind that Argentina and the United Kingdom engaged in negotiations on the possibility of joint sovereignty over the Falkland Islands (Malvinas) before the war of 1982, and again after the Argentine invasion that year, during the brief mediation of the then Secretary of State of the United States, Alexander Haig.[262]

218. The joint sovereignty model was also a matter of negotiation between Spain and the United Kingdom in respect of Gibraltar in 2001 and 2002. More recently, on 4 October 2016, the Permanent Representative of Spain to the United Nations put forward a proposal formally inviting the United Kingdom to engage in negotiations with a view to reaching an agreement on a joint sovereignty regime for Gibraltar based on the recognition of the broadest self-government possible that is compatible with the constitutional system of Spain, and on an advantageous personal status for Gibraltarians, which could include dual nationality.[263]

Bosnia and Herzegovina

219. In Bosnia and Herzegovina, the Constitution resulting from the 1995 General Framework Agreement for Peace in Bosnia and Herzegovina states that the State would comprise two entities, the Republika Srpska and the Federation of Bosnia and Herzegovina, whose inhabitants would be citizens of each of those entities and of the Federation as a whole.[264]

Faroe Islands

220. The Faroe Islands have a very high degree of autonomy within the Kingdom of Denmark and are active in international relations through the conclusion of treaties[265] (such as commercial treaties with the European Union and with Iceland, Norway and Switzerland) and participation in international organizations, including fisheries

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[262] Ana Laura Bochicchio, "Cold War and American Intervention in Malvinas (1982)", *Quinto Sol*, vol. 25, No. 1 (January–April 2021); John O'Sullivan, "How the U.S. Almost Betrayed Britain", *The Wall Street Journal*, 2 April 2012, at https://www.wsj.com/articles/SB10001424052702303816504577313852502105454 (accessed on 25 February 2022); and Juan González Yuste, "Buenos Aires rechaza una administración tripartita", *El País*, 13 April 1982, at https://elpais.com/diario/1982/04/14/internacional/387583201_850215.html (accessed on 25 February 2022). There is a dispute between the Governments of Argentina and the United Kingdom of Great Britain and Northern Ireland concerning sovereignty over the Falkland Islands (Malvinas). See ST/CS/SER.A/42, of 3 August1999.

[263] Spain (http://www.spainun.org/wp-content/uploads/2016/10/Intervenci%C3%B3n-Espa%C3%B1a-Item-58-71AG-versi%C3%B3n-compilada-ESP.ING_.pdf; A/C.4/71/SR.3, paras. 3–4).

[264] Letter dated 29 November 1995 from the Permanent Representative of the United States of America to the United Nations addressed to the Secretary-General, attaching the General Framework Agreement for Peace in Bosnia and Herzegovina (A/50/79C-S/1995/999), 30 November 1995.

[265] Act No. 80 of 14 May 2005 on the Conclusion of Agreements under International Law by the Government of the Faroes, at https://www.government.fo/en/foreign-relations/constitutional-status/the-foreign-policy-act/ (accessed on 25 February 2022).

management organizations, such as the South Pacific Regional Fisheries Management Organization.[266]

Special Administrative Regions of Hong Kong and Macao (China)

221. The Special Administrative Regions of Hong Kong and Macao, in the People's Republic of China, are separate customs territories and, as such, are members of the World Trade Organization and conclude treaties concerning trade and investment.[267] The legal and court systems that existed in those territories before they were retroceded to the People's Republic of China are still in place, and their inhabitants enjoy a specific set of rights. Hong Kong and Macau are able to continue to use English and Portuguese, respectively, as official languages, alongside Chinese.[268]

Scenarios relating to citizenship

222. The possibilities with regard to citizenship include individuals holding the citizenship of a constituent entity of the State as well as a common citizenship of the State as a whole, as in Bosnia and Herzegovina, or a model along the lines of the "citizenship of the European Union" system, whereby citizenship of the Union is accorded to nationals of any of its member States. This makes it possible, for example, for nationals of a State member of the Union to receive consular assistance in a third State from another member State if the State of nationality of the individual is not represented in the third State.[269]

223. The various categories of citizenship other than that of "British citizen" provided for in the British Nationality Act do not in themselves entitle individuals in those categories to live and work in the United Kingdom, but they do enable them to hold a British passport and receive consular assistance and diplomatic protection from the United Kingdom abroad. In that connection, it is worth bearing in mind the case of the descendants of Asians who had settled in Uganda during the period of British colonization, most of whom were of Indian origin and were engaged in trade and business, who had to leave Uganda as a result of a decision by the country's dictator, Idi Amin, in August 1972. Given the situation and the fact that those persons held British passports, the United Kingdom provided them with assistance. Approximately

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[266] South Pacific Regional Fisheries Management Organization, Participation, Commission Members, at https://www.sprfmo.int/about/participation/ (accessed on 25 February 2022).

[267] World Trade Organization, Members and Observers, at https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm. The Free Trade Agreements and International Investment Agreements concluded by Hong Kong, China, and Macao, China, may be consulted at https://investmentpolicy.unctad.org/international-investment-agreements/by-economy (accessed on 25 February 2022).

[268] Constitution of the People's Republic of China, adopted at the Fifth Session of the Fifth National People's Congress and promulgated by the Announcement of the National People's Congress on 4 December 1982, at https://www.basiclaw.gov.hk/en/constitution/introduction.html (accessed on 25 February 2022); and Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, adopted at the Third Session of the Seventh National People's Congress on 4 April 1990, at https://www.basiclaw.gov.hk/en/basiclaw/basiclaw.html (accessed on 25 February 2022).

[269] Consolidated version of the Treaty on European Union, Official Journal of the European Union; Consolidated version of the Treaty on the Functioning of the European Union, Official Journal of the European Union; Charter of Fundamental Rights of the European Union, Official Journal of the European Union (2016/C 202/02), at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:C:2016:202:FULL&from=ES (accessed on 25 February 2022); and Council Directive (EU) 2015/637 of 20 April 2015 on the coordination and cooperation measures to facilitate consular protection for unrepresented citizens of the Union in third countries and repealing Decision 95/553/EC, Official Journal of the European Union 24.4.2015, at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32015L0637&from=ES (accessed on 25 February 2022).

30,000 of them settled in the United Kingdom, while the rest were taken in by other Commonwealth countries, such as Australia and Canada, and the United States.[270]

224. Another scenario would be where a State grants nationality to specific categories of persons with historic links to that State. For example, Spain adopted the royal decree of 1924, and Act No. 12/2015, of 24 June 2015, granting Spanish nationality to Sephardic persons originating in Spain. It is also worth bearing in mind that Spain and Sweden issued protective passports to Jews in Budapest during the latter years of the Second World War.[271]

Scenarios relating to the right of peoples to self-determination

225. Indigenous peoples have the right to self-determination, in terms of the power to organize themselves and handle their own internal and local affairs, in accordance with the United Nations Declaration on the Rights of Indigenous Peoples of 2007,[272] and the American Declaration on the Rights of Indigenous Peoples of 2016,[273] and taking into consideration the jurisprudence of the Inter-American Court of Human Rights.[274] Particularly interesting cases in this regard include those of the Maori in New Zealand and the Cook Islands (with the noteworthy precedent set by the Treaty of Waitangi of 1840);[275] the Sami in the Nordic countries (Finland, Norway and Sweden);[276] and the Kanak people in New Caledonia, in the context of that territory's relationship with France.[277]

226. It is essential to preserve the right to self-determination of the populations of any small island developing States whose land territory is completely covered by the sea or becomes uninhabitable. That right could be upheld through the maintenance of

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[270] Chibuike Uche, "The British Government, Idi Amin and the expulsion of British Asians from Uganda", *Interventions – International Journal of Postcolonial Studies*, vol. 19-6, published online 15 May 2017, at https://www.tandfonline.com/doi/abs/10.1080/1369801X.2017.1294099?journalCode=riij20 (accessed on 25 February 2022); and Becky Taylor, "Good Citizens? Ugandan Asians, Volunteers and 'Race' Relations in 1970s Britain", *History Workshop Journal*, vol. 85, 19 June 2018, pp. 120–141, at https://academic.oup.com/hwj/article/doi/10.1093/hwj/dbx055/4818096 (accessed on 25 February 2022).

[271] Alejandro González-Varas Ibáñez, "La adquisición de la ciudadanía española por parte de los judíos sefardíes tras la aprobación de la Ley 12/2015", *Revista Latinoamericana de Derecho y Religión*, vol. 2, No. 2 (2016); Ministerio de Asuntos Exteriores y de Cooperación de España, "Más allá del deber: La respuesta humanitaria del Servicio Exterior frente al Holocausto" (2014); and Ministerio de Asuntos Exteriores y de Cooperación de España y Casa Sefarad-Israel, "Visados para la libertad (Visas for freedom): Diplomáticos españoles ante el Holocausto" (2008), at https://cdn.bush41.org/exhibits/catalogo_visadosDic08.pdf (accessed on 25 February 2022).

[272] General Assembly resolution 61/295 of 13 September 2007, annex.

[273] American Declaration on the rights of indigenous peoples, adopted by the General Assembly of the Organization of American States on 14 June 2016, at https://www.oas.org/es/sadye/documentos/res-2888-16-es.pdf (accessed on 25 February 2022).

[274] See, for instance, Inter-American Court of Human Rights, Case of the Saramaka People v. Suriname, Judgment of 28 November 2007 (Preliminary Objections, Merits, Reparations, and Costs), para. 93.

[275] Treaty of Waitangi (Waitangi, 6 February 1840), at https://nzhistory.govt.nz/politics/treaty/read-the-treaty/english-text (accessed on 25 February 2022).

[276] A/HRC/EMRIP/2021/2.

[277] Loi No. 88-1028 du 9 novembre 1988 portant dispositions statutaires et préparatoires à l'autodétermination de la Nouvelle-Calédonie en 1998, published in Journal Officiel de la République Française, at https://www.legifrance.gouv.fr/loda/id/JORFTEXT000000687687/ (accessed 25 February 2022); and Loi No. 99-209 organique du 19 mars 1999 relative à la Nouvelle-Calédonie, published in Journal Officiel de la République Française, at https://www.legifrance.gouv.fr/loda/id/JORFTEXT000000393606/#:~:text=La%20Nouvelle%2DCal%C3%A9donie%20d%C3%A9termine%20librement,d%C3%A9cider%20de%20modifier%20son%20nom (accessed on 25 February 2022).

statehood or the implementation of other approaches that enable the populations concerned to express their will in relation to decisions that could affect their future, and that preserve their rights, including their right to maintain their identity.

Part Three: Protection of persons affected by sea-level rise

I. Introductory considerations

A. A significant threat

227. Sea-level rise poses a significant threat to small islands and low-lying coastal areas around the world. Among the physical impacts, rising sea levels expose coastal populations to loss of land owing to an exacerbated risk of destructive erosion, inundation and wetland flooding of low-lying coastal areas. Increased flooding will have particularly adverse consequences for infrastructure, settlements and agricultural lands located at or near coasts. Higher sea levels also promote saltwater intrusion into river estuaries and aquifers, causing stress on the supply of freshwater resources and reducing the bearing capacity of the ground.[278] Studies of extreme sea levels worldwide have also indicated that sea-level rise brings with it more frequent extreme events driven by severe weather such as tropical cyclones and mid-latitude storms, which further aggravate such physical changes.[279]

B. A phenomenon of multifold dimensions and intensity with the potential to affect the enjoyment of human rights

228. Because sea-level rise is not uniform across time and space,[280] the nature and intensity of its physical impact will vary from region to region and locality to locality,[281] depending, *inter alia*, on terrain, climatic conditions, wealth, economic conditions, infrastructure and political institutions.[282] Yet, together, sea-level rise and the frequency and intensity of extreme events have potentially significant socioeconomic, environmental and cultural consequences for human lives and living conditions in coastal and low-lying areas. They threaten all aspects of human life, including mortality, livelihoods and industry, food and water security, health and well-being, homes, land and other property, infrastructure and critical services, and cultural heritage.[283] Accordingly, although sea-level rise does not in itself constitute a violation of human rights, it has the potential to adversely affect the enjoyment of human rights,[284] especially those of already vulnerable persons and groups, including

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[278] Nobuo Mimura, “Sea-level rise caused by climate change and its implications for society”, *Proceedings of the Japan Academy, Series B: Physical and Biological Sciences*, vol. 89, No. 7 (25 July 2013), pp. 281–301, at pp. 291–295.

[279] Antarctic Climate and Ecosystems Cooperative Research Centre, “Position analysis: climate change, sea-level rise and extreme events – impacts and adaptation issues” (Hobart, 2008), p. 12.

[280] Benjamin Horton *et al.*, “Mapping sea-level change in time, space and probability”, *Annual Review of Environment and Resources*, vol. 43 (2018), pp. 481–521.

[281] McAdam *et al.*, *International Law and Sea-Level Rise* (see footnote 134 above), p. 2.

[282] Sujatha Byravan and Sudhir Chella Rajan, “The ethical implications of sea-level rise due to climate change”, *Ethics and International Affairs*, vol. 24, No. 3 (Fall 2010), pp. 239–260, at p. 240.

[283] McAdam *et al.*, *International Law and Sea-Level Rise* (see footnote 134 above), p. 4.

[284] Siobhán McInerney-Lankford, “Human rights and climate change: reflections on international legal issues and potential policy relevance”, in Gerrard and Wannier (eds.), *Threatened Island Nations* (see footnote 158 above), pp. 195–242.

women, children, older persons, and indigenous groups and other traditional communities.

229. In resilient communities, the physical impact of sea-level rise and associated extreme events falling short of total submergence may be overcome through mitigation and adaptation strategies.[285] However, in more severe cases, where the habitability of coastal and low-lying areas is jeopardized and adaptation and mitigation measures prove inadequate, such disruption may have a serious impact on the lives of local inhabitants, potentially leaving them with no choice but to relocate or migrate.

C. A phenomenon whose impact may lead to significant internal or international movement of persons

230. Estimating the magnitude of such relocation or migration is challenging, because the impact of sea-level rise interacts with that of other, economic, social and political, factors that force people from their homes.[286] In the past decade, 83 per cent of all disasters triggered by natural hazards were caused by extreme weather- and climate-related events.[287] According to the Internal Monitoring Displacement Centre, weather-related disasters caused the internal displacement of 23.9 million people in 2019 alone.[288] Other studies estimate that 146 million people will be at risk of having to evacuate their homes over the next century owing to the adverse effects of climate change, including sea-level rise.[289]

231. Most involuntary relocation or displacement in the context of sea-level rise will be internal as opposed to across international borders. However, without timely and proactive interventions, displacement to other States may become inevitable.[290] In either scenario, given that it is, in principle, irreversible, sea-level rise is more likely to cause long-term or permanent movement of people than any other form of environmentally-induced human migration.[291]

232. The partial or complete inundation of State territory, including of small island States and low-lying coastal States, as a result of sea-level rise, has thus an impact on the populations of those areas, which are often densely populated. Sea-level rise jeopardizes the habitability of such areas, leading to a potentially large number of displaced persons, but also affecting those who might be able to stay.

233. A key issue to be addressed is therefore that of the protection of persons affected by sea-level rise, whether they are displaced or migrate owing to sea-level rise, or are

[285] Anthony Oliver-Smith, *Sea Level Rise and the Vulnerability of Coastal Peoples: Responding to the Local Challenges of Global Climate Change in the 21st Century* (Bonn, United Nations University (UNU) Institute for Environment and Human Security, 2009), p. 28.

[286] Gregory E. Wannier and Michael B. Gerrard, "Overview" in Gerrard and Wannier (eds.), *Threatened Island Nations* (see footnote 158 above), p. 5.

[287] International Federation of Red Cross and Red Crescent Societies, *World Disasters Report 2020: Come Heat or High Water – Tackling the Humanitarian Impacts of the Climate Crisis Together* (Geneva, 2020).

[288] Internal Monitoring Displacement Centre, *Global Report on Internal Displacement 2020* (Geneva, 2020).

[289] Etienne Piguet, "Climate change and forced migration", New Issues in Refugee Research, Research Paper No. 153 (Geneva, UNHCR, 2008); and David Anthoff *et al*., "Global and regional exposure to large rises in sea-level: a sensitivity analysis" Working Paper No. 96 (Norwich, Tyndall Centre for Climate Change Research, 2006).

[290] McAdam *et al*., *International Law and Sea-Level Rise* (see footnote 134 above), p. 23.

[291] Byravan and Chella Rajan, "The ethical implications of sea-level rise due to climate change" (see footnote 282 above), p. 240.

able to stay owing to mitigation and adaptation measures but may still face the impact of sea-level rise.

D. Absence of a dedicated legal framework and of a distinct legal status for persons affected by sea-level rise

234. To date, there is no binding international legal instrument that specifically includes provisions for cross-border movements induced by climate change and for the protection of persons who are affected and/or move owing to the adverse effects of climate change, such as sea-level rise. International law does not at present grant to persons affected by the adverse consequences of climate change, including sea-level rise, any distinct legal status.

235. However, because of the particular situation that persons affected by sea-level rise may face, owing to the nature of this adverse effect of climate change, they may have specific needs that would need to be addressed. The impact of sea-level rise on affected persons thus raises questions as to how such persons should be protected and what existing legal frameworks are potentially applicable to this situation (*lex lata*), and whether existing legal frameworks are sufficiently comprehensive, coherent or specific, what their limitations are and whether adjustments would be warranted (*lex ferenda*).

E. Protection of persons affected by sea-level rise: the dual rights- and needs-based approach of the 2016 draft articles on the protection of persons in the event of disasters

236. The protection of persons affected by sea-level rise should be understood, for the purposes of this subtopic, as all activities aimed at ensuring full respect for the rights of persons affected, in accordance with the relevant and applicable bodies of international law. As stated by the Special Rapporteur, Eduardo Valencia-Ospina, in the Commission's preliminary report on the topic "protection of persons in the event of disasters": "The title [of the topic] … imports a distinct perspective, that is, of the individual who is a victim of a disaster, and therefore suggests a definite rights-based approach to treatment of the topic. The essence of a rights-based approach to protection and assistance is the identification of a specific standard of treatment to which the individual, the victim of a disaster, *in casu*, is entitled. To paraphrase the Secretary-General, a rights-based approach deals with situations not simply in terms of human needs, but in terms of society's obligation to respond to the inalienable rights of individuals, empowers them to demand justice as a right, not as a charity, and gives communities a moral basis from which to claim international assistance when needed."[292]

237. In the subsequent work of the Special Rapporteur on the protection of persons in the event of disasters and the outcome of the Commission's work on the topic, a needs-based approach was also adopted, informed by existing human rights obligations. As the Special Rapporteur stated in the second report: "More than a normative statement with claims of exclusivity, the [rights-based] approach is a useful departing position that carries the all-important baggage of rights-based language, and needs to be complemented by other views of relevance to the specific subject matter to be understood. [The International Federation of Red Cross and Red Crescent Societies] has suggested that a rights-based approach to the topic may be complemented by considering the relevance of needs in the protection of persons in

[292] A/CN.4/598, para. 12.

the event of disasters. The Special Rapporteur believes that such an exercise can be usefully undertaken in this context. There is no stark opposition between needs and a rights-based approach to the protection of persons in the event of disasters. On the contrary, a reasonable, holistic approach to the topic seems to require that both rights and needs enter the equation, complementing each other when appropriate."[293]

238. This compromise between the rights-based and the needs-based approaches resulted in draft article 2, which reads as follows: "The purpose of the present draft articles is to facilitate the adequate and effective response to disasters and reduction of the risk of disasters, so as to meet the essential needs of the persons concerned, with full respect for their rights."[294]

239. A similar approach would seem justified in regard to the protection of persons affected by sea-level rise, since the two approaches (rights-based and needs-based) are not necessarily mutually exclusive but are best viewed as complementary: the protection of persons affected by sea-level rise should meet their needs, and such response must take place with full respect for their rights.

II. Mapping the existing legal frameworks potentially applicable to the protection of persons affected by sea-level rise

240. This section is devoted to mapping the existing legal frameworks that are potentially applicable to the protection of persons affected by sea-level rise. The relevant legal frameworks are addressed according to the following categories: international human rights law, international humanitarian law, international law concerning refugees and internally displaced persons, international law concerning migrants, international law concerning disasters and international law concerning climate change.

241. International human rights law, both at the international and regional level, is one of the relevant to the protection of persons affected by sea-level rise since the adverse effects of sea-level rise may affect the enjoyment of several human rights. The analysis mostly focuses on international human rights law, but also refers to regional protection systems as appropriate.

242. A brief analysis of international humanitarian law is relevant in the sense that there could be a nexus between the adverse effects of climate change, such as sea-level rise, and conflict, in terms of both the root causes of armed conflict and the impact of climate change on the vulnerability of civilian victims of armed conflict.

243. Because sea-level rise might lead to the movement of persons, within their own country or abroad, their protection from the point of view of international and regional legal regimes related to refugees, internally displaced persons and migrants is also appropriate.

244. Since sea-level rise has also been characterized as a disaster and is an adverse effect of climate change, international and regional legal regimes concerning the protection of persons in the event of disasters and international law concerning climate change might also contain relevant provisions.

245. The mapping exercise is intended to be descriptive rather than prescriptive, and is based on existing *lex lata* that is potentially applicable, taking into account that in

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[293] A/CN.4/615 and Corr.1, para. 17.

[294] 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), paras. 48–49.

many cases the existing instruments are of a soft-law character. Both international and regional instruments are considered, as appropriate.

A. International human rights law

246. It is now generally recognized that climate change can adversely affect the enjoyment of human rights, although there is no specific protection in the international or regional human rights legal regime regarding the adverse effects of climate change, including sea-level rise.

247. The Human Rights Council, in several of its resolutions,[295] has acknowledged that the adverse effects of climate change have a range of direct and indirect implications for the effective enjoyment of human rights. These adverse effects have also been highlighted by the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment[296] and other special procedures of the Council.[297] The Council's recent creation of the Special Rapporteur on the promotion and protection of human rights in the context of climate change[298] and the Council's recognition of the human right to a clean, healthy and sustainable environment[299] further highlights the link between the adverse effects of climate change and the enjoyment of human rights.

248. The Paris Agreement, concluded on 12 December 2015,[300] was the first international agreement on the subject of climate change to refer to human rights: in the preamble, it is acknowledged "that climate change is a common concern of humankind", and that States should, "when taking action to address climate change, respect, promote and consider their respective obligations on human rights, the right to health, the rights of indigenous peoples, local communities, migrants, children, persons with disabilities and people in vulnerable situations and the right to development, as well as gender equality, empowerment of women and intergenerational equity".

249. Although sea-level rise does not in itself constitute a violation of human rights, it has the potential to adversely affect the enjoyment of human rights, protected by both international and regional conventions,[301] especially those of already vulnerable persons and groups. Moreover, it has the potential to increase future vulnerability, as relatively safe communities today may become increasingly vulnerable.

250. The consequences of sea-level rise pose risks to many aspects of human life, including mortality, food and water security, health, housing, land and other property,

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[295] Human Rights Council resolutions 10/4 of 25 March 2009, 18/22 of 30 September 2011, 26/27 of 27 June 2014, 29/15 of 2 July 2015, 32/33 of 1 July 2016, 35/20 of 22 June 2017, 38/4 of 5 July 2018, 41/21 of 12 July 2019, 44/7 of 16 July 2020 and 47/24 of 14 July 2021.

[296] See https://www.ohchr.org/en/Issues/environment/SRenvironment/Pages/SRenvironmentIndex.aspx.

[297] See paras. 369–370 and 391–394 below.

[298] See Human Rights Council resolution 48/14 of 8 October 2021.

[299] See Human Rights Council resolution 48/13 of 8 October 2021.

[300] United Nations, *Treaty Series*, No. I-54113, eleventh preambular para. Available from https://treaties.un.org.

[301] See, in particular: Universal Declaration of Human Rights; International Covenant on Civil and Political Rights; International Covenant on Economic, Social and Cultural Rights (New York, 16 December 1966), *ibid.*, vol. 993, No. 14531, p. 3; American Convention on Human Rights: "Pact of San José, Costa Rica" (San José, 22 November 1969), *ibid.*, vol. 1144, No. 17955, p. 123; African Charter on Human and Peoples' Rights (Nairobi, 27 June 1981), *ibid.*, vol. 1520, No. 26363, p. 217; and Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) (Rome, 4 November 1950), *ibid.*, vol. 213, No. 2889, p. 221.

livelihoods and cultural heritage. Such adverse effects have to be taken into consideration both regarding measures to address climate change, such as mitigation and adaptation measures, and regarding the effects of sea-level rise that might require the affected persons to be relocated, internally displaced or moved abroad.

251. Among the human rights that are most likely to be affected by sea-level rise are the rights to life, property, adequate food and water, health, adequate housing, and cultural identity,[302] and States have an obligation to respect such human rights vis-à-vis persons within their jurisdiction. Slow-onset events, such as sea-level rise, can negatively affect these substantive human rights, but also the rights of participation and information, of persons potentially affected by sea-level rise.

252. By means of exemplification, without being fully comprehensive and without prejudice to a case-by-case analysis regarding the specific right and situation in question, there follows a discussion of the potentially specific effects on the dignity and human rights of persons affected by sea-level rise:

(a) **The right to life.**[303] Adverse effects of climate change, including the impact of sea-level rise, can pose both direct and indirect threats to human life. Mortality is one impact of climate-related extremes. There is a high risk of death in low-lying coastal zones and small island developing States and other small islands owing to storm surges, coastal flooding and sea-level rise. In an extreme case, if an entire country is at risk of becoming submerged under water, the conditions of life in that country may become incompatible with the right to a life with dignity before the risk is realized;

(b) **The prohibition of cruel, inhuman or degrading treatment.**[304] Even if the right to life is not directly in peril, adverse effects of climate change such as sea-level rise could expose individuals who live in the territories affected to cruel, inhuman or degrading treatment, in that they are deprived of the effective enjoyment of several human rights – namely the economic, social and cultural rights mentioned below – that are essential to an adequate standard of living and a life with dignity. The presence of such adverse effects in receiving States, which may expose individuals to a violation of the prohibition of cruel, inhuman and degrading treatment, could also trigger the *non-refoulement* obligations of sending States;

(c) **The right to adequate housing.**[305] The right to adequate housing is a component of the right to an adequate standard of living. Having a place of shelter is fundamental to many aspects of human existence and is closely associated with a number of other human rights. The observed and projected impact of climate change, including sea-level rise, has several direct and indirect implications for the enjoyment of the right to adequate housing, including through its impact on infrastructure and

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[302] See A/HRC/10/61.

[303] Universal Declaration of Human Rights, art. 3; International Covenant on Civil and Political Rights, art. 6; European Convention on Human Rights, art. 2; American Convention on Human Rights, art. 4; and African Charter on Human and Peoples' Rights, art. 4. See also Human Rights Committee, general comment No. 36 (2018) (CCPR/C/GC/36).

[304] Universal Declaration of Human Rights, art. 5; International Covenant on Civil and Political Rights, art. 7; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (New York, 10 December 1984), United Nations, *Treaty Series*, vol. 1465, No. 24841, p. 85, art. 16; European Convention on Human Rights, art. 3; American Convention on Human Rights, art. 5; and African Charter on Human and Peoples' Rights, art. 5. See also Human Rights Committee, general comment No. 20 (1992), report of the Human Rights Committee, *Official Records of the General Assembly, Forty-seventh Session, Supplement No. 40* (A/47/40), annex VI.

[305] Universal Declaration of Human Rights, art. 25, and International Covenant on Economic, Social and Cultural Rights, art. 11. See also Committee on Economic, Social and Cultural Rights, general comment No. 4 (1991), *Official Records of the Economic and Social Council, 1991, Supplement No. 3* (E/1992/23-E/C.12/1991/4), annex III.

settlements. Inappropriately located and poor-quality housing are often the most vulnerable to extreme events, including floods and sea-level rise. Settlements and infrastructure in coastal areas are particularly at risk;

(d) **The right to food.**[306] Livelihoods can be disrupted in low-lying coastal zones and small island developing States and other small islands owing to storm surges, coastal flooding and sea-level rise, which may have implications for the availability and accessibility of food and cause disruption in food production, reductions in crop yields, increased food prices and food insecurity;

(e) **The right to water.**[307] The right to water is regarded as implicit in the right to an adequate standard of living and the right to the enjoyment of the highest attainable standard of health. It is indispensable for leading a life with dignity and is a prerequisite for the realization of other human rights. The salinization of the freshwater lens due to sea-level rise in small island developing States and in low-lying coastal areas can affect the right to water of the local population;

(f) **The right to take part in cultural life and to respect for cultural identity.**[308] When people move as a result of slow-onset events such as sea-level rise or coastal erosion, they risk losing their cultures that are attached to the traditional territory. The inability to live on ancestral lands or close to the ocean might for some be at odds with their right to pursue their protected cultural rights. This is relevant in respect of the enjoyment of cultural rights by indigenous groups and minority populations, including their ability to identify with a particular community and, so, to engage in their cultural practices;

(g) **The right to a nationality and the prevention of statelessness.**[309] Everyone has the right to a nationality and must be protected from arbitrary deprivation of nationality. Persons affected by sea-level rise are not per se at risk of losing their nationality and becoming statelessness. Only in an extreme scenario, in which a State disappeared and there was no solution to ensure the continuity of its legal personality or some form of State succession, would that issue arise. At the same time, it is important to guarantee, in the context of the possible displacement or migration abroad of persons affected by sea-level rise, that such persons will not be involuntarily arbitrarily deprived of their nationality as a result of the application of national laws relating to nationality matters;

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[306] Universal Declaration of Human Rights, art. 25, and International Covenant on Economic, Social and Cultural Rights, art. 11. See also Committee on Economic, Social and Cultural Rights, general comment No. 12 (1999), *Official Records of the Economic and Social Council, 2000, Supplement No. 2* (E/2000/22-E/C.12/1999/11 and Corr.1), annex V.

[307] Universal Declaration of Human Rights, art. 25, and International Covenant on Economic, Social and Cultural Rights, arts. 11 and 12. See also Committee on Economic, Social and Cultural Rights, general comment No. 15 (2002) *Official Records of the Economic and Social Council, 2003, Supplement No. 2* (E/2003/22-E/C.12/2002/13), annex IV, and General Assembly resolution 64/292 of 28 July 2010 on the human right to water and sanitation.

[308] Universal Declaration of Human Rights, art. 27, and International Covenant on Economic, Social and Cultural Rights, art. 15. See also Committee on Economic, Social and Cultural Rights, general comment No. 21 (2009), *Official Records of the Economic and Social Council, 2003, Supplement No. 2* (E/2010/22-E/C.12/2009/3), annex VII.

[309] Universal Declaration of Human Rights, art. 15, and American Convention on Human Rights, art. 20. See also Convention relating to the Status of Stateless Persons (New York, 28 September 1954), United Nations, *Treaty Series*, vol. 360, No. 5158, p. 117; and Convention on the Reduction of Statelessness.

(h) **The rights of children.**[310] The human rights discussed in the present section are also generally protected by the Convention on the Rights of the Child. Children have been recognized as being particularly affected by climate change, in terms of both the manner in which they experience the effects of climate change and the potential of climate change to affect them throughout their lifetime, particularly if immediate action is not taken. Given the particular impact on children, and the recognition by States parties to the Convention on the Rights of the Child that children are entitled to special safeguards, including appropriate legal protection, States may have heightened obligations to protect children from foreseeable harm caused by climate change, including sea-level rise;

(i) **Public participation, access to information and access to justice.**[311] International human rights law, complemented by international environmental law, increasingly recognizes that the right of all persons to take part in the government of their country and in the conduct of public affairs includes the right of public participation in the preparation of plans or measures that may have a significant impact on the environment, which might be the case with measures to combat sea-level rise or to protect persons from its effects. Closely related is the right of access to relevant information in these domains held by public authorities and the right of access to justice, including for the purposes of redress and remedies, regarding decisions taken in connection with sea-level rise that might affect human rights;

(j) **The right to self-determination and the rights of indigenous peoples.**[312] The collective right to self-determination is a fundamental principle of international law, in accordance with the Charter of the United Nations. It is also a human right, in accordance with common article 1 of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, which establishes that, by virtue of that right, "all peoples … freely determine their political status and freely pursue their economic, social and cultural development". The right to self-determination is essential for the effective enjoyment of other human rights. Land inundation stemming from sea-level rise can pose risks to the territorial

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[310] Universal Declaration of Human Rights, art. 25, and International Covenant on Civil and Political Rights, art. 24. See also Convention on the Rights of the Child (New York, 20 November 1989), United Nations, *Treaty Series*, vol. 1577, No. 27531, p. 3; and Human Rights Committee, general comment No. 17 (1989), report of the Human Rights Committee, *Official Records of the General Assembly, Forty-fourth Session, Supplement No. 40* (A/44/40), annex VI.

[311] Universal Declaration of Human Rights, arts. 8 and 19–21; International Covenant on Civil and Political Rights, arts. 2, 19 and 25; International Covenant on Economic, Social and Cultural Rights, art. 13; Convention on the Elimination of All Forms of Discrimination against Women (New York, 18 December 1979), United Nations, *Treaty Series*, vol. 1249, No. 20378, p. 13, art. 7; Convention on the Rights of the Child, art. 13; and American Convention on Human Rights, arts. 23 and 25. See also Human Rights Committee, general comment No. 25 (1996), report of the Human Rights Committee, *Official Records of the General Assembly, Fifty-first Session, Supplement No. 40* (A/51/40), vol. I, annex V. See also Rio Declaration on Environment and Development (A/CONF.151/26/Rev.l (Vol. l)), annex I, principle 10; United Nations Framework Convention on Climate Change (New York, 9 May 1992), United Nations, *Treaty Series*, vol. 1771, No. 30822, p. 107, art. 6; Paris Agreement, art. 12; Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus, Denmark, 25 June 1998), United Nations, *Treaty Series*, vol. 2161, No. 37770, p. 447; and Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean (Escazú, Costa Rica, 4 March 2018), *ibid*., No. I-56654, available from https://treaties.un.org.

[312] International Covenant on Civil and Political Rights and International Covenant on Economic, Social and Cultural Rights, common art. 1. See also Human Rights Committee, general comment No. 12 (1984), report of the Human Rights Committee, *Official Records of the General Assembly, Thirty-ninth Session, Supplement No. 40* (A/39/40 and Corr.1 and Corr.2), annex VI; and the United Nations Declaration on the Rights of Indigenous Peoples (General Assembly resolution 61/295, annex).

integrity of States with extensive coastlines and to small island States; at its most extreme, sea-level rise may threaten the continued existence of some low-lying States. In such cases, the right to self-determination could be at risk, since it is unlikely that the whole community would be able to be relocated and remain together elsewhere, with functioning institutions and governance capacity. In these and other cases, the impact of sea-level rise may deprive indigenous peoples of their traditional territories and sources of livelihoods. The potential loss of traditional territories from sea-level rise and coastal erosion, for example, threatens the cultural survival, livelihoods and territorial integrity of indigenous peoples.

253. It should be noted, however, that only a case-by-case enquiry, taking into account all the relevant circumstances, would allow for an assessment of the applicability of each of the above-mentioned rights. In particular, sea-level rise could be considered an extreme circumstance in which derogation from human rights obligations was permitted under several treaties, such that it might not be entirely certain that the corresponding obligations to ensure the enjoyment of the various rights would apply equally in such circumstances. Such an enquiry might be needed before establishing that a right definitely applied, and to what extent.

254. The exact applicability and scope of States' human rights obligations would depend on the nature of the right in question, namely whether it was a civil or political right or an economic, social or cultural right. A deeper and more nuanced analysis would also be necessary in this respect.

B. International humanitarian law

255. The relationship between international humanitarian law and climate change is a subject that has been attracting growing attention,[313] but the potential applicability of international humanitarian law to the protection of persons affected by sea-level rise is not easy to ascertain.

256. International humanitarian law could be relevant in connection with the protection of persons affected by sea-level rise in the event of an international or non-international armed conflict in a territory subject to sea-level rise, a situation that would trigger the application of this specialized body of international law, as *lex specialis* over human rights law.[314] That is to say, sea-level rise could occur in the same territory where an armed conflict is taking place, or vice versa, and the situation would then be governed in the first instance by the rules of international humanitarian law.

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[313] See, for example, Tuiloma Neroni Slade, "International humanitarian law and climate change", in Suzannah Linton, Tim McCormack and Sandesh Sivakumaran (eds.), *Asia-Pacific Perspectives on International Humanitarian Law* (Cambridge, Cambridge University Press, 2019), pp. 643–655. See also Karen Hulme, "Climate change and international humanitarian law", in Rosemary Rayfuse and Shirley V. Scott (eds.), *International Law in the Era of Climate Change* (Cheltenham, United Kingdom, and Northampton, Massachusetts, Edward Elgar Publishing, 2012), pp. 190–218, at p. 207; and Christine Bakker, "The relationship between climate change and armed conflict in international law: does the Paris Agreement add anything new?", *Journal for Peace Processes*, vol. 2, No. 1 (first quarter, 2016), pp. 2–3.

[314] As the International Court of Justice stated in its Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (*I.C.J. Reports 2004*, p. 136, at p. 178, para. 106): "As regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law. In order to answer the question put to it, the Court will have to take into consideration both these branches of international law, namely human rights law and, as *lex specialis*, international humanitarian law."

257. In draft article 18 of the draft articles on the protection of persons in the event of disasters, the Commission recognized that the draft articles did not apply to the extent that the response to a disaster was governed by the rules of international humanitarian law. As explained in the commentary, "the rules of international humanitarian law shall be applied as *lex specialis*, whereas the rules contained in the present draft articles would continue to apply 'to the extent' that legal issues raised by a disaster are not covered by the rules of international humanitarian law. The present draft articles would thus contribute to filling legal gaps in the protection of persons affected by disasters during an armed conflict while international humanitarian law shall prevail in situations regulated by both the draft articles and international humanitarian law. In particular, the present draft articles are not to be interpreted as representing an obstacle to the ability of humanitarian organizations to conduct, in times of armed conflict (be it international or non-international) even when occurring concomitantly with disasters, their humanitarian activities in accordance with the mandate assigned to them by international humanitarian law."[315]

258. In several provisions of the Geneva Conventions of 1949 and of the Protocols additional thereto of 1977,[316] reference is made to forms of humanitarian relief to be provided during conflict or occupation even where the situations that they seek to alleviate have not necessarily been caused by such conflict or occupation, although they might have been exacerbated.[317]

259. Accordingly, if it became necessary to provide relief to people subject to the effects of sea-level rise in a situation of armed conflict (of either international or non-international character), such relief would be provided in accordance with the applicable rules of international humanitarian law. Given that a complex situation is at issue, in which multiple vulnerabilities intersect, international humanitarian law and disaster law would then be applicable concurrently,[318] against a backdrop of subsidiary applicable protections afforded by international human rights law and other relevant bodies of international law.

260. It has been recognized in the literature that people are subject to a "double vulnerability" in many conflicts,[319] owing to the coexistence of risk factors emanating, on the one hand, from climate-related circumstances (including sea-level rise) and, on the other, from the conflict itself.[320] In these cases, people are simultaneously victims of the conflict and of hardship arising from environmental and climate causes, thus meriting specific forms of humanitarian assistance.

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[315] Commentary to draft article 18 of the draft articles on the protection of persons in the event of disasters, *Yearbook of the International Law Commission, 2016*, vol. II (Part Two), para. 49.

[316] Geneva Conventions for the protection of war victims (Geneva, 12 August 1949), United Nations, *Treaty Series*, vol. 75, Nos. 970–973, p. 31; and Protocols Additional to the Geneva Conventions of 12 August 1949 (Geneva, 8 June 1977), *ibid.*, vol. 1125, Nos. 17512–17513, p. 3.

[317] In particular: Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Convention IV), *ibid.*, vol. 75, No. 973, p. 287, arts. 23, 55, 59–61 and 63; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), *ibid.*, vol. 1125, No. 17512, p. 3, arts. 17, 61–71 and 81; and Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), *ibid.*, vol. 1125, No. 17513, p. 609, art. 18. See Hulme, "Climate change and international humanitarian law", in Rayfuse and Scott (eds.) *International Law in the Era of Climate Change* (see footnote 313 above), p. 207.

[318] On international law concerning disasters, see also sect. E below, paras. 284–305.

[319] See International Committee of the Red Cross (ICRC), "The relationship between climate change and conflict", 6 January 2016.

[320] Katie Peters *et al.*, "Double vulnerability: the humanitarian implications of intersecting climate and conflict risk", Overseas Development Institute, March 2019.

261. In a recent report, the International Committee of the Red Cross (ICRC) points out that while climate change does not directly cause armed conflict, its effects may indirectly increase the risk of conflict by exacerbating social, economic or environmental factors that can, in a complex interplay, ultimately lead to conflict.[321] In places already enduring armed conflicts, climate change may impede the capabilities of the competent authorities to deal with the vulnerabilities and needs of the civilian population.[322]

C. International law concerning refugees and internally displaced persons

1. International law concerning refugees

262. To date, no receiving State has granted refugee status, in the sense of the Convention relating to the Status of Refugees (1951),[323] based exclusively on factors relating to climate-induced changes such as sea-level rise.[324]

263. The existing international regulatory framework governing refugees does not recognize climate change, or any of its adverse effects, such as sea-level rise, as a situation that merits the recognition of protected status, unless the specific conditions of the existing legal definition of a refugee discussed below are otherwise met.

264. Terms such as "climate change refugee", "climate refugee" or "environmental refugee" are therefore not legal terms, though often used as advocacy tools to generate attention and mobilize civil society around the dangers of global warming.[325]

265. Besides not constituting a legal category, several limits have been pointed out regarding these terms:

(a) they may contribute to misunderstandings about the likely patterns, timescale and nature of climate change-related movement;[326]

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[321] ICRC, *When Rains Turns to Dust: Understanding and Responding to the Combined Impact of Armed Conflicts and the Climate and Environment Crisis on People's Lives* (Geneva, 2020), p. 19.

[322] *Ibid.*, pp. 18–20.

[323] Convention relating to the Status of Refugees (Geneva, 28 July 1951), United Nations, *Treaty Series*, vol. 189, No. 2545, p. 137.

[324] See, for instance, cases before the courts in New Zealand Courts, such as Supreme Court of New Zealand, *Teitiota v. Chief Executive of the Ministry of Business, Innovation and Employment*, Case No. [2015] NZSC 107, Judgment, 20 July 2015.

[325] The notion of "environmental refugee" became popular in 1985 when Essam el-Hinnawi of UNEP used the term in his report to designate "... those people who have been forced to leave their traditional habitat, temporarily or permanently, because of a marked environmental disruption (natural and/or triggered by people) that jeopardized their existence and/or seriously affected the quality of their life" (Essam el-Hinnawi, *Environmental Refugees* (Nairobi, UNEP, 1985), p. 4). See also François Gemenne, "How they became the human face of climate change: research and policy interactions in the birth of the 'environmental migration' concept", in Etienne Piguet *et al.* (eds.), *Migration and Climate Change* (Cambridge, Cambridge University Press; Paris, United Nations Educational, Scientific and Cultural Organization, 2011), pp. 225–259, at p. 228.

[326] Jane McAdam, "The relevance of international refugee law", in *Climate Change, Forced Migration, and International Law* (Oxford University Press, 2012), pp. 39–51, at p. 40.

(b) they may be considered offensive by those to whom they are ascribed,[327] and may be rejected because they are seen as invoking a sense of helplessness, lack of dignity and stigmatization of the victims;[328]

(c) legal scholars reject them as misnomers.[329]

266. The legal definition of "refugee" status, and the rights and entitlements that it entails, are set out in the 1951 Convention, read in conjunction with the Protocol relating to the Status of Refugees (1967).[330] This definition governs mainly political refugees (that is, those who are fleeing persecution) and therefore does not cover the possibility of extending protection to persons affected by climate change, including sea-level rise.

267. The 1951 Convention defines a refugee as any person who, "owing to 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 his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it".[331]

268. The Office of the United Nations High Commissioner for Refugees (UNHCR),[332] in its *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status*, has confirmed that victims of natural disasters are excluded from the scope of the Convention,[333] unless the above-mentioned criteria from the 1951 Convention are met. The same reasoning would be applicable in relation to the adverse effects of climate change, such as sea-level rise.

269. At the regional level, both the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa (1969)[334] and the Cartagena Declaration on Refugees (1984)[335] in Latin America contain broader definitions of refugees than the 1951 Convention. However, these expanded definitions do not dispense with the difficulty of establishing legal causation between climate-induced changes and human activity;

[327] Jane McAdam, "The normative framework of climate change-related displacement", Brookings Institution, 3 April 2012, pp. 1–2; and Peter Penz, "International ethical responsibilities to 'climate change refugees'", in Jane McAdam (ed.), *Climate Change and Displacement: Multidisciplinary Perspectives* (Oxford and Portland, Oregon, Hart Publishing, 2010), pp.151–174, at p. 152.

[328] McAdam, "The relevance of international refugee law", in *Climate Change* (see footnote 326 above), p. 41.

[329] Jane McAdam, "From economic refugees to climate refugees? Review of *International Refugee Law and Socio-Economic Rights: Refuge from Deprivation* by Michelle Foster", *Melbourne Journal of International Law*, vol. 10, No. 2 (October 2009), pp. 579–595.

[330] Protocol relating to the Status of Refugees (New York. 31 January 1967), United Nations, *Treaty Series*, vol. 606, No. 8791, p. 267.

[331] Art. 1 (A) (2).

[332] On UNHCR, see also paras. 395–398 below.

[333] UNHCR, *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* (Geneva, 2011), para. 39.

[334] OAU Convention Governing the Specific Aspects of Refugee Problems in Africa (Addis Ababa, 10 September 1969), United Nations, *Treaty Series*, vol. 1001, No. 14691, p. 45.

[335] Cartagena Declaration on Refugees, adopted at the Colloquium on the International Protection of Refugees in Central America, Mexico and Panama: Legal and Humanitarian Problems, held in Cartagena, Colombia, on 19–22 November 1984. Available at www.oas.org/dil/1984_Cartagena_Declaration_on_Refugees.pdf.

for example, it is unclear who might be considered an agent of persecution in situations of climate-induced displacement.[336]

270. Concerning relevant soft-law instruments or initiatives, the New York Declaration for Refugees and Migrants,[337] adopted in 2016 by the General Assembly at its seventy-first session, formally recognizes the link between migration, the environment and climate change.[338] Nonetheless, the New York Declaration does not recognize a category of climate refugees or environmental refugees, and neither does the global compact on refugees, presented by UNHCR and affirmed by the Assembly on 17 December 2018.[339]

2. International law concerning internally displaced persons

271. Individuals who are displaced within their country are categorized or referred to as "internally displaced persons" rather than refugees, and are therefore excluded from the scope of the 1951 Convention. Instead, they fall under the responsibility of their country of origin, and there is no international convention regarding this category of persons.

272. At the international level, the Guiding Principles on Internal Displacement,[340] presented to the Commission on Human Rights,[341] contain the first international standards developed for internally displaced persons, and collate all the existing international principles relevant to internally displaced persons into a single instrument. The Guiding Principles do not create a new legal status for internally displaced persons – who enjoy the same rights and freedoms as other persons in their country – but seek to address their specific needs.[342]

273. The Guiding Principles define internally displaced persons as "persons or groups of persons who have been forced or obliged to free or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalized violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognized State border".[343] This definition is not a legal definition but a "descriptive identification of the category of persons whose needs are the concern of the Guiding Principles".[344]

274. The defining characteristics of internal displacement are that the movement is coerced or forced and that the movement occurs within national borders. Under the Guiding Principles, States are called upon to take measures to prevent internal displacement, to uphold the rights of the individuals who are displaced and to support durable solutions.

275. While the Guiding Principles are, in principle, applicable to persons who have been displaced internally owing to the adverse effects of climate change, such as sea-level rise, they might present some limits:

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[336] Environmental Justice Foundation, "Falling through the cracks: a briefing on climate change, displacement and international governance frameworks" (2014), p. 7.
[337] General Assembly resolution 71/1 of 19 September 2016.
[338] *Ibid.*, paras. 1 and 43.
[339] General Assembly resolution 73/151 of 17 December 2018.
[340] E/CN.4/1998/53/Add.2, annex.
[341] See Commission on Human Rights resolution 2004/55.
[342] Roberta Cohen, "The Guiding Principles on Internal Displacement: a new instrument for international organizations and NGOs", *Forced Migration Review*, No. 2 (August 2998), p. 2.
[343] E/CN.4/1998/53/Add.2, annex, para. 2.
[344] Walter Kälin, *Guiding Principles on Internal Displacement – Annotations*, (Washington, D.C., American Society of International Law, 2008), pp. 3–5.

(a) as the effects of climate change, such as rising sea levels, can occur over months, years or even decades, it is difficult to determine whether displacement is voluntary or coerced and thus whether the Guiding Principles are applicable;[345]

(b) it is difficult to determine when an area becomes uninhabitable. In the context of small island States affected by sea-level rise, for instance, it is likely that as conditions deteriorated, individuals would leave long before the islands were submerged to avoid the longer-term effects, because of the salinization of water supplies and arable land and because of the destruction of infrastructure;[346]

(c) slow-onset disasters and the negative effects of climate change may not necessarily cause displacement, but may prompt people to consider moving as a way to adapt to the changing environment and may explain why people move to regions with better living conditions and income opportunities. However, if areas become uninhabitable over time because of further deterioration, eventually leading to complete desertification, permanent flooding of coastal zones or similar situations, population movements will amount to forced displacement and become permanent;[347]

(d) the intricate intersection of environmental and economic drivers of population movements makes it hard to apply the Guiding Principles, which are based on the distinction between voluntary and involuntary movement. It is challenging to determine when climate-induced changes lead to the loss of livelihoods and people move in order to find work;[348]

(e) the Guiding Principles deliberately exclude those displaced for economic reasons, yet most human mobility related to climate change features a strong economic dimension centred around the loss of livelihoods and reductions in household income;[349]

(f) displacement is likely to be slow and to occur in places where seasonal migration has been used as a livelihood strategy in the past. In some countries, seasonal labour migration and temporary displacement because of disasters is common. In such contexts, it becomes difficult to make the distinction between migration used as a livelihood strategy and displacement.[350]

276. At the regional level, the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention), of 2009, seeks to fill the legal protection gap regarding internal displacement in international law.[351] Furthermore, its article V (4) recognizes the link between climate change and displacement, providing that States parties should take measures to protect and assist persons who have been internally displaced due to natural or human made disasters, including climate change". The Secretary-General's High-Level Panel on Internal Displacement, in a report of September 2021 entitled *Shining a Light on Internal Displacement: A Vision for the Future*,[352] further recognized that link and highlighted

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[345] See Elizabeth Ferris, Erin Mooney and Chareen Stark, *From Responsibility to Response: Assessing National Approaches to Internal Displacement* (Brookings Institution–London School of Economics Project on Internal Displacement, Washington, D.C., 2011), p. 119.

[346] *Ibid.,* p. 124.

[347] *Ibid*., p. 123.

[348] *Ibid*., p. 124.

[349] Environmental Justice Foundation, "Falling through the cracks" (see footnote 336 above), p. 9.

[350] See Ferris, Mooney and Stark, *From Responsibility to Response* (see footnote 345 above), p. 125.

[351] African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala, 23 October 2009), United Nations, *Treaty Series*, vol. 3014, No. 52375, p. 3. See also Mehari Taddele Maru, "The Kampala Convention and its contribution in filling the protection gap in international law", *Journal of Internal Displacement*, vol. 1, No. 1 (July 2011), pp. 91–130, at p. 96.

[352] United Nations, 2021.

the importance of finding durable solutions, strengthening prevention and improving protection and assistance.

D. International law concerning migrants

277. Those displaced by sea-level rise have been described as "climate" or "environmental" displaced persons or migrants. According to the International Organization for Migration (IOM), [353] "[e]nvironmental migrants are people or groups, who, for compelling reasons of sudden or progressive changes in the environment that adversely affect their lives or living conditions, are obliged to leave their habitual homes, or chose to do so, either temporarily or permanently, and who move either within their country or abroad".[354]

278. The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, adopted by the General Assembly on 18 December 1990,[355] deals mainly with economic migrants, as it defines a "migrant worker" as "a person who is to be engaged, is engaged or has been engaged in a remunerated activity in a State of which he or she is not a national".[356]

279. However, there have been recent soft-law developments concerning migration that are relevant to displacement caused by the adverse effects of climate change, including sea-level rise. On 19 September 2016, the General Assembly convened a high-level meeting on addressing large movements of refugees and migrants, with the aim of improving the response of the international community. At that meeting, all 193 Member States of the United Nations unanimously adopted the New York Declaration for Refugees and Migrants.[357]

280. Annex II to the New York Declaration set in motion a process of intergovernmental consultations and negotiations towards the development of a non-binding agreement for safe, orderly and regular migration. This process concluded on 10 December 2018 at an intergovernmental conference held in Marrakech, Morocco, with the adoption, by a majority of Member States, of the Global Compact for Safe, Orderly and Regular Migration, which was followed by its formal endorsement by the General Assembly on 19 December 2018.[358]

281. Under the Global Compact for Migration, States will:

(a) develop adaptation and resilience strategies to sudden-onset and slow-onset natural disasters, the adverse effects of climate change, and environmental degradation, such as desertification, land degradation, drought and sea-level rise, taking into account the potential implications for migration, while recognizing that adaptation in the country of origin is a priority;[359]

(b) cooperate to identify, develop and strengthen solutions for migrants compelled to leave their countries of origin owing to slow-onset natural disasters, the adverse effects of climate change, and environmental degradation, such as desertification, land degradation, drought and sea-level rise, including by devising

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[353] On IOM, see also paras. 399–401 below.

[354] Oli Brown, "Migration and climate change", IOM Migration Research Series, No. 31 (Geneva, IOM, 2008), p. 15.

[355] United Nations, *Treaty Series*, vol. 2220, No. 39481, p. 3.

[356] Art. 2 (1).

[357] General Assembly resolution 71/1.

[358] General Assembly resolution 73/195 of 19 December 2018. See also A/CONF.231/7.

[359] General Assembly resolution 73/195, annex, para. 18 (i).

planned relocation and visa options, in cases where adaptation in or return to their country of origin is not possible.[360]

282. The Global Compact is therefore significant for its recognition of disasters and climate change, including sea-level rise – which is expressly mentioned – as drivers of cross-border human mobility.

283. Also under the Global Compact, States will:[361]

(a) strengthen joint analysis and sharing of information to better map, understand, predict and address migration movements, such as those that may result from sudden-onset and slow-onset natural disasters, the adverse effects of climate change, environmental degradation, as well as other precarious situations, while ensuring the effective respect for and protection and fulfilment of the human rights of all migrants;

(b) integrate displacement considerations into disaster preparedness strategies and promote cooperation with neighbouring and other relevant countries to prepare for early warning, contingency planning, stockpiling, coordination mechanisms, evacuation planning, reception and assistance arrangements, and public information;

(c) harmonize and develop approaches and mechanisms at the subregional and regional levels to address the vulnerabilities of persons affected by sudden-onset and slow-onset natural disasters, by ensuring that they have access to humanitarian assistance that meets their essential needs with full respect for their rights wherever they are, and by promoting sustainable outcomes that increase resilience and self-reliance, taking into account the capacities of all countries involved;

(d) develop coherent approaches to address the challenges of migration movements in the context of sudden-onset and slow-onset natural disasters, including by taking into consideration relevant recommendations from State-led consultative processes, such as the Agenda for the Protection of Cross-Border Displaced Persons in the Context of Disasters and Climate Change, and the Platform on Disaster Displacement.

E. International law concerning disasters

284. There is no generally accepted legal definition of the term “disaster” in international law.[362] Nonetheless, definitions, where provided in treaties, do not differ in any significant manner. This term is commonly defined as a serious disruption of the functioning of society, causing significant, widespread human, material, economic or environmental losses, whether caused by accident, nature or human activity, and whether developing suddenly or as the result of complex, long-term processes.[363]

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[360] *Ibid.*, para. 21 (h).

[361] *Ibid.*, para. 18 (h) and (j)–(l).

[362] A/CN.4/598, para. 46.

[363] For example, in the Tampere Convention on the Provision of Telecommunication Resources for Disaster Mitigation and Relief Operations (Tampere, 18 June 1998; United Nations, *Treaty Series*, vol. 2296, No. 4096, p. 5, art. 1 (6)), the term “disaster” is defined as “a serious disruption of the functioning of society, posing a significant, widespread threat to human life, health, property or the environment, whether caused by accident, nature or human activity, and whether developing suddenly or as the result of complex, long-term processes”; and under the Association of Southeast Asian Nations (ASEAN) Agreement on Disaster Management and Emergency Response (Ventiane, 26 July 2005; *Asean Documents Series 2005*, p. 157, art. 1 (3)), the term “disaster” means “a serious disruption of the functioning of a community or a society causing widespread human, material, economic or environmental losses”.

285. Activities for the protection of persons in the event of disasters have generally been approached pragmatically, as evidenced by international law-making and organizational developments in disaster governance, such as the steady growth of bilateral agreements and of regulatory frameworks under the aegis of the United Nations and entities such as ICRC.[364]

286. Furthermore, there are several instruments and initiatives regarding the protection of persons and assistance in the event of disasters that are of potential relevance in the context of the protection of persons affected by sea-level rise.

287. As a preliminary comment, it is important to note that while disaster law provides for immediate or short-term responses, the consequences of sea-level rise might call for more long-term responses. That being said, several instruments and initiatives may be relevant to the protection of persons in the context of sea-level rise,[365] such as the Commission's 2016 draft articles on the protection of persons in the event of disasters,[366] the Sendai Framework for Disaster Risk Reduction 2015–2030,[367] and the Nansen Initiative and its Agenda for the Protection of Cross-Border Displaced Persons in the Context of Disasters and Climate Change.[368]

1. Draft articles on the protection of persons in the event of disasters (2016)

288. The draft articles on the protection of persons in the event of disasters, adopted by the Commission in 2016,[369] make it clear that sea-level rise is a type of disaster. According to the commentary, "the draft articles apply equally to sudden-onset events (such as an earthquake or tsunami) and to *slow-onset events* (such as drought or *sea-level rise*), as well as frequent small-scale events (floods or landslides)" (emphasis added).[370]

289. This means that these 2016 draft articles are applicable to the protection of persons in relation to sea-level rise. Nevertheless, despite being a disaster comparable to other calamitous events, sea-level rise has specificities that can and should be considered when applying the 2016 draft articles to individual cases. Sea-level rise is a slow-onset event, which can create long-term consequences that might be difficult, if not impossible, to overturn, such as the loss of territory and the salinization of otherwise fresh water. Although the 2016 draft articles were designed to be flexible in order to take account of the nature and contours of different types of disasters, the irreversibility of some of the effects of sea-level rise and the impossibility of reverting to the *status quo ante* might justify specific forms of application of some of the 2016 draft articles and the need for additional forms of protection.

290. Given that the 2016 draft articles have the ultimate objective of meeting "the essential needs of the persons concerned, with full respect for their rights",[371] even the draft articles that formally apply between States or between States and other actors (such as those dealing with the duty to cooperate, the duty of the affected State to seek assistance where its capacity is manifestly exceeded, the termination of external

[364] A/CN.4/598, para. 17.
[365] For a list of relevant instruments applicable to the protection of persons in the event of disasters, compiled by the Secretariat in 2008, see A/CN.4/590/Add.2.
[366] *Yearbook of the International Law Commission, 2016*, vol. II (Part Two), para. 48.
[367] General Assembly resolution 69/283 of 3 June 2015, annex II.
[368] Nansen Initiative, *Agenda for the Protection of Cross-Border Displaced Persons in the Context of Disasters and Climate Change*, vol. 1 (December 2015).
[369] *Yearbook of the International Law Commission, 2016*, vol. II (Part Two), para. 48.
[370] Para. (4) of the commentary to draft article 3, *ibid.* para. 49.
[371] Draft article 2, *ibid.*, para. 48.

assistance, and conditions placed by the affected State on the provision of external assistance)[372] are intended ultimately to achieve the objective of protecting persons.

291. According to the 2016 draft articles, when responding to sea-level rise or reducing the risks associated therewith, States, as well as other relevant actors, must respect and protect human dignity and human rights.[373] They must also act "in accordance with the principles of humanity, neutrality and impartiality, and on the basis of non-discrimination, while taking into account the needs of the particularly vulnerable".[374]

292. Similarly, as "[e]ffective international cooperation is indispensable for the protection of persons in the event of disasters",[375] all States, not only those affected by sea-level rise, have a general duty to cooperate among themselves – and with other actors, as appropriate – to reduce the risks of and to respond to this phenomenon.[376] This general duty to cooperate is further addressed in different circumstances throughout the 2016 draft articles, especially in draft articles 8 and 9.[377]

293. The 2016 draft articles, by including within their scope the phenomenon of sea-level rise, help to clarify the nature, content and application of a set of rights and duties in relation to the protection of persons affected by rising sea levels. These rights and duties apply differently to States directly affected, to States not directly affected, and to other potential or actual assisting actors. They also apply on two distinct axes: "the rights and obligations of States in relation to one another" (including also other relevant actors) "and the rights and obligations of States in relation to persons in need of protection".[378]

2. Sendai Framework for Disaster Risk Reduction 2015–2030

294. The Sendai Framework for Disaster Risk Reduction 2015–2030 was adopted by 187 States on 18 March 2015, and endorsed by the General Assembly on 3 June 2015,[379] to build on the Hyogo Framework for Action 2005–2015: Building the Resilience of Nations and Communities to Disasters.[380] The objective of the Sendai Framework is to prevent new and reduce disaster risk by 2030.

295. Several of the Sendai Framework's guiding principles may be considered relevant to the protection of persons affected by sea-level rise:[381]

(a) each State has the primary responsibility to prevent and reduce disaster risk, including through international, regional, subregional, transboundary and bilateral cooperation;

(b) disaster risk reduction requires that responsibilities be shared by central Governments and relevant national authorities, sectors and stakeholders, as appropriate to their national circumstances and systems of governance;

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[372] Para. (1) of the commentary to draft article 7, para. (3) of the commentary to draft article 8, para. (1) of the commentary to draft article 11, para. (1) of the commentary to draft article 14, and para. (4) of the commentary to draft article 17, *ibid.* para. 49.

[373] Draft articles 4 and 5, *ibid.*, para. 48.

[374] Draft article 6, *ibid.*, para. 48.

[375] Para. (1) of the commentary to draft article 7, *ibid.*, para. 49.

[376] See draft article 7, *ibid.*, para. 48.

[377] Para. (6) of the commentary to draft article 7, *ibid.*, para. 49.

[378] Para. (2) of the commentary to draft article 1, *ibid.*, para. 49.

[379] General Assembly resolution 69/283. The United Nations Office for Disaster Risk Reduction is the United Nations focal point for disaster risk reduction and supports the implementation of the Sendai Framework.

[380] A/CONF.206/6 and Corr.1, chap. I, resolution 2.

[381] General Assembly resolution 69/283 annex II, para. 19 (a), (b), (l) and (m).

(c) an effective and meaningful global partnership and the further strengthening of international cooperation, including the fulfilment of respective commitments of official development assistance by developed countries, are essential for effective disaster risk management;

(d) developing countries, in particular the least developed countries, small island developing States, landlocked developing countries and African countries, as well as middle-income and other countries facing specific disaster risk challenges, need adequate, sustainable and timely provision of support, including through finance, technology transfer and capacity-building from developed countries and partners tailored to their needs and priorities, as identified by them.

296. Several of the Sendai Framework's priorities for action may also be deemed relevant to the protection of persons affected by sea-level rise:

(a) the Sendai Framework recognizes the need to "find durable solutions in the post-disaster phase and to empower and assist people disproportionately affected by disasters",[382] and highlights the importance of formulating public policies on the "relocation, where possible, of human settlements in disaster risk-prone zones"[383] as a potential preventive or adaptive measure;

(b) the Sendai Framework highlights the importance of encouraging "the adoption of policies and programmes addressing disaster-induced human mobility to strengthen the resilience of affected people and that of host communities, in accordance with national laws and circumstances".[384]

3. Nansen Initiative and its Agenda for the Protection of Cross-Border Displaced Persons in the Context of Disasters and Climate Change

297. The Nansen Initiative was a State-led, bottom-up consultative process intended to identify effective practices and build consensus on key principles and elements to address the protection and assistance needs of persons displaced across borders in the context of disasters, including the adverse effects of climate change. It was based upon a pledge by the Governments of Switzerland and Norway, supported by several States, to cooperate with interested States and other relevant stakeholders, and was launched in October 2012.[385]

298. The Nansen Initiative identified a number of lessons learned, over the course of the consultative process that it conducted worldwide, on how to protect displaced persons in the context of disasters and the effects of climate change, among which the following may be highlighted for their relevance to the protection of persons affected by sea-level rise:[386]

(a) in the absence of clear provisions in international law, some States have developed measures that allow them to admit foreigners from disaster-affected countries, at least temporarily. Such measures include admitting cross-border disaster-displaced persons using their regular migration laws by, for instance, giving priority to immigration applications submitted by individuals from disaster-affected countries, or by expanding the use of temporary work quotas; adopting agreements allowing the free movement of persons between countries in the region; taking

[382] *Ibid*., para. 30 (j).
[383] *Ibid*., para. 27 (k).
[384] *Ibid.*, para. 30 (l).
[385] Nansen Initiative, *Agenda for the Protection of Cross-Border Displaced Persons* (see footnote 368 above).
[386] Nansen Initiative, "Fleeing floods, earthquakes, droughts and rising sea levels: 12 lessons learned about protecting people displaced by disasters and the effects of climate change" (November 2015).

exceptional migration measures, such as providing for a humanitarian visa or temporary protection status; and using refugee law when the effects of a disaster generate violence and persecution;[387]

(b) States of origin have the responsibility to support communities to relocate to safer areas, before or after a disaster strikes. Planned relocation is generally considered a last resort, and today takes place within countries. It is more likely to be sustainable if it is undertaken in direct consultation with affected people and host communities, while taking into account cultural values and psychological attachments to the original place of residence and ensuring adequate livelihood opportunities, basic services and housing in the new location;[388]

(c) States of origin have the responsibility to address the needs of internally displaced persons in disaster contexts. A lack of durable solutions allowing them to rebuild their lives in a sustainable way either after returning back home or in another part of their country is one reason why internally displaced persons may subsequently move abroad to seek assistance and protection.[389]

299. The Nansen Initiative also resulted in 2015 in the Agenda for the Protection of Cross-Border Displaced Persons in the Context of Disasters and Climate Change (Protection Agenda),[390] a non-binding text in which key principles and examples of effective State practice worldwide are compiled and analysed, and a toolbox provided of policy options for action.

300. Under the Protection Agenda, the term "disaster displacement" refers to "situations where people are forced or obliged to leave their homes or places of habitual residence as a result of a disaster or in order to avoid the impact of an immediate and foreseeable natural hazard."[391] Disaster displacement "may take the form of spontaneous flight, an evacuation ordered or enforced by authorities or an involuntary planned relocation process. Such displacement can occur within a country … or across international borders".[392]

301. According to the Protection Agenda, the provision of protection to cross-border disaster-displaced persons can take two forms:[393]

(a) States can admit such persons to the territory of the receiving country and allow them to stay at least temporarily;

(b) States can refrain from returning foreigners to a disaster-affected country if they were already present in the receiving country when the disaster occurred.

302. The need to facilitate "migration with dignity" in the context of natural hazards and climate change as an adaptation strategy is stressed in the Protection Agenda,[394] and the following effective practices, *inter alia*, are listed for States to consider for that purpose:

(a) reviewing existing bilateral, subregional and regional migration agreements to determine how they could facilitate migration as an adaptation measure, including issues such as simplified travel and customs documents. In the

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[387] *Ibid*., p. 20.

[388] *Ibid.*, p. 30.

[389] *Ibid*., p. 31.

[390] Nansen Initiative, *Agenda for the Protection of Cross-Border Displaced Persons* (see footnote 368 above).

[391] *Ibid*., para. 16.

[392] *Ibid*., para. 18.

[393] See *ibid*., paras. 30–34.

[394] *Ibid*., paras. 87–93.

absence of such agreements, negotiating and implementing new agreements to facilitate migration with dignity;

(b) developing or adapting national policies providing for residency permit quotas or seasonal worker programmes in accordance with international labour standards to prioritize people from countries or areas facing the effects of natural hazards or climate change.

303. It is recognized in the Protection Agenda that the possibility for permanent migration is particularly important for low-lying small island States and other countries confronting substantial loss of territory or other adverse effects of climate change that increasingly make large tracts of land uninhabitable.[395]

304. The importance of protecting internally displaced persons is stressed in the Protection Agenda, as is the responsibility of States to find durable solutions for them. Such solutions include voluntary return with sustainable reintegration at the place where displaced persons lived before the disaster, local integration at the location where people were displaced, or settlement elsewhere within their country.[396]

305. The Platform on Disaster Displacement[397] is a State-led initiative whose main objective is to follow up on the work of the Nansen Initiative by implementing the recommendations of the Protection Agenda to work towards better protection for people displaced across borders in the context of disasters and climate change. The Platform seeks, *inter alia*, to promote policy and normative development to address gaps in the protection of persons at risk of displacement or displaced across borders.

F. International law concerning climate change

306. International law concerning climate change consists of a number of widely ratified binding international agreements, most notably the United Nations Framework Convention on Climate Change 1992) and the Paris Agreement (2015).

307. While the climate change legal regime focuses on mitigation and adaptation measures, the issue of the protection of persons affected by the adverse effects of climate change, including sea-level rise, has also been a part of the discussions in the context of the United Nations Framework Convention on Climate Change and the Paris Agreement, essentially through the use of the concept of “human mobility” in the context of climate change. Human mobility can be seen not only as a consequence of climate change, but also as a form of adaptation to it. The term “human mobility” covers three types of movement induced by climate change: migration, displacement and planned relocation.

308. This term “human mobility” has gradually taken hold in the context of the international legal framework on climate change and has now been explicitly included in the language of the sessions of the Conference of the Parties to the United Nations Framework Convention on Climate Change, as well as under the Warsaw International Mechanism for Loss and Damage associated with Climate Change Impacts.

309. References to human mobility in the context of climate change negotiations first appeared in documents for adoption by the Conference of the Parties at its fifteenth

[395] *Ibid.*, para. 90.
[396] *Ibid.*, para. 102.
[397] On the Platform on Disaster Displacement, see also paras. 407–408 below.

session that prepared the elements of a new climate agreement.[398] In the Cancun Agreements, adopted in 2010 by the Conference of the Parties at its sixteenth session, all Parties were invited "to enhance action on adaptation under the Cancun Adaptation Framework … by undertaking, *inter alia*, … [m]easures to enhance understanding, coordination and cooperation with regard to climate change induced displacement, migration and planned relocation, where appropriate, at the national, regional and international levels".[399]

310. The language of human mobility in the context of climate change was explicitly adopted by the Conference of the Parties at its eighteenth session, in 2012, in its decision 3/CP.18, in which it acknowledged the further work needed to advance the understanding of and expertise on loss and damage, including enhancing the understanding of "[h]ow impacts of climate change are affecting patterns of migration, displacement and human mobility".[400]

311. The adoption of the Paris Agreement in 2015 rendered climate migration more visible by providing for the creation of the Task Force on Displacement,[401] which was entrusted with developing recommendations for integrated approaches to avert, minimize and address displacement related to the adverse impacts of climate change.[402] The Executive Committee of the Warsaw International Mechanism for Loss and Damage associated with Climate Change Impacts was responsible for operationalizing the Task Force.[403] One of the strategic workstreams of the five-year rolling workplan of the Executive Committee concerns "enhanced cooperation and facilitation in relation to human mobility, including migration, displacement and planned relocation".[404]

312. At its twenty-sixth session, held in October and November 2021, the Conference of the Parties adopted the Glasgow Climate Pact, a package of decisions, whose preamble includes the following: "[a]cknowledging that climate change is a common concern of humankind, Parties should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights, the right to health, the rights of indigenous peoples, local communities, migrants, children, persons with disabilities and people in vulnerable situations and the right to development, as well as gender equality, empowerment of women and intergenerational equity."[405]

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[398] Olivia Serdeczny, *What Does It Mean to "Address Displacement" under the UNFCCC? An Analysis of the Negotiation Process and the Role of Research* (Bonn, German Development Institute, 2017), p. 7.

[399] Report of the Conference of the Parties to the United Nations Framework Convention on Climate Change on its sixteenth session, held in Cancun from 29 November to 10 December 2010, addendum: decisions adopted by the Conference of the Parties, decision 1/CP.16 (FCCC/CP/2010/7/Add.1), para. 14 (f).

[400] Report of the Conference of the Parties to the United Nations Framework Convention on Climate Change on its eighteenth session, held in Doha from 26 November to 8 December 2012, addendum: decisions adopted by the Conference of the Parties, decision 3/CP.18 (see FCCC/CP/2012/8/Add.1), para. 7 (vi).

[401] On the Task Force on Displacement, see also paras. 405–406 below.

[402] Report of the Conference of the Parties to the United Nations Framework Convention on Climate Change on its twenty-first session, held in Paris from 30 November to 13 December 2015, addendum: decisions adopted by the Conference of the Parties, decision 1/CP.21 (FCCC/CP/2015/10/Add.1), para. 49.

[403] *Ibid.*, para. 50.

[404] FCCC/SB/2017/1/Add.1, annex.

[405] For an advance unedited version of the Glasgow Climate Pact, see https://unfccc.int/sites/default/files/resource/cop26_auv_2f_cover_decision.pdf (accessed 20 February 2022).

313. In the Glasgow Climate Pact, States also reaffirmed their duty to fulfil the pledge of developed countries to mobilize jointly 100 billion dollars annually. The "Climate finance delivery plan: meeting the US$100 billion goal" was agreed in order to scale up financial resources to achieve a balance between adaptation and mitigation. These pledges are particularly important for the work of the Executive Committee of the Warsaw International Mechanism for Loss and Damage and the Task Force on Displacement, since increasing access to sustainable and predictable climate financing to avert, minimize and address displacement related to the adverse effects of climate change has remained a challenging issue.[406]

314. The term "human mobility" has also been used in the context of international law concerning disasters, including in the Hyogo Framework for Action 2005–2015,[407] the Sendai Framework for Disaster Risk Reduction 2015–2030,[408] and the Nansen Initiative's Agenda for the Protection of Cross-Border Displaced Persons in the Context of Disasters and Climate Change (2015).[409] The Platform on Disaster Displacement, whose main objective is to follow up on the work of the Nansen Initiative by implementing the recommendations of the Protective Agenda, seeks, *inter alia*, to promote the mainstreaming of human mobility challenges into, and across, relevant policy and action areas.[410]

315. "Human mobility" is thus an umbrella term that has been used in the context of the climate change and disaster frameworks, which refers to all aspects of the movement of people (individuals and groups) in space and time; that is, encompassing involuntary internal and cross-border displacement, voluntary internal and cross-border migration, and planned relocation with the consent of those concerned.[411] It reflects a wider range of movement of persons than the term "migration", and covers the broad range of types of movement that can take place in the context of climate change.[412] It is an academic,[413] an analytical,[414] and an advocacy tool.[415]

316. As regards the legal value of the term "human mobility", the term has, so far, been mainstreamed into soft-law instruments only. It is not a legal term or a term with

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[406] See, for instance, https://disasterdisplacement.org/staff-member/pdd-key-messages-cop26 (accessed 20 February 2022).

[407] A/CONF.206/6 and Corr.1, chap. I, resolution 2.

[408] General Assembly resolution 69/283, annex II, para. 30.

[409] Nansen Initiative, *Agenda for the Protection of Cross-Border Displaced Persons* (see footnote 368 above), para. 22.

[410] Platform on Disaster Displacement, "Update on 2017 progress", July 2018, p. 1. Available at https://agendaforhumanity.org/sites/default/files/resources/2018/Jul/2018%20Initiatives%20Updates_PDD_final_20%20June_1.pdf (accessed 20 February 2022).

[411] Advisory Group on Climate Change and Human Mobility (2015), "Human mobility in the context of climate change: elements for the UNFCCC Paris Agreement", March 2015, p. 2, available at https://www.unhcr.org/5550ab359.pdf (accessed 20 February 2022); and IOM, "Glossary on Migration", International Migration Law, No. 34 (Geneva, 2018). See also strategic workstream (d) of the five-year rolling workplan of the Executive Committee of the Warsaw International Mechanism for Loss and Damage: "Enhanced cooperation and facilitation in relation to human mobility, including migration, displacement and planned relocation" (FCCC/SB/2017/1/Add.1, annex).

[412] IOM, "Glossary on migration" (see footnote 411 above).

[413] For a literature review, see Serdeczny, *What Does It Mean to "Address Displacement" under the UNFCCC?* (see footnote 398 above), pp. 13–18.

[414] See, for instance, United Nations Development Programme, *Human Development Report 2009: Overcoming Barriers – Human Mobility and Development* (Basingstoke and New York, Palgrave Macmillan, 2009).

[415] For instance, UNU and the Nansen Initiative, in collaboration with IOM, UNHCR and a number of other organizations, have advocated the integration of human mobility issues into national adaptation plans. See Koko Warner *et al.*, "Integrating human mobility issues within national adaptation plans", UNU Institute for Environment and Human Security Publication Series, Policy Brief No. 9 (Bonn, UNU Institute for Environment and Human Security, 2014).

a specific legal content.[416] It is therefore not a legal concept or framework for analysis, but it is worth referencing since it has been used frequently in the context of the protection of persons affected by climate change and its adverse effects, including sea-level rise.

III. Mapping State practice and the practice of relevant international organizations and bodies regarding the protection of persons affected by sea-level rise

317. The States most affected by the impact of sea-level rise first attempted to bring the issue to the attention of the international community some 30 years ago, through the Malé Declaration on Global Warming and Sea-Level Rise of 1989.[417]

318. Because sea-level rise – although already happening, as proven by scientific data – is still a relatively new phenomenon and, as mentioned above, its acceleration will have different impacts through time and space, many States seem only now to be beginning to consider the measures required to protect persons affected by it. Furthermore, some of the emerging practice that may be identified is not necessarily specific to sea-level rise, since it may cover the wider phenomena of disasters and climate change.

319. While a preliminary assessment of State practice shows that it is still scarce at the global level, it is increasingly more developed in the States and regions that are the most exposed to sea-level rise and thus that are already feeling its effects on their territory, such as Pacific small island States and States with low-lying coastal areas.

320. Certain third States that might be exposed to an indirect impact, from cross-border displacement of persons affected by the adverse effects of climate change, including sea-level rise, are also commencing to take legal or policy measures to prepare for such a possibility.

321. International organizations and other bodies with relevant mandates in the field of human rights, displacement, migration, labour, refugees, statelessness, climate change and financing have been taking a more proactive approach in order to promote tools that would allow States to be better prepared with regard to issues related to human rights and human mobility in the face of climate displacement, including as a result of sea-level rise.

322. In spite of the general support for the inclusion of the subtopic of the protection of persons affected by sea-level rise in the current work of the Commission, and following the Commission's requests in chapter III of its annual reports of 2019[418] and 2021[419] for information from States, international organizations and other relevant bodies, only a few replies have been received so far.[420] More time appears to

[416] Certain domestic laws and policies do adopt the term, however. See, for instance, Fiji, "Planned relocation guidelines: a framework to undertake climate change related relocation", available at https://cop23.com.fj/wp-content/uploads/2018/12/CC-PRG-BOOKLET-22-1.pdf (accessed 20 February 2022).

[417] A/C.2/44/7, annex.

[418] A/74/10, paras. 31–33.

[419] A/76/10, para. 26.

[420] Submissions have been received from Belgium (23 December 2021), Fiji (on behalf of the members of the Pacific Islands Forum, namely Australia, Fiji, Kiribati, Marshall Islands, Micronesia (Federated States of), Nauru, New Zealand, Palau, Papua New Guinea, Samoa, Solomon Islands, Tonga, Tuvalu and Vanuatu) (31 December 2021), Liechtenstein (12 October 2021), Morocco (22 December 2021), the Russian Federation (17 December 2020) and Tuvalu (on

be needed for States, international organizations and other relevant bodies to provide the Commission with the necessary supporting material to complete its task. Further information would therefore be welcomed, and could be the subject of a more detailed study in the future.

323. A very preliminary, merely illustrative and non-exhaustive mapping exercise of the practice of States, international organizations and other relevant bodies is presented in the following sections, therefore, based on the replies received and on further research on the basis of publicly available information, for the purposes of highlighting examples of relevant practice, including of practice not specific to sea-level rise that arises in the context of the protection of persons in the context of disasters and climate change.

324. It is hoped that, at a later stage, based on further submissions received from States, international organizations and other relevant bodies, and possibly on a memorandum by the Secretariat and/or contribution papers by members of the Study Group, a more detailed analysis of the emerging practice with regard to the protection of persons affected by sea-level rise may be carried out.

325. The following sections therefore contain some examples of practice by directly and indirectly affected States and by international organizations and other relevant bodies, in order to highlight emerging practice relevant for the purposes of the protection of persons affected by sea-level rise.

A. State practice regarding the protection of persons affected by sea-level rise

326. The present section contains examples from small island States directly affected by sea-level rise, from States with low-lying coastal areas and from third States that might be indirectly affected by the movement of persons affected by sea-level rise.

1. Practice of small island States

327. The submission of Fiji on behalf of the Pacific Islands Forum,[421] an international organization comprising 18 States and territories,[422] contains information provided by individual Forum members and relevant regional organizations. While not exhaustive, the submission serves to "demonstrate examples of national and regional practice across the region". The information provided is representative of national practice and positions of individual Forum members, and therefore do not reflect a collective position of the Forum unless stated otherwise.

328. According to the submission, the members of the Forum have been at the "forefront of tackling issues such as the protection of persons affected by sea-level rise through climate change and disaster resilience efforts". States such as Kiribati, the Marshall Islands and Tuvalu "are taking urgent actions to protect their people who live the reality of climate change on a daily basis."

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behalf of the members of the Pacific Islands Forum) (30 December 2019), and from ECLAC (3 January 2022), FAO (30 December 2021), IMO (11 October 2021), UNEP (6 December 2021) and the United Nations Framework Convention on Climate Change (30 December 2021). The submissions are available at https://legal.un.org/ilc/guide/8_9.shtml#govcoms.

[421] The submission of Fiji (on behalf of the members of the Pacific Islands Forum) is accompanied by supplementary reference documents, also available at https://legal.un.org/ilc/guide/8_9.shtml#govcoms.

[422] Australia, Cook Islands, Fiji, French Polynesia, Kiribati, Marshall Islands, Micronesia (Federated States of), Nauru, New Caledonia, New Zealand, Niue, Palau, Papua New Guinea, Samoa, Solomon Islands, Tonga, Tuvalu and Vanuatu.

329. Most recently, the leaders of Forum members have prepared and endorsed various declarations regarding climate change and the impact of sea-level rise, such as the Boe Declaration on Regional Security (2018) and the Kainaki II Declaration for Urgent Climate Action Now (2019).[423] In 2021, leaders endorsed the Declaration on Preserving Maritime Zones in the Face of Climate Change-related Sea-Level Rise, recognizing "the threats of climate change and sea-level rise as the defining issue that imperils the livelihoods and well-being of our peoples and undermines the full realization of a peaceful, secure and sustainable future for our region".

330. The subtopic of the protection of persons affected by sea-level rise is a "complex [issue] of vital importance to [Forum] [m]embers and the entire global community, and … more time is needed to work through [it]". For Forum members, due consideration of the subtopic "should be guided and informed by applicable principles and norms of international law and relevant international frameworks and standards to address the need for an effective response to the urgent threats posed by sea-level rise".

331. There follows a short summary of the submission of Fiji to the Commission on behalf of the members of the Pacific Islands Forum, concerning regional and national legislation, policies and strategies relating to the protection of persons affected by sea-level rise:

(a) for the Federated States of Micronesia, helping its population to remain in their island homes is a major priority. Its goal is to "prevent environmental migration through adaption strategies", for which coordination is needed between national, state and local actors and across multiple sectors. The Constitution of enshrines the right of citizens to migrate within the borders of the State, a right that is particularly critical in the face of displacement induced by climate change, including sea-level rise and inundation of atolls and low-lying atolls;

(b) Fiji has put in place various policies and frameworks to address the adverse effects of climate change, including sea-level rise, in relation to the possible displacement of people and communities. The National Climate Change Policy 2018–2030, encapsulated in the Climate Change Act (2021), includes strategies to reduce the climate change-related impact on human well-being and national sovereignty through robust regional and international policy. For Fiji, human mobility is a priority issue for human security and for national security. It prioritizes the need for legal frameworks, policies and strategies for managing climate and disaster-induced displacement in order to protect human rights and reduce long-term risks, through planned relocation, relevant resourcing and national policies and strategies as a form of adaptation. On cross-border migration issues, the Global Compact for Migration is considered a useful guide. Fiji has also developed guidelines on displacement in the

[423] See also, for example: Pacific Islands Forum, "Our Sea of Islands, Our Livelihoods, Our Oceania": Framework for a Pacific Oceanscape – A Catalyst for Implementation of Ocean Policy, November 2010, available at https://library.sprep.org/sites/default/files/684.pdf; Palau Declaration on "The Ocean: Life and Future – Charting a Course to Sustainability", adopted by the Pacific Islands Forum Leaders at their forty-fifth meeting, in July 2014, available at https://www.forumsec.org/wp-content/uploads/2017/11/2014-Forum-Communique_-Koror_-Palau_-29-31-July.pdf; Taputapuātea Declaration on Climate Change, adopted by the Polynesian Leaders Group on 16 July 2015, available at https://www.samoagovt.ws/wp-content/uploads/2015/07/The-Polynesian-P.A.C.T.pdf; Delap Commitment on Securing Our Common Wealth of Oceans – "Reshaping the Future to Take Control of the Fisheries", adopted by the representatives of eight Pacific island States on 2 March 2018, available at https://www.pnatuna.com/sites/default/files/Delap%20Commitment_2nd%20PNA%20Leaders%20Summit.pdf; and communiqué of the fiftieth Pacific Islands Forum Leaders meeting, held in Funafuti, Tuvalu, 13–16 August 2019, available at https://www.forumsec.org/2019/08/19/fiftieth-pacific-islands-forum-tuvalu-13-16-august-2019/.

context of climate change and disasters, and a national adaption plan to address climate change in relation to sea-level rise and the relocation of affected communities. Reinforcing the preservation and practicality of traditional knowledge and expression of culture is pivotal. For Fiji, relocation is probably the most drastic of the possible steps to be taken, as people rarely want to move from the places in which they have grown up and that provide them with sustenance. However, if the risks are too great and will affect not just the livelihoods but the very existence of communities, relocation is a sensible option. In total, four local communities have been relocated in Fiji, and another 80 communities have been earmarked for relocation due to sea-level rise and other adverse effects of climate change. In the case of displacement and relocation within a State, the human rights of the persons affected must be protected and their security guaranteed as they move into new communities where social issues and potential conflicts over limited resources can arise. Fiji launched the first ever national planned relocation guidelines in 2018, at the twenty-fourth session of the Conference of the Parties to the United Nations Framework Convention on Climate Change. The guidelines provide a blueprint for a human rights-based approach in relation to relocation processes, particularly with regard to vulnerable groups;

(c) in Palau, the action plan of the national climate change policy focuses, *inter alia*, on strengthening resilience within vulnerable communities through innovative financing for relocation and climate-proofing, and on establishing relocation, displacement and emergency support programmes for vulnerable members of society. Climate change-related sea-level rise has necessitated urgent action to protect access to health-care services, and there are plans to relocate a national hospital;

(d) in Papua New Guinea, the people of the Carteret Islands, in the Autonomous Region of Bougainville, have been relocated owing to sea-level rise;

(e) in the Marshall islands, the National Strategic Plan 2020–2030 sets out the following key principles that underpin the State's approach to climate change adaptation: the right to remain, the resilience imperative, integrated adaptation, the "knowledge first" principle, adaptative capacity-strengthening, consensus and inclusion, and technology and tradition;

(f) in Samoa, the 2017 "State of Human Rights Report" focused on the impact of climate change on the full enjoyment of human rights, including the impact of sea-level rise. It highlighted the impact of climate change in human rights terms, and considered how the Government could embrace a human rights-based approach to climate change policies;

(g) in Tuvalu, the national climate change policy (2012–2021) lists as a strategy the development of a climate change migration and resettlement plan for each island in case the impact of climate change impacts lead to the worst-case scenario.

332. In the debate in the Sixth Committee in 2021, Tuvalu further stated that "[w]hile several international legal instruments, literature and human rights case law addressed the situation and status of refugees and stateless persons, international law did not explicitly apply to the situation of persons displaced by sea-level rise. The human rights of such persons must be protected."[424]

333. During the same debate, Solomon Islands added that "[i]t was also important for States to consider disaster risk reduction principles when adopting measures in the context of sea-level rise, such as measures to help populations remain *in situ* or to evacuate and relocate populations. In that connection, [the] delegation encouraged

[424] Tuvalu (A/C.6/76/SR.23, para. 5).

the Study Group to consider the numerous international frameworks that incorporated those principles in its work."[425]

2. Practice of States with low-lying coastal areas

334. In their submissions to the Commission, Belgium and Morocco describe, *inter alia*, measures taken for the protection of their coastal areas.

335. In other publicly available information, cited here for illustrative purposes, there are accounts of measures regarding flooding adaptation and the restriction of coastal development in States with low-lying coastal areas such as the Netherlands,[426] Indonesia, Thailand,[427] the United States,[428] the United Kingdom,[429] South Africa[430] and France.[431] Singapore has put in place land reclamation strategies and installed hard walls or stone embankments, and has developed a national plan for combating sea-level rise.[432]

336. The case of Bangladesh provides an example of a rights-based approach to internal displacement in the context of disasters and climate change. In Bangladesh, sea-level rise caused by climate change is anticipated to subsume up to 13 per cent of the coastal land by 2080. A national strategy on the management of internal displacement in the context of disasters and climate change was adopted in December 2020.[433] In this strategy, it is recognized that the key driver of displacement in coastal regions was increasing tidal-water height, leading to tidal flooding. The national strategy proposes a rights-based approach with three prongs: (a) prevention and preparation (risk reduction); (b) protection during displacement; and (c) durable solutions.

3. Practice of third States

337. In its submission to the Commission, the Russian Federation stated the following:

> The interests of the Russian Federation in connection with climate change are not limited to its territory, and are global in nature. This is driven both by the global character of climate change and by the need to take into account in international relations the diversity of climate impacts and the implications of

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[425] Solomon Islands (A/C.6/76/SR.22, para. 80).

[426] Louise Miner and Jeremy Wilks, "Rising sea levels: how the Netherlands found ways of working with the environment", Euronews, 25 February 2020; and C40 Cities Climate Leadership Group, "C40 Good Practice Guides: Rotterdam – climate change adaptation strategy", February 2016.

[427] Robert Muggah, "The world's coastal cities are going under: here's how some are fighting back", World Economic Forum, 16 January 2019.

[428] C40 Cities Climate Leadership Group, "Sea-level rise and coastal flooding: a summary of *The Future We Don't Want* research on the impact of climate change on sea levels". Available at https://www.c40.org/other/the-future-we-don-t-want-staying-afloat-the-urban-response-to-sea-level-rise (accessed 20 February 2022).

[429] Organisation for Economic Co-operation and Development (OECD), *Responding to Rising Seas: OECD Country Approaches to Tackling Climate Risks* (Paris, OECD Publishing, 2019).

[430] Sally Brown, "African countries aren't doing enough to prepare for rising sea levels", The Conversation, 16 September 2018.

[431] OECD, *Responding to Rising Seas* (see footnote 429 above).

[432] Audrey Tan, "Singapore to boost climate change defences", The Straits Times, 8 January 2018, available at https://www.straitstimes.com/singapore/environment/spore-to-boost-climate-change-defences (accessed 20 February 2022); and Singapore, National Climate Change Secretariat, "Impact of climate change and adaptation measures", available at https://www.nccs.gov.sg/faqs/impact-of-climate-change-and-adaptation-measures/ (accessed 20 February 2022).

[433] See http://www.rmmru.org/newsite/wp-content/uploads/2020/02/NSMDCIID.pdf (accessed 20 February 2022).

> climate change in different regions of the Earth. When establishing climate policies, account must be taken not only of the direct, but also of the indirect and long-range, impacts of climate change on the natural environment, the economy, the population and its various social groups. Indirect impacts of climate change include their impact on migration patterns as a result of the global redistribution of natural resources, including food and water, and the reduction in the relative comfort of human habitation in some regions of the Russian Federation and beyond.[434]

338. The Russian Federation further stated that the 1951 Convention's definition of a refugee "does not so far allow for the recognition of persons affected by sea-level rise as refugees", and that "assistance …, in the form of temporary asylum on humanitarian grounds, may be provided on the territory of Russia, but only if it is established that there is a real threat to the lives of such persons due to a natural emergency. We were unsuccessful in finding evidence of practice of the Russian Federation that would make it possible to establish whether sea-level rise and its consequences would be regarded as such an emergency".[435]

339. In its submission to the Commission, Liechtenstein affirmed that it "sees a fundamental role for the right of self-determination in addressing the issues raised by sea-level rise for the protection of persons affected by sea-level rise and for statehood". It recalled that common article 1 of the International Covenant on Economic, Social and Cultural Rights and International Covenant on Civil and Political Rights provides for the right of all peoples to self-determination, and that, by virtue of that right, they freely determine their political status and freely pursue their economic, social and cultural development.[436]

340. The submission of Fiji, on behalf of Pacific Islands Forum, contains information on measures taken by third States with regard to small island developing States that may be relevant for the protection of persons affected by sea-level rise.

341. According to that submission, the Marshall Islands, Micronesia (Federated States of) and Palau are party to Compacts of Free Association with the United States.[437] The compacts make it easier for citizens of the three States parties to enter and establish non-immigrant residence in the United States by, *inter alia*, waiving visa and labour certification requirements. The compacts do not confer the right to establish the residence necessary for naturalization or the right to petition for benefits for non-citizen relatives, though they do not preclude citizens of the States parties from pursuing those rights under the United States Immigration and Nationality Act.

342. Because of the compacts, emigration to the United States from their States parties is continuing. The Federated States of Micronesia reports that this movement is primarily for "education, employment and health reasons" rather than climate displacement, but that this "will likely change in the near future to becoming driven primarily by climate displacement, especially from atolls and low-lying islands in the three States [parties to the compacts] (indeed, there is already evidence that this is happening for citizens of [the Marshall Islands] at an accelerated rate)".

343. The compacts allow citizens of the Marshall Islands, Micronesia (Federated States of) and Palau to become and remain non-immigrant, non-citizen residents in the United States indefinitely, without the need for a visa or any other similar immigration documents: only a passport issued by the relevant State party is required for entry. This status allows them to retain their original citizenship while remaining

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[434] Submission of the Russian Federation.

[435] *Ibid.*

[436] Submission of Liechtenstein.

[437] See https://www.doi.gov/oia/compacts-of-free-association.

in the United States indefinitely. It also allows them, *inter alia*, to pursue gainful employment, seek educational opportunities and use health and medical services while in the United States.

344. According to publicly available information, third States that might be exposed to an indirect impact, from displacement and migration of persons affected by sea-level rise, have begun to take legal or policy measures to prepare for such a possibility. Such measures concern, for instance, the adoption of procedures for temporary protection status and humanitarian visas, and the inclusion in national legislation on immigration and asylum of categories of environmental migrants or similar.

345. In the United States, the White House published a report in October 2021 on the impact of climate change on migration.[438] While it is recognized in the report that domestic climate change-related displacement is a current and future security risk in the United States, the focus of the report is on international climate change-related migration. It notes that United States policy can aid in supporting human security by building on existing foreign assistance towards reconsidering and developing legal mechanisms to support those who migrate. After an analysis of existing legal instruments at the international, regional and domestic levels, the report concludes that expanding access to protection will be vital, including through national measures such as the granting of "temporary protected status" in the United States.

346. Countries such as New Zealand have discussed the creation of a humanitarian visa category to help relocate people from the Pacific countries displaced by the effects of climate change, including for persons displaced by rising sea levels.[439]

347. In Sweden, the Aliens Act (2005)[440] applies to "refugees and persons otherwise in need of protection". The latter category comprises aliens who, under circumstances falling outside the scope of either asylum or subsidiary protection, are outside their country of origin because they: (a) need protection because of external or internal armed conflict or, because of other severe conflicts in their country of origin, feel a well-founded fear of being subjected to serious abuse, or (b) are unable to return to their country of origin because of an environmental disaster. Such persons in need of protection and their family members are entitled to a residence permit.[441]

B. Practice of relevant international organizations and bodies regarding the protection of persons affected by sea-level rise

348. Certain international organizations and other bodies have developed a relevant body of practice relating to the protection of persons affected by disasters and climate change, including sea-level rise, especially in the past decade or so. The present section adds further examples to those already mentioned above, in particular in section II of the present Part.

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[438] Available at https://reliefweb.int/sites/reliefweb.int/files/resources/Report-on-the-Impact-of-Climate-Change-on-Migration.pdf.

[439] Lin Taylor, "New Zealand considers visa for climate 'refugees' from Pacific islands", Reuters, 17 November 2017. Resident visas had already been granted on a humanitarian basis owing to the effects of climate change in the country of origin: see Immigration and Protection Tribunal, *AD (Tuvalu)*, Case No. [2014] NZIPT 501370-371, Decision, 4 June 2014, available at https://www.refworld.org/cases,NZ_IPT,585152d14.html (accessed 20 February 2022).

[440] See https://www.government.se/contentassets/784b3d7be3a54a0185f284bbb2683055/aliens-act-2005_716.pdf (accessed 20 February 2022).

[441] See Jane McAdam, *Climate Change Displacement and International Law: Complementary Protection Standards* (Geneva, UNHCR, 2011).

349. Submissions to the Commission referring to such practice have been received so far from the United Nations Environment Programme (UNEP) and the Food and Agriculture Organization of the United Nations (FAO).

350. Further preliminary research, based on publicly available documents, is then presented to illustrate potentially relevant practice from United Nations organs and bodies, Office of the United Nations High Commissioner for Human Rights (OHCHR), UNHCR, IOM, the International Labour Organization (ILO), the Task Force on Displacement, the Platform on Disaster Displacement, the International Federation of Red Cross and Red Crescent Societies, the World Bank and the Organisation for Economic Co-operation and Development (OECD). According to this preliminary research, these organizations and bodies have been integrating into their respective policies the issue of climate change, including sea-level rise, and its impact on the protection of persons.

1. United Nations Environment Programme

351. UNEP, in its submission, provides relevant examples of regional and national legislation, policies and strategies regarding the protection of persons affected by sea-level rise. It includes examples of Pacific regional instruments and national legislation, policies and strategies from several States in the Caribbean and in the Pacific and Indian Oceans. According to UNEP, the objective of many of these instruments is to strengthen resilience for people and communities in the face of sea-level rise, prevent displacement if possible and, in some instruments, set out a rights-based framework that seeks to respect, protect and ensure the rights of displaced persons in different stages of displacement and during the search for durable solutions.

2. Food and Agriculture Organization of the United Nations

352. FAO, in its submission, refers to its 2017 strategy on climate change, in which it recognizes that biophysical changes, including sea-level rise, have an impact on the socioeconomic status of the fishery and aquaculture sector in many parts of the world. It also has an impact on levels of poverty and food insecurity in areas dependent on fish and fishery products, as well as on the governance and management of the sector and on societies. These changes are having profound impacts on fishery- and aquaculture-reliant communities and the ecosystems on which they depend, especially in tropical regions, including persons affected by sea-level rise.

353. FAO recalls that it is mandated to assist Member Nations in addressing the biophysical impacts of climate change, including sea-level rise, through technical assistance projects and programmes, including through regional and national legislation, policies and strategies for ensuring food security and nutrition for affected persons, in particular the marginalized and vulnerable members of the community.

3. United Nations

354. This section briefly presents practice arising from treaties deposited with the Secretary-General or registered with the Secretariat, and resolutions and decisions of the General Assembly and some of its bodies – such as the United Nations Open-ended Informal Consultative Process on Oceans and the Law of the Sea – the Security Council, the Human Rights Council and its special procedures, and the human rights treaty bodies.

Treaties deposited or registered with the United Nations

355. No treaties relating specifically to the protection of persons in the event of sea-level rise were found among treaties deposited or registered with the United Nations.

Nonetheless, there are agreements that anticipate the relocation of persons in the context of emergencies.[442] Such agreements envisage the relocation of persons, including as refugees, albeit, again, not in the specific context of the consequences of sea-level rise.

356. There are also several agreements dealing with specific repatriation arrangements, again not specifically related to persons affected by sea-level rise, but which could nonetheless be deemed relevant as analogous practice.[443]

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[442] See, for example, the Agreement between Mexico and United States of America on cooperation in cases of natural disasters (Mexico City, 15 January 1980; United Nations, *Treaty Series*, vol. 1241, No. 20171, p. 207, at p. 211), which envisages the establishment of a United States–Mexico consultative committee on natural disasters, whose mandate (art. II) would include the exchange of information on techniques for evacuation and relocation of persons under emergency conditions (although not specifically or expressly related to sea-level rise). Another example, this time a treaty action, is that of the notification by Brazil under article 1 (B) (2) of the Convention relating to the Status of Refugees, which reads as follows (United Nations, *Treaty Series*, vol. 1558, No. 2545, p. 370): "... by Decree 98.602, of 19 December 1989, the President of the Republic annulled the geographic restriction clause in Section B.1 (a) of article 1 of the Convention on the Status of Refugees concluded in Geneva on 20 June 1951. As Your Excellence is aware, that clause rendered the Convention inapplicable in Brazil to refugees of non-European origin, who currently make up almost the total number applying for refuge. While the clause was in effect, non-European refugees were accepted in Brazil on an in-transit basis, although, in practice, they were allowed to work and remain on national territory until their relocation to another country, and were even allowed to settle permanently in Brazil provided petitions for them to do so had been filed by the United Nations High Commissioner for Refugees. The annulment of the geographic restriction clause renders possible, as of now, the official acknowledgment of these refugees by the Brazilian Government and makes the application of this international instrument in Brazil fully in conformity with Article 48, subsection X, of the new Constitution, which establishes the concession of political asylum as one of the principles of Brazil's foreign policy."

[443] See, for example: Tripartite Agreement for the voluntary repatriation of the Surinamese refugees, between France, Suriname and UNHCR (Paramaribo, 25 August 1998), United Nations, *Treaty Series*, vol. 1512, No. 26128, p. 69; Agreement concerning migration and settlement, between Japan and Brazil (Rio de Janeiro, 14 November 1960), *ibid*., vol. 518, No. 7491, p. 61; Convention (with Final Protocol) concerning the reciprocal grant of assistance to distressed persons, between Sweden, Denmark, Finland, Iceland and Norway (Stockholm, 9 January 1951), *ibid*., vol. 197, No. 2647, p. 377; and Fourth Convention between the European Economic Community and the African, Caribbean and Pacific States (with protocols, final act, exchange of letters, minutes of signature, declaration of signature dated 19 December 1990 and memorandum of rectification dated 22 November 1990) (Lomé, 15 December 1989), *ibid*., vol. 1924, No. 32847, p. 3. In particular, under article 255 (1) and (2) of the latter Convention: "1. Assistance may be granted to [African, Caribbean and Pacific] States taking in refugees or returnees to meet acute needs not covered by emergency assistance, to implement in the longer term projects and action programmes aimed at self-sufficiency and the integration or reintegration of such people. 2. Similar assistance, as set out in paragraph 1, may be envisaged to help with the voluntary integration or reintegration of persons who have had to leave their homes as a result of conflicts or natural disasters. In implementing this provision account shall be taken of all the factors leading to the displacement in question including the wishes of the population concerned and the responsibilities of the government in meeting the needs of its own people." Under article 257 of the same Convention: "Post-emergency action, aimed at physical and social rehabilitation consequent on the results of natural disasters or extraordinary circumstances having comparable effects, may be undertaken with Community assistance under this Convention. The post-emergency needs may be covered by other resources, in particular the counterpart funds generated by Community instruments, the special appropriation for refugees, returnees, and displaced persons, the national or regional indicative programmes or a combination of these different elements." Under annex LII of the same Convention, entitled "Joint declaration on article 255": "The Contracting Parties agree that, in the implementation of Article 255, particular attention should be given to the following: (i) projects that assist the voluntary repatriation and reintegration of refugees; (ii) the cultural identity both of refugees in host countries and displaced persons within their own countries; (iii) the needs of women, children, the aged or the

General Assembly

357. The General Assembly, in a number of its resolutions, has referred to the fact that sea-level rise is a result of climate change or link the phenomenon to the various threats that it poses to, for example, small island developing States and biodiversity.

358. In resolution 44/206 of 22 December 1989,[444] on the possible adverse effects of sea-level rise on islands and coastal areas, particularly low-lying coastal areas, the General Assembly urged the international community to provide effective and timely support to countries affected by sea-level rise, particularly developing countries, in their efforts to develop strategies to protect themselves and their vulnerable natural marine ecosystems from the particular threats of sea-level rise caused by climate change.

359. In General Assembly resolution 70/1 of 25 September 2015,[445] by which the Assembly adopted the 2030 Agenda for Sustainable Development, it was stressed that increases in global temperature, sea-level rise, ocean acidification and other climate change impacts were seriously affecting coastal areas and low-lying coastal countries, including many least developed countries and small island developing States.

360. A further relevant example is resolution 66/288 of 27 July 2012,[446] in which the General Assembly endorsed the outcome document of the United Nations Conference on Sustainable Development, entitled "The future we want". In the outcome document, the Conference "note[s] that sea-level rise and coastal erosion are serious threats for many coastal regions and islands, particularly in developing countries" and "call[s] upon the international community to enhance its efforts to address these challenges". The Conference further notes that "[s]ea-level rise and other adverse impacts of climate change continue to pose a significant risk to small island developing States and their efforts to achieve sustainable development and, for many, represent the gravest of threats to their survival and viability, including for some through the loss of territory", and "call[s] for continued and enhanced efforts to assist small island developing States".

361. A resolution that directly connects sea-level rise to migration is resolution 73/195 of 19 December 2018,[447] in which the General Assembly endorsed the Global Compact for Safe, Orderly and Regular Migration. Under the Global Compact, States would "[d]evelop adaptation and resilience strategies to sudden-onset and slow-onset natural disasters, the adverse effects of climate change, and environmental degradation, such as desertification, land degradation, drought and sea-level rise, taking into account the potential implications for migration, while recognizing that adaptation in the country of origin is a priority". States would further "[c]ooperate to identify, develop and strengthen solutions for migrants compelled to leave their countries of origin owing to slow-onset natural disasters, the adverse effects of climate change, and environmental degradation, such as desertification, land degradation, drought and sea-level rise, including by devising planned relocation and visa options, in cases where adaptation in or return to their country of origin is not possible".

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handicapped among refugees or displaced persons; (iv) creating a greater awareness of the role that assistance under Article 255 can play in meeting the longer-term developmental needs of refugees, returnees and displaced persons and of the population of the host regions; (v) closer coordination between the ACP States, the Commission and other agencies in the implementation of these projects."

[444] General Assembly resolution 44/206, para. 2.

[445] General Assembly resolution 70/1, para. 14.

[446] General Assembly resolution 66/288, annex, paras. 165, 178 and 179.

[447] General Assembly resolution 73/195, annex, paras. 18 (i) and 21 (h).

362. It is also worth noting – although it has not yet, at the time of writing, been debated or adopted – that Tuvalu proposed a draft resolution to the General Assembly in July 2019 under the agenda item on sustainable development in relation to the protection of the global climate for present and future generations of humankind. The draft resolution included a proposal to develop a "legally binding instrument to create appropriate protection for persons displaced by the impacts of climate change".

United Nations Open-ended Informal Consultative Process on Oceans and the Law of the Sea

363. "Sea-level rise and its impacts" was the theme of the twenty-first meeting of the United Nations Open-ended Informal Consultative Process on Oceans and the Law of the Sea, which was held from 14 to 18 June 2021. The report on the work of the Informal Consultative Process at its twenty-first meeting includes the Co-Chairs summary of discussions on sea-level rise and its impacts.[448]

364. The General Assembly, in its resolution of 9 December 2021,[449] on oceans and the law of the sea, provided a brief overview of the meeting and the discussions, noting that they, *inter alia*:

> … focused on the characterization and extent of sea level rise, including regional variability, and its environmental, social and economic impacts, highlighted the urgency of sea level rise and the impacts of the increasing frequency of extreme weather events for small island developing States and coastal States including low-lying coastal areas, discussed the various mitigation and adaptation responses, urging that measures be taken urgently and stressing possible challenges such as their cost, data gaps and challenges for modelling and monitoring sea level rise, stressed the importance of the science-policy interface and cooperation at all levels and with all stakeholders, the relevance of traditional and local knowledge, of the ocean-climate nexus and of the legal dimension, while noting that delegations looked forward to engaging in, and do not want to prejudge, the work of appropriate forums on legal matters related to sea level rise, and the need for international cooperation and coordination, capacity-building, national planning processes, and financing.

Security Council

365. The Security Council has discussed whether climate change and its consequences can be considered a threat to international peace and security on several occasions and in different formats.[450] Since 2007, the Security Council has held open debates and Arria-formula meetings on the issue of climate change, international peace and security.[451] At the most recent open debate, held on 13 December 2021, the Council failed to adopt a draft resolution in which it would have expressed "deep concerns that the impacts [of climate change], including the loss of territory caused by the rise of the sea level, may have implications for international peace and security".[452]

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[448] A/76/171.

[449] General Assembly resolution 76/72, para. 211.

[450] See, for example, S/PV.8451 (25 January 2019).

[451] For the open debates, see S/PV.5663 (17 April 2007), S/PV.6587 and S/PV.6587 (Resumption 1) (20 July 2011), S/PV.7499 (30 July 2015), S/PV.8307 (11 July 2018), S/PV/8451 (25 January 2019), S/PV/8864 (23 September 2021) and S/PV/8926 (13 December 2021). Arria-formula meetings were held on 15 February 2013, 20 June 2015, 10 April 2017, 15 December 2017, 22 April 2020 and 18 October 2021. See https://www.securitycouncilreport.org/un-security-council-working-methods/arria-formula-meetings.php?msclkid=276251c2afb911ecbb0098022f272058.

[452] S/2021/990.

366. At the Arria-formula meeting in October 2021, on sea-level rise and implications for international peace and security,[453] the concept note circulated by Viet Nam contained five questions to guide the discussions,[454] including the following:

(a) how can a better understanding be gained of the interlinkages between instability, conflict and climate risks, including climate change-related sea-level rise?

(b) what are the best policy and practical measures to effectively approach the multifaceted risks of climate change, and in particular sea-level rise, including through conflict prevention and peacebuilding?

(c) how can the United Nations system and other international and regional organizations be better empowered to address the challenges of climate change and sea-level rise, including through adaptation and mitigation measures and support for small island developing States?

(d) how can the Security Council better employ its existing tools and mechanisms in addressing climate-related security risks, in particular the risks from sea-level rise?

(e) how can developing States affected by climate change and small island developing States gain better access the support that they need to mitigate these threats?

367. Previously, in April 2017, the Security Council had discussed the theme "Security implications of climate change: sea-level rise" during an Arria-formula meeting organized by the then-Council member Ukraine in cooperation with non-Council member Germany. During the open debate held in July 2015 on peace and security challenges facing small island developing States, the Secretary-General noted that "[r]ising sea levels, dying coral reefs and the increasing frequency and severity of natural disasters exacerbate the conditions leading to community displacement and migration".[455] In a statement by the President of the Security Council in July 2011, the President expressed the Council's "concern that possible security implications of loss of territory of some States caused by sea-level rise may arise, in particular in small low-lying island States".[456]

Human rights bodies

368. There has been a marked increase since 2010 in references to topics concerning human rights and climate change, including sea-level rise, within United Nations human rights bodies.[457] Whether in States' submissions or in reports or other

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[453] See https://media.un.org/en/asset/k1i/k1im1x4i6t.

[454] Available at https://s3-eu-west-1.amazonaws.com/upload.teamup.com/908040/IHrZ4x3Q2a7eWfWfWUq5_Concept-20Note-20--20Arria-20on-20Sea-20level-20rise-final.pdf.

[455] S/PV.7499.

[456] S/PRST/2011/15.

[457] Although it is not a document of a human rights body, it may be worth noting that *International Migration and Human Rights: Challenges and Opportunities on the Threshold of the 60th Anniversary of the Universal Declaration of Human Rights* (Global Migration Group, 2008), which includes a foreword from the Secretary-General, the following definition of an environmental migrant is provided, distinguishing between "environmentally motivated migrants" and "environmental forced migrants" (p. 9; citing IOM, "Expert seminar: migration and the environment", International Dialogue on Migration, No. 10 (Geneva, 2008), pp. 22–23): "An environmental migrant is characterized as a person who, for compelling reasons of sudden or progressive change in the environment that adversely affects his/her life or living conditions, is forced to leave his/her habitual home and cross a national border, or chooses to do so, either

documents issued by human rights bodies, including reports of special rapporteurs or independent experts, the aim of these references is to underline a range of potential consequences of sea-level rise, such as the potential risk of the flooding of low-lying lands due to sea-level rise,[458] the threat posed to local communities,[459] the challenges regarding access to water and sanitation and the need to make the human right to water a tangible reality,[460] the increased incidence of disease,[461] and the fear of forced relocation among affected populations and the need for the legal order to include guarantees that they would be properly consulted.[462]

369. A number of Human Rights Council documents describe sea-level rise as a factual cause of migration or internal displacement. This connection has been referred to the context of the universal periodic review and other review mechanisms, both in documents prepared by the States under review and in Council documents.[463] The Special Rapporteur in the field of cultural rights, Karima Bennoune, highlighted the connection in her report on a visit to Tuvalu, and refers to a 2001 agreement between Tuvalu and New Zealand establishing an annual emigration quota of Tuvaluans wishing to leave their country because of sea-level rise.[464]

370. More specifically, some Human Rights Council documents spell out that rising sea-levels caused by global warming threaten the very existence of small island States, which has "implications for the right to self-determination, as well as for the full range of rights for which individuals depend on the State for their protection".[465] In addition, during a visit to Maldives in 2011 to examine the situation of persons internally displaced as a result of the 2004 tsunami and to study issues related to risks of potential internal displacement in the future, including owing to the effects of climate change, the Special Rapporteur on the human rights of internally displaced persons, Chaloka Beyani, found that "climate change and other factors specific to the low-lying island environment of Maldives were already affecting the livelihoods and rights of residents of many islands, including the rights to housing, safe water and health". The Special Rapporteur further noted that "other factors, such as more frequent storms and flooding, coastal erosion, salination, overcrowding and the existential threat posed by rising sea levels, point to increased risks of potential internal displacement in the future".[466]

371. Commenting in the context of the universal periodic review of Solomon Islands on the status of persons displaced owing to climate factors, UNHCR noted that while such persons "were not 'refugees' under the 1951 Convention, there were nonetheless clear links between environmental degradation or climate change, and social tensions

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temporarily or permanently. Environmental migrants may be distinguished between two categories: [(a)] [e]nvironmentally motivated migrants are defined as those persons who 'pre-empt the worst by leaving before environmental degradation results in [the] devastation of their livelihoods and communities. These individuals may leave a deteriorating environment that could be rehabilitated with proper policy and effort.' Their movement may be temporary or permanent; [(b)] [e]nvironmental forced migrants are defined as those persons who 'are avoiding the worst. These individuals have to leave due to a loss of livelihood, and their displacement is mainly permanent. Examples include displacement or migration due to sea-level rise or loss of topsoil.'".

[458] For example, CRC/C/ATG/2-4, para. 138.

[459] For example, A/HRC/WG.6/22/MHL/3, para. 22.

[460] For example, A/HRC/24/44/Add.2, summary.

[461] For example, A/HRC/24/44/Add.1, para. 48, and A/HRC/22/43, para. 20.

[462] For example, CCPR/C/SR.2902, para. 21.

[463] For examples emanating from States, see A/HRC/WG.6/24/PLW/1, CEDAW/C/MHL/1-3 and A/HRC/WG.6/35/KIR/1. For examples emanating from OHCHR, see A/HRC/WG.6/24/SLB/3, A/HRC/WG.6/35/KIR/2 and A/HRC/WG.6/38/SLB/3.

[464] A/HRC/46/34/Add.1, para. 8.

[465] For example, A/HRC/22/43, para. 20.

[466] A/HRC/19/54, para. 12.

and conflict. Experience in other Pacific island countries has demonstrated that displacement can lead to competition with a host community and lead to conflict, often over land or the use of limited resources (e.g. potable water). In the worst-case scenario, involving complete submersion under rising sea levels, widespread 'external displacement' and a *de facto* or *de jure* loss of the sovereign State itself may result." UNHCR went on to recognize that "climate change posed a unique set of challenges for many Pacific island countries, including Solomon Islands, as it resulted in … rising sea levels, salinization, the incidence of storms of increasing frequency and severity, and increasing climate variability", and noted that "[t]he populations of a number of small islands in Solomon Islands were facing imminent relocation".[467]

Human rights treaty bodies' joint statements, general recommendations, decisions and general comments

372. Human rights treaty bodies have also referred to the connection between climate change and human rights, namely between sea-level rise and migration. One example is the joint statement on human rights and climate change by the Committee on the Elimination of Discrimination against Women, the Committee on Economic, Social and Cultural Rights, the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, the Committee on the Rights of the Child and the Committee on the Rights of Persons with Disabilities, issued on 14 May 2020. In that statement, the treaty bodies highlight sea-level rise as a cause of forced migration, and assert that "States must therefore address the effects of climate change, environmental degradation and natural disasters as drivers of migration and ensure that such factors do not hinder the enjoyment of the human rights of migrants and their families. In addition, States should offer migrant workers displaced across international borders in the context of climate change or disasters and who cannot return to their countries complementary protection mechanisms and temporary protection or stay arrangements".[468]

373. The Committee on the Elimination of Discrimination against Women addressed sea-level rise in its general recommendation No. 37 (2018) on the gender-related dimensions of disaster risk reduction in the context of climate change. It emphasized that, "[i]n their reports submitted to the Committee pursuant to article 18 [of the Convention on the Elimination of All Forms of Discrimination against Women], States parties should address general obligations to ensure substantive equality between women and men in all areas of life, as well as the specific guarantees in relation to those rights under the Convention that may be particularly affected by climate change and disasters, including extreme weather events such as floods and hurricanes, as well as slow-onset phenomena, such as the melting of polar ice caps and glaciers, drought and sea-level rise".[469]

374. Two important communications have been submitted to the Human Rights Committee for the purposes of assessing the principles applicable to the protection of persons affected by sea-level rise.

375. In the first case, the author, Ioane Teitiota, alleged that, by removing him to Kiribati, New Zealand had violated his right to life under article 6 of the International Covenant on Civil and Political Rights.[470] This case was the Committee's first ruling on a communication by an individual seeking asylum from the effects of climate change, in particular the effects of sea-level rise.

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[467] A/HRC/WG.6/11/SLB/2, paras. 56 and 59.
[468] HRI/2019/1, paras 15–16.
[469] CEDAW/C/GC/37, para. 10.
[470] *Teitiota v. New Zealand* (CCPR/C/127/D/2728/2016), para. 3.

376. In the communication, Mr. Teitiota claimed, *inter alia*, that “the effects of climate change and sea-level rise forced him to migrate from the island of Tarawa in Kiribati to New Zealand. The situation in Tarawa has become increasingly unstable and precarious due to sea-level rise caused by global warming”.[471] He argued that the severe impacts of climate change in Kiribati triggered the *non-refoulement* obligations of New Zealand not to send him back to Kiribati.

377. In its Views, adopted on 24 October 2019, the Committee assessed whether there was clear arbitrariness, error or injustice in the evaluation by the authorities of New Zealand of Mr. Teitiota’s claim that when he was removed to the Kiribati he faced a real risk of a threat to his right to life under article 6 of the Covenant. The Committee noted that the facts before it did not permit it to conclude that Mr. Teitiota’s removal violated his right to life under article 6 of the Covenant, or thus that the *non-refoulement* obligations of New Zealand were triggered in this particular case.

378. The Committee nonetheless recalled that “environmental degradation can compromise effective enjoyment of the right to life”. It also stated that the “obligation not to extradite, deport or otherwise transfer, pursuant to article 6 of the Covenant, may be broader than the scope of the principle of *non-refoulement* under international refugee law, since it may also require the protection of aliens not entitled to refugee status”. However, it was of the opinion that Mr. Teitiota had not substantiated the claim that he faced upon deportation “a real risk of irreparable harm to his right to life”, that was specific to him, rather than a general risk faced by all individuals in Kiribati.

379. The Committee accepted Mr. Teitiota’s claim that sea-level rise was “likely to render Kiribati uninhabitable”. However, it noted that the “time frame of 10 to 15 years, as suggested by the author, could allow for intervening acts by Kiribati, with the assistance of the international community, to take affirmative measures to protect and, where necessary, relocate its population”. While the Committee recognized the burdensome living conditions in Kiribati for the general population, it concluded that the information provided to it had not indicated that upon his return to Kiribati, Mr. Teitiota was at serious risk of living in poverty, being deprived of adequate food or being subjected to a situation of extreme precariousness that would affect his right to a decent life.

380. Significantly, the Committee expressed the view that “without robust national and international efforts, the effects of climate change in receiving States may expose individuals to a violation of their rights under articles 6 or 7 of the Covenant, thereby triggering the *non-refoulement* obligations of sending States. Furthermore, given that the risk of an entire country becoming submerged under water is such an extreme risk, the conditions of life in such a country may become incompatible with the right to life with dignity before the risk is realized”.[472]

381. In his dissenting opinion, Committee member Duncan Laki Muhumuza found that it would be “counter-intuitive to the protection of life to wait for deaths to be very frequent and considerable in number in order to consider the threshold of risk as met”. As he put it, “the action taken by New Zealand is … like forcing a drowning person back into a sinking vessel, with the ‘justification’ that after all, there are other passengers on board”.[473]

382. In her dissenting opinion, Committee member Vasilka Sancin argued that the notion of “potable water” should not be equated with “safe drinking water”. She stated it fell to New Zealand, not to Mr. Teitiota, “to demonstrate that [he] and his family

[471] *Ibid*., para. 2.1.

[472] *Ibid*., para. 9.11.

[473] *Ibid*., annex I, paras. 5 and 6.

would in fact enjoy access to safe drinking (or even potable) water in Kiribati, to comply with its positive duty to protect life from risks arising from known natural hazards”.[474]

383. The second communication was initiated on 13 May 2019 by eight Torres Strait Islanders, who alleged that Australia is violating their rights under articles 2 (respect for Covenant rights), 6 (right to life), 17 (right to be free from arbitrary interference with privacy, family and home), 24 (rights of the child) and 27 (right of minorities to enjoyment of their own culture) of the Covenant as a result of the insufficient targets and plans set by Australia concerning greenhouse gas mitigation, and its failure to fund adequate measures for coastal defence and resilience on the islands, such as sea walls.[475] In particular, the authors requested that Australia commit to the provision of at least $20 million for emergency measures such as sea walls, as requested by local authorities; to sustained investment in long-term adaptation measures to ensure that the islands can continue to be inhabited; to a reduction in its emissions by at least 65 per cent below 2005 levels by 2030 and to net zero emissions by 2050; and to a phasing-out of thermal coal, both for domestic electricity generation and for export markets.

384. This case constitutes the first communication to the Committee by inhabitants of low-lying islands, where communities are highly vulnerable to the effects of climate change, including sea-level rise, against a national Government for inaction on climate change. The Committee has yet to render its decision.

385. In its general comment No. 36 (2018) on the right to life, under article 6 of the Covenant, the Committee specifically stated the following:

> Environmental degradation, climate change and unsustainable development constitute some of the most pressing and serious threats to the ability of present and future generations to enjoy the right to life. The obligations of States parties under international environmental law should thus inform the contents of article 6 of the Covenant, and the obligation of States parties to respect and ensure the right to life should also inform their relevant obligations under international environmental law. Implementation of the obligation to respect and ensure the right to life, and in particular life with dignity, depends, *inter alia*, on measures taken by States parties to preserve the environment and protect it against harm, pollution and climate change caused by public and private actors. States parties should therefore ensure sustainable use of natural resources, develop and implement substantive environmental standards, conduct environmental impact assessments and consult with relevant States about activities likely to have a significant impact on the environment, provide notification to other States concerned about natural disasters and emergencies and cooperate with them, provide appropriate access to information on environmental hazards and pay due regard to the precautionary approach.[476]

386. On 22 September 2021, the Committee on the Rights of the Child adopted decisions on the impact of climate change on children’s rights. Sixteen children had submitted five identical communications against Argentina, Brazil, France, Germany and Turkey, alleging that those States had violated their rights under articles 6 (right to life), 24 (right to the enjoyment of the highest attainable standard of health) and 30 (rights of children belonging to minorities and indigenous children), read in conjunction with article 3 (the principle of the best interests of the child) of the

[474] *Ibid.*, annex II, paras. 3 and 5.

[475] Communication No. 3624/2019, currently pending before the Human Rights Committee.

[476] Human Rights Committee, general comment No. 36 (2018), para. 62.

Convention on the Rights of the Child by failing to prevent and mitigate the consequences of climate change.[477]

387. In particular, the authors claimed that rising sea levels were transforming children's relationships with the land, and the Committee noted the authors' claims that, "due to the rising sea level, the Marshall Islands and Palau are at risk of becoming uninhabitable within decades".

388. The Committee found the communications inadmissible for failure to exhaust domestic remedies. It noted that domestic remedies were available to the authors, and recalled that they must make use of all judicial or administrative avenues that could offer them a reasonable prospect of redress.

389. Nevertheless, in its decisions concerning these communications, the Committee clarified the scope of extraterritorial jurisdiction in relation to environmental protection. It found that the appropriate test for jurisdiction in the present case was that adopted by the Inter-American Court of Human Rights in its Advisory Opinion on the environment and human rights.[478] which implied that when transboundary harm occurred, children were under the jurisdiction of the State on whose territory the emissions originated if there was a causal link between the acts or omissions of the State in question and the negative impact on the rights of children located outside its territory, when the State of origin exercised effective control over the sources of the emissions in question. As a result, the Committee found that the State parties had effective control over the sources of carbon emissions that contributed to causing reasonably foreseeable harm to children outside their territory.

390. It is also important to note that, in June 2021, the Committee on the Rights of the Child decided to draft a general comment on children's rights and the environment, with a special focus on climate change. The draft general comment is being prepared through consultations and workshops with the global community, including specific consultations with children and young people. It is expected to be adopted in March 2023.

4. Office of the United Nations High Commissioner for Human Rights

391. The United Nations High Commissioner for Human Rights and her Office have, in response to requests by the Human Rights Council and on their own initiative, contributed to the analysis of the implications for human rights of climate change, including sea-level rise.

392. OHCHR has developed the following key messages on human rights, climate change and migration:[479] (a) ensure the dignity, safety and human rights of migrants in the context of climate change; (b) reduce the risk of forced migration through climate change mitigation; (c) reduce climate change risks through adaptation; (d) protect the human rights of people who are in particularly vulnerable situations; (e) ensure liberty and freedom of movement for all persons; (f) ensure durable legal status for all those forced to move and safeguards in the context of returns; (g) ensure meaningful and informed participation; (h) guarantee human rights in relocation; (i)

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[477] *Sacchi et al. v. Argentina* (CRC/C/88/D/104/2019), *Sacchi et al. v. Brazil* (CRC/C/88/D/105/2019), *Sacchi et al. v. France* (CRC/C/88/D/106/2019), *Sacchi et al. v. Germany* (CRC/C/88/D/107/2019) and *Sacchi et al. v. Turkey* (CRC/C/88/D/108/2019).

[478] Inter-American Court of Human Rights, Advisory Opinion OC-23/17, on "The environment and human rights" (requested by Colombia), 15 November 2017.

[479] OHCHR, "OHCHR's key messages on human rights, climate change and migration", available at https://www.ohchr.org/Documents/Issues/ClimateChange/Key_Messages_HR_CC_Migration.pdf (accessed 20 February 2022).

ensure access to justice for those affected by climate change; and (j) cooperate internationally in order to protect the rights of migrants.

393. In 2018, the High Commissioner produced a report entitled "Addressing human rights protection gaps in the context of migration and displacement of persons across international borders resulting from the adverse effects of climate change and supporting the adaptation and mitigation plans of developing countries to bridge the protection gaps".[480]

394. Also in 2018, OHCHR presented a conference room paper to the Human Rights Council on a study undertaken on behalf of OHCHR, in collaboration with the Platform on Disaster Displacement, on the slow-onset effects of climate change and human rights protection for cross-border migrants.[481]

5. Office of the United Nations High Commissioner for Refugees[482]

395. UNHCR seeks to contribute substantively to understanding on legal and normative issues around displacement in the context of disasters and climate change. In this context, and in the exercise of its supervisory role for international refugee instruments, UNHCR has recalled that refugee law, as well as broader human rights principles, will be relevant in certain circumstances, but that this does not involve the creation of a new legal category, or the expansion of the refugee definition, given that most people who move in the context of climate change or disasters are not likely to fall within the definition of a refugee.

396. UNHCR has been working on legal guidance in relation to claims for asylum in the context of the adverse effects of climate change. In this regard, people fleeing in the adverse effects of climate change and disasters may, in certain circumstances, have valid claims for refugee status under the 1951 Convention, or under the wider refugee definition in the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa or the 1984 Cartagena Declaration on Refugees, but only insofar as the criteria for recognition as a refugee under those definitions are fulfilled. Complementary forms of protection under international human rights law in some contexts, as well as the potential for the use of temporary protection and stay arrangements, may also be of relevance.

397. Building on a study that it had published in 2018,[483] UNHCR issued a document in 2020 entitled "Legal considerations regarding claims for international protection made in the context of the adverse effects of climate change and disasters", to guide interpretation and steer international discussion on such claims.[484] The term "climate refugee" is not used by UNHCR in this document, preferring instead "persons displaced in the context of disasters and climate change".

398. UNHCR has also begun to examine the question of the potential implications of sea-level rise for the risks of statelessness, since it has mandate responsibilities in this

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[480] A/HRC/38/21.

[481] A/HRC/37/CRP.4, available at https://www.ohchr.org/en/migration/reports.

[482] See the pages on the UNHCR website dedicated to climate change and disaster displacement (https://www.unhcr.org/climate-change-and-disasters.html); and UNHCR, "Key concepts on climate change and disaster displacement", June 2017. See also "Displaced on the front lines of the climate emergency", a new data visualization launched by UNHCR in 2021, that shows how a warming world is compounding risks for people already living with conflict and instability, driving further displacement, and often decreasing possibilities for return.

[483] Sanjula Weerasinghe, *In Harm's Way: International Protection in the Context of Nexus Dynamics between Conflict or Violence and Disaster or Climate Change* (Geneva, UNHCR, 2018).

[484] Available at https://www.refworld.org/docid/5f75f2734.html. Also published in *International Journal of Refugee Law*, vol. 33, No. 1 (2021), pp. 151–65.

area under the 1954 and 1961 Statelessness Conventions.[485] In this regard, it has recently published a fact sheet on the links between the impacts of climate change and statelessness.[486] According to this fact sheet, millions of stateless people face considerable vulnerabilities in the context of climate change, including exclusion from disaster relief, health care and adaptation solutions. The risks of statelessness can increase when people move, including during displacement situations in the context of climate change and disasters. For UNHCR, the greatest risks of statelessness owing to climate change relate not to the disappearance of States as such, but rather to the significant number of people being displaced in the context of climate change and disasters all over the world. Specific efforts are therefore needed to reduce statelessness risks for displaced people and to include stateless persons in climate action to strengthen their protection and resilience.

6. International Organization for Migration[487]

399. IOM has played an important role in the development of the notion of environmental migrants and environmental migration. The vision of IOM is to support States and migrants in addressing the complex challenges posed by environmental degradation and climate change in terms of human mobility and in delivering enhanced benefits to migrants and vulnerable communities.

400. IOM has produced, for instance, the *Atlas of Environmental Migration*,[488] the annual *World Migration Report*,[489] and the *Institutional Strategy on Migration, Environment and Climate Change 2021–2030*.[490]

401. IOM has consistently recognized sea-level rise as one of the greatest climate change threats that are likely to affect populations and cause migration in the future and has called for a rights-based approach to migration in the context of environmental degradation, climate change and migration.

7. International Labour Organization

402. ILO is another international organization that has included in its policy analysis and action the issue of climate change, including sea-level rise, as an additional driver of migration, both internal and across borders.[491] In the case of slow-onset events, climate variables interact with other key drivers, including lack of decent work and employment opportunities, weak governance and intercommunity violence. The sectors that employ the majority of workers are also some of the most vulnerable to climate change. When livelihoods are compromised and if survival is at stake, people migrate in search for better opportunities. This is an increasing trend, particularly among young persons.

[485] 1954 Convention relating to the Status of Stateless Persons and 1961 Convention on the Reduction of Statelessness.

[486] UNHCR, "Statelessness and Climate Change", October 2021. Available at https://www.unhcr.org/618524da4.pdf (accessed 20 February 2022).

[487] See the IOM Environmental Migration Portal (https://environmentalmigration.iom.int/), which is a rich repository for information from both IOM and other sources.

[488] Dina Ionesco, Daria Mokhnacheva and François Gemenne, *Atlas of Environmental Migration* (Abingdon and New York, Routledge, 2016).

[489] Available at https://worldmigrationreport.iom.int.

[490] IOM, *Institutional Strategy on Migration, Environment and Climate Change 2021–2030: For a Comprehensive, Evidence- and Rights-Based Approach to Migration in the Context of Environmental Degradation, Climate Change and Disasters, for the Benefit of Migrants and Societies* (Geneva, 2021).

[491] See John Campbell and Olivia Warrick, *Climate Change and Migration Issues in the Pacific* (Suva, United Nations, 2014).

403. The experience of ILO has shown that labour migration, when governed in accordance with international labour standards, can play an important role in the development of both countries of origin and countries of destination. Labour migration can be used to boost resilience in communities through the generation of remittances, the transfer of knowledge and skills and the development of networks that can lead to entrepreneurship and new markets. If migrants crossing borders owing to climate-related factors can do so through safe and regular channels and can access formal employment opportunities, they are more likely to contribute positively to their home country's development.

404. ILO participates in the Task Force on Displacement under the Warsaw International Mechanism for Loss and Damage associated with Climate Change Impacts. In addition, ILO is contributing to the Platform on Disaster Displacement through the implementation of regional and integrated projects and plans of action.

8. Task Force on Displacement[492]

405. The Conference of the Parties to the United Nations Framework Convention on Climate Change, at its twenty-first session, in Paris, established the Task Force on Displacement to develop recommendations for integrated approaches to avert, minimize and address displacement related to the adverse impacts of climate change. The Executive Committee of the Warsaw International Mechanism for Loss and Damage associated with Climate Change Impacts was entrusted by the Conference of the Parties with operationalizing the Task Force. The Task Force also includes representatives from, *inter alia*, UNHCR, IOM, the United Nations Development Programme, the International Federation of Red Cross and Red Crescent Societies, ILO and the Platform on Disaster Displacement, among others.

406. The Task Force presented a set of recommendations on integrated approaches in 2018.[493] These recommendations provide for a range of actions and policy instruments that aim to strengthen policies, institutional frameworks, tools and guidelines, and the preparedness and capacities of national and local governments to address climate-related drivers and the impact of displacement. The recommendations also recognize and stress the importance of enhancing knowledge, data collection, monitoring of risks, and coordination and policy coherence.

9. Platform on Disaster Displacement

407. The Platform on Disaster Displacement is a State-led initiative that was launched at the World Humanitarian Summit in 2016 as a follow-up to the Nansen Initiative, to work towards better protection for people displaced across borders in the context of disasters and climate change.

408. The Platform on Disaster Displacement continues the work of the Nansen Initiative by bringing together a group of States committed to supporting the implementation of the Protection Agenda. The Protection Agenda offers States a toolbox to better prevent and prepare for displacement before a disaster strikes. When displacement cannot be avoided, it helps States improve their responses to situations when people are forced to find refuge, either within their own country or across an international border. Rather than calling for a new binding international convention on cross-border disaster displacement, the Protection Agenda supports the integration of effective practices by States and subregional actors into their own normative frameworks, in accordance with their specific context.

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[492] For further information, see https://unfccc.int/process/bodies/constituted-bodies/WIMExCom/TFD#eq-5.

[493] Available at https://unfccc.int/sites/default/files/resource/2018_TFD_report_17_Sep.pdf.

10. International Federation of Red Cross and Red Crescent Societies

409. The International Federation of Red Cross and Red Crescent Societies has increasingly devoted its attention to disasters and climate change and their impact on affected populations. A resolution entitled "Disaster laws and policies that leave no one behind" was adopted in December 2019 at the thirty-third International Conference of the Red Cross and Red Crescent.[494]

410. The *World Disasters Report 2020: Come Heat or High Water*[495] discusses how disaster risk management should become climate smart, including in the face of sea-level rise: "In a world already replete with people highly exposed to natural hazards, we must, at the least, ensure the resilience of our critical infrastructure against reasonably predictable weather extremes and rising sea levels. In light of these growing risks, we need also to develop a much more thorough and nuanced understanding of existing vulnerabilities and capacities – and not just in a national aggregate, but at community level."

411. In a 2021 report entitled *Displacement in a Changing Climate*,[496] a collection of case studies is presented on how national Red Cross and Red Crescent societies around the world are protecting and assisting communities in the context of climate-related displacement, including sea-level rise. More ambitious climate action and investment in local communities and local organizations is called for to address this urgent humanitarian challenge. According to the report, millions of people around the world are displaced and moving in the context of disasters and the adverse effects of climate change, which is only set to worsen as climate change increases the intensity and frequency of sudden- and slow-onset hazards. It refers to a collective duty to address the humanitarian impacts of climate-related displacement, without waiting until communities are displaced: "we can and must take action now to protect them".

412. In a 2021 report entitled Turning the Tide: Adapting to Climate Change in Coastal Communities,[497] the devastating impact of climate change on coastal communities across the globe is highlighted. People living in the world's coastal regions face multiple and compounding risks from climate change. Sea levels are rising, coastal floods are becoming more severe, storms and cyclones are intensifying, and storm surge is reaching higher levels, further inland. In addition to extreme weather events, large areas are becoming uninhabitable, and millions of people have been or may be forced to leave their homes. The report includes first-hand accounts by resilient people living in coastal areas in Bangladesh, Mexico and Somalia. Whether as a result of extreme heat, sea-level rise, droughts or storms, the climate crisis is already pushing those communities towards the very limits of their future survival.

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[494] Resolution 7, in ICRC and International Federation of Red Cross and Red Crescent Societies, *33rd International Conference of the Red Cross and Red Crescent, Including the Summary Report of the 2019 Council of Delegates* (Geneva, 2019), p. 125.

[495] International Federation of Red Cross and Red Crescent Societies, *World Disasters Report 2020* (see footnote 287 above).

[496] International Federation of Red Cross and Red Crescent Societies, *Displacement in a Changing Climate: Localized Humanitarian Action at the Forefront of the Climate Crisis* (Geneva, 2021).

[497] Bangladesh Red Crescent Society, Cruz Roja Mexicana, International Federation of Red Cross and Red Crescent Societies, Norwegian Red Cross, Red Cross Red Crescent Climate Centre and Somalia Red Crescent Society, *Turning the Tide: Adapting to Climate Change in Coastal Communities* (Oslo, Norwegian Red Cross, 2021).

11. World Bank

413. In June 2021, the World Bank published a report entitled *Legal Dimensions of Sea Level Rise: Pacific Perspectives*.[498] The focus of the report is on key policy questions pertaining to the law of the sea, but it also covers issues related to the protection of persons affected by sea-level rise and how the international community could assist affected communities.

414. In the area of development and internal climate migration, the World Bank published its first *Groundswell* report in 2018),[499] focusing on sub-Saharan Africa, South Asia and Latin America, and the second *Groundswell* report in 2021,[500] focusing on East Asia and the Pacific, North Africa, and Eastern Europe and Central Asia. In these reports, future scenarios were explored and patterns identified of potential hotspots for both in- and outmigration, which constitute key steps towards a better understanding of the nexus of climate, migration and development.

415. The World Bank also published two *Groundswell Africa* reports, focusing on internal climate migration in Africa and using the *Groundswell* methodology.[501] The impact of sea-level rise and related projections are covered in these reports, but their scope is broader than sea-level rise. The *Groundswell Africa* reports also contain a dedicated legal and policy chapter.

12. Organisation for Economic Co-operation and Development

416. In 2019, OECD published a report on the risks of sea-level rise and how their members were adapting. This report, entitled *Responding to Rising Seas: OECD Country Approaches to Tackling Coastal Risks*,[502] includes an analysis of potential strategies and their benefits and limitations. Such strategies include the construction and maintenance of hard defences, beach nourishment and dune restoration, "living" shorelines, amendment of building codes, prevention of new development through zoning, and relocation.

Part Four: Preliminary observations, guiding questions for the Study Group and future programme of work

I. Preliminary observations and guiding questions for the Study Group

A. Statehood

417. The present paper constitutes an initial and preliminary approach to the question of statehood, where we sought to introduce the main aspects of the issue and to present some points for discussion and an exchange of views. Although the starting point of the paper is that sea-level rise is a global phenomenon and has global effects, it is

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[498] David Freestone and Duygu Çiçek, *Legal Dimensions of Sea Level Rise: Pacific Perspectives* (Washington, D.C., World Bank Group, 2021).

[499] Kanta Kumari Rigaud *et al.*, *Groundswell: Preparing for Internal Climate Migration* (Washington, D.C., World Bank Group, 2018).

[500] Viviane Clement *et al.*, *Groundswell Part II: Acting on Internal Climate Migration* (Washington, D.C., World Bank Group, 2021).

[501] Kanta Kumari Rigaud *et al.*, *Groundswell Africa: Internal Climate Migration in the Lake Victoria Basin Countries* (Washington, D.C., World Bank Group, 2021); and Kanta Kumari Rigaud *et al.*, *Groundswell Africa: Internal Climate Migration in West African Countries* (Washington, D.C., World Bank Group, 2021).

[502] (See footnote 429 above).

very important to note that the phenomenon poses a very serious threat to the existence of some small island developing States, whose land territory may be completely covered by the sea or become uninhabitable.

418. In this paper, we set out the requirements for the creation of a State as a subject of international law, on the basis of the 1933 Convention on the Rights and Duties of States, and a brief description of the criteria in that regard contained in the Convention. We also considered the 1936 Institut de Droit International resolution concerning the recognition of new States and new Governments, the International Law Commission's 1949 draft Declaration on the Rights and Duties of States, the draft articles on the law of treaties presented to the International Law Commission in 1956 by Special Rapporteur Sir Gerald Fitzmaurice; and the opinions of the Arbitration Commission of the International Conference on the Former Yugoslavia (Badinter Commission) of 1991. We provided representative examples of actions taken by States and other subjects of international law, including the cases of the Holy See, the Sovereign Order of Malta and Governments in exile, and drew attention to elements of certain international instruments that demonstrate the right of the State to ensure its own preservation, in accordance with international law and without prejudice to the rights of other members of the international community.

419. The following issues should also be considered in relation to the phenomenon of sea-level rise from the perspective of statehood: (a) the entire land territory of a State may be covered by the sea or become uninhabitable, possibly resulting in insufficient supply of drinking water for the population; (b) there may be a displacement of persons to other States, raising a number of concerns relating to the rights and legal status of nationals of particularly affected States, including questions concerning the prevention of situations of *de facto* statelessness through the maintenance of original nationality or citizenship, the acquisition of another nationality or the implementation of a dual nationality or common citizenship system; the ways in which diplomatic protection and assistance and consular protection and assistance could be provided; and the possibility of treating these displaced persons as refugees; (c) the legal status of the Government of a State needing to take up residency in the territory of another State; (d) the preservation by States affected by sea-level rise of their rights with respect to the maritime areas under their jurisdiction and the resources therein, also taking into account the need to maintain maritime boundaries established pursuant to agreements or judicial or arbitral decisions; and (e) the right to self-determination of the people of the States affected by sea-level rise, which encompasses the right to preserve identities of various kinds.

420. We noted that measures adopted by States include the construction and reinforcement of coastal defences and polders, as well as the construction of artificial islands to accommodate persons affected by sea-level rise, and drew attention to the high costs of such measures and the need to evaluate their potential environmental impact.

421. Lastly, we emphasized that, although there have not yet been any cases of the land territory of a State being completely covered by the sea or becoming uninhabitable, States that have the potential to be the most affected by sea-level rise have a legitimate interest in seeing the question of statehood in such situations addressed and the possible approaches analysed. This paper is not intended to be exhaustive or definitive; the intention is rather to explore possible alternatives, with a view to contributing to the consideration of the issue by the States Members of the United Nations, whether that be within the United Nations, in the context of other entities or groupings or at the level of civil society. Such alternatives include a strong presumption of continuity of States; the maintenance of international legal personality without a territory, as in the cases of the Holy See from 1870 to 1929 and the Sovereign Order of Malta today; and the use of modalities such as the ceding of a

portion of territory by another State, with or without transfer of sovereignty, association with other State(s), the establishment of or incorporation into confederations or federations, unification with another State, including the possibility of a merger, and the possible development of hybrid schemes, for which we provided some examples and ideas that may be useful at some point.

422. This is a very sensitive issue that should be addressed with caution, but its consideration should not be avoided or further postponed, especially considering the concerns and worries expressed by the States directly concerned. At this time, the aim is to set out various options that could be considered individually, or, depending on the circumstances, elements of different options could be combined.

423. The following questions are proposed with a view to fostering a fruitful discussion within the Commission's Study Group:

(a) Could we consider the criteria set out in the Convention on the Rights and Duties of States as the determinants of the existence of a State as a subject of international law, but agree that, in exceptional circumstances, a State does not cease to exist despite not meeting any of those criteria?

(b) How can the cases of the Holy See, the Sovereign Order of Malta and Governments in exile be of use in addressing the topic?

(c) How can a State exercise the right to provide for its preservation?

(d) How can situations of *de facto* statelessness be avoided?

(e) How can adequate diplomatic protection and consular assistance be provided to nationals of a small island developing State affected by the phenomenon of sea-level rise who are located in third States?

(f) How could the Government of a small island developing State that has to be hosted in a third State because its territory has been completely covered by the sea or become uninhabitable best perform its functions?

(g) Is it appropriate to maintain a strong presumption in favour of the continuity of the statehood of States whose land territory is completely covered by the sea or becomes uninhabitable?

(h) How could a State whose land territory is completely covered by the sea or becomes uninhabitable exercise its rights with respect to the maritime areas under its jurisdiction and the resources therein?

(i) What would be the best ways to preserve and ensure the exercise of the right to self-determination of the people of States whose land territory is totally covered by the sea or becomes uninhabitable?

(j) What statehood options could be considered for States whose land territory is completely covered by the sea or becomes uninhabitable?

424. As indicated by the Republic of Korea in its statement in the Sixth Committee of the General Assembly delivered in October 2018,[503] this issue should be dealt with comprehensively, that is, taking into account elements of both *lex lata* and *lex ferenda*. Furthermore, as highlighted by both the Republic of Korea[504] and the Holy See,[505] at that same session, sea-level rise is an intergenerational issue and, therefore, the approaches adopted should ensure respect for the rights and the needs of future generations.

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[503] Republic of Korea (A/C.6/73/SR.23, para. 71).
[504] *Ibid*.
[505] Holy See (Observer) (A/C.6/73/SR.24, para. 49).

B. Protection of persons affected by sea-level rise

425. Sea-level rise is among the several adverse effects of climate change. According to scientific evidence, this phenomenon, which is already taking place, is likely to accelerate in the future, resulting in the increased inundation of low-lying coastal areas and of islands, making these zones less and less habitable. Low-elevation coastal zones in different regions will be at risk from a variety of threats related to the rising sea levels, including soil salinization, degradation of marine ecosystems, more frequent flooding and extreme weather events such as cyclones.

426. Particularly vulnerable areas include small island developing States in the Pacific and Indian Oceans, West Africa and the Caribbean and highly populated urban centres in megadeltas and low-lying coastal areas. In these areas, sea-level rise is having and will continue to have an impact on the lives and livelihoods of the inhabitants, and may lead to their displacement.

427. Displacement and migration may be triggered by the slow-onset consequences of sea-level rise, such as coastal erosion, by sudden-onset disasters or by a combination of both. Sea-level rise may exacerbate storm surges, leading to saltwater intrusion into surface water and corruption of the freshwater lens, thus diminishing habitable conditions of a territory even before its possible submersion or disappearance. Displacement within one's own country and cross-border displacement to third countries in the context of climate change and disasters, including sea-level rise, is a multicausal phenomenon, involving interaction with other, economic, social and political, factors. Unlike some other disasters or adverse effects of climate change, however, sea-level rise has the potential to create long-term or permanent movement of persons within a country or to another country.

428. At the same time, for those who wish to remain *in situ* and who may be able to do so because of mitigation and adaptation measures, questions may arise as to how to ensure that their human rights are respected, in terms, *inter alia*, of human dignity, non-discrimination, access to information and public participation and regarding possible processes of planned relocation.

429. The current international legal frameworks – that is, the *lex lata* – that are potentially applicable to the protection of persons affected by sea-level rise are fragmented, mostly non-specific to sea-level rise but generally applicable in the context of disasters and climate change, and often of a soft-law character. Such international legal frameworks could be further developed in a more specific, coherent and complete manner in order to effectively protect persons who remain *in situ* or have to move because of the impact of sea-level rise.

430. A preliminary assessment of State practice shows that it is still sparse at the global level, but that it is more developed in States that are already feeling the impact of sea-level rise on their territory. Some of the practice that it has been possible to identify is not necessarily specific to sea-level rise, since it covers the wider phenomena of disasters and climate change, but it reveals relevant principles that may be used as guidance for the protection of persons affected by sea-level rise. International organizations and other bodies with relevant mandates in the field of human rights, displacement, migration, refugees, statelessness, labour, climate change and finance have been taking a proactive approach in order to promote practical tools to enable States to be better prepared with regard to issues related to human rights and human mobility in the face of climate displacement, including in the context of sea-level rise.

431. Consequently, given the complexity of the issues at hand and taking account of the mapping exercise of the applicable legal frameworks and emerging practice, presented in the present paper, it can be concluded that the principles applicable to the protection of persons affected by sea-level rise could be further identified and developed by the Study Group and the Commission.

432. This identification and development exercise could build on the draft articles on the protection of persons in the event of disasters,[506] which provide a general framework for disaster response and the protection of persons, namely with regard to human dignity (draft article 4), human rights (draft article 5), the duty to cooperate (draft article 7) and the role of the affected State (draft article 10). This framework could be further developed to reflect the specificities of the long-term or permanent consequences of sea-level rise and to take account of the fact that affected persons may remain *in situ*, be displaced within their own country or migrate to another State in order to cope with or avoid the effects of sea-level rise.

433. As discussed in Part Three, section II, of the present paper, in addition to instruments of international and regional human rights law,[507] other existing instruments that could usefully be taken into consideration in this respect include the Guiding Principles on Internal Displacement (1998),[508] the Kampala Convention (23 October 2009), the New York Declaration for Refugees and Migrants (2016),[509] the Global Compact for Safe, Orderly and Regular Migration (2018),[510] the Sendai Framework for Disaster Risk Reduction 2015–2030 (2015)[511] and the Nansen Initiative's Agenda for the Protection of Cross-Border Displaced Persons in the Context of Disasters and Climate Change (2015).[512] Guidance could also be drawn from the International Law Association's Sydney Declaration of Principles on the Protection of Persons Displaced in the Context of Sea-level Rise.[513]

434. This exercise should also incorporate the relevant emerging practice of States and relevant international organizations and bodies, mapped in a preliminary and illustrative form in Part Three, section III, of the present issues paper. Special attention should be paid to recent decisions, such as that by the Human Rights Committee in *Teitiota v. New Zealand*,[514] according to which the effects of climate change, namely sea-level rise, in receiving States may expose individuals to a violation of their rights under articles 6 (right to life) or 7 (prohibition of torture and cruel, inhuman or degrading treatment or punishment) of the International Covenant on Civil and Political Rights, thereby triggering the *non-refoulement* obligations of sending States, and that given that the risk of an entire country becoming submerged under water is such an extreme risk, the conditions of life in such a country may become incompatible with the right to life with dignity before the risk is realized.

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[506] *Yearbook of the International Law Commission, 2016*, vol. II (Part Two), para. 48.

[507] Universal Declaration of Human Rights; International Covenant on Civil and Political Rights; International Covenant on Economic, Social and Cultural Rights; American Convention on Human Rights: "Pact of San José, Costa Rica"; African Charter on Human and Peoples' Rights; and European Convention on Human Rights.

[508] E/CN.4/1998/53/Add.2, annex.

[509] General Assembly resolution 71/1.

[510] General Assembly resolution 73/195, annex.

[511] General Assembly resolution 69/283, annex II.

[512] Nansen Initiative, Agenda for the Protection of Cross-Border Displaced Persons (see footnote 368 above).

[513] Resolution 6/2018, annex, in International Law Association, *Report of the Seventy-eighth Conference* (see footnote 108 above), p. 34.

[514] CCPR/C/127/D/2728/2016.

435. Taking the 2018 syllabus into account,[515] and starting from the recognition that territorial States have the primary duty and responsibility to provide protection and assistance to persons within their jurisdiction,[516] the following issues may be studied further and in more detail in order to identify and develop principles regarding the protection of persons affected by sea-level rise:

(a) what principles are applicable or should be applicable to the protection of the human rights of persons affected by sea-level rise? In particular, what are or should be:

(i) the substantive obligations of States to respect human rights with regard to the right to life, the prohibition of cruel, inhuman or degrading treatment, the right to adequate housing, the right to food, the right to water, the right to take part in cultural life and respect for cultural identity, the right to a nationality and the prevention of statelessness, the rights of children, the right to self-determination and the rights of indigenous peoples;

(ii) the procedural obligations regarding public participation, access to information and access to justice;

(iii) the *non-refoulement* obligations for third States;

(iv) the obligations regarding the protection of vulnerable persons and groups (including women, children and indigenous peoples);

(v) the obligations regarding the prevention of risks affecting persons?

(b) what principles are applicable or should be applicable to situations involving the evacuation, relocation, displacement or migration of persons, including vulnerable persons and groups, owing to the consequences of sea-level rise or as a measure of adaptation to sea-level rise? In particular, with regard to displacement and human mobility, what are or should be the obligations of States to protect and assist persons affected by sea-level rise, adopting both a rights-based and a needs-based approach, in the following areas:

(i) prevention of displacement;

(ii) assistance to remain *in situ*;

(iii) establishment of principles for planned relocation;

(iv) protection of persons in case of internal displacement and promotion of durable solutions;

(v) protection options in case of cross-border displacement (such as humanitarian visas or temporary protection schemes);

(vi) arrangements for regular migration (both temporary and long-term);

(vii) the granting of refugee status or complementary protection if existing criteria are met?

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[515] A/73/10, annex B, para. 17.

[516] See, for instance, Guiding Principles on Internal Displacement, principle 3; General Assembly resolution 71/127 of 8 December 2016, on strengthening of the coordination of emergency humanitarian assistance of the United Nations, twenty-second preambular para.; draft article 10 of the draft articles on the protection of persons in the event of disasters, *Yearbook of the International Law Commission, 2016*, vol. II (Part Two), para. 48; and Assembly resolution 45/100 of 14 December 1990 on humanitarian assistance to victims of natural disasters and similar emergency situation, third preambular para.; and Assembly resolution 46/182 19 December 1991 on strengthening of the coordination of humanitarian emergency assistance of the United Nations, annex, para. 4.

(c) what is or should be the applicability and scope of the principle of international cooperation by other States, in the region and beyond, and by international organizations, to help States with regard to the protection of persons affected by sea-level rise?[517]

436. With regard to subparagraph (c) above, the importance of international cooperation for the protection of persons was highlighted not only in the Commission's draft articles on the protection of persons in the event of disasters,[518] but generally also in many statements by Member States while addressing the topic of sea-level rise in the debates in the Sixth Committee, namely, in 2021: Colombia,[519] Cuba,[520] Germany,[521] Italy,[522] Maldives,[523] Mexico,[524] New Zealand,[525] Solomon Islands,[526] Turkey[527] and Viet Nam.[528] For instance, according to Solomon Islands: "With regard to the protection of persons affected by sea-level rise, the foundational principles of international cooperation must apply, to help States cope with the adverse effects of sea-level rise on their populations. The duty to cooperate with respect to the effects of sea-level rise should be informed by specialized legal regimes connected to sea-level rise … The principle of cooperation had been interpreted in

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[517] Article 1 (3) of the Charter of the United Nations lists the following as one of the four purposes of the United Nations: "To achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion". Under Article 56 of the Charter, "[a]ll Members pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55." See also, for instance, International Covenant on Economic, Social and Cultural Rights, arts. 2 (1), 11, 15 and 22–23; Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, General Assembly resolution 2625 (XXV), annex, para. 1; Rio Declaration on Environment and Development, principles 5, 7, 13, 24 and 27; United Nations Framework Convention on Climate Change, arts. 4 (1) (c)–(e), (g), (h), (i), 5(c), 6(b); articles on prevention of transboundary harm from hazardous activities (2001) (General Assembly resolution 62/68 of 6 December 2007, annex), arts. 4, 14 and 16; Declaration of the United Nations Conference on the Human Environment (Stockholm, 16 June 1972), *Report of the United Nations Conference on the Human Environment, Stockholm, 5–16 June 1972* (United Nations publication, Sales No. E.73.II.A.14 (A/CONF.48/14/Rev.1 and Corr.1, part I, chap. 1), principles 22 and 24. See also Committee on Economic, Social and Cultural Rights, general comment No. 2 (1990), *Official Records of the Economic and Social Council, 1990, Supplement No. 3* (E/1990/23-E/C.12/1990/3 and Corr.1 and Corr.2), annex III; general comment No. 3 (1990), *ibid., 1991, Supplement No. 3* (E/1991/23-E/C.12/1990/8 and Corr.1), annex III; general comment No. 7 (1997), *ibid., 1998, Supplement No. 2* (E/1998/22-E/C.12/1997/10 and Corr.1), annex IV; general comment No. 14 (2000), *ibid., 2001, Supplement No. 2* (E/2001/22-E/C.12/2000/21), annex IV; and general comment No. 15 (2002). Under the Convention on the Rights of Persons with Disabilities (New York, 13 December 2006; United Nations, *Treaty Series*, vol. 2515, No. 44910, p. 3), the principle of cooperation applies "in situations of risk, including situations of armed conflict, humanitarian emergencies and the occurrence of natural disasters" (art. 11). In the context of natural disasters specifically, see: General Assembly resolution 46/182, annex, para. 5; draft Article 5 of the draft articles on the protection of persons in the event of disasters, *Yearbook of the International Law Commission, 2016*, vol. II (Part Two), para. 48; and Guiding Principles on Internal Displacement, principle 3.

[518] *Yearbook of the International Law Commission, 2016*, vol. II (Part Two), para. 48).

[519] Colombia (A/C.6/76/SR.23, para. 24).

[520] Cuba (A/C.6/76/SR.21, para. 32).

[521] Germany (*ibid.*, para. 79).

[522] Italy (A/C.6/76/SR.20, para. 87).

[523] Maldives (A/C.6/76/SR.21, para. 139).

[524] Mexico (*ibid.*, para. 48).

[525] New Zealand (*ibid.*, para. 104).

[526] Solomon Islands (A/C.6/76/SR.22, paras. 79–80).

[527] Turkey (A/C.6/76/SR.20, para. 81).

[528] Viet Nam (A/C.6/76/SR.21, para. 83).

the context of human rights, the environment and other areas of international law as an obligation of States to exchange information and provide financial and technical assistance to States that required additional support."[529] In that regard, it is also worth recalling the Malé Declaration on Global Warming and Sea-Level Rise, adopted at the Small States Conference on Sea-Level Rise in 1989, in which the participants declared their "intent to work, collaborate and seek international cooperation to protect the low-lying small coastal and island States from the dangers posed by climate change, global warming and sea-level rise."[530]

437. The Co-Chairs would appreciate guidance and comments from the members of the Study Group regarding the guiding questions proposed in paragraphs 423 and 435 above. Contribution papers from members of the Study Group on any of the issues raised in the guiding questions would be welcomed, and on aspects of State practice and the practice of relevant international organizations and bodies.

II. Future programme of work

438. In the next quinquennium, the Study Group will revert to each of the subtopics – the law of the sea, statehood and the protection of persons affected by sea-level rise – and will then seek to prepare a substantive report on the topic as a whole by consolidating the results of the work undertaken.

[529] Solomon Islands (A/C.6/76/SR.22, paras. 79–80).
[530] A/C.2/44/7, annex.