INTERNATIONAL LAW ASSOCIATION

LISBON CONFERENCE (2022)

INTERNATIONAL LAW AND SEA LEVEL RISE

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REPORT

(Draft, April 2022)

Part I

BACKGROUND

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

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

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

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

The Executive Council appointed Professor Davor Vidas (Norwegian branch) as the Chair of the Committee, and Professors David Freestone (British branch) and Jane McAdam (Australian branch) as Co-Rapporteurs.[2] After the establishment of the Committee at the end of 2012, its membership was initially appointed during the course of 2013.

The first meeting of the Committee was held at the 76th ILA Conference in Washington DC, USA, in April 2014.[3] At that meeting, the Committee adopted its work plan and defined three main issue-areas of international law in relation to sea level rise it intended to focus on: (1) the law of the sea; (2) forced migration and human rights; and (3) issues of statehood under international law and international security.[4]

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

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[1] ILA, *Minutes of the Meeting of the Executive Council* (London, 10 November 2012), at 5.
[2] Ibid.
[3] ILA, *Report of the Seventy-sixth Conference, held in Washington D.C., April 2014* (London: ILA, 2014), at 877–881. At the time of the 76th ILA Conference, the Committee had 21 Members and four Alternates.
[4] For the initial proposal on structuring the work of the Committee through a division into those three main issue-areas, see *Letter of the Chair to the Members of the Committee*, 19 December 2013 (on file with the Committee).
[5] The final version of the 2018 Report, which includes all the amendments made in the follow-up of the August 2018 Sydney ILA Conference, is published in: ILA, *Report of the Seventy-eighth Conference, held in Sydney, 19–24 August 2018* (London: ILA, 2019), 866–915. Published also separately in an edited version as: D. Vidas, D. Freestone and J. McAdam (eds), *International Law and Sea Level Rise: Report of the International Law Association Committee on International Law and Sea Level Rise* (Leiden/Boston: Brill, 2019). Hereinafter: the *2018 Report*; in further references to that report below, page numbers indicated relate to the ILA printed published version, and pages referred to in square brackets relate to the edited version published by Brill.
[6] ILA Resolutions 5/2018 and 6/2018, in their English language original and French translation, are published in: ILA, *Report of the Seventy-eighth Conference* (n. 5), at 29–40; also available online at ILA webpage, at: <https://www.ila-hq.org/index.php/committees> (last accessed on 22 April 2022).

B. Extension of the Committee's Term and Focus in Phase Two (from 2019)

In Resolution 6/2018, the 78th ILA Conference recommended that the Executive Council extend the term of the Committee in order to enable it to continue its work on the remaining aspects of its mandate. Following that resolution and the 2018 Report, the Committee agreed to ask for the extension of its original mandate beyond 2018, in order to enable it to focus on the second phase of its work involving the study of the statehood question and the rights of affected populations, and other aspects of international law including the law of the sea and territory issues.

In November 2018, the ILA Executive Council approved the extension of the term of the Committee, initially to November 2022, to enable it to complete its mandate by addressing also those pending issues in the second stage (phase two) of its work;[7] and in May 2022 the term of the Committee was extended to 2024.

At the beginning of phase two, the membership of the Committee partially changed. Several Members of the Committee who took part in phase one withdrew, and many new Members with the special expertise required to address the Committee's mandate in the second stage of its work joined the Committee.[8] As of 22 April 2022, the Committee consists of 40 Members and five Alternates from 22 regional and national ILA branches, in addition to the Headquarters branch.

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

C. Work of the Committee in Phase Two and Focus of this Report

In approaching the phase two, the Committee was aware in particular that its study concerning the question of statehood and other issues of international law and international security prompted by the partial or complete inundation of State territory and/or its inhabitability, as well as the gradual depopulation prior to this, involved a medium to longer-term perspective, based on the scientific predictions of sea level rise.

This scientific evidence, in addition to that taken into consideration in the 2018 Report of the Committee,[9] is contained in the reports and assessments issued subsequently by the Intergovernmental Panel on Climate Change (IPCC) within its Sixth Assessment Report (AR6) cycle. This in particular includes: the Special Report on Global Warming of 1.5°C (of October 2018),[10] the Special Report on the Ocean and Cryosphere in a Changing Climate (of September 2019),[11] and the updated predictions as contained in the report on Climate Change 2021: The Physical Science Basis (of August 2021)[12].

On 10-11 December 2019, the Committee met for an intersessional meeting co-organised by the Autonomous University of Madrid and the Fridtjof Nansen Institute (FNI) of Norway, held at the FIDE

[7] ILA, *Minutes of the Meeting of the Executive Council* (London, 17 November 2018), at 3, and Annex 5.
[8] In 2019, ten members/alternates withdrew, while 17 new members/alternates joined the Committee since 2019.
[9] See the *2018 Report* (n. 5), 868–873 [7–12].
[10] See: IPCC, *Global Warming of 1.5°C. An IPCC Special Report on the Impacts of Global Warming of 1.5°C above Pre-industrial Levels and Related Global Greenhouse Gas Emission Pathways, in the Context of Strengthening the Global Response to the Threat of Climate Change, Sustainable Development, and Efforts to Eradicate Poverty*, V. Masson-Delmotte, P. Zhai, HO Pörtner et al. (eds); available at: <https://www.ipcc.ch/sr15/> (last accessed on 22 April 2022). This report was the first publication issued in the IPCCs AR6 cycle, due to be completed in 2022.
[11] IPCC, *Special Report on the Ocean and Cryosphere in a Changing Climate*, H.-O. Pörtner, D.C. Roberts, V. Masson-Delmotte et al. (eds), available at: <https://www.ipcc.ch/srocc/> (last accessed on 22 April 2022).
[12] IPCC, *Climate Change 2021: The Physical Science Basis. Contribution of Working Group I to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change*, V. Masson-Delmotte et al. (eds), available at: <https://www.ipcc.ch/report/ar6/wg1/downloads/report/IPCC_AR6_WGI_Full_Report.pdf> (last accessed on 22 April 2022). This is the first out of three WG reports and a synthesis report from AR6, all due in the rest of 2022.

Foundation in Madrid, Spain. At the Madrid meeting, the Committee adopted its work plan for phase two. In accordance with that work plan, the Committee defined study areas and allocated tasks to the Committee officers and members in the form of the development of several short papers (see the list below), designed to serve as the basis for the draft report. Moreover, at the Madrid meeting the Committee agreed on a Questionnaire on statehood and international legal personality, to which the Members were invited to respond to during 2020.

The Committee had planned to meet for its next intersessional meeting on 31 March 2020 in Washington DC, at the kind invitation of the George Washington University Law School. However, the introduction, on 11 March 2020, of COVID-19 related travel restrictions by the USA, as well as concern for the overall health and well-being of the Committee members, prevented this plan and the meeting had to be cancelled. The Committee has continued its work as a correspondence and online group. Doing so has involved exchanges of several working papers by e-mail and a series of virtual 'zoom' sessions that have enabled the presentation and discussion of those papers and the Questionnaire as agreed in the Committee's work plan for phase two.

Five zoom sessions of the Committee were held during the course of 2020 and 2021: on 5 October 2020, and on 21 January, 11 March, 30 June, and 22 November 2021. Each of the first four sessions was focused on a different thematic area as agreed in the work plan, gradually leading to a draft report that was the subject of the fifth session. The themes of the sessions and the short papers presented and discussed in these were:

On 5 October 2020: issues of the law of the sea and territory, with short papers on:

- The development of State practice regarding maritime zones and maritime boundaries in the context of climate change-related sea level rise (by David Freestone and Davor Vidas);
- Impacts of sea level rise on archipelagic States (by David Freestone and Clive Schofield);
- 'The land dominates the sea' and the Committee on International Law and Sea Level Rise: an introductory paper by the Chair (by Davor Vidas).

On 21 January 2021: issues concerning the rights of affected populations, with short papers on:

- Human mobility in the context of sea level rise and multilevel governance (by Elisa Fornalé);
- The relevance of the UNFCCC loss & damage regime to rights of affected populations and human mobility (by Maxine Burkett).

On 11 March 2021: discussion of papers prepared by the Co-Rapporteurs and Chair on the basis of the responses from Committee Members to the Questionnaire on statehood:

- Questions 1 and 2: Does a State retain its legal personality if it loses its territory and/or becomes uninhabitable; and does the creation of a new category of States/entity follow from this? (by Davor Vidas);
- Questions 3 and 6: What are the options for relocation; and how do these options relate to the rights of the affected populations? (by Maxine Burkett);
- Questions 4 and 5: What happens to the entitlements of the State/entity; and if the rights are retained, in what circumstances are they retained? (by David Freestone).

On 30 June 2021: issues concerning statehood and international law personality, with short papers on:

- Submergence of land territory and loss of its habitability due to sea level rise: consequences for statehood in a long-term process (by Davor Vidas);
- Statehood, relocation and the rights of affected populations (by Elisa Fornalé);
- Maritime entitlements (by David Freestone);
- Leases of territory under international law (by Michael Strauss).

On the basis of these papers, that were discussed during the zoom meetings and on which Members of the Committee also commented, a first draft report was prepared and presented at the Committee session held via zoom on 22 November 2021. The discussion at that meeting and several subsequent rounds of written comments provided by the Members served as the basis for revising that draft until arriving at this version.

This draft report is up-to-date as of 22 April 2022. The report is organised in two main parts, addressing the law of the sea issues (Part II), and statehood and the rights of affected populations (Part III).

Part II

THE LAW OF THE SEA

A. Sea Level Rise and Archipelagic States

The Committee initiated its work on the second phase by looking at the particular risks faced by archipelagic States. It considered the potential impacts of sea level rise on the baseline systems of those twenty-two States that currently claim archipelagic status and have established archipelagic baselines. Although the baseline and maritime zone issues of archipelagic States are similar to these considered in the 2018 Report, the loss of small features can have a disproportionate impact on archipelagic baselines and archipelagic status itself. This provides a critical test case for the resilience of the regime established under the 1982 United Nations Convention on the Law of the Sea (hereinafter: LOSC, or the LOS Convention)[13] in relation to its ability, or otherwise, to withstand the impacts of climate change-induced sea level rise.[14]

1. Archipelagic Status under the LOSC

The concept of archipelagic status is, in terms of its codification, essentially a creature of the Third UN Conference on the Law of the Sea, 1973–1982 (UNCLOS III). The detailed requirements for archipelagic status are set out in Articles 46 and 47 of the LOSC.

Of particular note is the stipulation in Article 47(1) that provides that, in defining the State's system of straight archipelagic baselines, archipelagic States may link 'the outermost points of the outermost islands and drying reefs of the archipelago'. Fundamentally, a system of archipelagic baselines comprises a series of lines connecting base points located on or above the normal baseline along the coast of a number of insular features. Consequently, archipelagic baselines are reliant on potentially ambulatory low-water lines along the coast in order to ensure that the baseline system is 'closed'.[15] Even though, in accordance with Article 47(4) LOSC, straight archipelagic baselines shall not be drawn to and from low-tide elevations (LTEs), this is nonetheless permitted in the cases of LTEs where 'lighthouses or similar installations which are permanently above sea level have been built on them or where a low-tide elevation is situated wholly or partly at a distance not exceeding the breadth of the territorial sea from the nearest island.'[16] While this approach seems designed to ensure that States may enclose the maximum amount of sea area, it also arguably encourages the use of features that are inherently peripheral and also potentially insubstantial and therefore potentially vulnerable to sea level rise. The potential loss of features that constitute key basepoints or turning points in the archipelagic baselines system may mean that the remaining basepoints are further apart than the LOSC permits[17] or it may mean that the resulting water to land ratio proportions no longer meet the necessary ratio requirements.[18] Such changes might actually compromise the State's ability to maintain valid archipelagic baselines so that it might risk losing all the special advantages that the LOSC archipelagic regime confers.

A total of twenty-two States have been identified as claiming archipelagic status under the LOSC and have defined systems of archipelagic baselines.[19] Those States are: Antigua and Barbuda, Bahamas, Cape Verde, Comoros, Dominican Republic, Fiji, Grenada, Indonesia, Jamaica, Kiribati, Maldives, Marshall Islands,

[13] In this report, the Committee uses the acronym 'LOSC' or abbreviation 'LOS Convention' for referring to the 1982 United Nations Convention on the Law of the Sea – with the exception, however, of direct citations if the acronym 'UNCLOS' is used in a source text cited.

[14] See further D. Freestone and C. Schofield, 'Sea level Rise and Archipelagic States: A Preliminary Risk Assessment' (2021) 35 *Ocean Yearbook* 340–387.

[15] See, United Nations, *Baselines: An Examination of the Relevant Provisions of the United Nations Convention on the Law of the Sea* (UN Office for Ocean Affairs and the Law of the Sea: New York, 1989), at 23.

[16] Art. 47(4) LOSC. The UN Group of Technical Experts on Baselines indicated that this rule combines the provisions of Arts. 13(1) and 7(4) of the LOSC and 'differs from the rules for applying the method of straight baselines'; ibid., 36.

[17] Art. 47(2) LOSC.

[18] In accordance with Art. 47(1) LOSC, this water to land ratio proportions is stated as 'between 1 to 1 and 9 to 1'.

[19] See K. Baumert and B. Melchior, 'The Practice of Archipelagic States: A Study of Studies' (2015) 46 *Ocean Development and International Law* 60–80, at 61. The authors are from the US State Department. See also C.G. Lathrop, J.A. Roach and D.R. Rothwell, *Baselines under the International Law of the Sea: Reports of the ILA Committee on Baselines under the International Law of the Sea* (Brill: Boston, 2019), at 98–124.

Mauritius, Papua New Guinea, Philippines, San Tomé and Príncipe, Seychelles, Solomon Islands, Saint Vincent and the Grenadines, Trinidad and Tobago, Tuvalu, and Vanuatu.[20] All of them use at least one or more types of vulnerable basepoints in their systems of archipelagic baselines.

2. The Use of Vulnerable Features in Archipelagic State Practice

The wording of Article 47(1) LOSC means that archipelagic States may employ peripheral and potentially insubstantial, low-elevation features that may be vulnerable to sea level rise. Examples of such features include:

i. small, low-elevation islands, especially those composed of soft sediments that may be readily eroded as a consequence of sea level rise as well as by the impacts of more frequent and intense extreme weather events, which may become more intense as a result of climate change-induced weather changes;
ii. reefs – several archipelagic States are partly or wholly composed of coral reefs and such features have often been incorporated into archipelagic baseline systems;
iii. low-tide elevations – a limited number of States have used LTEs, that is, naturally formed areas of land which are surrounded by and above water at low tide but submerged at high tide,[21] as part of their claimed baselines.

2.1. *Small, low-elevation islands*

A preliminary survey of the claims of archipelagic States indicates that at least seven archipelagic baselines systems have used small islands and potentially vulnerable island features as basepoints.[22] This use is in line with the provisions of Article 47(1) LOSC, that 'the outermost islands … of the archipelago' may be joined to form archipelagic baselines. Almost by definition some of these outermost features will be vulnerable to sea level rise.[23]

2.2. *Reefs*

The overwhelming majority of States that claim archipelagic status are in warm tropical waters, where the reef building corals are a major feature of coastal ecosystems. It is no surprise therefore that many archipelagic States have included basepoints located on reefs in their archipelagic baselines systems.[24] In fact, a number of archipelagic States are entirely or predominantly composed of low elevation coral atolls and related reef islands.[25] In the context of a changing global ocean, the issue is whether the natural processes that allow coral reef islands to adapt to changing sea levels can be maintained in the face of significantly accelerated sea level rise. This potential effect on coral adaptation is especially significant against the backdrop of warming,[26] acidification, and deoxygenation of the ocean which, moreover, include increasingly frequent extreme weather events such as intense storms.[27] All of these factors are likely to

[20] Baumert and Melchior (n. 19).
[21] See Art. 13 LOSC.
[22] Cape Verde, Comoros, Grenada, Jamaica, San Tomé and Príncipe, Saint Vincent and the Grenadines, Trinidad and Tobago. See Appendix II in Freestone and Schofield (n. 14).
[23] See Freestone and Schofield (n. 14), that uses Jamaica's baselines as an example.
[24] See the very careful analysis of the role of reefs in P.B. Beazley, 'Reefs and the 1982 Convention on the Law of the Sea' (1991) 6 *International Journal of Estuarine and Coastal Law* 281–312.
[25] For example, Kiribati consists of 32 atolls and one raised island feature, Banaba (Ocean) Island; also Tokelau and the Maldives.
[26] The potentially disastrous effects of ocean warming for coral reefs are underscored by the increasing frequency and severity of coral reef bleaching events. See, for example, P.P. Wong et al., 'Coastal systems and low-lying areas', in *Climate Change 2014: Impacts, Adaptation, and Vulnerability. Part A: Global and Sectoral Aspects. Contribution of Working Group II to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change*, eds. C.B. Field et al. (Cambridge, UK: Cambridge University Press, 2014), 361–409, at 378.
[27] Such events can be highly destructive for coastal ecosystems such as corals and, coupled with multiple other factors such as disease, feed web changes, invasive organisms and heat stress mortality, may 'overwhelm the capacity for natural and human systems to recover following disturbances'; see, IPCC 1.5°C Special Report (n. 10), at 223.

seriously impair the ability of coral reefs to respond to rising sea level and thus impair the resilience of coral reef islands.[28] Fourteen archipelagic States use reefs as integral parts of their baselines systems.[29]

2.3. *Low-tide elevations*

Baumert and Melchior suggest that only two archipelagic States may have utilised LTEs for their archipelagic baselines: Dominican Republic, and Trinidad and Tobago.[30] Additionally, Baumert and Melchior point out that Comoros appears to use a submerged basepoint and that Seychelles has utilised anomalous 'open water' or floating basepoints.[31]

This practice suggests that the actual use of LTEs themselves as basepoints for archipelagic baselines is not widespread. What is more difficult to assess is the extent to which a one or two metre sea level rise would render some of the existing insular features de facto LTEs.

3. Issues Identified by the Committee and Preliminary Conclusions

Based on the discussion as presented in this section, the Committee identified three main issues:

First, regarding at-risk basepoints: low-elevation insular features and low-tide elevation basepoints are by definition frequently instable both spatially and temporally and are likely to be most at risk from sea level rise. Although LTEs are not widely used as basepoints, low-elevation island features and coral reefs are more frequently used. Indeed, coral reef basepoints are particularly at risk; there are significant doubts over whether coral reef structures employed as basepoints for archipelagic baseline claims can continue growing and keep up with sea level rise, and this could have major implications for archipelagic baseline systems.

Second, there are particular threats that result from archipelagic status set out in Articles 46 and 47 LOSC. Foremost among the problems is meeting the water: land ratio.

Third, every single one of the twenty-two States that have claimed archipelagic status has utilised high-risk features of low-elevation rocks, coral reefs or LTEs as archipelagic basepoints.

The Committee arrived at the following preliminary conclusion: Having considered the particular situation of archipelagos, the Committee reaffirms the approach to archipelagic baselines taken by the ILA Resolution 5/2018, so that once archipelagic baselines have been established in accordance with the LOSC, they should not be required to be recalculated should sea level change affect the geographical reality of these baselines.

B. The Development of State Practice concerning the Limits of Maritime Zones and Maritime Boundaries in the Context of Climate Change-Related Sea Level Rise

The Committee has continued its study of the development of State practice in relation to the issue of maintenance of the limits of maritime zones and maritime boundaries in the context of climate change-induced sea level rise. In doing so, the Committee has built on its 2018 Report and the relevant parts of the ILA Resolution 5/2018. In the ILA Resolution 5/2018, it was noted that:

> [T]he Committee has presented evidence of the emergence of State practice, particularly in the South Pacific region, indicating that small island States intend to maintain the baselines and limits of their

[28] The absorption of carbon dioxide by the ocean leads to ocean waters becoming more acidic which, in turn, impairs the ability of calcifying organisms such as corals to form, leading to reduced levels of calcification and enhanced skeletal dissolution and coral mortality.

[29] They are Antigua and Barbuda, The Bahamas, Comoros, Fiji, Kiribati, Maldives, Marshall Islands, Mauritius, PNG, Philippines, Seychelles, Solomon Islands, Tuvalu and Vanuatu. See Appendix II in Freestone and Scofield (n. 14).

[30] Baumert and Melchior (n. 19), at 66. Note that the Dominican Republic LTE in question is on the other side of an agreed maritime boundary but only by using it can DR meet the minimal 1:1 end of the water: land ratio test. While Trinidad and Tobago utilizes an LTE which is within 12 M of the nearest island, as permitted by Art. 47(4) LOSC, its loss would not appear to endanger the integrity of Trinidad and Tobago's archipelagic baselines system and status.

[31] Ibid.

> current maritime zones established in accordance with the 1982 Law of the Sea Convention for the future, notwithstanding physical coastline changes brought about by sea level rise.

In its 2018 Report, the Committee identified the initial evidence of the emerging State practice in the Pacific region regarding the intent of some island States to maintain their maritime entitlements in the face of sea level rise. State practice emerging in the aftermath of the 2018 Report has included an increasing number of examples from other regions. Moreover, as of 2021, several other States from different regions have also expressed support for the efforts of coastal States particularly affected by sea level rise, such as those in the Pacific region, to maintain their maritime entitlements in the context of climate change-related sea level rise (as is further discussed in section B.3.3, below in this part).

The development of State practice in relation to the issue of maintenance of the limits of maritime zones and maritime boundaries in the context of climate change-induced sea level rise can be seen to date in *three main phases*:

An ***initial*** phase from about 2010 to 2018 during which early evidence of State practice regarding the intent of some island States to maintain their maritime entitlements in the face of sea level rise began to emerge, especially in the South Pacific region (section II.B.1, below);

A ***watershed*** phase in the course of 2019 and 2020, during which some main trends can be identified. State practice at that time began to include an increasing number of examples also from regions other than the South Pacific – a trend which became evident after 2019 (section II.B.2, below); and

A ***consolidation*** phase from 2021, during which the State practice of South Pacific countries has achieved the current level of clarity and specificity. Indeed, as of 2021 several other States from different regions have also expressed support for the efforts of coastal States particularly affected by sea level rise (from the Pacific region, but also the Indian Ocean, the Caribbean, and elsewhere), to maintain their maritime entitlements in the context of climate change-induced sea level rise (section II.B.3, below).

1. Initial Evidence of State Practice: 2010–2018[32]

The emergence of State practice on this issue can be dated to about 2010. Initially this practice consisted of policy documents adopted at the regional level as well as national legislation of certain South Pacific States. In its 2018 Report, the Committee identified the following early indications and examples of an emerging regional State practice:

In 2010, the Pacific Island Forum adopted the *Framework for a Pacific Oceanscape*, a strategy document that urged, in Action 1A, that the Pacific Island Countries and Territories (PICTs) 'in their national interest' deposit with the United Nations coordinates and charts delineating their maritime zones. Action 1B, entitled 'Regional Effort to Fix Baselines and Maritime Boundaries to Ensure the Impact of Climate Change and Sea Level Rise Does Not Result in Reduced Jurisdiction of PICTs', stated:

> Once the maritime boundaries are legally established, the implications of climate change, sea level rise and environmental change on the highly vulnerable baselines that delimit the maritime zones of Pacific Island Countries and Territories should be addressed. This could be a united regional effort that establishes baselines and maritime zones so that areas could not be challenged and reduced due to climate change and sea level rise.

On 16 July 2015 at Papeete, Tahiti, seven leaders of Polynesian States and Territories (French Polynesia, Niue, Cook Islands, Samoa, Tokelau, Tonga, and Tuvalu) signed the *Taputapuātea Declaration on Climate Change*, calling, in advance of the COP21 in Paris, upon the State Parties to the UN Framework Convention on Climate Change to:

> *With regard to the loss of territorial integrity:*

[32] This section summarizes the findings of the Committee as presented in its 2018 Report. For more comprehensive discussion see the *2018 Report* (n. 5), at 885–887 [27–30].

- Accept that climate change and its adverse impacts are a threat to territorial integrity, security and sovereignty and in some cases to the very existence of some of our islands because of the submersion of existing land and the regression of our maritime heritage.
- Acknowledge, under the United Nations Convention on the Law of the Sea (UNCLOS), the importance of the Exclusive Economic Zones for Polynesian Island States and Territories whose area is calculated according to emerged lands and permanently establish the baselines in accordance with the UNCLOS, without taking into account sea level rise [*sic*].

On 2 March 2018 at Majuro, in the Marshall Islands, the heads of State or their representatives of eight Pacific Island States (Micronesia, Kiribati, Marshall Islands, Nauru, Palau, Papua New Guinea, Solomon Islands, and Tuvalu), signed the *Delap Commitment on Securing Our Common Wealth of Oceans*. This declaration (in para. 8) acknowledged the 'challenges presented by their unique vulnerability and the threat to the integrity of maritime boundaries and the existential impacts due to sea level rise', to which end they agreed:

> To pursue legal recognition of the defined baselines established under the *United Nations Convention on the Law of the Sea* to remain in perpetuity irrespective of the impacts of sea level rise.

In the aftermath of the Sydney ILA Conference, which was held in August 2018, several policy documents were adopted by the Pacific Islands Forum (PIF) – the region's premier political and economic policy organisation which was founded in 1971 and includes the Pacific small island developing States (SIDS) and territories plus Australia and New Zealand.[33]

In September 2018, at its 49th Meeting held in Nauru, the PIF issued the *Boe Declaration on Regional Security*.[34] The accompanying PIF Communiqué recognized the 'urgency and importance of securing the region's maritime boundaries', including an assertion that Pacific leaders are 'committed to progressing the resolution of outstanding maritime boundary claims'.[35] The accompanying Action Plan to Implement the Boe Declaration itemized a number of future activities, with baselines and targets, in six strategic focal areas – the first being 'Climate Security'. The actions in the implementation schedule for this strategic focal area include 'securing sovereignty and territorial integrity in the face of the impacts of climate change'. Measures of success were stated as follows:

> (i) The number of maritime boundaries resolved over the next 12 months: baseline (35), target (42);
> (ii) The development of a regional strategy to safeguard Members' maritime zones and related interests in the face of sea level rise;
> (iii) Members participation at relevant international forums to highlight the region's interests and concerns as detailed in the strategy.

These regional level policy developments have been coupled with detailed national legislation by Pacific Island countries whereby several of those States have been unilaterally declaring, updating and publicising their maritime jurisdictional baselines, limits and boundaries using modern geo-positioning co-ordinates. For example, the Republic of the Marshall Islands passed comprehensive new legislation on 18 March 2016, repealing 'in its entirety' its 1984 Maritime Zones Declaration Act, and declaring anew all its maritime zones.[36] Similar legislation, designating new archipelagic waters and designating the outer limits of national EEZs was passed in 2012 by Tuvalu, and in 2014 by Kiribati.[37]

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[33] The 18 Members of the PIF (16 of which are Parties to the LOSC, including 14 UN Member States) are: Australia, Cook Islands, Federated States of Micronesia, Fiji, French Polynesia, Kiribati, Nauru, New Caledonia, New Zealand, Niue, Palau, Papua New Guinea, Republic of Marshall Islands, Samoa, Solomon Islands, Tonga, Tuvalu, and Vanuatu.

[34] See PIF Secretariat, 'Boe Declaration on Regional Security' (5 September 2018), Doc. PIFS(18)10, available at: <https://uploads.guim.co.uk/2018/09/05/1FINAL_49PIFLM_Communique_for_unofficial_release_rev.pdf> (last accessed on 22 April 2022).

[35] PIF Secretariat, 'Communiqué of the Forty-Ninth Pacific Islands Forum', Yaren, Nauru, 3–6 September 2018.

[36] Act No. 13 of 2016, discussed in detail by D. Freestone and C. Schofield, 'Republic of the Marshall Islands: 2016 Maritime Zones Declaration Act: Drawing Lines in the Sea' (2016) 31 *International Journal of Marine and Coastal Law* 720–746.

[37] See the *2018 Report* (n. 5), at 886 [29].

In its 2018 Report, the Committee observed that this national legislative practice appears to be a deliberate attempt to establish zones that would remain fixed notwithstanding physical changes to the coastline resulting from climate change-induced sea level rise.[38]

2. Watershed Phase: Trends in State Practice emerging in 2019–2020

In August 2019, the 50th Meeting of the PIF, held in Funafuti, Tuvalu, adopted a Communique that included highly relevant paragraphs on 'Oceans and Maritime Boundaries.' The PIF Leaders stated that they had:

> [25] discussed progress made by Members to conclude negotiations on maritime boundary claims since the Leaders meeting in Nauru 2018, and encouraged Members to conclude all outstanding maritime boundaries claims and zones […and…] reaffirmed the importance of preserving Members' existing rights stemming from maritime zones, in the face of sea level rise, noting the existing and ongoing regional mechanisms to support maritime boundaries delimitation.
>
> [26] committed to a collective effort, including to develop international law, with the aim of ensuring that once a Forum Member's maritime zones are delineated in accordance with the 1982 UN Convention on the Law of the Sea, that the Member's maritime zones could not be challenged or reduced as a result of sea-level rise and climate change.[39]

2.1. *Examples of State practice in submissions by UN Member States (2019–2020)*

In late 2019 and in the course of 2020, a number of States responded to an invitation by the International Law Commission (ILC)[40] to UN Member States to submit examples of State practice that may be relevant to sea level rise in relation to the law of the sea. Thereafter, Antigua and Barbuda, Croatia, Maldives, Micronesia (Federated States of: hereinafter FSM), The Netherlands, Romania, the Russian Federation, Singapore, the United Kingdom, and the United States submitted such information through the UN Secretariat. Moreover, Tuvalu also submitted information on behalf of the members of the PIF, 16 of which are Parties to the LOSC (including 14 UN Member States).[41] For the purposes of analysis, these submissions can be divided into three groups; the views and comments by two of these are summarised here.[42]

a) The submissions by Tuvalu (on behalf of the PIF Member States),[43] the Maldives (Indian Ocean) and Antigua and Barbuda (Caribbean region), all have important shared elements and are presented here first. The PIF Members referred to their 'consistent State practice' for coping with sea level rise by establishing their maritime zones in advance of any future impacts from sea level rise. This practice is comprised of:

(i) settling outstanding maritime limits and boundaries as soon as possible; and
(ii) fixing geographical coordinates of baselines and outer limits of maritime zones.

These submissions specially reference their fundamental desire to promote the *stability* and *certainty* of maritime zones and entitlements, notwithstanding the effects of sea level rise.[44] They highlight the fact that uncertainty about maritime zones and entitlements would defeat those important purposes of the LOSC. For example, the PIF submission states that:

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[38] See a commentary in ibid.
[39] This wording is accordingly stated also in para. 14 of the PIF's Kainaiki II Declaration for Urgent Climate Action.
[40] United Nations, *Report of the International Law Commission: Seventy-first session (29 April–7 June and 8 July–9 August 2019)*, UN Doc. A/74/10 (UN: New York, 2019), Chapter III.C.
[41] All those submissions are available at the ILC website, at: <https://legal.un.org/ilc/guide/8_9.shtml> (last accessed on 22 April 2022).
[42] A third 'group' – consisting only of two States: Croatia and Romania – includes those who have sent excerpts from their legislation but without adding comments regarding their State practice. Moreover, three States (Iraq, Qatar, and Syria) submitted their information through Asian-African Legal Consultative Organization.
[43] With additional information separately submitted by the FSM which is a PIF Member.
[44] Note that the ILA Assembly in August 2018, in its Resolution 5/2018, endorsed the proposal of the Committee that, 'on the grounds of legal certainty and stability', once the baselines and the outer limits of maritime zones of a coastal State or an archipelagic State are determined in accordance with the LOSC and notified to the UN Secretary-General, these should not be required to be recalculated should sea level rise affect the geographical reality of the coastline.

> Recently, State practice from among PIF Members has shifted from using nautical charts as the sole or primary method to show the location of the normal, strait [*sic*], or archipelagic baselines and the outer limits of maritime zones to the use of geographic coordinates specifying points on the baseline and outer limits.

PIF Members 'consider that there are good grounds to work towards ensuring that, once maritime zones are delineated in accordance with UNCLOS, those maritime zones should not be challenged or reduced as a result of sea-level rise and climate change'.[45]

FSM supplemented the PIF submission with a copy of the set of observations that it included in its deposit with the UN Secretary-General of its charts and lists of geographical coordinates (of 24 December 2019). In it, FSM pointed to the fact that, as a country made up of 607 islands, many of which are low-lying atolls, it is specially affected by sea level rise and climate change. The observations state FSM's:

> … understanding that it is not obliged to keep under review the maritime zones reflected in the present official deposit of charts and lists of geographical coordinates of points, delineated in accordance with UNCLOS, and that the Federated States of Micronesia intends to maintain these maritime zones in line with that understanding, notwithstanding climate change-induced sea-level rise.

From a different region (Indian Ocean), the Maldives in its submission pointed out that it shares a key feature with other small island developing States, as being 'on the front line of climate change and particularly vulnerable to the impacts of sea-level rise'.[46] Despite being engaged in coastal fortification efforts (including the construction of an artificial island built at 2.1 m above sea-level), the Maldives considered that such physical efforts will not be feasible on the scale needed, and that international law is a much more viable tool for protecting maritime entitlements. It stated its position as follows:

> First, once a State has determined the extent of its maritime entitlements in accordance with UNCLOS and deposited the appropriate charts and/or geographic coordinates with the UN Secretary-General […], these entitlements are fixed and will not be altered by any subsequent physical changes to a State's geography as a result of sea-level rise. […]
>
> Second, the Maldives considers that sea-level rise does not have any effect on maritime boundaries between two States when they have been fixed by a treaty. [47]

Antigua and Barbuda, a Caribbean State, explained in its submission that it shares the views of the PIF Members and Maldives on a number of issues. It was Antigua and Barbuda's 'legal opinion, which is backed by its state practice' that:

> baselines established in accordance with UNCLOS may remain fixed despite sea-level rise and, additionally, States have no obligation to revise maritime baselines because of sea-level rise.

Antigua and Barbuda took the view that this position 'abides with the principles of certainty and stability', while 'ambulatory baselines are inequitable and unfair, and violate State sovereignty and the permanent sovereignty of peoples and States over their natural wealth and resources'.[48] Moreover, Antigua and Barbuda

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[45] Submission by Tuvalu (on behalf of the PIF Member States), of 30 December 2019 (n. 41), at 5.

[46] Submission by the Maldives, Doc. 2019/UN/N/50, of 31 December 2019 (n. 41), in Part A, stating also that it is composed of a chain of 21 natural coral atolls consisting of about 1200 low-lying islands (approximately 80 percent of which less than a meter above sea-level), with a population of around 400,000 distributed widely and unevenly across the 186 permanently inhabited islands.

[47] Ibid., Part B: *The Maldives Views on Sea-level Rise and the Law of the Sea*. See also n. 143, below.

[48] Submission by Antigua and Barbuda (see n. 41), at 3–4. The reason for Antigua and Barbuda to consider ambulatory baselines as *inequitable and unfair* is because of the disproportionate economic and geographic consequences of sea level rise for SIDS: despite their bearing next to no responsibility for sea level rise (in Antigua and Barbuda's case, e.g., 0.0015% of global CO_2 emissions in 2019), in addition to the loss of *land* due to sea-level rise, ambulatory baselines would add further adverse consequences for them by entailing also a loss of parts of their current *maritime* areas (ibid., at 4–6).

considered that sea level rise has no effect on maritime boundaries set forth by treaty or by adjudication – and notes that 'no State seems to have so far voiced a contrary opinion'.[49]

***b*)** The submissions by The Netherlands, the Russian Federation, the UK and the USA might, for analytical purposes, be regarded a second group. Moreover, although Singapore is a small island State that has invested large sums in expanding its land territory, its submission has certain similarities with those of this second group, as explained below; it is for this reason added here. This group is partially characterised by diversity of views, but also in part by shared views by some of the States concerned regarding some distinct aspects.

Three of those States make explicit reference to *ambulatory* baselines. The UK, while observing that it is not able to point to elements of its own State practice that directly respond to the issues under consideration, drew attention to two aspects of its legislation, one of which is the 'legislation establishing UK's Territorial Sea that provides for ambulatory baselines in accordance with [LOSC]'. The USA, which stated that '[u]nder existing international law, coastal baselines are generally ambulatory, meaning that if the low-water line along the coast shifts (either landward or seaward), such shifts may impact the outer limits of the coastal State's maritime zones.' If, under the US practice, shifts in the low-water line along the coast other than *de minimis* ones (i.e., shifts that are greater than 500 meters) take place then the USA makes changes to its own baselines and outer limits. The Netherlands provided comments and observations concerning its practice 'with regard to ambulatory baselines': a practice which 'occurs only in the European part of the Kingdom'. Additionally, The Netherlands pointed to its practice regarding low tide elevations that are within its territorial sea: when a change to these occurs (be it appearance or disappearance) at a distance exceeding 0.1 nm, the normal baselines are adjusted accordingly, and published, together with the associated territorial sea limits, in a new Chart edition.

The Netherlands, Singapore, the Russian Federation, and the USA all referred to the importance of *physical measures* for coastal defence and reinforcement. For Russia, 'the construction of dams is a promising adaptive measure in view of rising sea levels due to global warming'. The Netherlands and Singapore moreover singled out their own examples of major national projects, such as *Maasvlakte 2* and *Sand Motor* in The Netherlands, and various measures undertaken since 2011 by Singapore to raise platform levels for new critical infrastructure projects to at least 4 m above the mean sea level, and planned investments of over S$100 billion over the next 50–100 years.

The UK, the Russian Federation, and the USA all referred to their practice and views regarding *maritime boundaries*. The USA:

> … generally considers maritime boundaries established by treaty to be final… [and…] would not be affected by any subsequent changes to the baseline points that may have contributed to the construction of a maritime boundary, unless the treaty establishing the boundary provides otherwise.

The Russian Federation stated its view according to which:

> International treaties on maritime delimitation should be distinguished from State boundary treaties, which usually deal with boundaries on land and inland non-maritime waters … [where] natural changes in the terrain … are more expected and are usually covered by a remark in the text of the treaty. In this connection, it does not appear to be necessary to infer the applicability of any of the practices that exist in relation to State boundary treaties to the situation of sea-level rise and its impact on the outcome of maritime delimitation.

The UK referred to the legislation establishing the UK EEZ which is defined by fixed coordinates as agreed in bilateral maritime boundary delimitation treaties with neighbouring countries.

2.2. *Evidence from the 2019 Sixth Committee debate*

The previous examples demonstrate that in the period under review (2019–2020), there has been an emerging convergence of State practice and positioning not only among the PIF Members but also among

[49] Ibid., at 8.

certain other island States that face the impacts of sea level rise (such as Maldives, and Antigua and Barbuda). Other states, particularly more developed States, however presented somewhat different positions. The 2019 UNGA Sixth Committee debate provided further views on these issues and appeared to evidence some congruence of views on a number of key issues.[50] These included:

The paramount objectives of legal stability and certainty under international law and the LOSC.
Many States referred to this fundamental consideration in connection with the effects of climate change and sea level rise, interpreting the need for 'stability' and 'certainty' in the context of climate-change-induced sea level rise as calling for fixed baselines and maritime zones. This desire for stability and certainty seems to be among the most frequently emphasized points made by the States taking part in the debates.[51] In the analysis of the 2019 Sixth Committee debate contained in the *First Issues Paper*, this issue was noted as being of utmost importance.[52] This ILA Committee has consistently put considerable emphasis on this issue. It is reflected in the 2018 Report of the Committee and the resulting ILA Resolution 2018/5, to which some States and the ILC itself also referred.

The unprecedented nature of challenges posed by climate change and sea level rise.
Some States, such as China, referred to sea level rise as a new phenomenon that goes beyond the current scope of the law of the sea and requires examination in the light of emerging State practice. Other States (e.g., Colombia, Estonia) pointed out that this development is unprecedented and that some commonly accepted concepts in international law would need to be re-evaluated, while yet other States (e.g., Egypt, Republic of Korea) pointed to the need of progressive development of international law and approaches *de lege ferenda*.

The particular vulnerability to sea level rise of low-lying and small island developing States.
This important circumstance was referred to by a number of States, including both highly developed States and the least developed and the most vulnerable States.[53] The explicit description of some States as being *specially affected* by the effects of sea level rise has been raised in the United Nations discussions. This description was used by New Zealand in relation to the PIF Members as being *some of* the States 'that are, and will be specially affected by sea-level rise';[54] by Tuvalu, on behalf of the PIF UN Members States, referring to the 'interests of those *particularly affected*, including small island developing States'; by FSM, also referring to States which are 'particularly affected' by sea level rise (in line with its submission to the UN, referring to its own position as being 'specially affected' by sea level rise); and by Papua New Guinea, referring to these States as the 'affected' ones, 'relying heavily' on their maritime zones. In addition to PIF Members, a number of States from other regions – the Indian Ocean (Maldives) and the Caribbean (e.g., Belize) – expressed similar views, or referred to their similar State practice.

Lack of objection so far to the State practice emerging among low-lying, small island developing States.
It is worth noting that no specific objection by any State has been raised to these examples of State practice. In the 2019 UN Sixth Committee debate there were no objections made to the practice of small island developing States repeatedly being pointed out in their statements. Several States pointed out that an important consideration was the fact that small island developing States were among the least responsible for

[50] As observed by the Co-Chairs of the ILC Study Group, Bogdan Aurescu and Nilüfer Oral, in their *First Issues Paper*: 'The statements of Member States in the Sixth Committee on the present topic are also indicative of State practice'; see: *Sea-level Rise in Relation to International Law: First Issues Paper by Bogdan Aurescu and Nilüfer Oral, Co-Chairs of the Study Group on Sea-level Rise in Relation to International Law* (UN Doc. A/CN.4/740), 28 February 2020, para. 89 [hereinafter: *First Issues Paper*].

[51] See the statements in the 2019 UNGA Sixth Committee debate by Australia, Canada, Cuba, Israel, Jamaica, Norway (on behalf of Nordic countries), Micronesia, Papua New Guinea, Poland, Thailand (summaries in UN Doc. A/C.6/74/SR.24–34; and statements, as delivered, available at: <https://www.un.org/en/ga/sixth/74/ilc.shtml>).

[52] See *First Issues Paper* (n. 50), especially paras 18, 23, 79, 82, 104(b), 121, 128, 138, 141(b), and 220.

[53] See the statements in the 2019 UNGA Sixth Committee debate by Argentine, Australia, Belize, Canada, Fiji, Honduras, Indonesia, Ireland, Italy, Jamaica, Liechtenstein, Micronesia, The Netherlands, New Zealand, Norway, Peru, Portugal, Sierra Leone, Singapore, Thailand, and Tuvalu (UN Doc. A/C.6/74/SR.24–34; and statements, as delivered).

[54] Summary record of the 26th meeting of the UN Sixth Committee (UN Doc. A/C.6/74/SR.26) failed to capture one entire paragraph in the statement by New Zealand, including the above-cited text, which however is included in its official statement of 31 October 2019, and was delivered as such – as is confirmed by the UN audio-video recording of the session, available at the UN website.

climate change but were likely to suffer the most from its adverse effects.[55] Thus, considerations of equity and justice could explain why protests to this recent practice are not being made, as they might lack legitimacy. Some States, however, did refer to the lack of sufficiently widespread State practice in this field to date, or to the fact that it was not yet clearly established.[56]

3. The Consolidation of State Practice in 2021: Achieving Clarity and Specificity

3.1. *Declarations adopted in 2021 by PIF and AOSIS*

PIF Declaration on Preserving Maritime Zones in the Face of Climate Change-Related Sea Level Rise.
On 6 August 2021, at the virtual session of the 51st Pacific Island Forum, the PIF Leaders adopted the *Declaration on Preserving Maritime Zones in the Face of Climate Change-Related Sea-Level Rise*.[57] This declaration has introduced further clarity and specificity concerning the views of those States on the interpretation of relevant international law and can in that respect be regarded as their most comprehensive and important collective statement so far. It therefore merits special attention and analysis.

The Declaration is premised on three key aspects of the PIF Members' understanding concerning climate change-related sea level rise context under the LOS Convention. They affirm that LOSC sets out 'the legal framework within which all activities in the oceans and seas must be carried out' and that it was 'adopted as an integral package containing a delicate balance of right and obligations', thus establishing 'an enduring legal order for the seas and oceans' (Preamble, paras 1 and 2). Those three key aspects are:

First, the Declaration states that 'the relationship between climate change-related sea-level rise and maritime zones was not contemplated by the drafters of the Convention at the time of its negotiation, and that the Convention was premised on the basis that, in the determination of maritime zones, coastlines and maritime features were generally considered to be stable' (Preamble, para. 6).

Second, the Declaration underlines that coastal States, and in particular small island and low-lying developing ones, 'have planned their development in reliance on the rights to their maritime zones guaranteed in the Convention' (Preamble, para. 7).

Third, the Declaration recognises 'the principles of legal stability, security, certainty and predictability that underpin the [LOS] Convention and the relevance of these principles to the interpretation and application of the Convention in the context of sea-level rise and climate change' (Preamble, para. 3).[58]

Based on these three underlying premises, the operative part of the Declaration contains two key proclamations specifying how PIF Members interpret the LOS Convention. The first is the affirmation by PIF Members that:

> the Convention imposes no affirmative obligation to keep baselines and outer limits of maritime zones under review nor to update charts or lists of geographical coordinates once deposited with the Secretary-General of the United Nations.

The second key proclamation by PIF Members in the Declaration is the consequence of the first, so that:

[55] See the statements in the 2019 UNGA Sixth Committee debate by, e.g., Belize, Cuba, Fiji, Nicaragua, Norway, Papua New Guinea, as well as the Holy See as observer (UN Doc. A/C.6/74/SR.24–34; and statements, as delivered: n. 51).
[56] See the statements in the 2019 UNGA Sixth Committee debate by Cyprus, Greece, France, and Poland (n. 51).
[57] The Declaration is published at the PIF webpage, at: <https://www.forumsec.org/2021/08/11/declaration-on-preserving-maritime-zones-in-the-face-of-climate-change-related-sea-level-rise/> (last accessed on 22 April 2022); also reproduced in D. Freestone and C. Schofield, 'Pacific Island Countries Declare Permanent Baselines, Limits and Maritime Boundaries' (2021) 36(4) *International Journal of Marine and Coastal Law* 685–695; and in F. Anggadi, 'Establishment, Notification, and Maintenance: The Package of State Practice at the Heart of the Pacific Islands Forum Declaration on Preserving Maritime Zones' (2022) 53 *Ocean Development & International Law* 19–36.
[58] In para. 4 of the Preamble, the Declaration *further recognises* 'the principles of equity, fairness and justice as key legal principles *also* underpinning the Convention'. Emphasis on 'also' is added here; as it became evident in the Sixth Committee debate in late October/early November 2021, aspects of equity, fairness and justice figured somewhat less prominently, while the main emphasis was put on the 'principles of stability, security, certainty and predictability'.

> maritime zones, as established and notified to the Secretary-General of the United Nations in accordance with the Convention, and the rights and entitlements that flow from them, shall continue to apply, without reduction, notwithstanding any physical changes connected to climate change-related sea-level rise.

The PIF Members' position, as stated in the Declaration, is that 'maintaining maritime zones established in accordance with the Convention, and rights and entitlements that flow from them, notwithstanding climate change-related sea-level rise, is supported by both the Convention and the legal principles underpinning it.'

Declaration by Alliance of Small Island States (AOSIS).
On 22 September 2021, the Heads of State and Government of the Alliance of Small Island States (AOSIS)[59] adopted, for the first time since 2014, a new Leaders' Declaration.[60] The relevant paragraph of that AOSIS Declaration mirrors, almost verbatim, the key proclamations in the operative clauses of the PIF August Declaration, stating that the Heads of State and Government of AOSIS:

> *Affirm* that there is no obligation under the United Nations Convention on the Law of the Sea to keep baselines and outer limits of maritime zones under review nor to update charts or lists of geographical coordinates once deposited with the Secretary-General of the United Nations,

and that:

> such maritime zones and the rights and entitlements that flow from them shall continue to apply without reduction, notwithstanding any physical changes connected to climate change-related sea-level rise.[61]

3.2. *Consolidation of the approach concerning treaty interpretation by AOSIS and PIF Members*

The adoption of these two declarations by PIF in August and by AOSIS in September 2021 means that there are now at least 41 Parties to the LOS Convention[62] expressly supporting the same interpretation of the Convention regarding the limits of maritime zones and the rights and entitlements that shall continue to adhere to these zones without any change, notwithstanding geographical change of coastline due to climate change-related sea level rise. These two declarations therefore represent a significant consolidation of the common approach taken by those States.

The evolution in this common thinking can be seen if the approach reflected in the 2021 declarations is compared with the statements made by those States in the 2020 debate in the Sixth Committee,[63] when the

[59] AOSIS, which was established in 1990, has a membership of 39 – mostly small island developing States but also some low-lying coastal States – which are spread across several different maritime regions: in the Atlantic, Indian, and Pacific Oceans, as well as in the Caribbean region and the South China Sea. From the *Pacific Ocean*, AOSIS includes 14 of in total 18 PIF Members (i.e., all except Australia, New Zealand, French Polynesia and New Caledonia). Other Member States of AOSIS are: in the *Atlantic Ocean*, three African States: Cape Verde, Guinea-Bissau, and San Tomé and Príncipe; in the *Indian Ocean*: Comoros, Maldives, Mauritius, and Seychelles; in the *Caribbean* region: Antigua and Barbuda, Bahamas, Barbados, Belize, Cuba, Dominica, Dominican Republic, Grenada, Guyana, Haiti, Jamaica, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Suriname, and Trinidad and Tobago; and in the *South China Sea*: Singapore.

[60] The Declaration is published at AOSIS webpage, at: <https://www.aosis.org/launch-of-the-alliance-of-small-island-states-leaders-declaration/> (last accessed on 22 April 2022).

[61] Ibid., para. 41. The AOSIS Declaration is divided into three operative parts, concerning 'Climate Change' (paras 1–15), 'Sustainable Development' (paras 16–38), and 'Oceans' (paras 39–44).

[62] This includes 39 UN Member States, since two among PIF and AOSIS members – Cook Islands and Niue – are not UN Members. Regarding participation in the LOSC, AOSIS and PIF members make around 25% of the LOSC Parties.

[63] In the 2020 discussion on sea level rise and international law in the Sixth Committee, due to COVID-19 measures and the resultant postponement of the ILC's 2020 session to 2021, only 11 statements (of in total 25 given) elaborated on this theme: by Tuvalu on behalf of the PIF 14 UN Member States; Fiji on behalf of 12 Pacific SIDS; Belize on behalf of AOSIS 37 UN Member States; and by Maldives, Micronesia, New Zealand, Papua New Guinea, Tonga, Turkey, Solomon Islands, and the USA. All those statements were given in the 13th plenary meeting of the Sixth Committee, on 5 November 2020 – and all further citations in this section from the statements, as delivered, refer to that meeting. For

PIF and AOSIS members had still not entirely synchronised their positions. Now they all seem to have adopted an approach that was clearly articulated by the Maldives and by Belize in 2020. The Maldives stated:

> our interpretation of UNCLOS is that once a state deposits the appropriate charts and/or geographic coordinates with the Secretary-General, these entitlements are fixed and will not be altered by any subsequent physical change to a state's geography as a result of sea-level rise.[64]

This position was, on behalf of AOSIS, elaborated by Belize. The 2020 statement on behalf of AOSIS made a distinction between the two ways in which this State practice can be relevant:

> First, the VCLT … states that subsequent practice applying the treaty, which evinces parties' agreement on treaty interpretation, shall be taken into account. This is particularly useful where the treaty is silent on an issue, as the Convention is with the requirement to update coordinates or charts.
>
> Second, recognizing that not all States are party to the Convention, State practice joined with the *opinio juris* is evidence of customary international law. While we recognize that there may not be sufficient State practice and *opinio juris* to make a conclusion that there is a general customary rule, we think that the trend is in that direction.
>
> Nevertheless, the absence of a general customary rule does not have an effect on the interpretation of the Convention, based on the subsequent practice of its States Parties.[65]

While there may have been some differing positions articulated in the past, the positions of the AOSIS and PIF members have now been fully coordinated by the two declarations. The debate held in the Sixth Committee in 2021 provided unambiguous evidence of that.

3.3. *Evidence from the debate in the Sixth Committee in 2021: views of other States*

In late October and early November 2021, many States took part in the Sixth Committee debate on the topic of sea level rise and international law.[66] It is of interest to examine whether the 2021 formal Declarations by the PIF Members and by AOSIS attracted any support, or opposition from States not associated with those organisations or even regions. Given that the formal statements by the PIF and AOSIS members concerned primarily the interpretation of the LOSC, the views expressed by the Parties to the LOSC are analysed first.

Several *Asian* UN Member States supported views such as those contained in the declarations by the PIF and AOSIS. Notably, Malaysia stated that, in the context of sea level rise, it 'shares the view with the majority of States that maritime baselines, limits and boundaries should be fixed in perpetuity'.[67] In this connection, Malaysia however cautioned that 'sea-level rise and reclamation activities pose possibly similar effects on a State's maritime space [and] should be carefully distinguished so to avoid that any State is taking advantage by enlarging its maritime space under the pretext of sea-level rise'.[68]

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the UN summary record of the 13th meeting of the Sixth Committee in 2020, see UN Doc. A/C.6/75/SR.13 of 25 November 2020. Statements by the States, as delivered, are available at: <https://www.un.org/en/ga/sixth/75/ilc.shtml>.

[64] UNGA Sixth Committee: Statement by Maldives on Agenda Item 80: Report of the International Law Commission on the work of its seventy-second session, 5 November 2020 (n. 63).

[65] UNGA Sixth Committee: Statement on behalf of the Alliance of Small Island States (AOSIS) under Item 80, Report of the International Law Commission on the work of its seventy-second session, by Belize, 5 November 2020 (n. 63).

[66] In addition to statements on behalf of AOSIS (by Antigua and Barbuda), PIF (by Fiji), and Pacific SIDS (by Samoa) Members – together comprising 39 UN Member States – and by the European Union (for its 27 members States and 8 candidate countries and/or potential candidates) and on behalf of the five Nordic countries (by Iceland), also 62 UN Member States and one observer (Holy See) delivered their individual statements in the course of five meetings (18th to 23rd) of the Sixth Committee held during the 76th Session of the UN General Assembly, from 28 October to 2 November 2021. Citations included in this section are from the statements as delivered in the Sixth Committee.

[67] Statement by Malaysia, Sixth Committee, 21st meeting, 29 October 2021.

[68] Ibid.

Indonesia stated that 'while maintaining existing maritime baselines and limits corresponds to the principles of certainty, security and predictability, it also reflects the interests of many States in connection with the effects of sea level rise'; and that 'charts or lists of geographical coordinates of baselines that have been deposited with the Secretary General pursuant to Article 16(2) and 47(9) of UNCLOS shall continue to be relevant'.[69]

Thailand's view was that 'in order to maintain peace, stability and friendly relations among States, their rights in relation to maritime zones and boundaries as guaranteed by UNCLOS must be protected'. Moreover, Thailand considered that 'each region faces a unique set of sea-level rise consequences' and, since the geography of coastlines varies, 'the rationale for the use of ambulatory baselines or otherwise depends to a large extent on the general configuration of the coast'.[70]

The Philippines cautioned 'against inference in favour of ambulatory baselines, absent showing of state practice and *opinio juris* on the matter', and also cautioned 'against any interpretation that would undermine the delicate balance of the rights and obligations of all States Parties' under the LOSC.[71] Taking the same position as a number of African States, the Philippines considered that 'an analogous principle [to the principle of *uti possidetis juris*] could be considered in favour of permanent baselines'.[72]

Several other Asian States, although sometimes in less specific terms, generally supported the overall approach to the interpretation of the LOSC in the context of climate change-induced sea level rise. India stated that 'the drafters of UNCLOS did not foresee the challenges posed by this phenomenon for the legal order created under UNCLOS' and emphasised the need for the integrity of the Convention as well as for reducing the vulnerability of SIDS as being a collective responsibility of the international community.[73] Japan stated its appreciation of the PIF Declaration as being in line with the understanding of the 'primacy of the [Convention] even in tackling climate change-related sea-level rise'.[74] Vietnam, similarly, emphasised that the 'approach to address the implications of sea-level rise should ensure stability and security in international relations, including the legal stability, security, certainty and predictability without involving the question of amending and/or supplementing the United Nations Convention on the Law of the Sea'.[75]

Among the *African* States, the most explicit on this matter was Egypt that argued that 'baselines should be static rather than mobile' and emphasized the relevance of 'the principle of continuity of boundaries – *uti possidetis juris*'.[76] Algeria stated that 'international law supports static baselines' and that it remains in favour of practical legal solutions for the States affected by sea level rise.[77] Sierra Leone pointed to the PIF Declaration of August 2021 in the 'context of instruments evidencing the emergence of State practice'.[78]

Several *European* States, in addition to aligning themselves to a general statement on behalf of the EU, provided more specific individual statements. In particular, Italy stressed 'the importance of stability, security and legal certainty with regard to baselines and maritime delimitation' and underlined that:

> *... any principle of permanency* of baselines, which have been established and deposited in accordance with international law, must refer solely to sea-level rise induced by climate change and not to other circumstances, including land accretion.[79]

Estonia considered that the interpretation of LOSC 'in the way that corresponds to the need for stability in inter-state relations' is possible and, in this connection, supported 'the idea to stop updating notifications, in

[69] Statement by Indonesia, Sixth Committee, 22nd meeting, 1 November 2021.
[70] Statement by Thailand, Sixth Committee, 22nd meeting, 1 November 2021.
[71] Statement by the Philippines, Sixth Committee, 23rd meeting, 2 November 2021.
[72] Ibid. For the views of some African States on this matter, see below.
[73] Statement by India, Sixth Committee, 22nd meeting, 1 November 2021.
[74] Statement of Japan, Sixth Committee, 21st meeting, 29 October 2021.
[75] Statement by Viet Nam, Sixth Committee, 21st meeting, 29 October 2021.
[76] Statement by Egypt, Sixth Committee, 21st meeting, 29 October 2021 (translation from Arabic original).
[77] Statement by Algeria, Sixth Committee, 22nd meeting, 1 November 2021(translation from Arabic original).
[78] Statement by Sierra Leone, Sixth Committee, 20th meeting, 29 October 2021. Several other African States, including Cameroon, Cote d'Ivoire, Senegal, and South Africa, took part in the debate yet were less specific on these issues.
[79] Statement by Italy, Sixth Committee, 20th meeting, 29 October 2021 (emphasis as in the original).

accordance with the UNCLOS, regarding the baselines and outer limits of maritime zones measured from the baselines after the negative effects of sea-level rise occur, in order to preserve the States' entitlements.'[80]

Cyprus stated that, in line with LOSC and international jurisprudence, 'baselines must be permanent and not ambulatory' and that, in light of the ongoing climate change-related sea level rise 'affected coastal States should be entitled to designate permanent baselines pursuant to Article 16 of UNCLOS, which would withstand any subsequent regression of the low-water line'.[81] In Cyprus' view, the obligation under LOSC Article 16 is 'meant to establish legal security' and 'no indication is provided for that these charts are to be periodically revised'.[82]

Greece likewise stated that the LOS Convention imposes no obligation to review or recalculate baselines or the outer limits of maritime zones and warned that generalised interpretations that could lead to unpredictable and uncertain situations should be avoided.[83]

More general statements, which nonetheless indicate an overall approach to the matter, were given by some other EU States. France stated that 'the principles of stability, security, certainty and of predictability, which are the key principles [of the LOSC] are also relevant for the issue of sea-level rise'.[84] Spain considered that, while guaranteeing the integrity of the LOS Convention, it may be possible to 'identify special formulas that take into consideration the extraordinary circumstances that several States, especially the Small Island Developing States, are suffering as a result of the process of sea level rise caused by climate change'.[85] Germany stated its readiness to work towards preserving 'maritime zones and the rights and entitlements that flow from them in a manner consistent with the Convention, including through a *contemporary reading and interpretation of its intents and purposes, rather than through the development of new customary rules*'.[86] This statement by Germany in fact summarized the general slant of views by many other States.

Two among 27 EU States referred to the baseline systems under their respective national legislations as being 'ambulatory': Ireland and Romania.[87] Romania clarified that:

> our legislation could be interpreted *as favouring an ambulatory system of baselines*, though a connection with the specific case of sea-level rise is difficult to make, given the particular character of the Black Sea as a semi-enclosed sea and less exposed to this phenomenon.[88]

In the light of Ireland's legislation, 'the normal baseline is ambulatory in that it may ambulate landward or seaward depending on a variety of factors, including coastal erosion and land reclamation'.[89]

Among *Latin American* States, Argentina and Chile in particular devoted special attention to the issue of interpretation of the LOS Convention in the context of climate change-related sea level rise. In Chile's view, in 'the application of the principles of stability, security, certainty and predictability … "legal stability" refers to the need to maintain baselines and outer boundaries of maritime zones' – while, contrary to this, 'special concern would be generated by the establishment of the concept of moving baselines.'[90] Argentina stated that:

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[80] Statement by Estonia, Sixth Committee, 21st meeting, 29 October 2021.
[81] Statement by Cyprus, Sixth Committee, 22nd meeting, 1 November 2021.
[82] Ibid.
[83] Statement by Greece, Sixth Committee, 22nd meeting, 1 November 2021.
[84] Statement by France, Sixth Committee, 20th meeting, 29 October 2021 (translation from French original).
[85] Statement by Spain, Sixth Committee, 22nd meeting, 1 November 2021 (translation from Spanish original).
[86] Statement by Germany, Sixth Committee, 21st meeting, 29 October 2021 (emphasis added).
[87] For the practice of The Netherlands in that respect, see above in this part, section 2.2.b.
[88] Statement by Romania, Sixth Committee, 21st meeting, 29 October 2021 (emphasis as in the original).
[89] Statement by Ireland, Sixth Committee, 21st meeting, 29 October 2021.
[90] Statement by Chile, Sixth Committee, 21st meeting, 29 October 2021(translation from Spanish original). Chile explicitly supported and agreed with the proposal made by the ILA Committee on International Law and Sea Level Rise, as contained in ILA Resolution 5/2018, according to which 'on the grounds of legal certainty and stability, provided that the baselines and the outer limits of maritime zones of a coastal or an archipelagic State have been properly determined in accordance with the 1982 Law of the Sea Convention, these baselines and limits should not be required to be recalculated should sea level change affect the geographical reality of the coastline'.

> in terms of legal certainty it seems appropriate to consider that once the baselines and the outer limits of a coastal State or an archipelagic State have been properly determined in accordance with the requirements of UNCLOS, which also reflects customary international law, these baselines and limits should not be required to be readjusted should sea level change affect the geographical reality of the coastline.[91]

For Brazil, 'legal certainty over this topic [of climate change-related sea level rise] can be key in preventing disputes between Member States' and the solutions 'should be in accordance with UNCLOS'.[92] Similarly, Costa Rica considered that the general legal framework established by the LOSC must be maintained, along with the principles of stability, security, certainty and predictability.[93]

As for the views of other powers, Russia stated that, in the context of climate change-related sea level rise 'the key issue is the question of baselines, on which at present there is a lack of general customary law … [and that] … it is important to find a practical solution that would, on the one hand, comply with the Convention while, on the other hand, respond to the concerns of the States affected by sea level rise.'[94]

China took the view that the issue of sea level rise had not been considered during the negotiation of the LOS Convention, but also considered that 'no uniform State practice has formed as yet on the issue of sea level rise' and has thus cautioned 'against over-emphasising regional practices.'[95]

Several other UN Member States, not Parties to the LOS Convention, took part in the debate in the Sixth Committee.[96] Iran stated that, although 'sea-level rise might lead to changes in baselines and, consequently, outer limits of maritime zones', its view is that 'any change in [these] lines shall be based on principles of equity and fairness.'[97]

Israel cautioned against too hastily arriving at conclusions about the potential emergence of rules of customary international law, since it 'believes that given the limited state practice in this field … it is doubtful whether any conclusion regarding evidence of existing binding rules of international law on the subject of sea level rise could be drawn at this juncture.'[98]

The USA noted its support to 'efforts by states to delineate and publish their baselines and the limits of their maritime zones in accordance with international law as reflected in the Law of the Sea Convention' since 'such a practice provides a useful context and clarifies the maritime claims of states, including in relation to future sea-level rise', but stated its view that:

> under existing international law, as reflected in the Convention, coastal baselines are generally ambulatory, meaning that if the low-water line along the coast shifts (either landward or seaward), such shifts may impact the outer limits of the coastal State's maritime zones.[99]

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[91] Statement by Argentina, Sixth Committee, 22nd meeting, 1 November 2021(translation from Spanish original). In its statement, Argentina added that 'along the same lines, in its study on this matter the International Law Association (ILA) has recommended an interpretation of UNCLOS that favours the preservation of rights over maritime spaces'.
[92] Statement by Brazil, Sixth Committee, 21st meeting, 29 October 2021.
[93] Statement by Costa Rica, Sixth Committee, 22nd meeting, 1 November 2021.
[94] Statement by Russia, Sixth Committee, 22nd meeting, 1 November 2021 (translation from Russian original).
[95] Statement by China, Sixth Committee, 20th meeting, 29 October 2021 (recorded on the basis of simultaneous translation from Chinese, as delivered). In the initial debate on international law and sea level rise, which was held in the Sixth Committee in 2018, China was the first State to argue for the need to 'reconcile those [sea level rise] changing circumstances with the provisions and spirit of the existing law of the sea regime, including UNCLOS … in order to *maintain its stability and predictability*' (emphasis added); see UN Doc. A/C.6/73/SR.20 of 18 Nov. 2018 (summary record of the debate held on 22 October 2018). Later on, also Canada argued that 'legal certainty and stability regarding maritime zones and entitlements [are] essential for international peace and security and orderly relations among States'; see UN Doc. A/C.6/73/SR.22 of 3 December 2018 (summary record of the debate held on 24 October 2018).
[96] Colombia, El Salvador, Iran, Israel, Liechtenstein, Turkey, and the USA.
[97] Statement by Iran, Sixth Committee, 20th meeting, 29 October 2021.
[98] Statement by Israel, Sixth Committee, 20th meeting, 29 October 2021.
[99] Statement of the USA, 20th meeting, 29 October 2021.

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

4. Issues Raised by the Committee and Preliminary Conclusions

4.1. *Issues raised by the Committee*

The examples of State practice reviewed above provide evidence of rapidly evolving State practice and a certain level of consolidation or uniformity of practice among some of the States concerned, in the context of climate change-related sea level rise. This State practice seems to be most developed among the PIF Members, but their approach is not limited to the South Pacific region; there are indications also of a similar practice among several other low-lying and small island developing States in different regions.

Some Committee members noted that while the need for 'stability' and 'certainty' are in the context of climate change-related sea-level rise interpreted by some States as calling for permanent baselines and limits of maritime zones, other States may interpret 'ambulatory' baselines, by virtue of following the physical coastline, as facilitating stability and certainty. A view was expressed that all States should have the same rights, to either declare their baselines 'ambulatory' or 'permanent'. The Committee was in agreement that this shows the need for a clarification and adaptation of the law to be taken into account.

The Committee members agreed that the legal implications of the recently emerging State practice required special attention and careful analysis by the Committee in its further work, not least as several States have explicitly referred to the ILA Resolution 5/2018 and the 2018 Report by the Committee in the UNGA Sixth Committee debates and in their submissions made through the UN Secretariat to the ILC.[100] The Committee members indicated in particular three possible implications under international law that might arise from the ongoing development of State practice. However, several Committee members cautioned that, on the basis of State practice so far, not all three issues can be regarded as equally mature and that the Committee thus might wish to focus on only some of these at this stage, while exploring the remaining ones in its further work. Moreover, several Committee members pointed to the need to clearly distinguish between the legal scope and consequences under international law of the three issues in question. These are:

First, what are the implications for treaty interpretation of the relevant provisions of the LOSC in view of the emerging State practice concerning the preservation of maritime zones within their established and notified limits in face of sea level rise? This relates to both the general rule of interpretation, as reflected in Article 31(3)(a) and (b), respectively, of the Vienna Convention on the Law of Treaties (VCLT), and to supplementary means of interpretation (VCLT, Article 32). The Committee has already indicated the importance of subsequent practice in its 2018 Report. However, in light of the newly available evidence, the Committee was in agreement that, given the background of recent evidence and in the unprecedented context of climate change-related sea level rise, this matter required further evaluation.

Second, what are the implications of this emerging State practice for customary international law? Customary international law is generally understood as requiring sufficiently widespread, representative and consistent practice in conjunction with *opinio juris*, but in certain circumstances that practice may consist of action by some States and inaction by other States. Further legal implications might result from the fact that

[100] See, e.g., statements in the UNGA Sixth Committee in 2019 by Papua New Guinea, Poland, and Romania, citing the 2018 ILA Report, while the content of statements by several other States reflected the recommendations by the ILA Committee as contained in its 2018 Report and ILA Resolution 5/2018. Regarding submissions of examples of State practice to the ILC in late 2019/early 2020, those by Tuvalu, on behalf of the PIF Members, and by the Maldives, both referred to the findings and recommendations of the ILA Committee. In the UNGA Sixth Committee debate in 2021, explicit reference to the work and conclusions of the ILA Committee as contained in its 2018 Report and/or ILA Resolution 5/2018 was made by Argentina, Chile, Cyprus, Israel, Sierra Leone, and South Africa.

certain States might be viewed as being 'specially affected States' in the context of sea-level rise,[101] noting in particular the international law requirements that the general practice must include the practice of such States for the emergence of a new rule of customary law.[102] Some members considered this question to be of particular relevance for the Committee, not least given the reference it made in its 2018 Report to the fact that the Pacific island States can be seen as being among those 'States whose interests are specially affected'.[103] Some Committee members cautioned, however, that sea-faring States with navigational and fishing rights at issue, also in the light of other high seas freedoms, might as well be viewed as specially-affected by the fixing of maritime zones.

Third, what are the implications of sea level rise, including in the light of Article 62 of the VCLT, for the finality of agreed maritime boundaries (including boundaries beyond the territorial sea). Also, what are the implications for adjudicated maritime boundaries? The views of States seem to increasingly converge in support of the finality of maritime boundaries notwithstanding sea level rise. The Committee initially addressed this issue in its 2018 Report and the ILA Resolution 5/2018, largely on the basis of legal interpretation. However, the newly available State practice appears to require an updated, supplementary assessment of the earlier conclusions in the light of the newly available evidence. Moreover, consideration must be given as to the finality of such agreements and judgments in relation to third parties.

All those issues, raised within the Committee during its current Phase Two, have to be viewed in the light of the rapidly emerging additional State practice that has been manifested especially in the course of 2021. This practice, which seems to have introduced significant elements of clarity of proposed solutions and is likely to be further developed in the coming years, will be in the focus of Committee's study in its future work.

4.2. *Preliminary Conclusions*

Over the last several years, a rapid consolidation of the practice of many States, including in particular low-lying island States, has occurred. The debates within the UNGA Sixth Committee, prompted by the establishment and initial work of the ILC Study Group on sea level rise, have provided an important forum for the ventilation of positions by States on these issues. In the light of these recent developments the Committee is able to make a number of important, albeit so far still preliminary, conclusions and proposals:

First, ILA Resolution 5/2018 proposed an 'interpretation of the 1982 Law of the Sea Convention' that 'on the grounds of legal certainty and stability, once the baselines and the outer limits of maritime zones of a coastal or an archipelagic State have been properly determined in accordance with the 1982 Law of the Sea Convention, these baselines and limits should not be required to be recalculated should sea level change affect the geographical reality of the coastline.'

In its 2018 Report, however, the Committee also stated that it 'considered the question of how it might present any proposal *de lege ferenda* that coastal and island States should have the option to maintain their maritime entitlements notwithstanding changes brought about by sea level rise'. Moreover, in ILA Resolution 5/2018, it was also noted that 'in the formulation of proposals for the progressive development of international law', the dominant consideration should, *inter alia*, be the need to avoid uncertainty about the extent and limits of maritime zones.

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[101] For such qualifications as made in the UNGA Sixth Committee debate in 2019, see, e.g., statements by New Zealand, Micronesia, Papua New Guinea, and Tuvalu, referred to above (in section II.B.2.2), and the submission by FSM (in section II. B.2.1, above).

[102] Regarding the specially affected States doctrine and the emergence of customary law, see e.g.: K.J. Heller, 'Specially-Affected States and the Formation of Custom' (2018) 112(2) *American Journal of International Law* 191–243; see also: M.P. Scharf, 'Accelerated Formation of Customary International Law' (2014) 20(2) *ILSA Journal of International & Comparative Law* 305–341, and S.A. Yeini, 'The Specially-Affecting States Doctrine' (2018) 112(2) *AJIL* 244–253. In the 2018 ILC *Draft Conclusions on Identification of Customary International Law, with Commentaries* (UN Doc. A/73/10), see Commentary to Conclusion 8, para. 4 (at 136–137); see also the views by China, Israel, The Netherlands, and the USA, in: ILC, *Identification of Customary International Law. Comments and Observations Received from Governments* (UN Doc. A/CN.4/716, of 14 February 2018), at 8 and 31–35.

[103] ILA Committee *2018 Report* (n. 5), at 30 [887]. *First Issues Paper* (n. 50) (at para. 103) cited this paragraph from the 2018 ILA Report, yet without further exploring this issue.

While the proposals of the Committee, as contained in ILA Resolution 5/2018, explicitly referred to the *interpretation* of the LOS Convention, in the light of recent State practice and views expressed until end-2021 by a wide variety of States, it is at this stage possible to make the following preliminarily conclusions:

There is an increasingly wide and strong support among States for the Committee's 2018 recommendation that as a matter of interpretation of the LOSC there is no legal requirement for a coastal State to update its national charts to reflect changes in their coastlines brought about by sea level rise.

It is however at present still arguable as to whether this support amounts to sufficient evidence to amount to 'subsequent practice in the application' of the LOSC which establishes the agreement of the parties regarding its interpretation (Article 31(3)(b), VCLT). The question also may be posed whether there is a potential for a 'subsequent agreement' among the parties to the LOSC regarding the interpretation of the LOSC or the application of its provisions (Article 31(3)(a), VCLT). The Committee was agreed that, while there is a broad consensus that the potential negative effects resulting from sea level rise on the maritime entitlements of coastal States, and in particular the low-lying island States, should be avoided, on the basis of the evidence available to the Committee so far, it seems that to date no such agreement has been reached.

However, some members of the Committee took the view that, in respect of issues regarding the impacts on maritime zones and limits as posed by sea level rise, there may not be a practical difference between these two aspects of the general rules of interpretation identified in the Vienna Convention. If, for example, the Meeting of the States Parties to the Law of the Sea Convention (SPLOS)[104] or the UN General Assembly were to adopt a Resolution to this effect unanimously – or even in the UNCLOS III style, by consensus – presumably that would be a significant step towards meeting the requirements of an 'agreement' of all the States Parties as to the interpretation of the LOSC.

Moreover, the Committee noted that even the practice of only some of the States Parties to the LOSC is of relevance to interpretation of that treaty, as indicated in the 2018 ILC *Draft Conclusions on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties.* The ILC concluded (conclusion 4) that 'a subsequent practice as a supplementary means of interpretation under article 32 [VCLT] consists of a conduct by one or more parties in the application of the treaty, after its conclusion'.[105]

Second, there seems to be strong evidence in support of the proposition of the finality of 'treaties establishing boundaries' and of decisions of international courts and tribunals on boundary delimitation as well as their binding nature vis-à-vis third States in the context of climate change-related sea level rise.

The Committee had initially addressed the finality of maritime boundary treaties in its 2018 Report (as did the ILA Resolution 5/2018) largely on the basis of interpreting the law of treaties. However, State practice and the views on this issue expressed by States since the publication of that report prompt an updated, supplementary assessment of those earlier conclusions. In the various statements made by States since 2018, no State has questioned the finality of agreed and/or adjudicated maritime boundaries, notwithstanding the possible changes resulting from climate change-related sea level rise. Moreover, the views of States appear to have converged in respect of an interpretation of the VCLT, that the terms 'treaty [which] establishes a boundary' under Article 62(2)(a) include not only land but also maritime boundaries – without making a distinction between the boundaries of a State's territory (thus limited to the territorial sea), on the one hand, and the delimitation of maritime zones beyond it, in which the coastal State has certain sovereign rights and exclusive jurisdiction (including the EEZ and the continental shelf), on the other.

[104] In this connection, it must be noted that even though the powers of the SPLOS appear to be procedural, it did venture into changing the substantive rules relating to time limits for submissions by States Parties to the the Commission on the Limits of the Continental Shelf. See UN Doc. SPLOS/72 of 29 May 2001, UN Doc. SPLOS/183 of 28 June 2008, and UN Doc. SPLOS/184 of 21 July 2008 – and, relatedly, para. 82 in UN Doc. SPLOS/31/9 of 12 July 2021. In a 2006 Meeting of States Parties (see UN Doc. SPLOS/148) the issue of the respective roles of the Meeting (as being competent for administrative, budgetary and procedural matters) and of the UN General Assembly (for considering substantial issues) in respect of the LOSC was highlighted and discussed.

[105] ILC, Draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, with commentaries, UN Doc. A/73/10 (2018), (Conclusion 4).

Part III

STATEHOOD AND THE RIGHTS OF AFFECTED POPULATIONS

A. Statehood and Sea Level Rise in a Longer-Term Process

In approaching the questions of a 'State' and 'statehood' in the context of its mandate, the Committee was at the outset mindful that these notions, and the impacts expected to be caused by climate change-induced sea level rise, are not to be dealt with on a generalised and presumptive basis. Although the issues concerning statehood discussed here arise in the specific context of small island and archipelagic States, not all of these are also low-lying.[106] Moreover, the Committee recognises that affected States are unlikely to renounce their statehood. It is equally unlikely that other States will proactively push for striking such countries off the list of States as members of the international community.[107]

The Committee also recognises that the degree to which the statehood of some of those States may, in a mid- to longer-term perspective, become threatened by climate change-induced sea level rise and its associated impacts depends on a variety of factors and will thus be the result of complex processes. This raises many complex legal issues, most of which are completely novel. Given the challenges faced by States that are increasingly losing territory and population, the Committee decided to focus on the options available under international law to cope with the potential weakening of aspects of statehood, rather than to examine in detail the question of whether and when statehood might end. Thus, the following reflections are preliminary in nature and should be considered as an overview of issues for further study by the Committee. Two basic considerations have framed the Committee's discussion so far, and it is useful to clarify these at the outset.

1. Two Basic Considerations

*The **first*** consideration relates to the category of States concerned. They are not just any States; these States have a very specific feature under international law. The essential aspect here, as related to sea level rise, concerns the relationship between the notions of the 'State' and of the 'coast'. A *State* of course may exist and have statehood in accordance with international law without having a sea-coast. There are today close to 50 such States: they are called 'land-locked States',[108] and are thus excluded from this discussion. Likewise, a *coast* may exist (and be governed) without there being a State on it. Aside from various historical examples of islands that remained undiscovered for a long time (for instance, the most isolated land on Earth, Bouvet Island), it should be noted that an entire continent, Antarctica, has been governed on the basis of an 'agreement to disagree' on the sovereignty claims made there.[109] This approach facilitated the development of the Antarctic Treaty System over the past 60 years.

However, the real question facing the Committee concerns the situation in which the *coast* and the *State* are necessarily, and per definition, inseparable: that is the situation of a *coastal State*. The States concerned and in focus here – those whose statehood criteria[110] are set to be most severely affected by sea level rise over time – are small, low-lying island and archipelagic States. They are all coastal States.

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[106] Several among small island and archipelagic States have high elevations: e.g., Kiribati's highest elevation (Banaba) is 81 m and Nauru's highest elevation is 60 m. In the Caribbean, the Bahamas have several islands with highest elevations between 20 and 60 meters. They are so-called 'raised' atolls sitting on top of extinct volcanos. See also n. 25.

[107] See, e.g., W. Kälin 'Conceptualising Climate-Induced Displacement' in J. McAdam (ed.), *Climate Change and Displacement: Multidisciplinary Perspectives* (Hart Publishing, 2010) at 102.

[108] Art. 124(1)(a) LOSC defines a land-locked State as 'a State which has no sea-coast'. It must be noted also that there are examples of some of the present-day land-locked States which at previous times possessed a coast.

[109] See Art. IV of the Antarctic Treaty, signed in Washington, DC, on 1 December 1959, entered into force on 23 June 1961; published in 402 UNTS 71. The Antarctic Treaty System, which emerged on this legal foundation, has been under development and operation for over 60 years. See generally O.S. Stokke and D. Vidas (eds), *Governing the Antarctic: The Effectiveness and Legitimacy of the Antarctic Treaty System* (Cambridge University Press, 1996).

[110] In accordance with international law as reflected in Article 1 of the 1933 Montevideo Convention on Rights and Duties of States (LNTS, vol. CLXV, 1936, no. 3802), the 'qualifications' which 'the State as a person of international law should possess' are: '(*a*) a permanent population; (*b*) a defined territory; (*c*) government; and (*d*) capacity to enter into relations with the other States.'

Can a coastal State exist without having a coast?[111] That is the question that the Committee might have been tempted to debate. Under present-day international law, the response to this question would indeed appear clear. A coastal State without a coast would be a prime example of a contradiction under the law of the sea, as it has developed over several centuries. In accordance with the legal principles and rules as reflected in the LOSC, having a coast does not mean that a coastal State has just *any* kind of territory. It means that such a State has a 'land territory' adjacent to the sea,[112] and this forms the legal basis for sovereignty and sovereign rights relating to maritime spaces – all of these extending from the land territory of a coastal State.[113] To retain the status of a coastal State, this State thus must retain a coast of its own, under its sovereignty. As a question of fact, however, the Committee was aware that it may be at least several decades before any such situations may start to occur.

Linked to this is the ***second*** consideration that is equally important and fundamental: it concerns the time perspective. Given sea level rise is a long-term process, different aspects of the statehood of the coastal States will become critically affected at different points. It is therefore important not to focus exclusively on the long-term outcome, but also on changes in the intervening period. Recent studies have found that, for many atoll islands, *habitability* may be threatened as soon as the middle of the 21st century – which is far sooner than indicated by studies that focus on the *permanent inundation* of these islands.[114] This process will therefore be underway on a scale of several decades in some cases, and possibly centuries in some others. In the course of this process, three (factual) elements of statehood – the *territory*, the *population* of the State inhabiting that territory, and the *display of authority/ability to govern* – will not necessarily be equally severely threatened by sea level rise, nor all at the same time. Thus, for instance, taking into consideration islands with natural elevations, natural accretion of land or artificial build-up suggests that even in the relatively long-term, the real problem for many small island and archipelagic States may not be the complete loss of territory, but the uninhabitability of the remaining land territory and the declining capacity of governments to perform their tasks and duties, including those towards their populations.

Given these two considerations, the Committee has viewed the gradual diminishment of – or disintegration of – indicia of statehood of a coastal State as a general process,[115] with particular significance for small island and archipelagic States. As already noted, this process will likely last for at least several decades, and will go through different phases. Throughout that relatively long period of time, the rights of the affected populations will need adequate protection, both at the original location and, in the case of migration, displacement or planned relocation, in the new location, whether within the country of origin or abroad.[116] Moreover, throughout that relatively long time-period, the maritime entitlements of the coastal State may persist – even though the land territory in question may become increasingly less habitable before ultimately becoming uninhabitable, at which point elements of the land territory as such may still remain above water, possibly for a long time.[117]

In addressing these issues, the Committee members were aware that sea level rise is a slow-onset phenomenon that is likely to intensify over the coming decades, and also persist after the end of this century

[111] The coast, as understood in this context, is also a representation of land territory.
[112] See further discussion below, in section B of this part. 'Land territory' is a key concept under the LOS Convention – in particular regarding the extension of the sovereignty of the coastal State to the territorial sea (Art. 2(1) LOSC), regarding the extension of its sovereign rights over the continental shelf beyond the territorial sea throughout the natural prolongation of its land territory (in accordance with Art. 76(1)), regarding the determination of the territorial sea, the contiguous zone, the EEZ and the continental shelf of an island (Art. 121(2)), and well as in relation to certain optional exceptions to applicability of compulsory procedures entailing binding decisions in the settlement of disputes under Part XV, Section 2 LOSC (Art. 298(1)(a)(i) – regarding unsettled disputes concerning sovereignty or other rights over continental or insular land territory). In contrast to the LOSC, which refers to the 'land territory', the Montevideo Convention refers to a 'defined territory', without explicitly specifying whether land or any other form of it.
[113] The consequences of that basic principle are further discussed in section B of this part, below.
[114] See *Science*, Vol. 372 (6548), 18 June 2021 – *Special section on* 'Climate-induced relocation', 1274–1299, at 1280–81. Those recent studies that have focused on specific coastal locations, rather than on global information, are based on refined assessments of tipping-point risks (such as annual overwash events that threaten infrastructure, and salinization of groundwater) – all of great importance to atolls, given their relatively small size, low elevation, and relative isolation.
[115] See the *2018 Report* of the Committee (n. 5), Part II.B, at 896 [42].
[116] See further discussion in section C in this part, below.
[117] For further discussion of that matter see section B in this part, below.

(and probably for millennia).[118] Accordingly, this report[119] considers a range of *interim approaches* or strategies, the application of which will depend on different scenarios. This report does not attempt to provide definitive, once-and-for-all answers or solutions that are in any event likely to be elusive. This is the approach that informs, and contextualizes, the following discussion in this and the next two sections.

2. Statehood: Termination or Continuity?

Views as to the termination or continuity of statehood in the context of climate change-related sea level rise under existing international law are quite diverse but can be divided into two main approaches. Both appear to imply how the *starting point* for the discussion might be understood and formulated. One approach is based on the view about a 'strong presumption of continuing statehood', holding that this should be the starting point for any consideration of this question.[120] The other approach is based on the argument that, as 'States are territorial entities',[121] a 'State without a territory is not possible, although the necessary territory may be very small'[122] – and that, therefore, if a State loses its territory *or* loses its permanent population on all of its territory, its statehood terminates.[123]

However, rather than offering a starting point, these and related views or approaches may in fact be seen as referring to the *end point* of a long-term process, one that is expected to take at least several decades, possibly throughout the current century and well into the next, depending also on different geographical factors of the affected States. Therefore, what the Committee decided to focus on is what happens *in the course of* a process extending from the present time and towards a point when a land territory of a coastal State may become uninhabitable and, potentially, totally submerged, at some still undefined future time.

Given that longer-term process, and a focus on the changes ongoing in the course of it, it may be advisable to start the analysis by taking another careful look at the conclusion reached by James Crawford, that 'there is a strong presumption *against the extinction* of States once firmly established.'[124] The implication of this, however, could be more usefully related to the process itself – and changes in circumstances occurring in the course of it – than to its possible end result for those among affected small island and archipelagic States that risk to lose all or at least most of their territory between the middle and the end of this century.[125] Some among the affected States may remain, albeit with much less territory, a lesser resident population and weaker capacity to display the functions of a State. Thus, questions of the attributes of statehood or a new form of international legal personality may emerge and will have to be addressed in the course of that long-term process, ultimately also impacting the legal outcomes. A 'presumption against the extinction of States once firmly established'[126] could prove, therefore, highly valuable and relevant *in the course* of that process, albeit perhaps less so regarding the possible end result for some of the affected States.[127]

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[118] See the 2021 IPCC Report (n. 12).

[119] In its *2018 Report* and ILA Resolutions 5/2018 and 6/2018, the Committee has presented its proposals and recommendations in a shorter-term perspective: the focus of its work in the first phase (2014–2018).

[120] Regarding there being a 'strong presumption of continuing statehood', reference has been made by some to J. Crawford, *The Creation of States in International Law*, 2nd edn (Oxford University Press, 2016), at 715.

[121] Crawford, ibid., at 46.

[122] *Oppenheim's International Law*, R. Jennings and A. Watts (eds), 9th edn, Vol. I, *Peace* (London: Longman, 1992), at 563.

[123] It could, moreover, be possible to venture into questioning the meaning and content of the concept of 'territory', so that a land which becomes submerged in consequence of climate change-related sea level rise, but which had formerly constituted a land territory of a coastal State, might still be considered to qualify as 'territory' (such as a 'submerged territory').

[124] Crawford, *The Creation of States in International Law*, at 715 (emphasis added) – where, regarding 'strong presumption', no reference is made to 'continuing statehood', as sometimes alleged (cf. n. 120); rather, this presumption concerns the extinction of a State, upon being firmly established. Here it should be added that the discussion by Crawford was written in the context of *political* issues that might cause the 'extinction' – or termination – of an existing State, rather than the consequences of *natural* (Earth system) processes leading to a change (submergence) of territory in a physical sense, not only a change in a political sphere over an existing, and unchanged, territory.

[125] Reliance on a general presumption of the continuity of statehood (be it called 'strong' or not) under present international law would in such cases be contradicted by facts – and, as such, would eventually cease to produce a legal effect. 'Presumption' is always weak in confrontation with facts.

[126] 'Presumption' is a legal device that operates in the absence of other proof. Basically, a presumption is an assumption of fact required by law – but it is not evidence, and it may be rebutted if (factual) evidence to the contrary is produced;

Impacts caused by climate change-related sea level rise will take decades to develop. The Committee considered that it could make a useful contribution by providing proposals as to how the current legal situation of the primary affected, low-lying island and archipelagic States (and, in a somewhat longer run, possibly also some low-lying coastal States), on the one hand, and the ultimate outcome should their territory become entirely or in most part submerged, on the other, could be bridged in the intervening period.

3. Issues Raised by the Committee concerning the Process of Diminishing Aspects of Statehood

The Committee raised several important aspects of the longer-term process of progressive uninhabitability or, eventually, even submergence of land areas. These aspects are briefly addressed here.

3.1. *Emphasis on the specific and unprecedented legal situation caused by sea level rise*

Unlike previous cases of the termination of States, the gradually diminished habitability and in some cases the submergence of land territory of some small island and archipelagic States will not result from political changes or processes. Such result will be a consequence of Earth system processes triggered by largely human-induced[128] global warming and ensuing sea level rise. This potential loss of statehood affects small island developing States that have not, or only very marginally, contributed to climate change. These factors make the situation of those States distinct and separate from *all other* situations where States lost their statehood in the past.[129]

Another specific aspect noted by the Committee relates to a key difference: whether the territory is 'lost' due to being physically submerged, or whether the territory in question has been rendered uninhabitable but remains still partly present above sea level.

3.2. *Ability to exist in a particular location and perform the core functions of a State*

While it might be possible to reimagine the various criteria of statehood identified in the 1933 Montevideo Convention, those criteria essentially contemplate the type of socio-economic polity that can operate within a community of co-equal States. Substantial loss of habitable territory in which a population governs itself may make it difficult for a State to maintain all the attributes that are necessary to function as a State. This is a serious legal and factual difficulty, and is particularly critical when the majority of the population (or even the entire population) has moved abroad: the more fragmented the location of the population and government, and the more exposed they are to the sovereignty of one or more other States, the more the State's ability to perform the core functions of a State or to exercise sovereign power over its population, including the protection of human rights, is compromised. A diminishing ability to perform the core functions of a State could trigger questions concerning yet another criterion under the Montevideo Convention: a State's capacity to enter into relations with other States.

3.3. *Importance of underlying reasons for requiring specific legal approaches*

The Committee noted the overarching legal reason for proposing specific legal solutions during the longer-term process of relocation and submergence: climate change-related sea level rise is a natural phenomenon not previously dealt with under existing international law. To date, international law has not been confronted

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see *Black's Law Dictionary*, 6th edn (St. Paul, MN: West, 1990), at 1185. Or, as Justice Mosk observed: 'I was not certain of facts. I had to rely on presumptions…'; see R. Mosk, 'The Role of Facts in International Dispute Resolution', *Collected Courses of the Hague Academy of International Law*, Vol. 304 (Boston: Brill, 2003), at 25.

[127] This is in accordance with the Committee's observations, as set out in its 2018 Report, that it should view such diminishing indicia of statehood (meaning the change over time of relevant factors – such as the territory, population, and the display or authority/ability to 'govern' – that are all important for determining statehood) as a *process.* See the *2018 Report* of the Committee (n. 5), Part II.B, at 896 [42].

[128] See the 2021 IPCC Report (n. 12).

[129] See, e.g., D. Vidas, 'Sea Level Rise and International Law: At the Convergence of Two Epochs' (2014) 4(1-2) *Climate Law* 70–84; also E. Allen and M. Prost, '*Ceci n'est pas un État*: The Order of Malta and the Holy See as precedents for deterritorialized statehood?' (2022) *Review of European, Comparative & International Environmental Law*, available at: < https://onlinelibrary.wiley.com/doi/epdf/10.1111/reel.12431>.

with sea level rise in this way and thus has not been forced to consider appropriate legal approaches for dealing with the physical submergence of a territory or its incapacity to sustain human habitation – certainly not on the scale that will be caused by sea level rise, according to scientific projections for this century and the coming ones.

Linked to this are various reasons that justify considering a specific legal solution in this respect, as indicated by many Committee members. These underlying reasons include:

- fundamental justice and fairness;
- self-determination of peoples;
- the overarching objectives of international law: facilitating legal stability, certainty and predictability, in the interest of the avoidance of conflicts and maintenance of peace and security.

Those overarching objectives and reasons will persist unchanged, regardless of any amount of sea level change and they thus call for the progressive development of existing international law or may justify solutions *de lege ferenda* which the Committee plans to explore in its further work.

3.4. *The role of other States and the international community at large*

In due course, an examination may be required of the role of other States and the international community at large regarding the acceptance of new legal solutions specifically targeted at the consequences of climate change-related sea level rise. A certain flexibility and ability to accommodate new situations is inherent in international law, notwithstanding traditional rules and principles.

The question here is, in addition to some form of acceptance needed from other States, primarily about the role that the global institutions such as the UN could, and should play, concerning both the facilitation of the recognition and implementation of specific legal solutions. The community of States has the power and responsibility to create and acknowledge new rules of international law as the prospective submersion of island States due to sea level rise calls for increased international cooperation to solve international problems, in accordance with the principles of justice and international law enshrined in Article 1 of the UN Charter. This is so since the perspective of climate change-related sea level rise, if left without satisfactory legal responses, may in a perspective undermine the principle of equal rights and self-determination of peoples and evolve into a threat to international peace and security contrary to the UN Charter.

Sections B and C below draw on the overall considerations contained in this section, and further elaborate and specify some of the legal issues relevant in their respective issue-areas.

B. Maritime Entitlements in a Mid- to Longer-Term Perspective

Having made proposals in its 2018 Report for dealing with the shorter-term impacts of sea level rise on maritime entitlements, the Committee has since 2019 moved on to consider a medium- to longer-term perspective. The IPCC is predicting that, sooner or later, some or all of the islands that make up parts of an island or an archipelagic State will become less habitable, and ultimately will become uninhabitable. This, in consequence, also implies that the centres of government of the most affected small island States will have to move elsewhere. What happens to the maritime entitlements of those islands?

The Committee took the view that, in accordance with the LOSC, existing international law does not contemplate (or permit) maritime zones for a submerged feature and only grants limited zones for islands that cannot sustain human habitation or economic life of their own. Accordingly, full maritime entitlements would be lost once the State ceased to have any form of relevant coastal frontages – even if the State itself persisted elsewhere, or has become transformed into some other form of international legal person.

Moreover, the Committee distinguished between the situation where the islands remained above water but were uninhabitable, on the one hand, and where they were totally inundated, on the other. In the situation of parts of the territory being above water but uninhabitable, it is relatively less challenging to argue for the continuation of at least certain maritime entitlements, such as the right to a territorial sea in accordance with the currently applicable law of the sea regime.

However, many Committee members also felt that the automatic loss of maritime entitlements – even in the event of total inundation – was inequitable and that the Committee should further explore alternative interpretations or approaches to the issue. The Committee was in agreement that, at this early point, a wide variety of approaches and options *de lege ferenda* were available for discussion. However, the Committee also agreed that feasible approaches will ultimately depend on the overarching reaction of the international community to this issue, as well as possible international agreements in, or related to, affected regions.

The Committee again recalled the overarching objectives of the LOSC as stated in its preamble – including that the Convention will contribute to:

> the strengthening of peace, security, cooperation and friendly relations among all nations in conformity with the principles of justice and equal rights and will promote the economic and social advancement of all peoples of the world, in accordance with the Purposes and Principles of the United Nations as set forth in the Charter.

The Committee also recalled the overall objectives underpinning the LOSC, including those of facilitating legal certainty and stability, and highlighted approaches already reflected in the ILA Resolution 5/2018 as potentially relevant for an interpretation, and application, of the LOSC regime in a mid- to longer-term perspective as well. Options considered by the Committee on these grounds included the following:

1. Extending the approach adopted by the Committee in its 2018 Report, so that baselines and limits of maritime zones that are compatible with the LOSC and notified to the UN Secretary General as required (or even when notified when not strictly required – such as unilateral 200 nm EEZ delineation lines) and have not met with objection by other States, would continue in place even during the course of the process of the land territory inhabitability and, possibly, submergence.

2. Extending the interpretation of the general principle as proposed by the Committee in its 2018 Report, and discussed in this report (Part II, section B.4, above) regarding the finality of maritime boundaries agreed by treaty[130] or settled by judicial processes, so that existing boundaries would continue in force and represent the legal extent of maritime zones, even if the territory from which the boundaries agreed in the treaty were originally calculated gradually changes in the process of submergence.[131]

The Committee did discuss, as a hypothetical issue, whether the concept of 'territory' might be extended *de lege ferenda* to include maritime zones such as the territorial sea, and perhaps also submerged lands which are inundated by sea level rise. The development of this argument would mean that the presence of submerged lands might be used to justify the maintenance of marine resources zones – such as the EEZ or the continental shelf.

However, it does seem clear *de lege lata* that the key concept under the LOSC is that rights over maritime areas emanate not from territory in general but, more specifically, from the 'land territory' of a coastal State. Article 2 LOSC on the 'Legal status of the territorial sea, of the air space over the territorial sea and of its bed and subsoil' highlights the importance of land territory. It provides that the sovereignty of a coastal State extends 'beyond its *land territory* and internal waters, and in the case of an archipelagic State, its archipelagic waters'.[132] Moreover, in the definition of the continental shelf of a coastal State under Article 76, the seabed and subsoil of the submarine areas that extend beyond its territorial sea are those 'throughout the natural prolongation of its *land territory*' to the outer edge of the continental margin, or to a distance of 200 nm from the baselines.[133] Regarding the territorial sea, the contiguous zone, the EEZ and the continental shelf of an island (or indeed the mainland territory – although islands are the case in point for the issue under

[130] In accordance with the interpretation as proposed by the Committee in its *2018 Report*, section II.A.2.1. – unless their renegotiation is provided for in the treaty, or the States concerned jointly decide to renegotiate the boundary.
[131] This does raise again the question – discussed in the *2018 Report* – as to the obligations of third states to respect those boundaries which might now be situated, for territorial sea, more than 12 nm, or for EEZs more than 200 nm from the coast (low-water line), even if the coastal States' legal baselines are maintained 'in perpetuity'.
[132] Art. 2(1) LOSC, emphasis added.
[133] Art. 76(1) LOSC, emphasis added.

discussion by the Committee in this report) – these maritime zones are 'determined in accordance with the provisions of [LOSC] applicable to other *land territory*'.[134] Finally, Article 298, concerning declarations on optional exceptions to Section 2 (compulsory procedures entailing binding decisions) of Part XV LOSC, on the settlement of disputes, makes a reference to 'any unsettled dispute concerning sovereignty or other rights over *continental or insular land territory*'.[135] While the repetition of the two words 'land territory' could suggest there are, or might be, other forms of territory, for an area to be considered as the 'land territory' of a coastal State it must for these purposes be found not under the sea but at the edge or margin of land next to the sea. This is recognized by the use of the low-water line for baseline purposes and for the determination of low-tide elevations (that are of course, in accordance with Article 13 LOSC, above water at low tide even if submerged at high tide). The only category of States that the LOSC recognizes that have no sea-coast are those defined as 'land-locked States'.[136]

So, to date there is no *lex lata* definition, in the LOSC or in customary international law/law of the sea more generally, of a 'sea-submerged State'.

Given the above considerations, the Committee at this stage considered it to be premature to be proposing legal solutions *de lege ferenda* regarding the issue of persistence of maritime entitlements following the full submergence of the land territory of some of the present-day States.

The Committee did, however, agree to the following two propositions concerning the maritime entitlements of the affected coastal (particularly island and archipelagic) States *in the process* of the diminishing habitability and gradual submergence of their land territory in consequence of climate change-related sea level rise:

1. The Committee confirmed the approach adopted in its 2018 Report so that baselines and limits of maritime zones that are compatible with the LOSC and notified to the UN Secretary General as required (or even when notified when not strictly required – such as unilateral 200 nm EEZ delineation lines) and have not met with objection by other States, should continue in place also during the course of the process of the land territory submergence.

2. The Committee confirmed the approach that it already adopted in its 2018 Report regarding the finality of maritime boundaries agreed by treaty[137] or settled by judicial processes, so that existing boundaries should continue in force and represent the legal extent of maritime zones, even if the territory from which the boundaries agreed in the treaty were originally calculated gradually changes in the process of submergence.

C. Retention or Transformation of Statehood and the Rights of Affected Populations

In accordance with its mandate, the Committee engaged in a study of legal options for the transformation of statehood of States affected by a long-term process of climate change-induced sea level rise and, relatedly, the impacts on the rights of affected populations. The Committee was mindful of the fact that effects of sea level rise in the course of a process involving gradual loss of habitability may lead, in some instances and at some future time, to the complete submergence of [land] territory understood as *terra firma*. This process will primarily affect two components of statehood: the State's 'defined territory' and its 'permanent population'.[138] However, this will also affect the ability of the affected State(s) to perform the core functions

[134] Art. 121(2) LOSC, emphasis added. Exception is made in Art. 121(2) to the provision of paragraph 3. In paragraph 1 of this article, an island is defined as a 'naturally formed area of *land*, surrounded by water, which is *above water* at high tide' (emphases added).
[135] Art. 298(1)(a)(i) LOSC, emphasis added.
[136] See Art. 124(1)(a) LOSC, which defines a 'land-locked State' as 'a State which has no sea-coast'.
[137] In accordance with the interpretation as proposed by the Committee in its *2018 Report* (n. 5), section II.A.2.1. – unless their renegotiation is provided for in the border treaty, or the States concerned jointly decide to renegotiate the boundary.
[138] See also J.S. Stoutenburg, 'When Do States Disappear?' in M. Gerrard and G. Wannier (eds), *Threatened Island Nations: Legal Implications of Rising Seas and a Changing Climate* (Cambridge University Press, 2013), 58–87; T. Sparks, 'Statehood in an Era of Sinking Islands' in T. Jafry, M. Mikulewicz and K. Helwig (eds), *Routledge Handbook of Climate Justice* (Routledge, 2018), 83–99.

of a State. This will have major implications for the rights of affected populations, whether directly or indirectly.

To address the legal challenges posed by sea level rise as a longer-term process, the analysis undertaken by the Committee has been oriented towards understanding which potential scenarios are available for States that face the reduction of the habitability and impending loss of their territory so as to retain their authority, autonomy, identity, capacity to perform the functions of a State, and the ability to continue to protect the human rights of their citizens.[139] In doing so, the aim of this section is to contribute to a reflection on the understanding of statehood and its historical requirements, and thereby to assist in framing what a transformation of statehood under the conditions of sea level rise could look like.[140]

In line with the conclusions already reached in its 2018 Report, the Committee viewed political concerns as a significant determinant of the ultimate resolution of the questions regarding statehood and relocation. These types of pressures or constraints are beyond the Committee's purview and, furthermore, they are difficult to predict. Instead, the Committee considered that the best course of action was for it to articulate potential scenarios and the relevant existing law that might apply to help in clarifying the legal questions raised.

1. Options for the Retention or Transformation of Statehood

In the context of the continuation of statehood under sea level rise, this section explores possible scenarios that could come into play – from adaptive strategies (e.g., sea walls, land acquisition) to the creation of new subjects of international law (e.g., federal State, confederation of States, condominium). The overall aim is to understand whether and how changes in the internal constitutional structure of a State in the process of transformation due to the impacts of sea level rise on its territory, population, and capacity to perform the functions of a State will affect its legal identity and rights and obligations under international law.

1.1. *State transformation by adapting to progressive inhabitability or submersion*

Although there is 'no rule that the land frontiers of a State must be fully delimited and defined',[141] the traditional relevance of territorial sovereignty implies that States cannot 'move' from one territory to another. In recent years, *de facto* preservation of the territory of States and their habitability has been pursued by implementing adaptive strategies such as the construction of sea walls or by artificial accretion.[142] These *ad hoc* solutions that aim to delay inhabitability and avoid submersion, even if acceptable from a legal perspective, may be insufficient to mitigate some heritage and cultural loss, or prevent psychological harm among affected populations, and raise complex political, technological and practical challenges.[143] First, such

[139] S. Lee and L. Bautista, 'Climate Change and Sea Level Rise. Nature of the State and of State Extinction' in R. Barnes and R. Long (eds), *Frontiers in International Environmental Law: Oceans and Climate Challenges. Essays in Honour of David Freestone* (Brill, 2021), 194–214; S. Besson and A. Zysset, 'Sovereignty' in R. Wolfrum et al. (eds), *Max Planck Encyclopedia of Public International Law*, Vol. IX (Oxford University Press, 2022).

[140] The aim of this exercise is to focus not only on the end-result ('a worst case scenario' hypothesis) but also on the process in the intervening period and how this interacts with different types of human mobility and (im)mobility and the rights of affected population. See also: A. Torres Camprubí, *Statehood Under Water: Challenges of Sea Level Rise to the Continuity of Pacific Islands States* (Brill, 2016).

[141] *Oppenheim's International Law*, Jennings and Watts, eds (n. 122), at 563.

[142] See for instance short-term and long-term strategies implemented by Singapore to protect building, infrastructure and coasts (see footnote 41 of Part II.B) and the agreement signed in 2010 between the Maldives and The Netherlands' Dutch docklands to develop 'floating facilities' as a way to build 'floating housing units' in the future; K.M. Wyman, 'Sinking Islands', in D.H. Cole and E. Ostrom (eds), *Property in Land and Others Resources* (Lincoln Institute of Land Policy, 2019), 439–469. Other examples include: Nauru that recently launched the 'Higher Ground Initiative' to increase the higher internal elevation of the island (Statement by Nauru, Pacific Regional Consultation on Internal Displacement, 11 February 2021); Fiji that has built seawalls in Viro Villages, Ovalu 'using an ingenious combination of human-made and nature-based solutions'; and Solomon Islands that has developed 'permanent concrete sea walls' at Tulagi to protect communities challenged by sea level rise (PIF Submission, ILC, of 31 December 2021, at 4 and 6), available at: < https://legal.un.org/ilc/guide/8_9.shtml>.

[143] The Maldives recognized that: 'artificial measures to preserve coastal areas, islands, and baselines cannot be a sustainable solution for developing States vulnerable to sea level rise' (see n. 46, at 3); and S.A. Atapattu and A.C. Simonelli, 'Climate Justice, Sustainable Development, and Small Islands State, A Case Study of the Maldives', in S.A. Atapattu, C.G. Gonzalez S.L. Seck (eds), *The Cambridge Handbook of Environmental Justice and Sustainable*

solutions risk working only for a limited time, depending on the rate of progression of sea level rise and resources available for investment in adaptation. Second, the financial implications would hardly be manageable for most affected island and archipelagic States,[144] unless the international community were to provide sufficient technical and financial support to preserve substantial parts of affected land territory and prevent its inhabitability. The degree to which such international cooperation is an obligation under international climate change law, including, in particular, provisions related to climate change adaptation and loss and damage, is still a matter of debate and remains to be further explored by the Committee.

One can imagine that an affected State might attempt to secure additional territory for its population to live in, which might eventually also accommodate the government, thus ensuring that it can 'remain a State' by preserving its statehood *de jure*.[145] This could be achieved through land purchase,[146] but this would also require the consent of the selling State to 'release' the purchased land from its own national territory. Another option would be for a State to lease territory from another; however, this approach risks raising some complex issues, especially because the State would acquire only temporary rights over the leased land.

BOX 1. Leases of Territory under International Law[147]

A territorial lease can be defined as a treaty or other agreement that involves the consent of both States and has certain characteristics: (1) it establishes rights for one State to display elements of its sovereign authority in a specified territory where another State has, and retains, *de jure* sovereignty; (2) it creates a relationship that emulates the one between a lessor and a lessee in private law; and (3) its structural elements are loosely similar to those in a private-law lease. The rights that are transferred by a territorial lease can be defined as a sort of servitude that limits the active exercise of sovereignty by the lessor State and extends the sovereign competences of the lessee State in the area involved.

States have leased territory between themselves for many reasons, often economic (e.g., to access more agricultural land or natural resources), military (e.g., to establish bases) or strategic (e.g., to project State

Development (Cambridge University Press, 2021), 434–450. At the same time, the Maldives invested significant funds to build up the island of Hulhumale to create new homes for an envisaged 240,000 people – more than half the entire current population of Maldives (see at: <https://hdc.com.mv/hulhumale/>). On the central role of Chinese funding in these projects, including also infrastructure such as the 2 km long China-Maldives Friendship Bridge for connecting the Maldivian capital with its international airport and Hulhumale, see: 'The Maldives counts the cost of its debts to China', *Financial Times*, 11 February 2019, at: <https://www.ft.com/content/c8da1c8a-2a19-11e9-88a4-c32129756dd8>.

[144] K.J. Machand and A.R. Siders, 'Reframing Strategic, Managed Retreat for Transformative Climate Adaptation' (2021) 372(6548) *Science* 1294–1299; D. Freestone and D. Cicek, *Legal Dimensions of Sea Level Rise: Pacific Perspectives* (The World Bank, 2021).

[145] The former President of the Maldives, Nasheed, indicated the possibility to purchase land in Australia, India or Sri Lanka. 'We can do nothing to stop climate change on our own', he said, 'so we have to buy land elsewhere'; see E. Hirsch, 'It Won't Be any Good to Have Democracy If We Don't Have a Country: Climate Change and the Politics of Synecdoche in the Maldives' (2015) 35 *Global Environmental Change* 190–198, at 193. See also: Atapattu and Simonelli (n. 143), at 445. The situation changed a lot over time and it is not excluded that the Maldives could decide to sell some of their islands to buy land where they could resettle in the near future (L. Hawwa, 'Vice President Pushes for Population Consolidation Plan', *Maldives Minivan News*, 30 April 2012). Among historical cases, we could cite the example of Vaitupu community from Tuvalu who bought land in Fiji (Kioa) in 1947 where 150 people were resettled; see R.G. Crocombe, *Land Tenure in the Pacific* (University of South Pacific, 1987).

[146] For instance, Kiribati purchased some land within another jurisdiction (Fiji). Although President Tong declared that the wish to enhance food security and expand economic opportunities was the main motive for this purchase (see Republic of Kiribati Office of the President, 'Kiribati Buys a Piece of Fiji', Government of Kiribati Press Release, 2014), theoretically, this option could offer the opportunity for Kiribati to continue to exist. See also: E. Hermann and W. Kempf, 'Climate Change and the Imagining of Migration: Emerging discourses on Kiribati's Land Purchase in Fiji' (2017) 29(2) *The Contemporary Pacific* 231–263; J. Benjamin, 'The Legal Challenges on Statehood Caused by Rising Sea Level' (2019) *New Zealand Journal of Environmental Law* 97–112. However, some scholars, such as Ellsmoor and Rosen, have highlighted that: 'Kiribati's purchase does not mean sovereignty over this land. As such, there is no legal guarantee that the I-Kiribati could move to the land, and the terms of the migration would be solely contingent on the Fijian administration'; see J. Ellsmoor and Z. Rosen, 'Kiribati's Land Purchase in Fiji: Does it Make Sense?' *DevPolicy Blog* (January 2016).

[147] A detailed analysis of this issue is contained in M. J. Strauss, 'Leases of Territory under International Law', Paper presented at ILA Committee Meeting (30 June 2021), on which also the above text box draws. See also: M.J. Strauss, *Territorial Leasing in Diplomacy and International Law* (Brill, 2015).

power abroad). In the last 15 years many private-law arrangements have been made between States, or between States and non-State actors (usually companies), for the long-term use of territory abroad in pursuit of State interests. This encompasses the so-called 'land-grabbing' phenomenon that surged to prominence in 2007–2008 when many States sought dedicated agricultural land in other States to reinforce their food security. These arrangements are similar to State-to-State territorial lease agreements but they may equally involve the sale/purchase of land, and they take the form of private property transactions under the domestic laws of the host States. Regardless of whether they are leases or sales, they may have the same positive or negative bilateral consequences that are found to arise from territorial leases.

(With thanks to Michael J. Strauss)

Cession of a territory might also support a State affected by sea level rise in retaining its statehood, provided the host State ceding part of its own territory is ready to also cede the accompanying sovereignty over the area to the State affected by sea level rise. In this case, the granting State would have to recognize an autonomous exercise of power to the 'resettled' entity, by granting land in perpetuity. As in the case of purchases, this is hardly a realistic option because there is little incentive for the host State to give up its sovereignty over parts of its own territory.

1.2. *State transformation by pooling plural authorities*

Faced with the prospect of at least a partial loss of their territory, a diminishing population in consequence of migration abroad, and a declining capacity to exercise the functions of a State, affected State might look for possibilities to cooperate with another State. Such cooperation might involve allowing its population to move to that other State and the two governments to share some responsibilities or even to delegate some of these. Scenarios that might facilitate such a transformation of affected States could include the creation of a federal State, a confederation of States, or a condominium. Given the uncertainty of the rules that could apply, the analysis will briefly review specific situations to illustrate the means that could be achievable in practice.

As a basic premise, it is crucial to understand that the three potential scenarios have very different characteristics due to their different legal basis.[148] First, the creation of a federal State through the unification of the affected State with (one or more) host State(s), which thereby form a new State, is established by a unilateral act, namely the adoption of a federal constitution (as a legal act of internal, national law) that identifies the competences of each sub-entity of the newly formed federation. Second, a confederation of States is an association of States that is established on the basis of an international treaty between two or more States; it is regulated under the terms of that treaty. Third, a condominium of the two (or more) States whereby they exercise sovereignty over the same territory would also be established on the basis of an international agreement (a condominium-like arrangement).

a. Federation: In line with the definition proposed by Rudolf, a 'federal State is a union of States in which both the federation and the Member States embody the constitutive elements of a State'.[149] In creating a new federation or joining an existing one, existing States are incorporated in a new complex entity that has or will acquire statehood and the affected State, while becoming one of the constituent states of the federation, will lose its separate identity as a State, understood as a subject of international law. As a consequence, the new or enlarged State will possess sovereignty[150] but the constituent members of the federal State will not be

[148] European Commission for Democracy Through Law, 'The Modern Concept of Confederation: Proceedings of the UniDem Seminar organized in Santorini on 22–25 September 1994 in co-operation with the Ministry of Foreign Affairs of Greece/European Commission for Democracy through Law' CDL –STD (1994) 011 (Council of Europe Publishing, 1995); E. Zoller, 'Aspects internationaux du droit constitutionnel. Contribution à la théorie de la fédération d'Etats' *Collected Courses of the Hague Academy of International Law*, Vol. 294 (Brill, 2002); C. Joerges, Y. Meny and J.H.H. Weiler (eds), *What Kind of Constitution for what kind of Polity? Responses to Joschka Fischer* (European University Institute, 2000); P. Reuter, 'Confédération et fédération: "vetera et nova"' in *La Communauté internationale – mélanges offerts à Charles Rousseau* (Pedone, 1974), 199–218.

[149] W. Rudolf, 'Federal States' in R. Wolfrum et al. (eds), *Max Planck Encyclopedia of International Law* (Oxford University Press, 2011).

[150] Although there are federations where, according to the distribution of power between the central and local organs, members can sometimes retain some elements of international personality, in international law they are generally not considered as sovereign States.

'States within the meaning of international law'.[151] The federal State has a defined territory and population within its authority.

b. Confederation: An alternative option would be the creation of a confederation that could legally preserve the statehood of each of its component units. According to Morrison 'the individual member units retain their status as sovereign States, and are separately recognized as members of the international community'.[152] In fact, the confederation would have its foundation in an international treaty and would therefore directly form part of the international legal order. Confederations have no territory 'of their own', there is no 'confederal nationality', and each State has jurisdiction and authority only over its own citizens.

c. *Condominium*: Under this option, multiple, separate, States would exercise sovereign authority over a single territory.[153] Traditional examples of this concept were employed in areas *beyond* the territories of the States participating in the condominium. This might make the concept difficult to translate to a different context where the affected States will undergo changes of their territory. Furthermore, more recent arrangements are not conceived as permanent institutions, but as 'transitional steps' for a temporary exercise of authority during the move towards a new permanent solution.[154]

This overview of these three paths for the creation of a new political entity – federal State, confederation of States, and condominium – shows that each presents specific difficulties for the survival of States by requiring the combination of plural authorities. Political considerations of the States concerned will in the future show whether and where any of these options might be realistic and, if so, how any of these might be implemented.

Besides these options of retaining statehood, State practice offers other alternatives. The free association of Cook Islands, Niue and Tokelau with New Zealand;[155] the *sui generis* integration of Aruba, Curaçao and Sint Maarten in the Kingdom of The Netherlands, and the case of Greenland and Faroe as autonomous parts of the Kingdom of Denmark are examples with different implications. Depending on the actual arrangements, these countries may retain international legal personality and thus can even be members of certain international organizations.[156] However, as in the case of a federation, their population does not have a nationality separate from that of the State with which they are associated but do enjoy freedom of movement within the whole territory of associations.

All these arrangements will be temporary in those cases where the original State loses all of its territory. This is because, under present international law, all such options presuppose the existence of territory. This would not be the case for *Tuvalu's Future Now Project*, launched in October 2021, that includes among its four major initiatives:

> c) ensuring a digital nation and creating a digital Government administrative system that can, in the very worst scenario, allow Tuvalu to shift its Government operations to another location and continue to fully function as a sovereign State.[157]

There is neither a ready-made nor a one-size-fits-all solution to the transformation of statehood. The basis for the concrete implementation of agreements for State transformation remains undefined.[158]

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[151] Joerges et al. (n. 148), at 102.
[152] F. Morrison, 'Confederation of States' in R. Wolfrum et al. (eds), *Max Planck Encyclopedia of International Law* (Oxford University Press, 2007).
[153] F. Morrison 'Condominium and Coimperium' in R. Wolfrum et al. (eds), *Max Planck Encyclopedia of International Law* (Oxford University Press, 2006).
[154] Ibid.
[155] Formerly dependencies of New Zealand, the Cook Islands is state in free association with New Zealand since 1965, and Niue since 1974. Niue's and the Cook Islands' 'nationals' have the New Zealand citizenship. See Z. Dumienski, 'Shared Citizenship and Sovereignty: The Case of the Cook Islands' and Niue's Relationship with New Zealand' in S. Ratuva, *The Palgrave Handbook of Ethnicity* (Springer, 2019), 221–246.
[156] Cook Island, e.g., is a member State of ILO and IOM, among others, and Niue is a member of FAO and UNESCO.
[157] PIF Submission (n. 142), at 17. See also: Tuvalu National Adaptation Plan (2012–2021), Goal 7 aims to: '2) ensure that Tuvalu continues to have the capacity to remain a nation regardless of negative impacts to land territory due to sea level rise'.

2. Climate Change-Induced Sea Level Rise: Implications for the Rights of Affected Persons

Recent scientific evidence of the likely impacts of sea level rise in the mid- to longer-term leaves little doubt that this process will have a range of consequences leading to harmful effects on affected populations and their human rights.[159] The following issues can be distinguished:

First, the inhabitants of small island and archipelagic States will face substantial impacts on the enjoyment of their rights to life, to adequate food, to water, to health, and to adequate housing.[160] While such States, as duty bearers, remain obliged to respect, protect and fulfil their rights, and while the negative duty to refrain from violations would not be affected by diminished State capacity, this would be different for their ability to fulfil their positive obligations.[161] This raises the question as to how international cooperation, or the different forms of State transformation discussed above, could support authorities in this regard.

Second, different scenarios linked to different forms of human mobility within the country (migration, internal displacement, planned relocation) in the context of sea level rise and other adverse effects of climate change raise each specific human rights issues. As the concept of *whenua/banua* (place, land) is central to the identity of Pacific people and influences both decisions to move and decisions to stay, we can expect people to remain in their homeland for as long as possible. However, the adverse effects of climate change may still trigger internal displacement or internal migration, creating specific human rights challenges. Some people will need support to move out of harm's way (through evacuations and planned relocations). The Committee has already addressed these issues in the 2018 Sydney Declaration of Principles on the Protection of Persons Displaced in the Context of Sea Level Rise (Principles 8–11),[162] but the question as to how international cooperation or the different forms of State transformation can help affected States to fulfil their human rights obligations is relevant here, too.

Third, as habitable territory diminishes over time, people might gradually be less inclined to stay, and instead seek to move abroad. The ability to do this will be influenced by socio-economic and political factors,[163] as well as the immigration laws and policies of other States. Those who decide to stay, or who are unable to move on their own, may in the long term end up in a situation where evacuation or (forced) relocation to another State becomes unavoidable.[164] While these persons remain right-holders, and while it is clear that the duty bearers are those States under whose power and control (jurisdiction) they find themselves, further examination is needed to determine exactly what this means for the State of origin and the State of destination.

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[158] E. Piguet, 'Climatic Statelessness: Risk Assessment and Policy Options' (2019) 45(4) *Population and Development Review* 865–888, at 876.

[159] OHCHR, *The Slow Onset Effects of Climate Change and Human Rights Protection for Cross-Border Migrants*, UN Doc. A/HRC/37/CRP.4, of 22 March 2018. Looking at projections for the future, sea level rise in Bangladesh could submerge 17% of the country and affect 20 million people who will risk losing their homes; see V. Clement et al., *Groundswell Part 2: Acting on Internal Climate Migration* (The World Bank, 2021).

[160] The PIF Submission to the ILC (n. 142) on the protection of persons affected by sea level rise contains significant examples. In Samoa 'climate change therefore threatens the Right to Housing in many ways, including an increase in flooding and the intensity of extreme whether events which may destroy housing. Droughts, floods, and erosion can also cause residential areas to become uninhabitable, and sea level rise can threaten settlements in low-lying areas' (Office of the Ombudsman, National Human Rights Institution of Samoa, State of Human Rights Report 2017, focus on climate change and human rights); also in Fiji 'housing quality is poor, increasing vulnerability to climate-related natural disasters, and access to municipal services is limited, leading to pollution and health risks' (Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment).

[161] On positive obligations see ILA Resolution 6/2018, Annex: Sydney Declaration of Principles on the Protection of Persons Displaced in the Context of Sea Level Rise, Principle 6, in the *2018 Report* (n. 5), at 37–38 [73].

[162] Ibid.

[163] See C. Zickgraf, 'Keeping People in Place: Political Factors of (Im)mobility and Climate Change' (2019) 8(8) *Social Sciences* 1–18.

[164] B. Burson, W. Kälin, J. McAdam and S. Weerasinghe, 'The Duty to Move People out of Harm's Way in the Context of Climate Change and Disasters' (2018) 37 *Refugee Survey Quarterly* 379–406.

Fourth, issues related to statelessness could arise in the 'worst case scenario' hypothesis,[165] namely, if affected States were to lose their statehood as a consequence of total submergence. While some have queried whether people might be rendered 'stateless',[166] this is unlikely as a matter of law. Although States have to respect the human rights of everyone under their jurisdiction, the deprivation of nationality (or citizenship) without the replacement by another nationality could have severe consequences in terms of the preservation of civil, political and socio-economic rights: the right to enter, to stay, to return, to diplomatic protection etc.[167] Problems arise already today where Pacific States do not permit dual nationality, or have restrictions on passing their nationality from citizens residing elsewhere to their descendants.[168]

Finally, the right to self-determination of peoples, a collective human right closely tied with the capacity of populations to realize individual human rights, could be under threat.[169] The right of self-determination entails peoples 'to determine their political status and freely pursue their economic, social and cultural development' (Article 1 of the International Covenant on Civil and Political Rights and the International Covenant of Economic and Social Rights)[170] and it is a primary concern to identify how it could operate in the future to meet the concerns of peoples experiencing territorial changes related to the progressive inhabitability and ultimate submersion of the territory.[171]

The Committee decided to examine these and other issues for each of these scenarios in its further work, in particular with regard to the complex relationship between the human rights obligations of the State of origin and those of other States in the context of the various forms of statehood transformation identified above. Although State transformation could destabilize the 'supply-side' of human rights, it also offers the opportunity to explore how the complex relationship of human rights with the State needs might evolve so that the transformative process is responsive to the needs of populations exposed to changes in sea levels.

3. International Cooperation and Statehood Transformation

Cooperation plays a crucial role in all options identified above. Cooperation has been identified as 'a cornerstone principle of contemporary international law'[172] that gained relevance in various disciplines of international legal relations. This section examines the emerging dimensions of this duty (or duties)[173] by focusing on central role of cooperation in tackling the global challenges raised by sea level rise. This raises

[165] Piguet (n. 158).

[166] M. Rouleau-Dick, 'Sea Level Rise and Climate Statelessness: From 'Too Little, Too Late' to Context Based Relevance' (2021) 3(2) *Statelessness and Citizenship Review* 286–307; S. Park, *Climate Change and the Risk of Statelessness under International Law: The Situation of Low-Lying Island States* (Background Paper PPLA/2011/04, May 2011); M. Dobrić, 'Rising Statelessness Due to Disappearing Island States' (2019) 1(1) *Statelessness and Citizenship Review* 42–68.

[167] L. Van Waas, 'The Intersection of International Refugee Law and International Statelessness Law', in C. Costello, M. Foster and J. McAdam (eds), *The Oxford Handbook of International Refugee Law* (Oxford University Press, 2021); U. Lauerhass, G. Pote and E. Wuchold, *Atlas of the Stateless. Facts and Figures about Exclusion and Displacement* (Rosa Luxemburg Stiftung, 2020).

[168] M. Foster, N. Hard, H. Lambert and J. McAdam, *The Future of Nationality in the Pacific: Preventing Statelessness and Nationality Loss in the Context of Climate Change* (Kaldor Centre for International Refugee Law, Peter McMullin Centre for Statelessness and UTS, forthcoming 2022).

[169] Liechtenstein in its statement specifically refers to the right to self-determination. The submission states that: 'it is a prerequisite for the enjoyment of human rights as a whole' and 'the international community may have a role to play in assisting relocated peoples in continuing to freely determine the expression of their right to self-determination' (Statement by Liechtenstein, UNGA Sixth Committee, 29 October 2021). See also: A. Maguire and J. McGee, 'A Universal Human Rights to Shape Responses to a Global Problem? The Role of Self-Determination in Guiding the International Legal Response to Climate Change' (2017) 26(1) *Review of European and International Environmental Law* 54–68.

[170] Respectively, 999 UNTS, entry into force 23 March 1976; and 994 UNTS, entry into force 3 January 1976.

[171] UNGA, *Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations*, UN Doc. A/RES/2625 (XXV), 1970, at 121.

[172] L.B. De Chazournes and J. Rudall, 'Co-Operation', in J.E. Viñuales (ed.), *The UN Friendly Relations Declaration at 50* (Cambridge University Press, 2020), 105–132.

[173] J. Delbruck, 'The International Obligation to Cooperate – An Empty Shell or a Hard Law Principle of International Law? A Critical Outlook at a Much Debated Paradigm of Modern International Law', in H. Hestermeyer et al. (eds), *Coexistence, Cooperation and Solidarity: Liber Amicorum Rüdiger Wolfrum* (Martinus Nijhoff, 2021), 3–16.

new issues concerning the interplay between the internal and external dimensions of climate risk governance, which requires a departure from being focused only on a State-centric approach, so to facilitate cooperation at the international level and effectively address climate uncertainty.[174]

The debate on human rights implementation in line with the implications and evolution of climate change impacts clearly illustrates new dimensions of cooperation that will require finding new strategies and new roles for giving content to these duties.[175] To explore these emerging dimensions, it may be helpful to recall the scope of cooperation provided by the ILC in the context of transboundary harm, according to which cooperation 'could involve both standard setting and institution building as well as action undertaken in a spirit of reasonable consideration of each other's interests and towards the achievement of common goals.'[176] In line with this, cooperation between States could require the adoption of new legal and institutional frameworks through which cooperation could be achieved. That said, as illustrated by De Schutter in the context of human rights, 'it is common for human rights treaties to refer to a duty of international cooperation and to include in the definition a duty to seek to conclude agreements with other States.'[177] This could be beneficial in translating human rights obligations by putting in place a cooperative framework to adapt to the negative effects of climate change by supporting the adoption of multilateral and bilateral agreements in several areas across different legal regimes.[178]

To elaborate further the content of this duty in order to better appreciate its meaning and functions, it is possible to build on the work already done by the Committee. As also reflected in the Committee's 2018 Sydney Declaration (Principle 4), the duty to cooperate corresponds to duties to 'act collectively' to overcome complex action problems in the context of environmental degradation and for the fulfilment of human rights in relation to cross-border human mobility (whether displacement, migration, evacuation or planned relocation).[179] In this context, the Global Compact for Safe, Orderly and Regular Migration (GCM) is the most recent 'collective commitment to improving cooperation on international migration'[180] that could help to advance the debate by framing a road map to be pursued over the long-term in the context of disasters, the adverse effects of climate change and sea level rise.[181]

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[174] A.G. Jain, 'The 21st Century Atlantis: The International Law of Statehood and Climate-Change Induced Loss of Territory' (2014) 50 *Stanford Journal of International Law* 1–52, at 49.

[175] L.F. Damrosh, 'Obligations of Cooperation in the International Protection of Human Rights', in J. Delbruck (ed.), *International Law of Cooperation and State Sovereignty* (Duncker and Humblot, 2002), 15–43.

[176] ILC, *First Report on Prevention of Transboundary Damage from Hazardous Activities*, by Mr. Pemmaraju Sreenvasa Rao, Special Rapporteur, UN Doc. A/CN.4/487, of 18 March 1998, para. 139.

[177] O. De Schutter, 'A Duty to Negotiate in Good Faith as Part of the Duty to Cooperate to Establish 'An International Legal Order in which Human Rights can be Fully Realized': The New Frontier of the Right to Development' *Cridho Working Papers Series* (2018/5).

[178] Ibid. This translates into a requirement to put forward proposals (procedural requirement) and, moreover, to put forward 'reasonable proposals' (the substantive requirement).

[179] ILA Resolution 6/2018, Annex: Sydney Declaration of Principles on the Protection of Persons Displaced in the Context of Sea Level Rise, Principle 4, in the *2018 Report* (n. 5), at 36–37 [72].

[180] Among the GCM's guiding principle 'international cooperation' is described as: '(b) The Global Compact is a non-legally binding cooperative framework that recognizes that no State can address migration on its own because of the inherently transnational nature of the phenomenon. It requires international, regional and bilateral cooperation and dialogue. Its authority rests on its consensual nature, credibility, collective ownership, joint implementation, follow-up and review'; UNGA, Global Compact for Safe, Orderly and Regular Migration (GCM), Resolution 73/195 of 19 December 2018, UN Doc. A/RES/73/195, of 11 January 2019. In this context, the USA stated: 'no single country can manage migration alone. International cooperation – among States, international and multilateral organizations, and civil society – is critical to ensure safe, orderly, and human migration' (Statement by the USA, Asia-Pacific Regional Review of Implementation of the Global Compact for Safe, Orderly, and Regular Migration, of 10 March 2021). See also: V. Chetail, 'The Global Compact for Safe, Orderly and Regular Migration: A Kaleidoscope of International Law' (2020) 16(3) *International Journal of Law in Context* 253–268; W. Kälin, 'The Global Compact on Migration: A Ray of Hope for Disaster-Displaced Persons' (2018) 30 *International Journal of Refugee Law* 664–667.

[181] Objective 2 of the GCM refers to 'sudden-onset and slow-onset natural disasters, the adverse effects of climate change, environmental degradation, as well as other precarious situations' (paras 18.h-18.l and 21.g-21.h), and 'sea level rise' is explicitly mentioned in para. 18.i; UNGA (n. 180). See also: Freestone and Cicek (n. 144); UNGA, *Global Compact for Safe, Orderly and Regular Migration*, Report of the Secretary-General, UN Doc. A/76/642, 27 Dec. 2021.

BOX 2. Emerging Trends for Long-Term Human Mobility Strategies in a Multi-level Perspective

The Global Compact process was officially launched by the UN New York Declaration for Refugees and Migrants by the UN General Assembly in 2016, when 'the adverse effects of climate change, natural disasters (some of which may be linked to climate change), or other environmental factors', in combination with other factors, were recognized as drivers of human mobility. The GCM includes 10 guiding principles, 23 objectives and 187 relevant actions to give implementation to its objectives. Objectives 2 (Minimize the adverse drivers and structural factors that compel people to leave their country of origin),[182] 5 (Enhance availability and flexibility of pathways for regular migration),[183] and 23 (Strengthen international cooperation and global partnerships for safe, orderly and regular migration)[184] are particularly relevant.

The adoption of the GCM in 2018 has highlighted the possibilities for multi-level governance by focusing on three levels as identified by Cristani et al. These are: '(1) the international level, which emerges as an interactive platform for fostering dialogue and coordination; (2) the regional level, which has a prominent role in framing concrete and operational responses; and (3), the national level, at which the States, together with local actors, are responsible for the implementation of domestic laws and policies in line with regional and international norms'.[185] Valuable academic studies have been conducted to gain empirical insights into the extent to which existing and/or new regional frameworks (from free movement agreements to tailored mobility regimes) may enhance cross-border mobility and promote long-term solutions.

In *Africa*, one of the most comprehensive studies on the potential of free movement agreements, conducted by Wood, highlighted how existing agreements at sub-regional levels may facilitate the regular mobility of persons displaced in the context of environmental changes by addressing three protection needs: '1) access to the territory; 2) status and rights during stay; and 3) opportunities for lasting solutions.' According to Wood, the recent adoption by the Intergovernmental Authority on Development of the Protocol on Free Movement of Persons is a specific step towards closing 'the protection gap for people displaced by disasters, who often do not qualify for refugee status or other forms of international protection'.[186]

In *the Americas*, the International Organization for Migration (IOM) issued a comprehensive report,[187] which focused on two regional agreements in place for the CARICOM[188] and the OECS Community.[189] These frameworks facilitated the mobility of disaster-displaced persons during the 2017 Atlantic hurricane season when more than 2000 people were displaced at domestic and cross-border level.[190] Cantor conducted an in-

[182] Objective 2 aims to 'harmonize and develop approaches and mechanisms at the sub-regional and regional level to allow access to humanitarian assistance for persons affected by sudden or slow-onset disasters' (Objective 2, para. 18 k) and 'the development of coherent approaches to address the challenges of migration' (Objective 2, para. 18 l).

[183] Objective 5 provides specific directions for the progressive development of international law in this context by highlighting the need to expand pathways for regular migration ('facilitate regional and cross-regional labour mobility through international and bilateral cooperation arrangements, such as free movement regimes, visa liberalization or multiple country visas, and labour mobility cooperation frameworks in line with national priorities, local market needs and skills supply') which could contribute to 'allow people to move out of harm's way before disasters strike or to cope with the impacts of such disasters' (Objective 5, para. 21 g/h).

[184] International cooperation informs all the objectives of the GCM and it is specifically addressed in the Objective 23 by highlighting the commitment of States 'to strengthen international cooperation and global partnership for safe, orderly and regular migration' (paragraph 39.b under Objective 23).

[185] F. Cristani, E. Fornalé and S. Lavenex, 'Regional Environmental Migration Governance' in T. Krieger, D. Panke and M. Pregernig (eds), *Environmental Conflicts, Migration and Governance* (Bristol University Press, 2020),137–156, at 142.

[186] T. Wood, *The Role of Free Movement of Persons Agreements In Addressing Disaster Displacement: A Study Of Africa* (Platform on Disaster Displacement, 2019), at 13 f., at 43.

[187] IOM, *Free Movement of Persons in the Caribbean: Economic and Security Dimension, Regional Program on Migration Meso America & the Caribbean* (IOM, 2019).

[188] The Caribbean Community and Common Market was created in 1973 by the adoption of the Treaty of Chaguaramas. Nationals have the right to enter and stay in another of the Member States for up to six months (Article 46 of the Revised Treaty of Chaguaramas).

[189] The Organization of Eastern Caribbean States (OECS) was created in 1981 with the adoption of the Treaty of Basseterre. It includes seven members (OECS protocol Member States) and four associate members. Permanent stay is granted to residents of all its Member States.

[190] IOM (n. 187).

depth review of existing practices across this region to contribute to gaining original data on how legal gaps affect both countries of origin and of destination, and the development of international law.[191]

In the *Pacific* region, Burson et al.[192] recently published a study to support the development of a 'harmonized regional approach' for the cross-border mobility in the Pacific region on humanitarian grounds. By mapping legislative and regulatory opportunities, the authors suggest the development of a 'pathway' for regional mobility in the context of climate change anchored in existing policy and practices for the coming decades.

To conclude, it is important to recall that the duty to cooperate extends beyond the affected States to third States together with States that are indirectly affected. Sub-regional groupings of States are increasingly organsing themselves on this basis, for example by working collaboratively to develop guides to effective practices.[193] A short insight into the development achieved by the Parliamentary Assembly of the Council of Europe (PA) is illustrative of the collective nature of responsibilites and the implications for present-future cooperation in the co-allocation of protective duties. In 2019, the PA adopted the Resolution *A legal status for 'climate refugees'*, which recognizes that Member States of the Council of Europe 'carry a particular responsibility to those countries, especially the countries of the global south affected by man-made climate change' (para. 5.4).[194] Notably, the resolution refers not only to technical, financial and operational support,[195] but also requires international cooperation to establish a normative and institutional framework in which 'industrialized member states of the Council of Europe' will 'provide asylum for climate refugees'[196] (para. 5.4). In line with this development, in 2021 the PA adopted the new Resolution *Climate and Migration* which makes reference to four pillars to coordinate the allocation of responsibilities.[197] First, the resolution (in para. 6) recalls the need to act on 'ensuring human rights protection'; second, to provide 'technical

[191] D.J. Cantor, 'Environment, Mobility, and International Law: A New Approach in the Americas' (2021) 21(2) *Chicago Journal of International Law* 263–322.

[192] B. Burson, R. Bedford and C. Bedford, *In the Same Canoe: Building the Case for a Regional Harmonization of Approaches to Humanitarian Entry and Stay in 'Our Sea of Islands'* (PDD, 2021). See also: the Keynote Statement of Dr Tauisi Taupo on behalf of Tuvalu: 'Our regional cooperation and engagement are crucially in fulfilling commitments to displaced populations and to avoid policies that intensify displacement' (Statement by Tuvalu, Pacific Regional Consultation on Internal Displacement, of 11 November 2021).

[193] For example, in November 2016, the Regional Conference on Migration (RCM), or the Puebla process, a regional inter-governmental process composed of eleven disaster-affected member States, mostly from North and Central America has published the Guide *Protection for Persons Moving Across Borders in the Context of Disaster: a Guide to Effective Practices for RCM Member Countries*. The Guide provides a common framework for understanding how a disaster may impact upon migration patterns and migrants, and sets out a range of effective practices using both regular migration pathways or exceptional measures on humanitarian grounds to regulate both the entry. Similar guidelines were adopted by States participating in the South American Conference on Migration (CMS) *Lineamientos regionales en materia de protección y asistencia a personas desplazadas a través de fronteras y migrantes en países afectados por desastres de origen natural*.

[194] PA, *A Legal Status for Climate Refugees,* Resolution 230, of 3 October 2019; PA, *A Legal Status for Climate Refugees,* Report of the Committee on Migration, Refugees and Displaced Persons, Rapporteur: M.C. Verdier-Jouclas, Doc. 14955, of 27 August 2019; E. Fornalé, '*A l'envers*: Setting the Stage for a Protective Environment to Deal with 'Climate Refugees' in Europe' (2020) 22(4) *European Journal for Migration Law* (2020) 518–540.

[195] On this specific issue, it is interesting to recall the joint statement on human rights and climate change by five UN Treaty bodies that highlights: 'as part of international assistance and co-operation towards the realization of human rights, high-income States should also support adaptation and mitigation efforts in developing countries, by facilitating transfers of green technologies, and by contributing to financing climate mitigation and adaptation. In addition, States must co-operate in good faith in the establishment of global responses addressing climate-related loss and damage suffered by the most vulnerable countries, paying particular attention to safeguarding the rights of those who are at particular risk of climate harm and addressing the devastating impact, incl on women, children, persons with disabilities and indigenous peoples,' at: <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24998>.

[196] Regarding the use of the term 'climate refugee', in the explanatory report, the Rapporteur illustrated the terminological debate raised by the use of this term: 'Should the expression 'climate refugees' be used – would that offer those concerned greater protection?'. The Rapporteur highlighted that 'the term 'environmentally displaced persons' should be used rather than 'climate refugees', firstly because of the lack of legal standing of the term in current texts, and secondly, because environmental catastrophes resulting in mass migration are not always caused by climate change. This approach is in line with the shift in positions of the international organisations with regard to defining the status and degree of protection to be granted to people displaced for environmental reasons' (4.1 – 2.2).

[197] PA, *Climate and Migration,* Resolution, Res. 2401, of 29 September 2021; PA, *Climate and Migration*, Report, Doc. 15348, of 23 August 2021.

assistance' by 'using science and technology to serve people and save life'; third to improve development co-operation; and fourth to strengthen preventive responsibilities.

4. Issues Raised by the Committee

Through this overview, the Committee has sought to illustrate some of the critical challenges that possible scenarios (adaptive and/or innovative strategies) could raise, and which will be addressed in further detail in the continuation of the Committee's work. These include:

1) What are the implications for statehood of diminishing State capacity and diminishing resident populations?

2) What are the implications of different potential forms of State transformation – including confederation, federation, condominium, lease – on the protection of affected populations?

3) Taking as a starting point the principle that all persons affected by sea level rise will, at all times, remain rights holders under international human rights law, what does existing international human rights law (and other relevant bodies/principles of international law, such as the law on statelessness) say about the distribution of obligations between States towards these persons as rights holders – especially under different scenarios likely to emerge during the process of sea level rise? Where are there gaps, and how might international law be developed to address such gaps (for instance, with regard to voting rights, rights related to nationality, or property rights)?

Political will and State-to-State relationships are likely to determine the path towards solutions in the mid- to longer-term. Further efforts, including research, are required to explore options not so far considered and to address the matter of different possible forms of international legal personality, in addition to statehood, to address the shortcomings that currently persist. Bringing together a plurality of authorities to cooperate in establishing a framework for realizing State transformation and facilitating human rights protection might prove an important aspect in making such efforts feasible. Nonetheless, the prospects of different scenarios put forward by the Committee provide 'legal forecasts'[198] of what the future may look like and might assist in facilitating the elaboration of legal proposals.

The Committee identified three tasks to contextualize the quest for State transformation in the context of climate change-related sea level rise:

> first, shaping a progressive outlook by offering perspectives of possible scenarios on how to achieve effective governance structures for the foreseeable future(s). Efforts are required to discuss different solutions by using a spectrum of possibilities that range from 'optimistic' to more 'pessimistic' futures;
>
> second, drawing attention to the individual responsibility of the State by stressing the duty to act locally on a global issue and deepening and expanding human rights, especially extending the reach of the principle of *non-refoulement* to efforts to take into account the adverse impacts of climate change in the short-to-medium term;
>
> third, stressing the collective responsibilities to cooperate by offering innovation in human mobility options both at domestic, regional and international levels. This could be translated into supporting creative pathways for human mobility as part of a coherent progressive normative environment.

[198] See Rouleau-Dick (n. 166), at 308.