



---

**International Law Commission**

**Seventy-fifth session**

Geneva, 29 April–31 May and 1 July–2 August 2024

**Sea-level rise in relation to international law**

**Additional paper to the second issues paper (2022) by Patrícia Galvão Teles\* and Juan José Ruda Santolaria,\*\* Co-Chairs of the Study Group on sea-level rise in relation to international law\*\*\***

**Contents**

	<i>Page</i>
Introduction . . . . .	4
I. Inclusion of the topic in the Commission's programme of work; consideration of the topic by the Commission . . . . .	4
II. Purpose and structure of the additional paper to the second issues paper (2022) . . . . .	5
III. Memorandum by the Secretariat . . . . .	6
IV. Debate in the Sixth Committee of the General Assembly; level of support from Member States; outreach efforts . . . . .	7
A. Debate in the Sixth Committee in 2022 . . . . .	7
1. Statehood . . . . .	7
2. Protection of persons affected by sea-level rise . . . . .	11
3. Relevance of the principle of self-determination . . . . .	13
4. Relevance of international cooperation . . . . .	13
5. Future work . . . . .	14
6. Final form of the work on the topic . . . . .	15
B. Debate in the Sixth Committee in 2023 . . . . .	15

---

\* The Co-Chair wishes to thank those who assisted in the preparation of the present paper, in particular Connor Brashear, Charlotte Laurence, Rodolfo Marques, Daniela Martins, Isabel Paolini and Lillian Robb.

\*\* The Co-Chair wishes to thank Grismi Bravo Arana, Joyce Chen, Jean-Baptiste Dudant and René Rodrigues for their valuable support, and, in particular, Roberto Claros Abarca for his invaluable collaboration.

\*\*\* The present report was submitted to the conference services for processing after the deadline so as to include the most recent information.



## Part One: Reflections on statehood

I. Introductory considerations . . . . .	17
II. Selected developments in State practice and in the practice of international organizations . . .	17
III. Analysis of relevant legal issues . . . . .	18
A. Configuration of a State as a subject of international law and continued existence of the State . . . . .	18
B. Scenarios relating to statehood in the context of sea-level rise and the right of the State to provide for its preservation . . . . .	23
C. Possible alternatives for addressing the phenomenon in relation to statehood . . . . .	26

## Part Two: Protection of persons affected by sea-level rise

I. Introductory considerations . . . . .	34
II. Selected developments in State practice and in the practice of international organizations . . .	36
A. Developments in State practice . . . . .	36
1. Comments submitted by States to the Commission . . . . .	36
2. Other developments in State practice . . . . .	41
B. Developments in the practice of international organizations . . . . .	43
1. Human rights treaty bodies . . . . .	43
2. Human Rights Council: Special Rapporteur on the promotion and protection of human rights in the context of climate change . . . . .	45
3. Security Council . . . . .	47
4. General Assembly . . . . .	48
5. International Court of Justice and other courts: pending advisory opinions . . . . .	48
III. Analysis of relevant legal issues . . . . .	50
A. Possible elements for legal protection of persons affected by sea-level rise . . . . .	50
1. Human dignity as an overarching principle . . . . .	50
2. Combination of needs-based and rights-based approaches as the basis for the protection of persons affected by sea-level rise . . . . .	51
3. General human rights obligations – including with regard to civil, political, economic, social and cultural rights – in the context of the protection of persons affected by sea-level rise . . . . .	52
4. Different human rights duties and different human rights duty bearers in the context of sea-level rise . . . . .	55
5. Protection of persons in vulnerable situations in the context of sea-level rise and the principle of non-discrimination . . . . .	58
6. Principle of <i>non-refoulement</i> in the context of the protection of persons affected by sea-level rise . . . . .	61
7. Guidelines in the Global Compact for Safe, Orderly and Regular Migration and other soft-law instruments relevant to the protection of persons displaced as a result of sea-level rise . . . . .	64

8. Applicability of complementary protection in the context of refugee law to persons affected by sea-level rise . . . . .	66
9. Humanitarian visas and similar administrative policies for the protection of persons affected by sea-level rise . . . . .	68
10. Tools for the avoidance of statelessness in the context of sea-level rise . . . . .	70
11. Principle of international cooperation as key to ensuring the protection of persons affected by sea-level rise . . . . .	72
12. Protection of the cultural heritage of individuals and groups that might be affected by sea-level rise . . . . .	76
B. Possible future outcomes . . . . .	79
Part Three: Preliminary observations and future work of the Study Group	
I. Preliminary observations . . . . .	80
A. Statehood . . . . .	80
B. Protection of persons affected by sea-level rise . . . . .	81
II. Future work of the Study Group . . . . .	82

## Introduction

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

1. At its seventieth session (2018), the Commission decided to recommend the inclusion of the topic "Sea-level rise in relation to international law" in its long-term programme of work.<sup>1</sup> Subsequently, in its resolution [73/265](#) of 22 December 2018, the General Assembly noted the inclusion of the topic in the long-term programme of work of the Commission.

2. At its seventy-first session (2019), the Commission decided to include the topic in its programme of work. The Commission also decided to establish an open-ended Study Group on the topic, to be co-chaired, on a rotating basis, by Mr. Bogdan Aurescu, Mr. Yacouba Cissé, Ms. Patrícia Galvão Teles, Ms. Nilüfer Oral and Mr. Juan José Ruda Santolaria. At its 3480th meeting, on 15 July 2019, the Commission took note of the joint oral report of the Co-Chairs of the Study Group.<sup>2</sup>

3. At its seventy-second session (2021), the Commission reconstituted the Study Group, chaired by the two Co-Chairs on issues related to the law of the sea, namely Mr. Aurescu and Ms. Oral. The Commission considered the first issues paper on the topic, concerning issues related to the law of the sea,<sup>3</sup> prepared by Mr. Aurescu and Ms. Oral. The paper was issued together with a preliminary bibliography.<sup>4</sup> The Study Group held eight meetings, from 1 to 4 June and on 6, 7, 8 and 19 July 2021. At its 3550th meeting, on 27 July 2021, the Commission took note of the joint oral report of the Co-Chairs of the Study Group. Chapter IX of the 2021 annual report of the Commission contains a summary of the work of the Study Group during that session on the subtopic of issues related to the law of the sea.<sup>5</sup>

4. At its seventy-third session (2022), the Commission reconstituted the Study Group, chaired by the two Co-Chairs on issues related to statehood and to the protection of persons affected by sea-level rise, namely Ms. Galvão Teles and Mr. Ruda Santolaria. The Commission considered the second issues paper on the topic, concerning issues related to statehood and to the protection of persons affected by sea-level rise,<sup>6</sup> prepared by Ms. Galvão Teles and Mr. Ruda Santolaria. The paper was issued together with a selected bibliography.<sup>7</sup> The Study Group held nine meetings, from 20 to 31 May and on 6, 7 and 21 July 2022. At its 3612th meeting, on 5 August 2022, the Commission considered and adopted the report of the Study Group on its work at that session. Chapter IX of the 2022 annual report of the Commission contains a summary of the work of the Study Group during that session on the subtopics of issues related to statehood and to the protection of persons affected by sea-level rise.<sup>8</sup>

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

<sup>2</sup> *Official Records of the General Assembly, Seventy-fourth Session, Supplement No. 10 (A/74/10)*, paras. 265–273.

<sup>3</sup> [A/CN.4/740](#) and Corr.1

<sup>4</sup> [A/CN.4/740/Add.1](#).

<sup>5</sup> *Official Records of the General Assembly, Seventy-sixth Session, Supplement No. 10 (A/76/10)*, paras. 247–296.

<sup>6</sup> [A/CN.4/752](#).

<sup>7</sup> [A/CN.4/752/Add.1](#).

<sup>8</sup> *Official Records of the General Assembly, Seventy-seventh Session, Supplement No. 10 (A/77/10)*, paras. 153–237.

5. At its seventy-fourth session (2023), the Commission reconstituted the Study Group, chaired by the two Co-Chairs on issues related to the law of the sea, namely Mr. Aurescu and Ms. Oral. The Commission considered an additional paper to the first issues paper on the topic, concerning issues related to the law of the sea,<sup>9</sup> prepared by Mr. Aurescu and Ms. Oral. A selected bibliography, prepared in consultation with members of the Study Group, was issued as an addendum to the additional paper.<sup>10</sup> The Study Group held 12 meetings, from 26 April to 4 May and from 3 to 5 July 2023. At its 3655th meeting, on 3 August 2023, the Commission considered and adopted the report of the Study Group on its work at that session. Chapter VIII of the 2023 annual report of the Commission contains a summary of the work of the Study Group during that session on the subtopic of issues related to the law of the sea.<sup>11</sup>

## II. Purpose and structure of the additional paper to the second issues paper (2022)

6. The purpose of the present paper is to supplement and develop the content of the second issues paper (2022), on the basis of a number of suggestions by the Co-Chairs and members of the Study Group that were proposed during the debate on that paper, which took place during the seventy-third session (2022). These suggestions were presented in the 2022 annual report of the Commission and refer to a wide range of issues.<sup>12</sup>

7. While all such suggestions are pertinent to the debates within the Study Group, owing to the inherent limited dimensions of the present paper, the Co-Chairs will address the main aspects highlighted by the Co-Chairs and the Study Group, and by Member States and others in their submissions to the Commission and in their statements presented in the Sixth Committee of the General Assembly after the second issues paper was issued and following the debate on it in the Commission in 2022.

8. From this perspective, the present paper focuses on the following areas and is structured accordingly: the subtopic of issues related to statehood, the subtopic of issues related to the protection of persons affected by sea-level rise, preliminary observations and the future work of the Study Group.

9. The section on the subtopic of issues related to statehood, building on the second issues paper, covers the most important legal issues, elements that have been added to the analysis on the matter within the Study Group, statements by States in the Sixth Committee and comments submitted by States to the Commission.

10. The section on the subtopic of issues related to the protection of persons affected by sea-level rise, building on the second issues paper, highlights selected developments in State practice and in the practice of international organizations that are posterior to those addressed in the second issues paper. There follows an analysis of relevant legal issues that were previously identified as possible elements for legal protection of persons affected by sea-level rise, and a brief discussion of possible future outcomes.

<sup>9</sup> [A/CN.4/761](#).

<sup>10</sup> [A/CN.4/761/Add.1](#).

<sup>11</sup> *Official Records of the General Assembly, Seventy-eighth Session, Supplement No. 10 (A/78/10)*, paras. 128–230.

<sup>12</sup> [A/77/10](#), paras. 234–236.

11. The paper concludes with preliminary observations on both subtopics, and an indication as to the future work of the Study Group in 2025, when a final report on the topic will be presented.
12. The present paper is intended to serve as a basis for discussion in the Study Group and may be complemented by contribution papers prepared by members of the Study Group.
13. A selected bibliography will be issued as an addendum to the present paper, to be prepared with input from members of the Study Group.

### III. Memorandum by the Secretariat

14. At its seventy-third session (2022), the Commission requested the Secretariat to prepare a memorandum identifying elements in the previous work of the Commission that could be relevant for its future work on the topic, in particular in relation to statehood and the protection of persons.<sup>13</sup>
15. To fulfil the request from the Commission, the Secretariat engaged in a review of the work of the Commission since 1949 with a view to identifying aspects relevant for its consideration of the subtopics of statehood and the protection of persons affected by sea-level rise. In preparing the memorandum, the Secretariat was guided by the issues identified as part of the Study Group's future programme of work in relation to the subtopics of statehood and the protection of persons affected by sea-level rise, reflected in the 2022 report of the Commission.<sup>14</sup>
16. The Secretariat focused primarily on texts adopted on second reading with commentaries, as well as the final reports of the Study Group. Given the volume of material reviewed for the purpose of preparing the memorandum, what was presented was a selection of examples intended to illustrate the approach of the Commission.
17. In preparing the memorandum, the Secretariat sought to identify and compile elements in the Commission's prior work that, while not addressing sea-level rise specifically, could nonetheless assist the Commission in its consideration of the specific questions of statehood and the protection of persons. As indicated in the syllabus for the topic, references to sea-level rise have been made in the work of the Commission only in recent years, and to a limited extent. Examples of such references can be found in specific commentaries adopted in the context of the topics on the protection of the atmosphere<sup>15</sup> and the protection of persons in the event of disasters.<sup>16</sup>
18. As regards statehood, the Commission has not directly considered certain questions, including the criteria for statehood or for the recognition of States. As such, the elements identified from the review of the Commission's work are primarily of indirect relevance to the study of sea-level rise in relation to international law. Those elements found in the review of the work of the Commission that could be of greater

<sup>13</sup> A/77/10, para. 246.

<sup>14</sup> *Ibid.*, paras. 235–236.

<sup>15</sup> Draft guidelines on the protection of the atmosphere and commentaries thereto, A/76/10, para. 39–40.

<sup>16</sup> Draft articles on the protection of persons in the event of disasters and commentaries thereto, *Yearbook ... 2016*, vol. II (Part Two), paras. 48–49. A “disaster” is defined in draft article 3, subparagraph (a), as “a calamitous event or series of events resulting in widespread loss of life, great human suffering and distress, mass displacement, or large-scale material or environmental damage, thereby seriously disrupting the functioning of society”. Slow-onset events, such as drought or sea-level rise, were given as examples of disasters covered by the draft articles (para. (4) of the commentary to draft article 3).

relevance to the topic pertain to issues related to the protection of persons in other vulnerable circumstances.

19. The present additional paper should, therefore, be read in conjunction with the memorandum by the Secretariat.<sup>17</sup> The Co-Chairs are most grateful to the Secretariat for the memorandum, and have used the materials identified therein – to the extent possible, where appropriate, but not exclusively – in the present paper.

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

20. The growing interest in and support for the topic, as described in the first and second issues papers and in the additional paper to the first issues paper, was confirmed as a trend during the debates in the Sixth Committee of the General Assembly in 2022 and 2023.<sup>18</sup>

##### **A. Debate in the Sixth Committee in 2022<sup>19</sup>**

21. In 2022, 67 delegations delivered statements in the Sixth Committee that referred to the topic. These statements not only refer to the second issues paper, dedicated to the subtopics of statehood and the protection of persons affected by sea-level rise, but also react to the substantive debates in the Study Group and the Commission that took place during its seventy-third session (2022).

22. Delegations emphasized once more that sea-level rise was an urgent issue of real and global concern, and one of critical importance. It was noted that sea levels would continue to rise throughout the current century, thus posing an existential threat with devastating effects for local communities across the world, in particular in small island developing States. Delegations emphasized the importance of international cooperation to effectively address the challenge, and the need to take account of the rights of vulnerable groups. It was further noted that strengthening the resilience of small island developing States to the effects of climate change was a collective responsibility of the international community.

##### **1. Statehood**

23. The following were the main aspects highlighted in relation to statehood: the distinction between the criteria for the creation of a State and those for its continuity or extinction; the presumption of continuing statehood; and possible scenarios and alternatives, from an international law perspective, in respect of statehood in the context of sea-level rise.

##### **(a) Distinction between the criteria for the creation of a State and those for its continuity or extinction**

24. In their statements in the Sixth Committee, Member States stressed that, when dealing with issues related to statehood, it was important to take as a reference the

<sup>17</sup> A/CN.4/768.

<sup>18</sup> The plenary debate in the Sixth Committee as pertains to the subtopic is reflected in the summary records contained in the documents cited in the following footnotes, which contain a summarized form of the statements made by delegations. The full texts of the statements made by delegations participating in the plenary debate are available from the Sixth Committee's web page, at <https://www.un.org/en/ga/sixth/>.

<sup>19</sup> A/CN.4/755, paras. 47–80.

provisions of the Convention on the Rights and Duties of States,<sup>20</sup> in particular with regard to the criteria for a State to be considered a subject of international law<sup>21</sup> and the inalienable right of the State to provide for its preservation.<sup>22</sup>

25. At the same time, some States stressed that it was necessary to distinguish between the criteria for the creation of a State and the criteria for its continuity or extinction.<sup>23</sup> In that context, the Convention on the Rights and Duties of States did not properly address the question of continuing statehood, so that non-compliance with one or more of the criteria set out in that treaty would not automatically lead to the extinction of statehood.<sup>24</sup> Antigua and Barbuda, speaking on behalf of the Alliance of Small Island States, noted in that regard that State practice over the past two centuries in respect of statehood was clear, and that the Convention was not relevant to the question of continuity of statehood.<sup>25</sup>

## (b) Presumption of continuing statehood

26. Given that the criteria set out in the Convention on the Rights and Duties of States are fundamentally situated in the context of the creation of States as subjects of international law, the view was expressed in several statements in the Sixth Committee that the principle of continuity of statehood could apply in situations that might arise subsequently.<sup>26</sup> In that regard, Liechtenstein and Brazil expressed the view that a presumption of continuity could be an acceptable starting point for the Commission's consideration of the issue of statehood in the context of the potential impact of sea-level rise.<sup>27</sup> States such as Samoa (speaking on behalf of the Pacific small island developing States), Antigua and Barbuda (speaking on behalf of the Alliance of Small Island States), the Netherlands and Papua New Guinea emphasized that there existed a strong presumption of continuity of statehood.<sup>28</sup> The Federated States of Micronesia, in turn, noted that it could not accept any interpretation of international law that would deprive it of its statehood as a result of loss of land territory due to the actions and omissions of other States.<sup>29</sup>

27. In the same vein, the Philippines and Estonia stressed that the presumption of continuing statehood in situations where any of the elements of statehood ceased to exist constituted a pragmatic approach that fostered legal stability, security, certainty

<sup>20</sup> Convention on the Rights and Duties of States (Montevideo, 26 December 1933), League of Nations, *Treaty Series*, vol. CLXV, No. 3802, p. 19.

<sup>21</sup> Netherlands (A/C.6/77/SR.27, para. 106) and Brazil (A/C.6/77/SR.27, para. 51).

<sup>22</sup> Iceland (on behalf of the Nordic countries, namely Denmark, Finland, Iceland, Norway and Sweden) (A/C.6/77/SR.26, para. 59).

<sup>23</sup> Singapore (A/C.6/77/SR.26, para. 65), Netherlands (A/C.6/77/SR.27, para. 106), Samoa (on behalf of the Pacific small island developing States) (A/C.6/77/SR.28, para. 21) and Micronesia (Federated States of) (A/C.6/77/SR.28, para. 107).

<sup>24</sup> A/CN.4/755, para. 52.

<sup>25</sup> Antigua and Barbuda (on behalf of the Alliance of Small Island States) (A/C.6/77/SR.28, para. 3).

<sup>26</sup> Liechtenstein (A/C.6/77/SR.29, para. 29), Brazil (A/C.6/77/SR.27, para. 51), El Salvador (A/C.6/77/SR.26, para. 116), Antigua and Barbuda (on behalf of the Alliance of Small Island States) (A/C.6/77/SR.28, para. 3), Netherlands (A/C.6/77/SR.27, para. 106), Samoa (on behalf of the Pacific small island developing States) (A/C.6/77/SR.28, para. 21), Papua New Guinea (A/C.6/77/SR.29, para. 22), Estonia (A/C.6/77/SR.27, para. 63), Philippines (A/C.6/77/SR.27, para. 93), Cuba (A/C.6/77/SR.27, para. 84), South Africa (A/C.6/77/SR.28, para. 62), Chile (A/C.6/77/SR.28, para. 88) and Micronesia (Federated States of) (A/C.6/77/SR.28, para. 106).

<sup>27</sup> Liechtenstein (A/C.6/77/SR.29, para. 30) and Brazil (A/C.6/77/SR.27, para. 51).

<sup>28</sup> Samoa (on behalf of the Pacific small island developing States) (A/C.6/77/SR.28, para. 21), Antigua and Barbuda (on behalf of the Alliance of Small Island States) (A/C.6/77/SR.28, para. 3), Netherlands (A/C.6/77/SR.27, para. 106) and Papua New Guinea (A/C.6/77/SR.29, para. 22).

<sup>29</sup> Micronesia (Federated States of) (A/C.6/77/SR.28, para. 107).



and predictability in international relations, while taking account of specific circumstances.<sup>30</sup> Cuba, South Africa and the Netherlands, for example, emphasized the case of loss of territory as a result of sea-level rise, stressing that in such cases the State would not automatically lose its status as a subject of international law.<sup>31</sup>

28. Other States, such as Chile, France and Malaysia, urged the Commission to approach the issue with particular caution as it examined in more detail the conditions and practical implications of such a presumption of continuity and whether and under what conditions it could be maintained indefinitely. They noted that the Committee should bear in mind that situations of a temporary nature – such as cases of Governments in exile – would not be comparable to those of States that were completely submerged or uninhabitable owing to rising sea levels, as the latter scenario would rather be of an irreversible nature.<sup>32</sup> Furthermore, a broad interpretation of the presumption of continuity would ultimately lead to the exclusion of the criteria for statehood set out in the Convention on the Rights and Duties of States.<sup>33</sup> Malaysia noted that continuity of statehood should be closely dependent on land territory and the maritime spaces generated by that territory.<sup>34</sup> For Croatia, if a State were to lose its territory by being totally submerged as a result of sea-level rise, it could no longer be considered as a State.<sup>35</sup>

**(c) Possible scenarios and alternatives, from an international law perspective, in respect of statehood in the context of sea-level rise**

29. The debate in the Sixth Committee included a discussion of the work of the Commission in providing a basis for dialogue among States on possible options for continuing statehood or recognition of some form of international legal personality in the face of the phenomenon of sea-level rise.<sup>36</sup>

30. Some States, such as Czechia, emphasized that the questions of existence and continuity of statehood involved a high degree of politically sensitive considerations, where the specific circumstances of each individual case must be taken into account.<sup>37</sup> In that regard, the Republic of Korea, Indonesia, Slovakia and Argentina stressed that the Commission should focus on the legal aspects of the topic, in accordance with its mandate, and take a prudent approach in its analysis of possible alternatives regarding the preservation of international legal personality in cases of loss of territory as a result of sea-level rise.<sup>38</sup>

31. Other States, such as Romania, pointed out that, in the absence of precedents, the issue would require innovation and adaptive solutions on the basis of considerations of international law.<sup>39</sup> Some States, such as Sierra Leone and Armenia, agreed that, given the particular circumstances of an extremely complex, existential and unavoidable phenomenon such as sea-level rise, and in the absence of State practice directly related to the issue, the Commission could have recourse to

<sup>30</sup> Philippines (A/C.6/77/SR.27, para. 93) and Estonia (A/C.6/77/SR.27, para. 63).

<sup>31</sup> Cuba (A/C.6/77/SR.27, para. 84), South Africa (A/C.6/77/SR.28, para. 62) and Netherlands (A/C.6/77/SR.27, para. 106).

<sup>32</sup> Chile (A/C.6/77/SR.28, para. 88) and France (A/C.6/77/SR.25, para. 49).

<sup>33</sup> Malaysia (A/C.6/77/SR.27, para. 15).

<sup>34</sup> *Ibid.*

<sup>35</sup> Croatia (A/C.6/77/SR.25, paras. 27, 29 and 30).

<sup>36</sup> A/CN.4/755, para. 55.

<sup>37</sup> Czechia (A/C.6/77/SR.28, para. 116).

<sup>38</sup> Republic of Korea (A/C.6/77/SR.29, para. 52), Indonesia (A/C.6/77/SR.29, para. 9), Slovakia (A/C.6/77/SR.27, para. 58) and Argentina (A/C.6/77/SR.29, para. 61).

<sup>39</sup> Romania (A/C.6/77/SR.27, para. 13).

reasoning by analogy and interpretative rules, consistent with its mandate on the progressive development of international law.<sup>40</sup>

32. While some States considered comparisons with entities that enjoyed international legal personality, such as the Holy See and the Sovereign Order of Malta, or with Governments in exile to be of limited use,<sup>41</sup> others argued that such parallels were relevant insofar as they demonstrated that prolonged situations in which one or more criteria for statehood were not met could be addressed under international law.<sup>42</sup>

33. On scenarios related to the maintenance of statehood, some States, such as Papua New Guinea, emphasized that the preservation of the maritime rights of States was closely linked to the preservation of their statehood, as only States could generate maritime zones.<sup>43</sup> The Russian Federation stressed that measures aimed at mitigating the effects of sea-level rise, such as coastal reinforcement, were particularly important and could be taken through international cooperation, and that the environmental impact of coastal reinforcement measures and the construction of artificial islands should be assessed from the perspective of small island developing States.<sup>44</sup>

34. Some States viewed favourably the possibility of maintaining some form of international legal personality without a territory, and called for further consideration of that option.<sup>45</sup> In that regard, the Federated States of Micronesia and Austria recalled that the Co-Chairs, in the second issues paper, had referred to a number of possible alternatives that would allow a State to maintain some form of international legal personality without a territory, including the cession or assignment of segments or portions of territory to other States, association with one or more other States and the establishment of confederations or federations.<sup>46</sup> The Federated States of Micronesia noted that the option of association with other States appeared to be modelled, at least in part, on the three compacts of free association that Palau, the Marshall Islands and the Federated States of Micronesia had entered into with the United States of America, which provided for all the parties to retain their statehood without diminution for the duration of the compacts.<sup>47</sup> Croatia, the Russian Federation and the Philippines argued that alternatives such as the creation of *sui generis* legal regimes, of non-territorial subjects of international law, could also be explored.<sup>48</sup>

35. Lastly, as an alternative proposal, the Islamic Republic of Iran suggested exploring the possibility of the affected State transferring sovereignty over a portion of its territory to an international mechanism such as the International Seabed Authority or any other international organization that could act on the basis of international law and scientific standards to ensure that the State's resources were used for the benefit of its population.<sup>49</sup> Nicaragua, in turn, considered that any reflection on statehood and sea-level rise should include the principle of common but

<sup>40</sup> Sierra Leone (A/C.6/77/SR.27, para. 27), Armenia (A/C.6/77/SR.27, para. 68)

<sup>41</sup> For example, Austria (A/C.6/77/SR.27, para. 21).

<sup>42</sup> For example, Netherlands (A/C.6/77/SR.27, para. 106).

<sup>43</sup> Papua New Guinea (A/C.6/77/SR.29, para. 22).

<sup>44</sup> Russian Federation (A/C.6/77/SR.28, para. 77).

<sup>45</sup> A/CN.4/755, para. 55.

<sup>46</sup> Micronesia (Federated States) (A/C.6/77/SR.28, para. 108) and Austria (A/C.6/77/SR.27, para. 21).

<sup>47</sup> Micronesia (Federated States of) (A/C.6/77/SR.28, para. 108). See also <https://www.doi.gov/oia/compacts-of-free-association>.

<sup>48</sup> Croatia (A/C.6/77/SR.25, para. 27), Russian Federation (A/C.6/77/SR.28, para. 76) and Philippines (A/C.6/77/SR.27, para. 93).

<sup>49</sup> Iran (Islamic Republic of) (A/C.6/77/SR.27, para. 45).

differentiated responsibilities, and that that principle should be the starting point for any solution.<sup>50</sup>

## 2. Protection of persons affected by sea-level rise

36. The following were the main issues highlighted with regard to the protection of persons affected by sea-level rise: the need to examine the adequacy of existing instruments and international legal frameworks to protect persons affected by sea-level rise; and support for combining needs-based and rights-based approaches to the topic.

### (a) Need to examine the adequacy of existing instruments and international legal frameworks to protect persons affected by sea-level rise

37. Several States emphasized the need to examine the adequacy of existing instruments and international legal frameworks for the protection of persons affected by sea-level rise,<sup>51</sup> including human rights law, refugee and migration law, disaster and climate change law,<sup>52</sup> and in the light of, for example, the right to a nationality.<sup>53</sup> Some States agreed that the existing legal frameworks were fragmented and general in nature.<sup>54</sup> One gap identified was that the definition of “refugee” status set out in the Convention relating to the Status of Refugees and the Protocol thereto did not cover persons affected by climate change, including sea-level rise.<sup>55</sup> Another gap identified was that there was currently no binding international legal instrument that dealt specifically with the issue of protection of persons affected by sea-level rise.<sup>56</sup> Cyprus and the Federated States of Micronesia noted that there was no binding international legal instrument that specifically addressed cross-border movements induced by climate change or the protection of persons forcibly displaced owing to the adverse effects of climate change, such as sea-level rise.<sup>57</sup> Nevertheless, some States advocated further interpretation of principles and rules in existing international law for the purposes of the protection of persons affected by sea-level rise, including through the application and reinterpretation of refugee law.<sup>58</sup> The Philippines endorsed the concept of complementing the existing framework for the protection of persons to address the consequences of sea-level rise, internal displacement and inter-State migration.<sup>59</sup> That position was echoed by Jamaica, which noted the international community should address existing gaps in international law and urged

<sup>50</sup> Nicaragua (A/C.6/77/SR.29, para. 41).

<sup>51</sup> Slovakia (A/C.6/77/SR.27, para. 59), Hungary (A/C.6/77/SR.27, paras. 2 and 4), Brazil (A/C.6/77/SR.27, para. 52), Chile (A/C.6/77/SR.28, paras. 90–92), Russian Federation (A/C.6/77/SR.28, para. 78), Japan (A/C.6/77/SR.29, para. 3), Jamaica (A/C.6/77/SR.29, paras. 27–28) and New Zealand (A/C.6/77/SR.29, para. 54).

<sup>52</sup> Italy (A/C.6/77/SR.26, para. 107).

<sup>53</sup> Brazil (A/C.6/77/SR.27, para. 52).

<sup>54</sup> Slovakia (A/C.6/77/SR.27, para. 59), Germany (A/C.6/77/SR.27, para. 40), Australia (A/C.6/77/SR.27, para. 73), Portugal (A/C.6/77/SR.27, para. 88), Philippines (A/C.6/77/SR.27, para. 94), Russian Federation (A/C.6/77/SR.28, para. 78), Thailand (A/C.6/77/SR.28, para. 95), Czechia (A/C.6/77/SR.28, para. 117), Peru (A/C.6/77/SR.29, para. 39), Holy See (Observer) (A/C.6/77/SR.29, para. 71), Hungary (A/C.6/77/SR.27, para. 3) and Sierra Leone (A/C.6/77/SR.27, para. 28).

<sup>55</sup> Estonia (A/C.6/77/SR.27, para. 64). Convention relating to the Status of Refugees (Geneva, 28 July 1951), United Nations, *Treaty Series*, vol. 189, No. 2545, p. 137; and Protocol relating to the Status of Refugees (New York, 31 January 1967), *ibid.*, vol. 606, No. 8791, p. 267.

<sup>56</sup> Malaysia (A/C.6/77/SR.27, para. 16).

<sup>57</sup> Cyprus (A/C.6/77/SR.28, para. 126) and Micronesia (Federated States of) (A/C.6/77/SR.28, para. 109).

<sup>58</sup> Peru (A/C.6/77/SR.29, para. 39), Estonia (A/C.6/77/SR.27, para. 64), Slovakia (A/C.6/77/SR.27, para. 59), Brazil (A/C.6/77/SR.27, para. 52) and Italy (A/C.6/77/SR.26, para. 107).

<sup>59</sup> Philippines (A/C.6/77/SR.27, para. 94).

the Commission to identify the obligations of States with regard to international cooperation.<sup>60</sup>

38. Further study of the applicability of those frameworks in the context of sea-level rise was thus deemed necessary. In particular, requests were made for the Commission to examine the principles of the protection of human dignity, international cooperation and *non-refoulement*. It was proposed to treat separately issues related to the protection of persons *in situ* and in displacement. Furthermore, it was observed that the status of persons affected by sea-level rise was closely linked to issues of statehood. In that regard, a proposal was made for the Commission to explore questions related to statelessness.<sup>61</sup>

39. Several States were of the view that the Commission should be cautious regarding the development of draft articles with new obligations outside of existing frameworks, questioning whether a new draft treaty was in fact necessary.<sup>62</sup>

40. While some States referenced the Commission's 2016 draft articles on the protection of persons in the event of disasters as a potential resource for determining solutions,<sup>63</sup> other States argued that they would not be adequate, as sea-level rise was a consequence of anthropogenic climate change whereas disasters were natural phenomena.<sup>64</sup> Antigua and Barbuda, speaking on behalf of the Alliance of Small Island States, and Maldives in its own statement, advocated an approach guided by the principle of common but differentiated responsibilities, to emphasize international accountability in the contribution to climate change and sea-level rise.<sup>65</sup> Other suggested factors on which any future obligations related to the protection of persons affected by sea-level rise should be based included the national capacity of non-affected States and relevant human rights and humanitarian principles.

41. Several States mentioned the relevance to the subtopic of the right to a clean, healthy and sustainable environment, as recognized both by the Human Rights Council and the General Assembly.<sup>66</sup>

42. Furthermore, some States raised the need to analyse such questions as the duties of third States in relation to the consequences of sea-level rise, the applicability of temporary and subsidiary protection measures and the principle of *non-refoulement*.<sup>67</sup>

**(b) Support for combining needs-based and rights-based approaches to the topic**

43. The Holy See considered that a rights-based approach appeared to be insufficient to protect victims of sea-level rise, favouring instead a needs-based approach that would give priority to addressing the differentiated needs of each person requiring protection.<sup>68</sup>

<sup>60</sup> Jamaica (A/C.6/77/SR.29, para. 26–28).

<sup>61</sup> A/CN.4/755, para. 65.

<sup>62</sup> For example, Argentina (A/C.6/77/SR.29, para. 62).

<sup>63</sup> Jamaica (A/C.6/77/SR.29, para. 28) and Peru (A/C.6/77/SR.29, para. 39). See also *Yearbook ... 2016*, vol. II (Part Two), para. 48.

<sup>64</sup> Czechia (A/C.6/77/SR.28, para. 117), Maldives (A/C.6/77/SR.28, para. 54) and Antigua and Barbuda (on behalf of the Alliance of Small Island States) (A/C.6/77/SR.28, para. 8).

<sup>65</sup> Antigua and Barbuda (on behalf of the Alliance of Small Island States) (A/C.6/77/SR.28, para. 8) and Maldives (A/C.6/77/SR.28, para. 54).

<sup>66</sup> Netherlands (A/C.6/77/SR.27, para. 107), Chile (A/C.6/77/SR.28, para. 90), Micronesia (Federated States of) (A/C.6/77/SR.28, para. 109), Nicaragua (A/C.6/77/SR.29, para. 43) and State of Palestine (Observer) (A/C.6/77/SR.29, para. 77).

<sup>67</sup> Hungary (A/C.6/77/SR.27, para. 4), Chile (A/C.6/77/SR.28, para. 92), Holy See (Observer) (A/C.6/77/SR.29, para. 72), Brazil (A/C.6/77/SR.27, para. 52) and Netherlands (A/C.6/77/SR.27, para. 107).

<sup>68</sup> Holy See (Observer) (A/C.6/77/SR.29, para. 72).

44. Papua New Guinea expressed support for a dual rights-based and needs-based approach, where international legal responses were adequate to meet the essential needs of persons affected by sea-level rise, with full respect for their rights.<sup>69</sup>

45. In connection with both subtopics, on statehood and on the protection of persons, delegations highlighted the relevance of the principles of self-determination and of international cooperation. Delegations also commented on the future work and the final form of the work of the Commission.

### 3. Relevance of the principle of self-determination

46. Several States recognized the importance of considering the right of a population affected by sea-level rise to self-determination.<sup>70</sup> Liechtenstein stated that the will of the people most immediately affected by sea-level rise must be at the centre of all discussions regarding statehood.<sup>71</sup> Estonia highlighted, in particular, the right of Indigenous peoples to self-determination.<sup>72</sup> The State of Palestine noted that the right of peoples affected to self-determination was unassailable.<sup>73</sup> Papua New Guinea asserted that the right to self-determination should include, as a basic constituent, the principle of permanent sovereignty over natural resources, as set forth by the General Assembly in its resolution 1803 (XVII) of 14 December 1962.<sup>74</sup> Cyprus emphasized the historical origins of the principle of self-determination.<sup>75</sup>

### 4. Relevance of international cooperation

47. Some delegations observed that one of the cornerstone principles related to protection of persons was the principle of international cooperation. According to several delegations, the principle presupposed a duty for developed States, in accordance with their human rights obligations, to assist developing ones, subject to their consent, and to cooperate in international environmental matters, hence building resilience to disasters. The need for the Commission to further examine the applicability and scope of the principle of international cooperation was emphasized, including the duties of non-affected States to cooperate.<sup>76</sup>

48. Several States emphasized the vital importance of the duty of international cooperation to address the issues presented by the Study Group,<sup>77</sup> some emphasizing the importance of delineating the obligation or duty to cooperate.<sup>78</sup>

<sup>69</sup> Papua New Guinea (A/C.6/77/SR.29, para. 24).

<sup>70</sup> El Salvador (A/C.6/77/SR.26, para. 116), Antigua and Barbuda (on behalf of the Alliance of Small Island States) (A/C.6/77/SR.28, para. 4), Samoa (on behalf of the Pacific small island developing States) (A/C.6/77/SR.28, para. 21), Chile (A/C.6/77/SR.28, para. 88), Cyprus (A/C.6/77/SR.28, para. 125) and Netherlands (A/C.6/77/SR.27, para. 106).

<sup>71</sup> Liechtenstein (A/C.6/77/SR.29, paras. 29–30).

<sup>72</sup> Estonia (A/C.6/77/SR.27, para. 64).

<sup>73</sup> State of Palestine (Observer) (A/C.6/77/SR.29, para. 77).

<sup>74</sup> Papua New Guinea (A/C.6/77/SR.29, para. 23).

<sup>75</sup> Cyprus (A/C.6/77/SR.28, para. 125).

<sup>76</sup> A/CN.4/755, para. 63.

<sup>77</sup> Peru (A/C.6/77/SR.29, para. 38), Türkiye (A/C.6/77/SR.29, para. 46), Hungary (A/C.6/77/SR.27, para. 4) and Nicaragua (A/C.6/77/SR.29, para. 46).

<sup>78</sup> Jamaica (A/C.6/77/SR.29, para. 28), Antigua and Barbuda (on behalf of the Alliance of Small Island States) (A/C.6/77/SR.28, paras. 5–8) and Samoa (on behalf of the Pacific small island developing States) (A/C.6/77/SR.28, para. 23).

49. Many States advocated commitment to international cooperation,<sup>79</sup> to ensure the protection of persons at risk owing to sea-level rise,<sup>80</sup> address important issues of statehood<sup>81</sup> and respond to and contain climate change,<sup>82</sup> and on the basis of the principle of common but differentiated responsibilities, laid out in principle 7 of the 1992 Rio Declaration on Environment and Development.<sup>83</sup> Nicaragua asserted that existing legal frameworks designed to address climate-related global challenges, including compensation for international responsibility, should be built upon as the first step of any solution.<sup>84</sup>

50. Chile noted that the case law of the Inter-American Court of Human Rights, in particular regarding the duty of States to avoid transboundary environmental harm, could be of use to the Study Group in determining the legal framework applicable to the protection of persons affected by sea-level rise.<sup>85</sup> Antigua and Barbuda, speaking on behalf of the Alliance of Small Island States, recalled that the International Court of Justice had recognized that States had a customary duty to cooperate in the prevention of transboundary environmental harm.<sup>86</sup> The Federated States of Micronesia underscored the finding in the second issues paper that States had the right to provide for their preservation, and that international cooperation would be of particular importance in that regard.<sup>87</sup>

## 5. Future work<sup>88</sup>

51. Some delegations noted the plan to consolidate the results of the work on the legal aspects of sea-level rise in the next quinquennium. Others requested the Commission to carefully formulate its future plan of work on the topic, as well as provide clarification on the status of past and future issues papers.

52. Some delegations emphasized that all the subtopics under consideration remained relevant and called upon the Commission not to dismiss areas in which State practice was insufficient. Other delegations considered it necessary for the Commission to focus on certain more urgent questions, in particular those related to the law of the sea and the protection of persons.

53. A request was made for the Commission to examine the effects of sea-level rise on States' human rights obligations, as well as on obligations related to migration

<sup>79</sup> Philippines (A/C.6/77/SR.27, paras. 94–95), Netherlands (A/C.6/77/SR.27, para. 107), Peru (A/C.6/77/SR.29, para. 40) and Micronesia (Federated States of) (A/C.6/77/SR.28, para. 106).

<sup>80</sup> El Salvador (A/C.6/77/SR.26, para. 114), Slovenia (A/C.6/77/SR.26, paras. 76–77), Sierra Leone (A/C.6/77/SR.27, para. 28), Germany (A/C.6/77/SR.27, para. 41), Antigua and Barbuda (on behalf of the Alliance of Small Island States) (A/C.6/77/SR.28, para. 5), Chile (A/C.6/77/SR.28, para. 92) and Papua New Guinea (A/C.6/77/SR.29, para. 24).

<sup>81</sup> Sierra Leone (A/C.6/77/SR.27, para. 28).

<sup>82</sup> Mexico (A/C.6/77/SR.27, para. 25), Germany (A/C.6/77/SR.27, para. 41), Russian Federation (A/C.6/77/SR.28, para. 77), Chile (A/C.6/77/SR.28, para. 92) and Bahamas (on behalf of the Caribbean Community) (A/C.6/77/SR.26, para. 44).

<sup>83</sup> Sierra Leone (A/C.6/77/SR.27, para. 28), Philippines (A/C.6/77/SR.27, para. 92), Nicaragua (A/C.6/77/SR.29, para. 41), Antigua and Barbuda (on behalf of the Alliance of Small Island States) (A/C.6/77/SR.28, para. 5–7), Philippines (A/C.6/77/SR.27, para. 92), Maldives (A/C.6/77/SR.28, para. 54), Chile (A/C.6/77/SR.28, para. 91), Malaysia (A/C.6/77/SR.27, para. 16) and Brazil (A/C.6/77/SR.27, para. 51). See also *Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3–14 June 1992*, vol. I, *Resolutions Adopted by the Conference* (United Nations publication, Sales No. E.93.I.8 and corrigendum), resolution 1, annex I, principle 7.

<sup>84</sup> Nicaragua (A/C.6/77/SR.29, paras. 41–43).

<sup>85</sup> Chile (A/C.6/77/SR.28, para. 91).

<sup>86</sup> Antigua and Barbuda (on behalf of the Alliance of Small Island States) (A/C.6/77/SR.28, para. 6). See also [https://www.un.org/en/ga/sixth/77/pdfs/statements/ilc/28mtg\\_aosis\\_2.pdf](https://www.un.org/en/ga/sixth/77/pdfs/statements/ilc/28mtg_aosis_2.pdf).

<sup>87</sup> Micronesia (Federated States of) (A/C.6/77/SR.28, para. 106). See also A/CN.4/752, para. 194.

<sup>88</sup> A/CN.4/755, paras. 71–78.



induced by sea-level rise. Support was voiced for the Commission to address the issue of compensation for the damage caused by sea-level rise.

54. It was considered that the unprecedented nature of sea-level rise called for progressive development of international law, at least by analogy with existing rules. According to another view, the Commission did not have a mandate to propose changes to existing international law.

55. Several delegations requested that the Commission should, in its future work, make a clear distinction between codification of existing legal rules and their progressive development.

56. A call was made for the Commission to take into account the comments and practice of States, regardless of their size or level of development, and of relevant international organizations. A view was also expressed that the Commission should pay attention to regional practice and, in particular, the practice of coastal States. At the same time, some delegations emphasized that the Commission should exercise caution while considering emerging regional State practices regarding sea-level rise.

57. It was proposed that the relevant rules and principles of international environmental law be taken into account, including the right to a clean, healthy and sustainable environment; human rights and humanitarian law; and the law of the sea. The need to take into consideration the decisions of the Security Council was emphasized. The increase in international climate change-related litigation, including requests for advisory opinions by the International Court of Justice and other judicial courts and mechanisms, was also noted as an important source of inspiration for further analysis on the topic.

58. The Commission was also encouraged to cooperate with other expert bodies dealing with sea-level rise and its effects. The need for the Study Group to maintain regular contacts with the scientific community was emphasized.

## **6. Final form of the work on the topic<sup>89</sup>**

59. It was suggested that the Commission should elaborate on the planned outcome of the work on the topic, including on the possibility of converting it into a traditional topic, with a designated special rapporteur or rapporteurs and with public debates in a plenary format.

60. It was noted that different outcomes could potentially be appropriate, depending on the subtopic in question. The identification of practical options for vulnerable States affected by sea-level rise was suggested as a possible outcome for matters related to statehood. Regarding matters related to protection of persons, some support was voiced for drafting an instrument on the protection of populations in territories affected by sea-level rise. According to another view, both subtopics could be best addressed through a report, while matters related to the law of the sea required more tangible proposals for future legal development and reform.

## **B. Debate in the Sixth Committee in 2023<sup>90</sup>**

61. In 2023, 71 delegations delivered statements in the Sixth Committee that referred to the topic. The majority of these statements referred to the additional paper to the first issues paper, on the subtopic of issues relating to the law of the sea, and to the debates in the Study Group and the Commission that took place during its seventy-fourth session (2023). Several statements also referred to the subtopics of issues

<sup>89</sup> A/CN.4/755, paras. 79–80.

<sup>90</sup> A/CN.4/763, paras. 79–105.

relating to statehood and to the protection of persons affected by sea-level rise: in addition to expressing delegations' support for the plan of the Study Group to revert to those subtopics in 2024, such statements highlighted the following issues.

62. With regard to statehood, some delegations, such as Belarus, Germany and Spain, stressed the importance of the Commission being able to provide practical guidance from the perspective of international law to the States most directly affected by the phenomenon of sea-level rise.<sup>91</sup> Germany, for example, stressed that the Commission could contribute to the analysis of possible solutions based on international law, concerning the continuity of statehood in situations where the territory of the State was completely submerged or rendered uninhabitable as a result of sea-level rise, by considering possible historical references which, without being strictly equivalent, could have an impact on the legal challenges related to the issue.<sup>92</sup>

63. On the presumption of continuing statehood, the United States noted that it had recently announced that it considered that sea-level rise driven by human-induced climate change should not cause any country to lose its statehood or its membership of international organizations.<sup>93</sup> Similarly, Cuba, Jamaica, Malta, New Zealand, Papua New Guinea and Samoa, speaking on behalf of the Alliance of Small Island States, supported the presumption of continuing statehood.<sup>94</sup> India, for its part, noted that greater caution was needed in considering the presumption of continuing statehood for States directly affected by sea-level rise, in particular from the perspective of the criteria set out in the Convention on the Rights and Duties of States.<sup>95</sup>

64. Some States, such as Jamaica and Papua New Guinea, emphasized that the preservation of States' maritime rights was closely linked to the preservation of their statehood.<sup>96</sup> In that regard, Malta noted that while a territory constituted a prerequisite for the establishment of a State, sovereignty referred to the whole territory under a State's control and not solely to the land territory; thus, a territory that became partially inundated or fully submerged because of sea-level rise should not be considered a non-existent territory.<sup>97</sup> In the same vein, the Federated States of Micronesia argued that while sea-level rise did pose an existential threat in a physical sense, in respect of the land surface of affected States, that threat was separate from related legal considerations, under international law, concerning the continuing existence of the State.<sup>98</sup> Chile considered that it would be helpful to reconsider the application of the principle that "the land dominates the sea", and that of permanent sovereignty over natural resources, in the context of the subtopic of statehood.<sup>99</sup>

65. With regard to the subtopic of issues related to the protection of persons affected by sea-level rise, delegations stressed that the existing international frameworks governing such issues were fragmented and comprised a mixture of hard- and soft-law instruments, and that rights-based and needs-based approaches were both important and were complementary. Addressing the human rights implications of climate change-related sea-level rise was crucial to ensuring that affected

<sup>91</sup> Belarus (A/C.6/78/SR.24, para. 13), Germany (A/C.6/78/SR.24, para. 56) and Spain (A/C.6/78/SR.27, para. 115).

<sup>92</sup> Germany (A/C.6/78/SR.24, para. 56).

<sup>93</sup> United States (A/C.6/78/SR.24, para. 71).

<sup>94</sup> Cuba (A/C.6/78/SR.25, para. 92), Jamaica (A/C.6/78/SR.28, para. 31), Malta (A/C.6/78/SR.27, para. 37), New Zealand (A/C.6/78/SR.25, para. 124), Papua New Guinea (A/C.6/78/SR.27, para. 89) and Samoa (on behalf of the Alliance of Small Island States) (A/C.6/78/SR.27, para. 7).

<sup>95</sup> India (A/C.6/78/SR.25, para. 37).

<sup>96</sup> Jamaica (A/C.6/78/SR.28, para. 31) and Papua New Guinea (A/C.6/78/SR.27, para. 87).

<sup>97</sup> Malta (A/C.6/78/SR.27, para. 37).

<sup>98</sup> Micronesia (Federated States of) (A/C.6/78/SR.27, para. 53).

<sup>99</sup> Chile (A/C.6/78/SR.24, para. 99).



communities were able to maintain their dignity, identity, culture and way of life.<sup>100</sup> A link was drawn between the subtopic and the requests for advisory opinions on climate change that were currently under consideration by various international courts and tribunals.<sup>101</sup> It was noted that the final report of the Study Group should contain practical guidance for affected States, and guidance on the protection of the most vulnerable populations and communities.<sup>102</sup>

66. The Co-Chairs of the Study Group have continued to undertake numerous outreach efforts to explain the progress of the Commission's work on the topic.

67. They note with satisfaction that the Inter-American Juridical Committee has included in its current agenda the topic entitled "Legal implications of the sea-level rise in the inter-American regional context".<sup>103</sup>

68. The Co-Chairs have also continued to follow closely the work of the Committee on International Law and Sea-Level Rise of the International Law Association, of which one of the Co-Chairs is also a member. The Committee produced an interim report that was presented at the Association's 2022 Lisbon Conference,<sup>104</sup> and is expected to conclude its work with a final report to be presented at the Athens Conference in June 2024.

## Part One: Reflections on statehood

### I. Introductory considerations

69. As noted in the second issues paper, sea-level rise is a global phenomenon of multi-fold dimensions that varies from one region of the world to another. It is, however, of an existential nature for low-lying coastal States, small island States and small island developing States, as some of their land territory may become completely or partially submerged, and also uninhabitable. Accordingly, one of the most important areas of reflection with respect to the phenomenon and its effects is that of statehood, which is why the issue was included in the programme of work of the Commission's Study Group in 2018, was examined for the first time in 2022, and is now being further examined in the present paper.

### II. Selected developments in State practice and in the practice of international organizations

70. In the legal analysis contained in this section of the additional paper, reference will be made to a number of submissions<sup>105</sup> provided to the International Law Commission by various States and the Pacific Islands Forum setting out valuable approaches and positions concerning statehood. However, of all these submissions, special attention will be drawn to the Declaration on the Continuity of Statehood and the Protection of Persons in the Face of Climate Change-related Sea-level Rise, adopted by the leaders of the States, countries and territories of the Pacific Islands

<sup>100</sup> Fiji (on behalf of the members of the Pacific Islands Forum) (A/C.6/78/SR.23, para. 57) and Papua New Guinea (A/C.6/78/SR.27, para. 89).

<sup>101</sup> Fiji (on behalf of the members of the Pacific Islands Forum) (A/C.6/78/SR.23, para. 57) and Mexico (A/C.6/78/SR.25, para. 9).

<sup>102</sup> Spain (A/C.6/78/SR.27, para. 115).

<sup>103</sup> See [https://www.oas.org/en/sla/iajc/docs/CJI-RES\\_283\\_CIII-O-23\\_ENG\\_rev1.pdf](https://www.oas.org/en/sla/iajc/docs/CJI-RES_283_CIII-O-23_ENG_rev1.pdf).

<sup>104</sup> Interim report of the Committee on International Law and Sea-Level Rise, in International Law Association, *Report of the Eightieth Conference, Held in Lisbon, 19–24 June 2022*, p. 506.

<sup>105</sup> The submissions provided to the Commission for its seventy-fifth session are available at [https://legal.un.org/ilc/guide/8\\_9.shtml](https://legal.un.org/ilc/guide/8_9.shtml).

Forum on 9 November 2023. That instrument represents a genuine milestone on the subject, since the leaders affirmed explicitly therein that international law supports a presumption of continuity of statehood and does not contemplate its demise in the context of climate change-related sea-level rise.

### III. Analysis of relevant legal issues

71. Of the main issues concerning statehood that had been addressed in a preliminary manner in the second issues paper on sea-level rise in relation to international law, and taking into consideration the discussion in that regard that had taken place in the Commission's Study Group in 2022 as well as the statements delivered on behalf of States in the Sixth Committee of the General Assembly that year and the next, the submissions provided by States to the Secretariat and the statements on the subject delivered by States, either individually or as members of groups, such as the Pacific Islands Forum, it is useful to focus on the following:

#### A. Configuration of a State as a subject of international law and continued existence of the State

72. It was noted in the second issues paper that while there is no generally accepted notion or definition of "State" – a point that was also raised during the exchange of views among the members of the Commission's Study Group in 2022 – the reference is usually the requirements that a State has to meet in order to be considered a subject of international law in accordance with article 1 of the 1933 Convention on the Rights and Duties of States (referred to hereinafter as the Montevideo Convention): a permanent population, a defined territory, a Government, and the capacity to enter into relations with other States, except that, given the existence of international organizations and other entities with international legal personality, as also noted in the second issues paper, that capacity includes the power to enter into relations with various subjects of international law.

73. It is worth noting that article 1 of that treaty, which had been adopted at the inter-American level and to which not all States of the region are parties, is used as a reference by various experts and States. However, one important detail to note in that regard is that jurists such as James Crawford stress that independence is the main criterion when considering statehood.<sup>106</sup> The classical conception of the State, based on the constituent elements of territory, population and Government, is in line not only with the award of 1 August 1929 in the case of *Deutsche Continental Geo-Gesellschaft v. Polish State*,<sup>107</sup> but also with the resolution concerning the recognition of new States and new Governments adopted in April 1936 by the Institute of International Law, which provided that the recognition of a new State is the free act by which one or more States acknowledge the existence on a defined territory of a human society politically organized, independent of any other existing State, and capable of observing the obligations of international law, and by which they manifest therefore their intention to consider it a member of the international community.<sup>108</sup> That conception is also consistent with opinion No. 1 of 29 November 1991 of the Conference of Yugoslavia Arbitration Commission, where it was noted that "the State

<sup>106</sup> James Crawford, *The Creation of States in International Law*, 2nd ed. (Oxford, Oxford University Press, 2006), p. 62.

<sup>107</sup> *Deutsche Continental Gas-Gesellschaft v. Polish State* (1929), *International Law Reports*, vol. 5, p. 11.

<sup>108</sup> Institute of International Law, "Resolutions concerning the recognition of new States and new Governments" (Brussels, April 1936), *The American Journal of International Law*, vol. 30, No. 4, *Supplement: Official Documents* (October 1936), pp. 185 to 187.

is commonly defined as a community which consists of a territory and a population subject to an organized political authority; [and] that such a State is characterized by sovereignty”.<sup>109</sup>

74. Specifically, authors such as Patrick Daillier, Mathias Forteau, Nguyen Quoc Dinh and Alain Pellet agree that a State is not just a human community that has a population, territory and effective political power, because other autonomous communities could claim to have the same characteristics; moreover, a State could claim to have full effective power, in both the international and the domestic arenas, as long as it has sovereignty.<sup>110</sup>

75. The Montevideo Convention does not address the extinction or disappearance of a State, but, as also indicated in the second issues paper, it refers to the right of each State to defend its integrity and independence, and to provide for its conservation and prosperity.<sup>111</sup> Efforts should therefore be made to avoid the proliferation and premature recognition of States, because for States to be created or to be constituted as such, as subjects of international law, they must meet the above-mentioned criteria or requirements of article 1 of the Montevideo Convention. However, once States exist, they benefit from a presumption of continuity, since there may be cases of fundamental changes in one or more of these requirements, or critical circumstances of absence of one or more of the requirements, without it being understood that the State has ceased to exist. At the same time, one situation where State succession occurs in practice is when a State ceases to exist completely and definitively and is replaced, in accordance with the relevant rules of international law, in the international representation of what was once its territory, by one or more States; however, such succession does not occur in the absence of that replacement.

76. One key issue in the examination of the subject is the need to draw a distinction between, on the one hand, situations resulting from the application of article 1 of the Montevideo Convention, which contains the criteria or requirements to be met for a State to exist as such, as a subject of international law, even though there may be cases – such as that of people subjected to colonial rule exercising their right to self-determination – that have been handled with flexibility in the past few decades; and, on the other hand, situations where the State clearly exists already and therefore maintains various types of relations, including diplomatic relations, with other members of the international community, has treaty-making capacity and can be a member of universal and regional international organizations, where there may be circumstances in which the State has lost one of the criteria or requirements of article 1 of the Montevideo Convention without it being assumed, in practice, that the State concerned has ceased to exist. This is especially significant in the case of small island States or small island developing States whose land territory may be partially or completely covered by the sea or become uninhabitable due to climate change-induced sea-level rise, an anthropogenic phenomenon to which they have not contributed or have contributed only minimally, and where the States themselves and their people have not manifested the will to terminate their statehood. Any interpretation to the contrary would result in a manifestly unjust and inequitable outcome, which would also run counter to the certainty, predictability and stability

<sup>109</sup> Maurizio Ragazzi, “Conference on Yugoslavia Arbitration Commission: opinions on questions arising from the dissolution of Yugoslavia”, *International Legal Materials*, vol. 31, No. 6 (November 1992), p. 1495.

<sup>110</sup> Patrick Daillier *et al.*, *Droit International Public*, 8th ed. (L.G.D.J. Lextenso Éditions, 2009), p. 465.

<sup>111</sup> Convention on the Rights and Duties of States (Montevideo, 26 December 1933), League of Nations, *Treaty Series*, vol. CLXV, No. 3802, art. 3.

that should be sought in confronting climate change-induced sea-level rise and its effects.

77. The opinions expressed by some States in submissions provided to the Commission are quite illustrative in that regard. A case in point is the position expressed by Antigua and Barbuda in its submission provided to the Commission on 30 June 2023, in which it states that:

6. There are several occurrences in history where States have lost one of the Montevideo criteria, but have nonetheless, maintained their status as States. Many of these examples were cited in the second issues paper.

[...]

10. What is consistent, in all scenarios where a State has lost one or more of the Montevideo criteria, is that there has been a strong presumption by the international community that the State shall continue despite the loss of one or more criteria.

[...]

12. Antigua and Barbuda considers that considerations of fairness and equity mean that it is critically important that international law operates to maintain the existence of established States. A failure to do so would result in inequitable and unfair treatment of States that are severely affected by rising sea levels, who would be disproportionately affected by any change to their status of statehood, notwithstanding that they have contributed virtually nothing to the climate crisis.

[...]

15. [...] Antigua and Barbuda does not object to the recognition of article 1 of the Convention as an accurate statement of customary international law. It is agreed that the Montevideo criteria capture the existing legal norms and its principles and therefore does not merely apply to the signatories, but to all subjects of international law as a whole.

[...]

16. While the application of this provision is universal, the common interpretation of these Montevideo criteria has always been that the criteria apply to the creation of the State.<sup>112</sup>

78. In that regard, it is worth noting that New Zealand, in its submission provided to the Commission on 30 June 2023:

[...] agrees with the second issues paper that there is a strong presumption of continuity of statehood and that this is a highly relevant legal principle to States whose territory could be covered by the sea or become uninhabitable due to sea-level rise. Moreover, in New Zealand's view, international law does not say anything about the demise of statehood in the context of sea-level rise. The second issues paper, and the examples of State practice it outlines, demonstrates the flexibility of international law in providing for continued statehood.<sup>113</sup>

79. The Pacific Islands Forum, in its submission No. 4, provided to the Commission on 1 August 2023, noted that:

There is no precedent for States ceasing to exist due to the submergence of land territory. The Montevideo Convention criteria deal with the requirement for the

<sup>112</sup> Antigua and Barbuda submission.

<sup>113</sup> New Zealand submission.

establishment of States and do not address the requirements to maintain a State. International law says nothing about the demise of a State with respect to climate change-related sea-level rise.<sup>114</sup>

80. The Kingdom of the Netherlands and the Principality of Liechtenstein took a similar position and went even further. The Netherlands stated in annex I to its note verbale of 17 October 2023 that:

[...] State practice shows that the criteria for statehood are not applied in the same manner to cases of the creation of States and cases of the continuity or extinction of States. This State practice demonstrates the existence of a strong presumption in favour of the continuity of statehood, even in cases in which one or more criteria are no longer met. [...] In respect of the differences between the creation of States and their continuance, it is also noted that the relative strictness of the application of the criteria for statehood in the case of the creation of States is inextricably linked with the prohibition on premature recognition. In those cases in which a territorial entity is created on the territory of another State, premature recognition may lead to a violation of the principles of non-intervention and territorial integrity. Such a prohibition and such legal consequences do not apply in regard of those cases in which an entity continued to be recognized as a State while one or more of the criteria for statehood are no longer met.<sup>115</sup>

81. Liechtenstein, in its submission provided to the Commission on 12 October 2021, noted that:

[...] in practice a strong presumption of the continuity and disavowing the extinction of an established State, including its rights and obligations under international law [...]. Discussing statehood in the context of rising sea levels should include all aspects of State sovereignty, domestically and internationally, including as a consequence of a State's membership in international organizations, as well as upholding civil and political, and economic and social rights as expressions of self-determination. Liechtenstein advocates an approach which acknowledges the novel nature of the challenge created by rising sea-levels, and emphasizes the continued existence of a people who retain their right to self-determination even in a situation of the inundation of their territory, including the expression of that right through continued statehood. It is worth noting in this respect that sea-level rise is predominantly caused by human action, to which States most immediately affected have made limited contributions.<sup>116</sup>

82. Nonetheless, the United Kingdom of Great Britain and Northern Ireland took a different position, maintaining in the document annexed to its note verbale of 30 June 2023, that:

With regard to recognition of statehood, the United Kingdom's general practice has been to consider whether a State has, and seems likely to continue to have, a clearly defined territory with a population, a Government who are able of themselves to exercise effective control of that territory, and independence in its external relations.<sup>117</sup>

<sup>114</sup> Pacific Islands Forum submission No. 4 (see footnote 105).

<sup>115</sup> The Netherlands submission relating to the subtopics of statehood and the protection of persons affected by sea-level rise.

<sup>116</sup> Liechtenstein submission for the seventy-third session, available at [https://legal.un.org/ilc/sessions/73/pdfs/english/slr\\_liechtenstein.pdf](https://legal.un.org/ilc/sessions/73/pdfs/english/slr_liechtenstein.pdf).

<sup>117</sup> United Kingdom of Great Britain and Northern Ireland submission.

83. An intermediate and more flexible position is that adopted by Germany, as reflected in its submission provided to the Commission on 30 June 2023:

Broadly speaking, should a State irrevocably lose one of the three foundational elements necessary for statehood under international law — namely a land territory, a permanent population and an effective Government — it may reasonably be assumed that the State would legally cease to exist. However, historical instances bear testimony to the fact that geopolitical realities as well as recognition by the international community assume significance when considering the continuance of statehood, the succession of States or the maintenance of international legal personality possibly even when being deprived of control over certain territory. A spectrum of viable solutions based on international law is therefore conceivable in order to preserve the international legal personality of island States that are subject to submergence or becoming uninhabitable. Currently, some of the most vulnerable countries are developing innovative approaches as they are expecting significant territory loss within this century.<sup>118</sup>

84. The United States of America, in its submission provided to the Commission on 20 July 2023:

[...] notes the qualifications for statehood outlined in the Montevideo Convention on the Rights and Duties of States: (a) a permanent population; (b) a defined territory; (c) Government; and (d) capacity to enter into relations with States. The issue of continuance of statehood in the context of sea-level rise raises complex questions related to foundational aspects of international law. Given the lack of applicable State practice in relevant areas, it is difficult to draw definitive conclusions on how international law may develop. The United States is committed to working with other countries to address legal issues of statehood as they arise.<sup>119</sup>

85. However, on 25 September 2023, the United States stated, in reference to statehood and sea-level rise, that:

For some States, particularly low-lying island States in the Pacific Ocean, increasing sea levels pose an existential threat. Today, the President announced that the United States considers that sea-level rise driven by human-induced climate change should not cause any country to lose its statehood or its membership in the United Nations, its specialized agencies, or other international organizations. The United States is committed to working with those States and others on issues relating to human-induced sea-level rise and statehood to advance these objectives.<sup>120</sup>

86. In conclusion, beyond the legitimate positions expressed by each State, it is valid to point out that the criteria set out in article 1 of the Montevideo Convention refer essentially to the creation or constitution of a State as a subject of international law, while the principle of continuity of statehood operates in respect of situations that may arise subsequently. This takes on greater force in situations arising from a phenomenon such as sea-level rise, which is rooted in human conduct beyond the behaviour or will of the directly affected or vulnerable States, in respect of which there must be a strong presumption of continuity of statehood and international legal personality.

<sup>118</sup> Germany submission.

<sup>119</sup> United States of America submission.

<sup>120</sup> The White House, “Fact Sheet: Enhancing the U.S.-Pacific Islands Partnership”, 25 September 2023, available at <https://www.whitehouse.gov/briefing-room/statements-releases/2023/09/25/fact-sheet-enhancing-the-u-s-pacific-islands-partnership/>.

87. Of particular relevance in that connection is the Declaration on the Continuity of Statehood and the Protection of Persons in the Face of Climate Change-related Sea-level Rise, adopted by the leaders of the States, countries and territories of the Pacific Islands Forum on 9 November 2023. The leaders affirm, in paragraph 8 of the Declaration, that the Forum recognizes that under international law there is a general presumption that a State, once established, will continue to exist and endure, and maintain its status and effectiveness, and that international law does not contemplate the demise of statehood in the context of climate change-related sea-level rise. The leaders of the Pacific Islands Forum also affirm that international law supports a presumption of continuity of statehood and does not contemplate its demise in the context of climate change-related sea-level rise.<sup>121</sup>

## **B. Scenarios relating to statehood in the context of sea-level rise and the right of the State to provide for its preservation**

88. Sea-level rise is a global phenomenon of multi-fold dimensions whose impact, as highlighted in the second issues paper, varies from region to region around the world. It is an existential issue for low-lying coastal States, small island States and small island developing States, in particular those in the Pacific and Indian Oceans, which are particularly and disproportionately affected by sea-level rise and climate change, as evidenced by cases such as those of Kiribati, Marshall Islands, Maldives, Nauru, Palau, Tuvalu and Vanuatu.

89. It is therefore vital to focus on the right of the State concerned to safeguard its very existence by taking various measures to ensure (a) the maintenance of its territory, understood as a unit under its sovereignty and sovereign rights consisting of the land territory and the maritime territory, the latter comprising the maritime areas or zones under its jurisdiction; and (b) the conservation and sustainable use of the natural resources existing in those areas, as well as the preservation of its biodiversity and ecosystems, thus providing for its population, taking into consideration the perspectives of both present and future generations.

90. As all of this pertains to the continuity of statehood, focus should be placed on the principles of security, stability, certainty and predictability and considerations of equity and justice that undergird it. Emphasis should also be placed on the applicability of the principles of self-determination, protection of the territorial integrity of the State, sovereign equality of States, permanent sovereignty of States over their natural resources, maintenance of international peace and security, and stability in international relations, as highlighted in the submission provided by New Zealand to the Commission on 30 June 2023 and in the Declaration on the Continuity of Statehood and the Protection of Persons in the Face of Climate Change-related Sea-level Rise, issued by the leaders of the Pacific Islands Forum on 9 November 2023 and already cited above.<sup>122</sup>

91. For the Pacific Islands Forum, for example, statehood remains paramount, and not a coincidental, issue, as pointed out in its submission No. 4, provided to the Commission on 1 August 2023, in which the leaders of the Forum stated that the

<sup>121</sup> 2023 Pacific Islands Forum Declaration on the Continuity of Statehood and the Protection of Persons in the Face of Climate Change-related Sea-level Rise. This instrument was communicated by the Forum with submission No. 5 (see footnote 105).

<sup>122</sup> New Zealand submission, and 2023 Pacific Islands Forum Declaration (see footnote 121). See also the following documents: regarding self-determination, General Assembly resolution 2625 (XXV), of 24 October 1970; International Covenant on Civil and Political Rights, United Nations, *Treaty Series*, vol. 999, No. 14668; and International Covenant on Economic, Social and Cultural Rights, United Nations, *Treaty Series*, vol. 993, No. 14531; and, regarding permanent sovereignty over natural resources, General Assembly resolution 1803 (XVII), of 14 December 1962.

growing use of phrases such as “Blue Pacific”, “Blue Pacific Continent” and “Blue Pacific Narrative” demonstrate the importance for Pacific States of preserving both land territory and maritime zones.<sup>123</sup> This is crucial, given that these States, countries and territories have small land territories and vast maritime areas under their jurisdiction.<sup>124</sup>

92. In this context, it is important to point out that, as indicated in the first issues paper and the additional paper to that issues paper, prepared by the Co-Chairs of the Commission’s Study Group, Bogdan Aurescu and Nilufer Oral, as well as in instruments such as the 2021 declarations adopted by the leaders of the Pacific Islands Forum,<sup>125</sup> and the Alliance of Small Island States,<sup>126</sup> States and countries can preserve their maritime zones, as established and notified to the Secretary-General in accordance with the relevant provisions of the 1982 United Nations Convention on the Law of the Sea, and the rights and entitlements that flow from them, without limitation or reduction, notwithstanding any physical changes resulting from climate change-related sea-level rise. As had been timely explained, this does not mean that the conventional or customary rules currently existing on the subject have to be changed.

93. In addressing issues relating to statehood, and given the progressive nature of the phenomenon of climate change-induced sea-level rise, it is essential to distinguish between two different scenarios or situations: (a) where the land territory of the States concerned is affected by erosion or salinization and partial submergence, and could, without being completely covered by the sea, become uninhabitable, owing to insufficient supply of water for direct human consumption or for the development of economic activities by the population, possibly causing the said population to relocate to other areas inside the territory of the State or to emigrate to the territories of other States or countries; and (b) where the land territory of the State concerned is completely covered by the sea.

94. The measures that coastal States or countries have taken to reduce the impact of sea-level rise include the installation or reinforcement of dykes and coastal barriers or defences, as well as the building of artificial islands in the maritime areas under their jurisdiction where a portion of the population may settle, as in the case of Hulhumalé, near Malé, the capital of Maldives. However, such measures are very costly and require technical, logistical and human resource capacities that are not always available in coastal States or countries, particularly in small island developing States.<sup>127</sup>

95. In considering the measures to be implemented, it is also necessary to look beyond the short term and to assess them in terms of their environmental impact, since they

<sup>123</sup> Pacific Islands Forum submission No. 4 (see footnote 114).

<sup>124</sup> See Liechtenstein submission, and Geraldine Giraudeau, “Pacific Islands in the face of sea level rise: some reflections from an international law perspective”, *Anuario Español de Derecho Internacional*, vol. 38 (2022), pp. 425 to 454.

<sup>125</sup> 2021 Pacific Islands Forum Declaration on Preserving Maritime Zones in the Face of Climate Change-related Sea-level Rise, available at <https://forumsec.org/sites/default/files/2024-03/2021%20Declaration%20on%20Preserving%20Maritime%20Zones%20in%20the%20face%20of%20Climate%20Change-related%20Sea-level%20rise.pdf>.

<sup>126</sup> 2021 Alliance of Small Island States Leaders’ Declaration, available at <https://www.aosis.org/addressing-climate-related-risks-to-international-peace-and-security/>.

<sup>127</sup> See Emma Allen, “Climate Change and Disappearing States: Pursuing Remedial Territory”, *Brill Open Law* (2018), pp. 5 and 6; Clive Schofield and David Freestone, “Archipelagic Atoll States and Sea Level Rise”, in James Kraska *et al* (eds.), *Peaceful Maritime Engagement in East Asia and the Pacific Region* (Leiden, Brill Nijhoff, 2022), pp. 96 and 97; Anemoon Soete, *The international legal personality of island States permanently submerged due to climate change effects* (Maklu, Antwerp – Apeldoorn, 2021), pp. 149 to 156; Roberto Virzo, “Sea-Level Rise and State of Necessity: Maintaining Current Baselines and Outer Limits of National Maritime Zones”, in *The Italian Review of International and Comparative Law*, vol. 2, No.1 (2022), p. 45; Pacific Islands Forum submission No. 3, 31 December 2021, available at [https://legal.un.org/ilc/sessions/73/pdfs/english/slr\\_pif.pdf](https://legal.un.org/ilc/sessions/73/pdfs/english/slr_pif.pdf).



may end up being counter-productive by accelerating the processes of erosion and salinization of the land territory, affect natural sedimentation, compromise the sustainability of coral reefs, where they exist, possibly promoting the massive relocation of people and the establishment of economic activities in sensitive coastal areas, and harming other neighbouring States that are equally affected by the phenomenon.<sup>128</sup>

96. Also of vital importance is international cooperation, in terms of providing technical or logistical assistance and qualified human or financial resources to States especially affected by the phenomenon that do not have sufficient capacities of their own, and considering – based on the specificities of each case – the possibility of combining the installation or reinforcement of coastal barriers or artificial islands with the use of natural measures, such as the establishment of mangroves, which are more environmentally sustainable, and the use of other measures, such as the transfer of persons affected by the phenomenon to other places, given the growing difficulties and the fact that it might be impossible to conduct economic activities in certain coastal spaces or to have sufficient water resources to sustain human life in such territories. On this last point, it may also be necessary to explore the possibility of installing desalinization plants which, with the support of international partners and the harnessing of technological developments, could be used to treat sea water for possible use by humans and animals alike, and for the conduct of economic activities.<sup>129</sup>

<sup>128</sup> See Allen, “Climate Change” (see footnote 127), pp. 5 to 7.

<sup>129</sup> See Allen, “Climate Change” (see footnote 127); Eyal Benvenisti and Moshe Hirsch, eds., *The Impact of International Law on International Cooperation: Theoretical Perspectives* (Cambridge and New York, Cambridge University Press, 2004); Michael Gagain, “Climate Change, Sea Level Rise, and Artificial Islands: Saving the Maldives’ Statehood and Maritime Claims Through the ‘Constitution of the Oceans’”, *Colorado Journal of International Environmental Law and Policy*, vol. 23, No. 1 (2012), pp. 79 to 120; Patricia Galvão Teles, Claire Duval, and Victor Tozetto da Veiga, “International Cooperation and the Protection of Persons Affected by Sea-Level Rise: Drawing the Contours of the Duties of Non-affected States”, *Yearbook of International Disaster Law Online*, vol. 3, No. 1 (2022), pp. 213 to 237; Michael Gerrard and Gregory E. Wannier, eds., *Threatened Island Nations: Legal Implications of Rising Seas and a Changing Climate* (Cambridge, Cambridge University Press, 2013); Elfriede Hermann and Wolfgang Kempf, “Climate Change and the Imagining of Migration: Emerging Discourses on Kiribati’s Land Purchase in Fiji”, *The Contemporary Pacific*, vol. 29, No. 2 (2017), pp. 231 to 263; Geronimo Gussmann and Jochen Hinkel, “What drives relocation policies in the Maldives?”, *Climatic Change*, Springer, vol. 163, No. 2 (2020), pp. 931 to 951; Karl Loewenstein, “Sovereignty and International Co-operation”, *The American Journal of International Law*, vol. 48, No. 2 (1954), pp. 222 to 244; Michael Oppenheimer et al., “Sea Level Rise and Implications for Low-Lying Islands, Coasts and Communities”, in *IPCC Special Report on the Ocean and Cryosphere in a Changing Climate* (Cambridge and New York, Cambridge University Press, 2019), pp. 321 to 445, available at <https://doi.org/10.1017/9781009157964.006>; Kya Raina Lal, “Legal Measures to Address the Impacts of Climate Change-induced Sea Level Rise on Pacific Statehood, Sovereignty and Exclusive Economic Zones”, *Te Mata Koi: Auckland University Law Review*, vol. 23 (2017), pp. 235 to 268; Alejandra Torres Camprubi, *Statehood under Water: Challenges of Sea-Level Rise to the Continuity of Pacific Island States* (Leiden, Brill Nijhoff, 2016); Max Valverde Soto, “Principios generales del derecho ambiental internacional”, *ILSA Journal of International & Comparative Law*, vol. 3, No. 1 (1997), available at <https://nsuworks.nova.edu/ilsajournal/vol3/iss1/19>; “Improving Coastal Protection”, *World Ocean Review 5: Coasts*, chap. 4 (Hamburg, maribus gGmbH, 2017), available at [https://worldoceanreview.com/wp-content/downloads/wor5/WOR5\\_en\\_chapter\\_4.pdf](https://worldoceanreview.com/wp-content/downloads/wor5/WOR5_en_chapter_4.pdf); Omair Ahmad and Anum Farhan, “Building a climate resilient future for coastal South Asia”, policy brief, *Cascades*, 22 December 2022, available at <https://www.cascades.eu/publication/building-a-climate-resilient-future-for-coastal-south-asia/>; Zinta Zommers, “Addressing Climate Risks in Small Island States – Opportunities for Action”, *SDG Knowledge Hub*, 22 June 2022, available at <https://sdg.iisd.org/commentary/guest-articles/addressing-climate-risks-in-small-island-states-opportunities-for-action/>; Sanjay Srivastava and Sudip Ranjan Basu, “Vanuatu Twin Cyclones Underscore Pacific’s Vulnerability to Climate Risks”, *SDG Knowledge Hub*, 15 March 2023, available at <https://sdg.iisd.org/commentary/guest-articles/vanuatu-twin-cyclones-underscore-pacifics-vulnerability-to-climate-risks/>; “REFMAR Days Advance International Cooperation on

97. It is essential for the international community to respond to sea-level rise through international cooperation in favour of States most affected, with an emphasis on the durability and sustainability of formulas that go beyond the short term and are compatible with individual rights, in particular, the right to self-determination of the affected populations. To that end, it is necessary to consider the possibility of bilateral or multilateral agreements involving the States and countries most directly affected and third States, or instruments that may be adopted in the context of regional or universal international organizations, especially in the context of the United Nations system. It would be very useful to devise or develop formulas, such as the establishment of funds for financing the implementation of some of the measures mentioned, to strongly promote technical and logistical cooperation and the provision of qualified human resources, along with the exchange of knowledge and experiences that may be sufficient to address, in different countries and realities, a phenomenon which, by its nature and characteristics, has a clearly global character.

98. In that connection, it is worth noting, among other relevant inputs received, the submission of Germany provided to the Commission on 30 June 2023, including the emphasis on the precautionary principle in assessing the measures being implemented, and the incorporation of indigenous and traditional knowledge to inform ecosystem-based conservation and adaptation,<sup>130</sup> as well as the submissions of the Kingdom of the Netherlands, dated 30 June 2023,<sup>131</sup> and New Zealand, dated 17 October 2023, respectively.

99. In its submission, New Zealand stated explicitly that it agrees with the second issues paper that States whose territory could be covered by the sea or become uninhabitable due to sea-level rise have the right to provide for their preservation, and international cooperation will be of particular importance.<sup>132</sup>

### C. Possible alternatives for addressing the phenomenon in relation to statehood

100. In thinking about how to address the phenomenon of sea-level rise in relation to statehood, it is instructive to quote Secretary-General António Guterres, who, at the first open debate of the Security Council on the impact of rising sea levels on international peace and security, held on 14 February 2023, noted that the legal and human rights impact of the phenomenon is broad and requires innovative legal and practical solutions. He also drew attention to the solutions proposed by the International Law Commission in 2022, including continuing statehood despite loss of territory, assigning portions of territory to an affected State and even establishing confederations of States.<sup>133</sup>

---

Sea-Level Observation”, *SDG Knowledge Hub*, 10 February 2016, available at <https://sdg.iisd.org/news/refmar-days-advance-international-cooperation-on-sea-level-observation/>; “Kiribati and China to develop former climate-refuge land in Fiji”, *The Guardian*, 23 February 2021, available at <https://www.theguardian.com/world/2021/feb/24/kiribati-and-china-to-develop-former-climate-refuge-land-in-fiji>; “Besieged by the rising tides of climate change, Kiribati buys land in Fiji”, *The Guardian*, 1 July 2014, available at <https://www.theguardian.com/environment/2014/jul/01/kiribati-climate-change-fiji-vanua-levu>; Shiwen Yap, “Floating infrastructure critical to Asian climate change adaptation”, *LinkedIn*, 15 April 2021, available at <https://www.linkedin.com/pulse/floating-infrastructure-critical-asian-climate-change-shiwen-yap>.

<sup>130</sup> Germany submission.

<sup>131</sup> Netherlands submission.

<sup>132</sup> New Zealand submission.

<sup>133</sup> See “Climate Change-induced Sea-Level Rise Direct Threat to Millions around World, Secretary-General tells Security Council”, 9260th meeting of the Security Council, 14 February 2023, SC/15199.

101. As indicated in the second issues paper, it is crucial to take as a premise a strong presumption of continuity of the State and of respect in all cases for the self-determination of the populations of States and countries directly affected. It is also just as crucial to assume that the right to self-determination is not extinguished upon termination of a colonial situation; rather, it is preserved, in keeping with the unity and territorial integrity of the State concerned, in situations involving, for example, the power of Indigenous Peoples to organize themselves and to handle their own internal and local affairs, in accordance with instruments such as the United Nations Declaration on the Rights of Indigenous Peoples of 2007,<sup>134</sup> and the American Declaration on the Rights of Indigenous Peoples of 2016.<sup>135</sup>

102. With regard to statehood and the various formulas which may be proposed or implemented as practical solutions, it should be borne in mind that there is no one-size-fits-all response; on the contrary, there are different alternatives which, pursuant to international law and as per the characteristics or circumstances of each case, may be taken into consideration in addressing the situation of States and countries directly affected by the phenomenon whose land territory is gradually being covered by the sea and will become uninhabitable and ultimately completely submerged. Such alternatives may be set out in bilateral or multilateral agreements between the States concerned and other States and international organizations, with one caveat: in the case of alternatives involving the populations of the States or countries affected, in the sense that they transcend the personal sphere of individuals, the relevant populations would have to be consulted on those alternatives, in order to safeguard their right to self-determination, and therefore ensure that the central or substantive aspects of their identity are preserved.<sup>136</sup>

103. As long as the land territory has not been completely covered by the sea, and based on the presumption of continuity of the State, whereby the State retains its sovereignty and sovereign rights over its territory as a unit, including not just the still-emerged and already-submerged land territory – which has not ceased to exist or to form part of the territory as a result thereof – but also the maritime areas under its jurisdiction, the Government of the State, or at least some of its principal organs or institutions, may – as had been suggested in the case of the island of Banaba, where the highest point of the territory of Kiribati is located – set itself up in or operate out of any area of the land territory not covered by the sea, where it could also symbolically maintain a portion of the population, even if it is only a very small portion.<sup>137</sup> In concrete terms, people who continue to reside anywhere on the territory of a State directly affected by the phenomenon, as well as those who are nationals of that State despite being physically present in the territory of another State or country would be considered the population of that State.<sup>138</sup>

104. In this scenario, and in line with the position of authors who posit that land territory under a State's sovereignty may become uninhabitable even though it has

<sup>134</sup> General Assembly resolution 61/295, of 13 September 2007, annex.

<sup>135</sup> American Declaration on the Rights of Indigenous Peoples, adopted by the General Assembly of the Organization of American States on 14 June 2016, available at <https://www.oas.org/es/sadye/documentos/res-2888-16-es.pdf>.

<sup>136</sup> Liechtenstein submission. See Nathan Jon Ross, "Low-Lying States, Climate Change-Induced Relocation, and the Collective Right to Self-Determination", thesis submitted in 2019 at the Victoria University of Wellington; Soete, "The international legal personality" (see footnote 127), pp. 27 to 56, 85, 88, 89 and 169 to 200.

<sup>137</sup> Hermann and Kempf, "Climate Change" (see footnote 129), p. 243.

<sup>138</sup> See Michelle Foster *et al.*, "The Future of Nationality in the Pacific: Preventing Statelessness and Nationality Loss in the context of Climate Change" (UNSW, Kaldor Centre for International Refugee Law, Peter McMullin Centre on Statelessness, University of Melbourne and University of Technology Sydney, May 2022), available at [https://law.unimelb.edu.au/\\_data/assets/pdf\\_file/0010/4119481/The-Future-of-Nationality-in-the-Pacific\\_May2022.pdf](https://law.unimelb.edu.au/_data/assets/pdf_file/0010/4119481/The-Future-of-Nationality-in-the-Pacific_May2022.pdf).

not yet been completely covered by the sea, owing to erosion, salinization and insufficient storage of potable water for human consumption, and when, as occurs already, large numbers of nationals of States especially affected by the phenomenon are migrating and settling in other States, countries or territories, it would also be necessary to think of practical formulas that would preserve the status of nationals of the State of origin while giving them the possibility of acquiring a second nationality, namely that of the State of residence, or another citizenship common to both States or to a group of States.<sup>139</sup>

105. With regard to its ties, a State of origin especially affected by the phenomenon may reinforce its consular offices in countries hosting the vast majority of its nationals. Nonetheless, if the said State has only a small network of consular offices around the world and does not have the capacity to expand that network, it could turn to a third State, upon notification of the said receiving State – unless the receiving State objects – to exercise certain consular functions on its behalf, as set out in article 8 of the Vienna Convention on Consular Relations of 1963.<sup>140</sup>

106. The State of origin may also strengthen its capacity to provide services and efficiently satisfy the requirements of its nationals in various places around the world, including by establishing virtual platforms for forwarding or renewing various types of documents. In this connection, it is worth mentioning the “Future Now Project” initiative of Tuvalu, devised as an option for the building of a “digital nation” in the face of its land territory possibly becoming completely covered by the sea.<sup>141</sup>

107. On the other hand, the States may also consider changing their laws, as has been the case in some countries of the Pacific, to allow their nationals to acquire another nationality, such as the nationality of the State of residence, without losing their nationality of origin, especially if both States maintain close ties or are in the same region.<sup>142</sup> An interesting example to consider, without necessarily delving into it, is that presented by Jane McAdam, who recalls the case of the inhabitants of Banaba, an island currently belonging to Kiribati, who had been relocated to the island of Rabi, in Fiji owing to phosphate mining and whose descendants are still living in Fiji but enjoy a number of rights recognized by the legal system of Kiribati and now have the unfettered possibility of holding the nationalities of both States, since the relevant law of Fiji has been changed to allow for such a possibility.<sup>143</sup>

108. Similarly, in the event of the formation, for example, of a confederation consisting of a group of States that are especially vulnerable to sea-level rise and other States of the same region, as could be the case in the Pacific, it would be necessary to devise a model, inspired “mutatis mutandis” by that of the European Union, whereby the nationals of each State member of the confederation would, in

<sup>139</sup> See Philippe Boncour and Bruce Burson, “Climate change and migration in the South Pacific region: policy perspective”, *Policy Quarterly*, vol. 5, No. 4 (2009), pp. 13 to 20; Jane McAdam, “‘Disappearing States’, Statelessness and the Boundaries of International Law”, in Jane McAdam (ed.), *Climate Change and Displacement: Multidisciplinary Perspectives* (Oxford and Portland, Hart Publishing, 2010), pp. 105 to 129; Sema Oliver, “A New Challenge to International Law: The Disappearance of the Entire Territory of a State”, *International Journal on Minority and Group Rights*, vol. 16, No. 2 (2009), pp. 209 to 243.

<sup>140</sup> 1963 Vienna Convention on Consular Relations, United Nations, *Treaty Series*, vol. 596, No. 8638, art. 8.

<sup>141</sup> Pacific Islands Forum submission No. 3 (see footnote 127); Jean-Baptiste Dudant, “Contre vents et marées: les Tuvalu et la disparition annoncée des petits États insulaires”, in Sandrine Maljean-Dubois and Jacqueline Peel, eds., *Climate Change and the Testing of International Law/Le droit international au défi des changements climatiques*, (Leiden, Brill Nijhoff, 2023), pp. 547 to 572.

<sup>142</sup> See Foster *et al.*, “The Future of Nationality” (see footnote 138).

<sup>143</sup> See Jane McAdam, “Under Two Jurisdictions: Immigration, Citizenship, and Self Governance in Cross-Border Community Relocations”, in *Law and History Review*, vol. 34, No. 2 (2016), pp. 281 to 333.

addition to their status as nationals of their individual States, become citizens of the confederation, as part of a common legal category or with a common legal status. As nationals of one of the States members of the confederation, people holding that citizenship could be able to move freely between all the States members of the confederation and, accordingly, could be eligible to receive assistance or protection from the diplomatic missions or consular offices of any of the member States in a non-member third State, if the State of which they are nationals does not have its own representation in that third State where the said assistance or protection is required.

109. In addressing the issues concerning statehood in relation to sea-level rise, it is vital to stress the presumption of continuity of a State directly affected by the phenomenon and respect for the self-determination of the populations of the State or country concerned, and to note the importance of preserving the sovereignty and sovereign rights of the State over its territory, understood as a unit comprising the land territory that has not been covered by the sea, together with the land territory that has become submerged owing to that phenomenon and that has not ceased to exist or to be under the sovereignty of the State as a result, and the maritime areas under its jurisdiction. Much like the rights over the resources existing therein, those maritime areas would have to be maintained, without limitation or reduction, notwithstanding any physical changes induced by an anthropogenic phenomenon resulting from climate change.<sup>144</sup>

110. The idea is not to afford new rights to States affected by sea-level rise, possibly affecting or reducing those of third States, but to ensure the preservation of the legitimate rights of the affected States under international law, including those relating to their living or non-living natural resources, and to the exploitation and sustainable use of those resources for the benefit of present and future generations of their populations. On the contrary, going against legal certainty and validly acquired rights would give rise to manifestly unjust, inequitable, arbitrary and unpredictable situations, and serious risks for international peace and security. This could occur if there are limitations to or reductions in the maritime areas under the jurisdiction of the States concerned and, in the event that the land territory of those States becomes completely submerged, it is assumed that the States have ceased to exist or have lost the maritime areas under their jurisdiction, along with the resources existing therein, and that their nationals have become stateless persons, except in the cases of a few persons who had acquired or could acquire the nationality of a third State, such as that of the country of residence.

111. Similarly, in order to ensure that the nationals of a State affected by sea-level rise residing in other States or countries maintain their status as nationals of that State – subject to the provisions of the law on the subject – while also being able to receive adequate assistance or protection and have efficient access to some basic services and documentation that such State would have to provide to them, it is necessary to enhance the care provided through consular offices in countries hosting the majority of emigrants from that country of origin, to consider possible cooperation with a friendly third State for the exercise of some consular functions, and to organize or strengthen digital platforms connecting the State affected by sea-level rise with its nationals around the world. This notwithstanding, pursuant to changes in domestic laws or the conclusion of bilateral or multilateral agreements between the State most directly affected by the phenomenon and other States, nationals of that State may be allowed to acquire the nationality of one of the other States without losing their nationality of origin. In addition, under a broader agreement, in the context, for example, of a confederation involving those States, the nationals of each State may acquire a common citizenship, which would not replace the nationality of origin but

<sup>144</sup> See 2023 Pacific Islands Forum Declaration (see footnote 121).

could provide its holders with a number of additional benefits, including receiving assistance or protection in third States where the State of nationality has no diplomatic representation or consular office.

112. It would also be necessary to consider the legal issues surrounding the possible establishment of the Government of a State directly affected by sea-level rise in the territory of another State, as well as other issues concerning the preservation of the international legal personality of the State directly affected. In that connection, when it is not feasible to physically maintain the Government within the land territory of the State, either because it has become uninhabitable despite being only partially submerged, or because it is completely covered by the sea, one option could be for the State concerned to provide certain services and exercise certain functions digitally or virtually, and at the same time set up a trimmed-down Government in the territory of a friendly third State, which could exercise other functions on behalf of the State affected by the phenomenon or act as its representative from that third State. This would be similar to the situation of “Governments in exile”, which were referred to in the second issues paper. However, the two situations would not be strictly equivalent, since Governments in exile are established owing to the occupation of the territory of a State by another State or to internal circumstances, which may involve a dispute as to the identity of the legitimate representative of the State in question. These circumstances may last for several years, but the expectation is that once the issues that gave rise to the establishment of a Government in exile are addressed, the Government in exile would cease to act in that capacity; besides, there would be a Government physically operating out of the territory of the State concerned, although this would not be possible in the case of States affected by sea-level rise whose land territory is uninhabitable or completely submerged.<sup>145</sup>

113. In such cases, it would be useful for the State affected by sea-level rise and the State to host the Government of that State in its territory to set out in an agreement between them the principal issues surrounding the establishment and functioning of the said Government, leaving clearly undisturbed the independence of that Government vis-à-vis the State in whose territory it is to be established. As the circumstances warrant, that Government could be granted other facilities for its functioning and, along with its officials, could be afforded immunities and privileges in accordance with international law. Based on the sovereign decision of the relevant State, such Government would be the one that was in existence at the time when it became necessary for it to relocate to the territory of a friendly State. However, either before or concomitantly with such relocation, it would be useful for the competent organs of the State affected by the phenomenon to establish norms – preferably higher-ranking or constitutional norms – to regulate the manner in which the Government that had settled in the territory of the other State would operate. The norms would also regulate the composition and renewal of that Government based on processes in which the State’s nationals residing in other States and countries would participate; the scope of the functions or competences to be fulfilled in those circumstances; the modalities for consulting nationals on issues of paramount importance; the administration of the maritime areas under its jurisdiction and use of the resources existing therein; and the handling of any assets, investments and metal or currency reserves that the State may have in banks or financial institutions around the world. The norms could also cover the protection and preservation of cultural heritage and its components; the preservation of archives and documents of particular importance (preferably in virtual form); the measures to be adopted in favour of its

<sup>145</sup> See A/CN.4/752, paras. 138 to 154; Catherine Blanchard, “Evolution or Revolution? Evaluating the Territorial State-Based Regime of International Law in the Context of the Physical Disappearance of Territory Due to Climate Change and Sea-Level Rise”, in *Canadian Yearbook of International Law/Annuaire canadien de droit international*, vol. 53 (2016), pp. 99 to 102.

nationals and the manner in which assistance or protection would be articulated and the services that would be provided to them; relations and cooperation with other States and international organizations; and the existence of follow-up, supervision and oversight mechanisms, in respect of which the State could receive support from some friendly States, international organizations and forums, private institutions or persons with a profile and experience that could be particularly useful in the different circumstances, without prejudice to its independence.

114. The Government of a State affected by sea-level rise that may be established in the territory of a friendly State would act on behalf of that State at the international level, exercising, for example, the right of legation, concluding treaties and participating in the work of international organizations and forums of which the State concerned is a member or an observer.

115. On the other hand, as noted above, a State directly affected by the phenomenon may, depending on the circumstances of individual cases, reach agreement with other States or international organizations on the most appropriate way of handling the key questions concerning statehood in relation to sea-level rise. Some of the options in that regard set out in the second issues paper could call for a State whose land territory may become uninhabitable or be completely covered by the sea to retain its statehood, while other alternatives could call for the State concerned to join another preexisting State, but preserve the main aspects of its identity and maintain a sufficient level of autonomy and the authority to exercise certain powers, despite becoming part of that other State. In order to ensure that the right to self-determination of the populations of States or countries affected by the phenomenon is respected, the population concerned would have to be consulted on the formula employed in each case.<sup>146</sup>

116. The modalities that may be taken into consideration include, but are not limited to:

The possibility that a State especially affected by the phenomenon may acquire, with or without transfer of sovereignty, a portion or an area of land in the territory of another State.

Illustrative examples worth highlighting include those of Maldives, which years before had considered the possibility of acquiring a piece of territory in another State, and of Kiribati, which in 2014 had finalized the purchase of 20 km<sup>2</sup> of land on the Fijian island of Vanua Levu through a private contract in which the State of Fiji did not participate. Following the purchase, the land was rehabilitated for farming and the subsequent relocation of a significant number of Kiribati nationals, which was meant, in the words of then President Tong, to facilitate “migration with dignity”, with reliance on international cooperation to that end.

(a) In the case of the operation undertaken by Kiribati, there was no transfer of sovereignty, but only a private right of ownership in relation to the land concerned, while Fiji indicated that it took particular consideration of the circumstances affecting Kiribati and its nationals, on which the settlement of persons originating from that State on the said land may indeed be based;<sup>147</sup>

Association with other States, such as the association between Cook Islands and Niue and New Zealand: Cook Islands and Niue are independent of New Zealand, act on their own behalf on the international plane, and in that regard, would establish diplomatic relations with the United States of America,<sup>148</sup> but hold

<sup>146</sup> See A/CN.4/752, para. 226.

<sup>147</sup> See Giraudeau, “Pacific Islands in the face of sea level rise” (see footnote 124), p. 412; Davorin Lapas, “Climate Change and International Legal Personality: Climate Deterritorialized Nations as Emerging Subjects of International Law”, in *Canadian Yearbook of International Law*, vol. 59 (2022), pp. 18 and 19.

<sup>148</sup> The White House, “Fact Sheet” (see footnote 120); Pacific Islands Forum submission No. 3 (see



New Zealand citizenship, which allows their inhabitants to resettle freely in the territory of New Zealand.

(b) Other cases of association are those of the Federated States of Micronesia, Marshall Islands and Palau with the United States of America, where the possibility of a common citizenship is contemplated, but not the possibility of the nationals of those island States resettling and working in or joining the United States armed forces;<sup>149</sup>

(c) The establishment of a confederation, through an agreement that would allow for the continuity of the States members of the confederation and of their international legal personality, except that, pursuant to the stipulations of the confederal covenant, it would be feasible for the confederation to act in such capacity on the international plane. It would also be necessary to consider the possibility of establishing a common citizenship for the nationals of each of the States members of the confederation and, accordingly, making it possible for the diplomatic mission or consular office of a State member of the confederation in a non-member third State to provide assistance or protection to nationals of another member State that does not have representation of its own in that third State;

(d) Integration in a federation where the State affected by sea-level rise would not continue to exist as such, but may retain a high degree of autonomy in respect of various issues and – depending on the structure of the federation and the division of competences between the federation and its constituent units in the relevant constitution – may exercise certain functions at the international level. A representative example in that regard cited in the second issues paper was the case of the former Kingdom of Bavaria which, upon joining the German Empire, retained certain “reserved rights” (“*Reservatrechte*”), which included the capacity to exercise the right of legation and to conclude treaties;<sup>150</sup>

(e) Unification with another State, including the possibility of merger, where another modality of autonomy may also be contemplated in favour of the State affected by sea-level rise that would cease to exist.

(f) Use of ad hoc legal formulas or regimes that would allow States affected by the phenomenon to retain their international legal personality as well as the rights pertaining to the maritime areas under their jurisdiction and the resources existing therein.

117. Lastly, some authors maintain that once the land territory of a State affected by sea-level rise becomes completely submerged, the territorial State itself would cease to exist, resulting in what would have to be characterized more as a “deterritorialized State” or a “nation *ex situ*”, with the creation of new types of subjects of international law who would inherit, for example, the rights of the States that would have ceased to exist in respect of the maritime areas under their jurisdiction and the living or non-living resources existing therein.<sup>151</sup>

footnote 127).

<sup>149</sup> Pacific Islands Forum submission No. 3 (see footnote 127); Giraudeau, “Pacific Islands in the face of sea level rise” (see footnote 124), p. 44.

<sup>150</sup> See A/CN.4/752, para. 209; Jean-Baptiste Dudant, “La conservation de l’État en droit international”, doctoral thesis on public law submitted in 2023 at Université Paris-Panthéon-Assas, pp. 152 to 154.

<sup>151</sup> See Maxine Burkett, “The Nation Ex-Situ: On climate change, deterritorialized nationhood and the Post-Climate Era”, *Climate Law*, vol. 2, No. 3 (2011), pp. 345 to 374; Giraudeau, “Pacific Islands in the face of sea level rise” (see footnote 124); Lapas, “Climate Change” (see footnote 147).



118. With regard to the latter scenarios and considering the effort to try to find answers or alternatives that would help to address a novel situation such as that which would arise when the land territory of a State is completely covered by the sea, it is useful to recall the point made above about viewing the territory of a State as a unit comprising the land territory – both that which has not been covered by the sea and that which has been submerged, which would not cease to exist or to be under the sovereignty of the relevant State as a result – and the maritime areas under the State’s jurisdiction.

119. Similarly, the notion of a “nation *ex situ*” distinct from the preexisting State would create serious difficulties, because, for instance, despite its name, the United Nations is composed of States, which in turn are the sole subjects of international law with the power to resort to the contentious jurisdiction of the International Court of Justice. In addition, under international law governing the subject, as reflected in the United Nations Convention on the Law of the Sea, only States possess rights in relation to the maritime areas under their jurisdiction, over which they have not only sovereignty but also sovereign rights.<sup>152</sup>

120. One of the options being contemplated as a way of establishing a legal channel for the assistance that the United Nations could provide to “nations *ex-situ*” is the possible reactivation of the Organization’s Trusteeship Council. However, that option itself would not be viable, or at least would give rise to serious complications, since that organ had been created for situations of non-self-governing territories and an independent State which, moreover, is a Member of the United Nations and might have been a trust territory in the past could not be subjected to such a regime.<sup>153</sup>

121. It would therefore not be appropriate to situate these issues in the Trusteeship Council. However, it is worth noting, as indicated in the second issues paper and reaffirmed in the present additional paper, the importance of the principle of international cooperation, by virtue of which consideration could be given to the advancement of resolutions of the General Assembly or the Security Council – given the implications of the phenomenon for international peace and security – in which modalities of support under the responsibility of certain United Nations organs or agencies would be established. Consideration could also be given to collaboration with various States to confront the effects of the phenomenon in general or in concrete cases or specific situations.

122. Lastly, it should be noted that a State directly affected by sea-level rise whose land territory may become completely or partially submerged or uninhabitable would retain its statehood as such if, based on the strong presumption of continuity of the State and considering not just the possible consultation of the population but also any agreements that may be concluded with other States, modalities such as the cession of a portion of territory with transfer of sovereignty, the establishment of an association with another State or the formation of a joint confederation with other States are used in the specific case.

123. However, in cases where the State concerned ceases to exist upon, for example, integration in a federation or unification or merger with another State, it would be useful to insist that the identity of the population of the State that would cease to exist as such be preserved and, inter alia, that the economic benefits that may accrue from the exploitation of the living and non-living resources of the maritime areas which would come under the jurisdiction of the federation or the unified State but had previously been under the jurisdiction of the disappeared State be used especially in

<sup>152</sup> See Lapas, “Climate Change” (see footnote 147), pp. 28, 29 and 33; Derek Wong, “Sovereignty Sunk? The Position of ‘Sinking States’ at International Law”, in *Melbourne Journal of International Law*, vol. 14 (2013), pp. 346 to 391.

<sup>153</sup> See Blanchard, “Evolution or Revolution” (see footnote 145), pp. 100 to 102; Wong, “Sovereignty” (see footnote 152), p. 386.

keeping with the needs of the communities of the disappeared State. It would also be useful to consider establishing modalities for participation in or consultation on matters relating directly to such communities, including matters of culture, language and priority care for certain communities, and to accept the possibility that autonomous entities in what would become the former States could have the capacity to act on the international plane as to, for example, the conclusion of treaties on questions falling within their competences, cooperation with some States, and participation in the work of specific international organizations and forums.

## Part Two: Protection of persons affected by sea-level rise

### I. Introductory considerations

124. Further to the information provided in the second issues paper,<sup>154</sup> and according to more recent scientific reports,<sup>155</sup> the continuing 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.

125. According to the preliminary observations on the subtopic in the second issues paper:

(a) The current international legal frameworks that are potentially applicable to the protection of persons affected by sea-level rise are fragmented, mostly non-specific to sea-level rise but generally applicable in the context of disasters and climate change, and often of a soft-law character. Such international legal frameworks could be further developed in a more specific, coherent and complete manner in order to effectively protect persons who remain *in situ* or have to move because of the impact of sea-level rise;

(b) A preliminary assessment of State practice shows that it is still sparse at the global level, but that it is more developed in States that are already feeling the impact of sea-level rise on their territory. Some of the practice that it has been possible to identify is not necessarily specific to sea-level rise, since it covers the wider phenomena of disasters and climate change, but it reveals relevant principles that may be used as guidance for the protection of persons affected by sea-level rise. International organizations and other bodies with relevant mandates in the field of human rights, displacement, migration, refugees, statelessness, labour, climate change and finance have been taking a proactive approach in order to promote practical tools to enable States to be better prepared with regard to issues related to human rights and human mobility in the face of climate displacement, including in the context of sea-level rise;

(c) Given the complexity of the issues at hand and taking account of the mapping exercise of the applicable legal frameworks and emerging practice, presented in the second issues paper, it was concluded that the principles applicable

<sup>154</sup> A/CN.4/752, paras. 45–50.

<sup>155</sup> See, for instance, Intergovernmental Panel on Climate Change, *Climate Change 2022: Impacts, Adaptation and Vulnerability. Working Group II Contribution to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge, Cambridge University Press, 2022); and “Summary for policymakers”, in *Intergovernmental Panel on Climate Change, Climate Change 2023: Synthesis Report. Contribution of Working Groups I, II and III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* (Geneva, 2023), pp. 1–34.

to the protection of persons affected by sea-level rise could be further identified and developed by the Study Group and the Commission;

(d) This identification and development exercise could build on the draft articles on the protection of persons in the event of disasters,<sup>156</sup> which provide a general framework for disaster response and the protection of persons, namely with regard to human dignity (draft article 4), human rights (draft article 5), the duty to cooperate (draft article 7) and the role of the affected State (draft article 10). This framework could be further developed to reflect the specificities of the long-term or permanent consequences of sea-level rise and to take account of the fact that affected persons may remain *in situ*, be displaced within their own country or migrate to another State in order to cope with or avoid the effects of sea-level rise;

(e) In addition to instruments of international and regional human rights law, other existing instruments that could usefully be taken into consideration in this respect include the Guiding Principles on Internal Displacement (1998),<sup>157</sup> the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention) (2009),<sup>158</sup> the New York Declaration for Refugees and Migrants (2016),<sup>159</sup> the Global Compact for Safe, Orderly and Regular Migration (2018),<sup>160</sup> the Sendai Framework for Disaster Risk Reduction 2015–2030 (2015)<sup>161</sup> and the Nansen Initiative’s Agenda for the Protection of Cross-Border Displaced Persons in the Context of Disasters and Climate Change (2015).<sup>162</sup> Guidance could also be drawn from the International Law Association’s Sydney Declaration of Principles on the Protection of Persons Displaced in the Context of Sea-Level Rise;<sup>163</sup>

(f) This exercise should also incorporate the relevant emerging practice of States and relevant international organizations and bodies, mapped in a preliminary and illustrative form in Part Three, chapter III, of the second issues paper. Special attention should be paid to decisions, such as that by the Human Rights Committee in *Teitiota v. New Zealand*,<sup>164</sup> according to which the effects of climate change, namely sea-level rise, in receiving States may expose individuals to a violation of their rights under articles 6 (right to life) or 7 (prohibition of torture and cruel, inhuman or degrading treatment or punishment) of the International Covenant on Civil and Political Rights,<sup>165</sup> thereby triggering the *non-refoulement* obligations of sending States, and given that the risk of an entire country becoming submerged under water is such an extreme risk, the conditions of life in such a country may become incompatible with the right to life with dignity before the risk is realized.<sup>166</sup>

126. Based on the above preliminary observations and taking into account the discussions in the Study Group in 2022, the Co-Chair listed a number of points that she intended to further examine in the present additional paper in order to complement the second issues paper with respect to the subtopic of protection of persons affected

<sup>156</sup> *Yearbook ... 2016*, vol. II (Part Two), para. 48.

<sup>157</sup> [E/CN.4/1998/53/Add.2](#), annex.

<sup>158</sup> African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala, 23 October 2009), United Nations, *Treaty Series*, vol. 3014, No. 52375, p. 3.

<sup>159</sup> General Assembly resolution 71/1 of 19 September 2016.

<sup>160</sup> General Assembly resolution 73/195 of 19 December 2018, annex.

<sup>161</sup> General Assembly resolution 69/283 of 3 June 2015, annex II.

<sup>162</sup> Nansen Initiative, *Agenda for the Protection of Cross-Border Displaced Persons in the Context of Disasters and Climate Change*, vol. 1 (December 2015).

<sup>163</sup> Resolution 6/2018, annex, in International Law Association, *Report of the Seventy-Eighth Conference, Held in Sydney, 19–24 August 2018*, vol. 78 (2019), p. 35.

<sup>164</sup> [CCPR/C/127/D/2728/2016](#).

<sup>165</sup> International Covenant on Civil and Political Rights (New York, 16 December 1966), United Nations, *Treaty Series*, vol. 999, No. 14668, p. 171.

<sup>166</sup> [A/CN.4/752](#), paras. 429–434.

by sea-level rise, without prejudice to the possibility of further examining other issues as appropriate.<sup>167</sup>

127. The next chapter contains an analysis of selected developments in State practice and in the practice of international organizations. The subsequent chapter comprises the following elements: an analysis of the relevant legal issues identified in the second issues paper that could constitute possible elements for legal protection of persons affected by sea-level rise, also building on the discussions in the Study Group and in the Sixth Committee and on the recent developments in State practice and in the practice of international organizations; and a brief discussion of possible future outcomes.

## II. Selected developments in State practice and in the practice of international organizations

128. The second issues paper contained a mapping exercise of State practice and the practice of international organizations.<sup>168</sup> The purpose of the present chapter is to build on that mapping exercise and update it with selected developments that are considered more relevant for the analysis of the legal issues to be provided in the following chapter.

129. Developments in State practice are considered first, based, *inter alia*, on comments submitted by States to the Commission. There then follows a discussion of some of the main developments in the practice of international organizations, in particular the human rights treaty bodies, the Human Rights Council, the Security Council, the General Assembly and the International Court of Justice.

### A. Developments in State practice

#### 1. Comments submitted by States to the Commission

130. In response to the Commission's requests for information in chapter III of its annual reports in 2022 and 2023,<sup>169</sup> the Commission received comments from Antigua and Barbuda, Germany, Liechtenstein, Netherlands (Kingdom of the), New Zealand, Oman, Portugal, the United Kingdom of Great Britain and Northern Ireland, the United States, Viet Nam, the Holy See and the Pacific Islands Forum.<sup>170</sup> The Co-Chairs are most grateful for these submissions. The present section highlights some of the main points of the submissions received with regard to the protection of persons affected by sea-level rise.

#### (a) General support for the approach of and preliminary observations in the second issues paper

131. According to the submission of the Pacific Islands Forum,<sup>171</sup> an international organization comprising 18 States and territories,<sup>172</sup> the issues of statehood and

<sup>167</sup> A/77/10, paras. 234 and 236.

<sup>168</sup> A/CN.4/752, paras. 317–416.

<sup>169</sup> A/77/10, paras. 25–28; and A/78/10, paras. 27–28.

<sup>170</sup> The submissions to the Commission at its seventy-fifth session are available at [https://legal.un.org/ilc/guide/8\\_9.shtml](https://legal.un.org/ilc/guide/8_9.shtml).

<sup>171</sup> The submission of the Pacific Islands Forum is accompanied by supplementary reference documents, also available at [https://legal.un.org/ilc/guide/8\\_9.shtml](https://legal.un.org/ilc/guide/8_9.shtml). Several individual members of the Forum made further specific comments, also contained in the Forum submission.

<sup>172</sup> Australia, Cook Islands, Fiji, French Polynesia, Kiribati, Marshall Islands, Micronesia (Federated States of), Nauru, New Caledonia, New Zealand, Niue, Palau, Papua New Guinea,

protection of persons affected by sea-level rise, given their complexity, should be accorded due consideration and needed to be unpacked further, guided and informed by applicable principles and norms of international law and relevant international frameworks and standards. A key regional development had been the Regional Conference on Statehood and Protection of Persons Affected by Sea-Level Rise, held in Fiji in March 2023, which the Co-Chairs had been invited to attend, and at which preparatory work was undertaken that later led to the adoption of a declaration by the leaders of Forum members (see below). The Forum had identified the following elements as deserving consideration by the Commission:

- (a) Climate change was the single greatest threat to the livelihoods, security and well-being of the Pacific people;
- (b) The international frameworks on the protection of persons affected by sea-level rise constituted a fragmented network of hard- and soft-law instruments;
- (c) The discharge of international human rights law obligations was a critical domain of Government and statehood. Climate change-related sea-level rise had the potential to adversely affect the enjoyment of human rights;
- (d) Both rights-based and needs-based approaches to the protection of persons were important, as they were complementary and allowed for the needs and rights of persons affected by climate change-related sea-level rise to be met and respected;
- (e) Addressing the human rights implications of climate change-related sea-level rise was crucial to ensuring that affected communities could maintain their dignity, identity, culture and way of life. Pacific women were disproportionately affected by climate-related effects and played a unique and leading role in addressing human rights concerns;
- (f) Existing international frameworks did not recognize climate change as a basis for affording refugee status unless affected persons met the legal definition of a refugee. However, the circumstances of those persons recognized as refugees under international law could be made worse by the impact of climate change, including sea-level rise;
- (g) The protection of persons was broad, and cut across many human rights and security issues. The displacement of persons resulting from climate change was a national, regional and global issue that could exacerbate security tensions.

132. The Pacific Islands Forum complemented its comments by transmitting the Declaration on the Continuity of Statehood and the Protection of Persons in the Face of Climate Change-Related Sea-Level Rise, which had been endorsed by the leaders of Forum members on 9 November 2023 (see below).

133. In its submission, Antigua and Barbuda considered that the concept of statehood was integral to the protection of persons under the current human rights regime, and a comprehensive solution must determine the role that States would play in the protection of persons.<sup>173</sup>

134. Germany emphasized that existing legal frameworks might not be adequate to address a situation in which a State physically ceased to exist or became uninhabitable as a consequence of rising sea levels, and noted that it would advocate the establishment of new legal frameworks where necessary. At the same time, Germany was closely monitoring the climate cases pending before the European Court of Human Rights, and the upcoming advisory opinions by the International Tribunal for the Law of the Sea, the Inter-American Court of Human Rights and the International

---

Samoa, Solomon Islands, Tonga, Tuvalu and Vanuatu.

<sup>173</sup> Submission of Antigua and Barbuda.

Court of Justice. In terms of the displacement of persons and issues of statelessness, Germany argued that neither the 1961 Convention on the Reduction of Statelessness<sup>174</sup> nor the 1954 Convention relating to the Status of Stateless Persons,<sup>175</sup> to both of which it was a signatory, excluded from their scope those displaced due to sea-level rise. Germany therefore did not consider it necessary to adapt its laws or policies on statelessness to accommodate climate change-induced statelessness.<sup>176</sup>

135. The United Kingdom noted that, with the exception of the right to self-determination, it did not recognize collective human rights in international law. With regard to sea-level rise, it asserted that the “responsibility to protect human rights [fell] on the State within whose territory the person concerned [suffered] any such violation”. The United Kingdom considered that international human rights obligations applied extraterritorially in very limited circumstances only, and rejected a “cause and effect” notion of jurisdiction in the context of climate change.<sup>177</sup>

136. The Holy See favoured the development of a new legal regime to protect both those who would be permanently displaced within their own country and those who would be forced to migrate to another country due to sea-level rise. It called for an ethical approach to the challenges posed by sea-level rise that would respect the rights and needs not only of the present generation, but also of future generations. It maintained that a rights-based approach would be insufficient to protect the victims of sea-level rise, and it would therefore favour a needs-based approach. It considered that the provisions of refugee law could provide a useful model to develop new norms for the protection of those affected by rising sea levels, including the recognition of the right to request asylum, the applicability of the principle of *non-refoulement* and the right not to be punished for illegal entry.<sup>178</sup>

**(b) Examples of domestic efforts towards climate mitigation and adaptation**

137. Germany described measures taken to reduce the impact of sea-level rise upon coastal communities, including the enhancement of early warning systems, coastal protection infrastructure, land-use planning and zoning (including a new maritime spatial plan for the exclusive economic zone), updates to building codes and regulations, insurance and financial mechanisms, and research and monitoring.<sup>179</sup>

138. Oman highlighted several provisions that had been introduced in its legislation to regulate the issue of climate change and sea-level rise at a technical level, such as requirements to take the measures necessary to drain rainwater and floodwater, protect valleys, fill swamps and manage beaches. The Environmental Authority had been established, which would, *inter alia*, propose strategic plans for environmental protection and sustainability, pollution control and nature conservation. Furthermore, ministerial decision No. 20/2016, promulgating the regulation of the Department of Climate Affairs, covered the preparation of studies and research to assess the impact of climate change, and the setting of plans to adapt to it and mitigate its effects. In regard to the implications on human rights of displacement owing to sea-level rise, Oman highlighted ministerial decision No. 72/2014 on social assistance, which covered aid in case of damage to homes, loss of sole sources of livelihood and loss of

<sup>174</sup> Convention on the Reduction of Statelessness (New York, 30 August 1961), United Nations, *Treaty Series*, vol. 989, No. 14458, p. 175.

<sup>175</sup> Convention relating to the Status of Stateless Persons (New York, 28 September 1954), United Nations, *Treaty Series*, vol. 360, No. 5158, p. 117.

<sup>176</sup> Submission of Germany.

<sup>177</sup> Submission of the United Kingdom.

<sup>178</sup> Submission of the Holy See.

<sup>179</sup> Submission of Germany.

lives, including immediate financial assistance to an individual or family affected by natural factors in order to provide for subsistence needs.<sup>180</sup>

139. Portugal had approved the Climate Framework Act (Act No. 98/2021 of 31 December 2021), whose scope went beyond the phenomenon of sea-level rise. The Act consolidated objectives, principles and obligations for the different levels of governance on climate action through public policies, and established new provisions related to climate policy. In particular, the Act established rights and obligations in climate matters and strengthened the right to citizen participation, and included provisions that explicitly focused on the protection of persons affected by climate change, a category that included persons affected by rising sea levels. The Act created obligations aimed at, *inter alia*: (a) ensuring climate justice, the protection of communities most affected by the climate crisis, and respect for human rights, equality and collective rights to common goods; (b) promoting climate security; and (c) promoting prosperity, green growth and social justice, tackling inequalities and creating more wealth and jobs. Furthermore, the Government was pursuing a global and integrated vision towards climate objectives, respecting the limits of the sustainable use of the planet's natural resources and the development paths of individual States, and actively defending foreign policy in the context of climate diplomacy. To that end, the Government had imposed on itself the following obligations: (a) to work towards a definition of the term and status of "climate refugee"; (b) to work internationally with the States of the global South to support implementation of the measures set out in the Sendai Framework for Disaster Risk Reduction 2015–2030; (c) to work towards the international recognition of a stable climate as part of the common heritage of humankind; and (d) to cooperate and participate in aid mechanisms for countries and citizens affected by extreme weather events and their consequences within the framework of international relations. Lastly, under the Act, the Government had the responsibility to promote climate security, a concept that included security of energy, health, and food and nutrition. Pursuant to that obligation, the Government was required to identify risks and take measures to prevent and mitigate the consequences of climate change on public order, safety and tranquillity, the integrity of persons and property and the regular exercise of rights, freedoms and guarantees.<sup>181</sup>

140. New Zealand, in a further submission to that of the Pacific Islands Forum, explained that its national adaptation plan to address climate risks, including the impact of sea-level rise, focused on four main areas: enabling better decisions, driving climate-resilient development in the right locations, options to adapt to climate change, including community-led retreat, and embedding resilience across Government. Adapting to climate change in partnership with the Māori was an essential foundation of the long-term strategy. In July 2022, the Government had published interim guidance for local governments on the use of new projections regarding sea-level rise, updating its previous guidance on coastal hazards and climate change. The International Climate Finance Strategy, *Tuia te Waka a Kiwa*, was guiding the delivery of its commitment of 1.3 billion New Zealand dollars, which would support Pacific island countries and target adaptation.<sup>182</sup>

141. The United States indicated that it published a national climate assessment, incorporating information on impact, risks and adaptation related to climate change in the United States, including in relation to sea-level rise.<sup>183</sup>

<sup>180</sup> Submission of Oman.

<sup>181</sup> Submission of Portugal.

<sup>182</sup> Submission of New Zealand.

<sup>183</sup> Submission of the United States.

142. Viet Nam, pointing to the seriousness of the situation in that country as regards the impact of climate change and sea-level rise in accordance with international reports, described some of the “hard” and “soft” measures that it had taken in order to protect persons from sea-level rise. It also reported on the relocation of persons in accordance with domestic laws and regulations and on the international financing received for such purposes.<sup>184</sup>

**(c) Contribution to efforts at the international and regional levels**

143. Germany had been supporting the Rising Nations Initiative, under which solutions were being developed to preserve the statehood and cultural heritage of small island developing States, including digitally documenting cultural heritage and designing a blueprint for digital citizenship. It highlighted its commitment to mitigating the impact of sea-level rise on human livelihoods and regional security, and its contribution to the Platform on Disaster Displacement, the National Adaptation Plan Global Network, the Special Climate Change Fund and the Global Shield against Climate Risks. Germany had appointed a special envoy for international climate action, a special envoy for the Pacific island States (responsible for responding to climate change and its consequences for Pacific island States), and a special envoy for climate in the Caribbean island States. It was a member of the core group that promoted the request for an advisory opinion on climate change from the International Court of Justice. Germany highlighted its cooperation with partner countries in order to implement ecosystem-based adaptation measures and develop relevant climate information and services under the International Climate Initiative. Together with other States, it had also supported adaptation programmes through the Team Europe Initiative on Climate Change Adaptation and Resilience in Africa, a programme that would reinforce policy dialogue on adaptation between the African Union and the European Union, guided by the principle of African ownership. Germany asserted that it regularly supported resolutions on the rights of Indigenous people in the Human Rights Council and the General Assembly, in addition to supporting the project activities of the Rising Nations Initiative, such as the Heritage Programme and the Tuvalu Digital Nation State Programme. At the domestic level, the Federal Constitutional Court had held that the State was under a constitutional obligation to protect both life and property rights in the light of climate change and sea-level rise. Finding that the Federal Climate Change Act was in violation of fundamental rights, the domestic courts had held that fundamental rights protected against the unilateral delaying of targets for the reduction of greenhouse gases. Germany based its commitment to issues related to climate change, sea-level rise and human rights upon the Geneva Pledge for Human Rights and Climate Action. Germany supported the right to a clean, healthy and sustainable environment as proposed in the General Assembly in July 2022.<sup>185</sup>

144. Portugal stated that it had been involved in several international initiatives focused on climate change-related matters:

(a) It had participated in a side event, at the 2022 United Nations Conference to Support the Implementation of Sustainable Development Goal 14: Conserve and sustainably use the oceans, seas and marine resources for sustainable development (2022 United Nations Ocean Conference), organized by the Pacific small island developing States, on leveraging the Small Island Developing States Partnership Framework through innovative approaches to achieve action for Goal 14, which focused on sea-level rise and extreme weather events;

<sup>184</sup> Submission of Viet Nam.

<sup>185</sup> Submission of Germany. See also General Assembly resolution [76/300](#) of 28 July 2022.



(b) It had co-chaired, with Samoa, the Steering Committee of the Small Island Developing States Partnership Framework;

(c) It had supported the operationalization of the first edition of the Small Island Developing States Partnership Awards;

(d) Lisbon had hosted the launch by the Alliance of Small Island States of the Declaration for the Enhancement of Marine Scientific Knowledge, Research Capacity and Transfer of Marine Technology to Small Island Developing States.

Regarding participation in advisory proceedings before international courts, Portugal had submitted a written statement to the International Tribunal for the Law of the Sea as part of the request for an advisory opinion on climate change. It was also part of the core group of States that supported General Assembly resolution 77/276, adopted on 29 March 2023, in which the Assembly decided to request the International Court of Justice to render an advisory opinion on the obligations of States in respect of climate change, including those under international law to ensure the protection of the climate system and other parts of the environment from anthropogenic greenhouse gas emissions for States and for present and future generations. The latter would be the first time that Portugal had participated in an advisory opinion procedure of the International Court of Justice.<sup>186</sup>

145. New Zealand recognized the importance of retaining the social and cultural identity of the Pacific, and noted that it had been working with other Pacific countries, civil society and non-State actors to develop the Pacific Regional Framework on Climate Mobility. New Zealand had extended its investment in the Pacific Climate Change Migration and Human Security programme and, in Fiji, the Climate Relocation of Communities Trust Fund. In order to address the lack of reliable data on climate migration, New Zealand was commissioning a multi-year research project to better understand trends in climate migration and the impact on communities in the Pacific and New Zealand.<sup>187</sup>

146. The United States noted that information regarding its international efforts to assist developing countries in adapting to and managing the impact of climate change was set out in the President's Emergency Plan for Adaptation and Resilience (PREPARE) Action Plan.<sup>188</sup>

## 2. Other developments in State practice

147. In addition to the submissions made to the Commission, some developments since 2022 are worth a particular mention owing to their direct relevance to the issue of the protection of persons affected by sea-level rise, in particular in the Pacific region.

### (a) Pacific Islands Forum Leaders' Declaration on the Continuity of Statehood and the Protection of Persons in the Face of Climate Change-Related Sea-Level Rise<sup>189</sup>

148. At the fifty-second meeting of Pacific Islands Forum Leaders, held in the Cook Islands from 6 to 10 November 2023, the leaders of Forum members endorsed the Declaration on the Continuity of Statehood and the Protection of Persons in the Face of Climate Change-Related Sea-Level Rise.<sup>190</sup> The leaders called on all States to support the Declaration, and committed to continued support for and engagement with

<sup>186</sup> Submission of Portugal.

<sup>187</sup> Submission of New Zealand.

<sup>188</sup> Submission of the United States.

<sup>189</sup> Submission of the Pacific Islands Forum.

<sup>190</sup> Also available at <https://forumsec.org/publications/communique-52nd-pacific-islands-leaders-forum-2023>.

the ongoing study by the Commission on the topic of sea-level rise in relation to international law.

149. In paragraph 10 of the Declaration, the leaders acknowledge that protecting persons and communities affected by climate change-related sea-level rise involves protecting, promoting and fulfilling their human rights, including civil, political, economic, social and cultural rights, and also protecting their culture, cultural heritage, identity and dignity, and meeting their essential needs, including through international cooperation.

150. In paragraph 11, the leaders further acknowledge that States carry an important duty in ensuring the protection of their people, and continuity of statehood is necessary and fundamental for that protection to be implemented and to endure.

151. In paragraph 14, the leaders declare that members of the Forum, individually and collectively, bear an important responsibility for ensuring the protection of their people, and are committed to protecting such persons affected by climate change-related sea-level rise, including with respect to human rights duties, political status, culture, cultural heritage, identity and dignity, and meeting essential needs.

152. In paragraphs 15 and 16, the leaders commit to cooperating and taking action, including at the regional and subregional levels, and call upon the international community to cooperate to achieve the purposes of the Declaration, consistent with the duty to cooperate and the principles of equity and fairness.

**(b) Pacific Regional Framework on Climate Mobility**

153. Also at the fifty-second meeting of Pacific Islands Forum Leaders, held in the Cook Islands from 6 to 10 November 2023, the leaders of Forum members endorsed the Pacific Regional Framework on Climate Mobility.<sup>191</sup> In the Framework, it is acknowledged that a fundamental priority of Forum member is to stay in place in their ancestral homes, including through land reclamation. The Framework is a global first that aims to provide practical guidance to Governments in planning for and managing climate mobility, taking into account that more than 50,000 people are displaced in the region every year as a result of climate- and disaster-related events.<sup>192</sup>

154. The principles of the Framework include the following:

- (a) Human rights, human security and protection;
- (b) Protection of culture, cultural heritage and identity and dignity;
- (c) Continuing statehood, nationality and associated rights.

155. The Framework sets out core areas for action, covering both the priority of staying in place and movement, including planned relocation, migration, displacement (evacuation and internal and cross-border displacement) and support for Pacific migrants stranded abroad.

**(c) Australia-Tuvalu Falepili Union**

156. On 9 November 2023, on the margins of the fifty-second meeting of Pacific Islands Forum Leaders, Australia and Tuvalu announced a new bilateral partnership, the Australia-Tuvalu Falepili Union. As part of the Union, the two States have signed a treaty covering migration and security issues, which is possibly the first agreement

<sup>191</sup> Available at <https://forumsec.org/publications/communique-52nd-pacific-islands-leaders-forum-2023>.

<sup>192</sup> See Forum communiqué, paras. 20–21. Available at <https://forumsec.org/publications/communique-52nd-pacific-islands-leaders-forum-2023>.

aiming at facilitating mobility specifically in the context of climate change.<sup>193</sup> The treaty is not yet in force, however.

157. According to article 1 of the treaty, among its main purposes is to provide the citizens of Tuvalu with a special human mobility pathway to access Australia, underpinned by a shared understanding and commitment to ensuring human mobility with dignity. Under article 3, entitled “Human mobility with dignity”, Australia is to arrange for a special human mobility pathway for citizens of Tuvalu to access Australia, which will enable citizens of Tuvalu to live, study and work in Australia, and to access Australian education, health services and key income and family support on arrival. Under article 2, on climate cooperation, the parties commit to working together to help the citizens of Tuvalu to stay in their homes with safety and dignity, including by promoting the adaptation interests of Tuvalu to other countries, through regional and international forums.

## **B. Developments in the practice of international organizations**

158. The present section covers some of the main developments in the practice of international organizations, in particular the human rights treaty bodies, the Human Rights Council, the Security Council, the General Assembly and the International Court of Justice.

### **1. Human rights treaty bodies**

159. Following the *Teitiota*<sup>194</sup> and *Sacchi*<sup>195</sup> cases, which were referred to in the second issues paper,<sup>196</sup> the human rights treaty bodies have continued to make an important contribution to the interpretation and application of human rights treaties in the context of climate change, including with regard to the impact of sea-level rise. Since the issuance of the second issues paper, the Human Rights Committee has issued a new pronouncement and the Committee on the Rights of the Child a new general comment,<sup>197</sup> which are discussed below.

#### **(a) Human Rights Committee**

160. In *Billy et al. v. Australia*,<sup>198</sup> the authors, belonging to an Indigenous minority group in the Torres Strait Islands, alleged that the State party had failed to take adequate measures to address the impact of climate change on their islands, violating their rights under various articles of the International Covenant on Civil and Political Rights. The Committee declared admissible the authors’ claims under articles 6 (right to life), 17 (right to be free from arbitrary interference with privacy, family and home), 24 (rights of the child) and 27 (rights of minorities to enjoyment of their own culture) of the Covenant. It found violations of articles 17 and 27, as a result of the State party’s failure to take adequate adaptation measures to protect the authors’ home, private life and family and their collective ability to maintain their cultural identity. However, the Committee found no violation of article 6, as the authors had not demonstrated a real and foreseeable risk to their lives. The State party was called upon to provide an effective remedy.

<sup>193</sup> Available at <https://www.dfat.gov.au/geo/tuvalu/australia-tuvalu-falepili-union-treaty>.

<sup>194</sup> Human Rights Committee, *Teitiota v. New Zealand* (CCPR/C/127/D/2728/2016).

<sup>195</sup> Committee on the Rights of the Child, *Sacchi et al. V. Argentina* (CRC/C/88/D/104/2019), *Sacchi et al. V. Brazil* (CRC/C/88/D/105/2019), *Sacchi et al. V. France* (CRC/C/88/D/106/2019), *Sacchi et al. v. Germany* (CRC/C/88/D/107/2019) and *Sacchi et al. v. Turkey* (CRC/C/88/D/108/2019).

<sup>196</sup> A/CN.4/752, paras. 375–382 and 386–389.

<sup>197</sup> *Ibid.*, paras. 383–384 and 390.

<sup>198</sup> CCPR/C/135/D/3624/2019.

161. In their submission to the Committee, the authors highlighted the vulnerability of their community to the impact of climate change, including rising sea levels, flooding, erosion, coral bleaching and the disappearance of important marine species. The authors described the specific effects on their islands, such as annual flooding, shoreline erosion, destruction of buildings, loss of land and intrusion of salt water into soil. Such changes had disrupted traditional gardening practices, damaged coconut trees and made the authors reliant on expensive imported goods. The altered climate patterns also affected the authors' livelihoods and made it harder for the authors to pass on their traditional ecological knowledge.

162. The Committee found admissible the authors' claims under articles 6, 17, 24 and 27, as they alleged violations of specific rights and demonstrated actual and ongoing effects of climate change on their lives and cultures. The Committee disagreed with the State party's position on the speculative nature of the allegations, and it emphasized that it could examine claims where a State party's failure to take adaptation and mitigation measures resulted in violations of rights under the Covenant. It acknowledged the vulnerability of the authors as inhabitants of low-lying islands and recognized the impact of climate change on their lives and cultures. The Committee thus concluded that the authors had demonstrated the risk of impairment of their rights due to severe effects of climate change, making their claims admissible.

163. Regarding article 6 of the Covenant (right to life), the Committee recognized the State party's obligation to take positive measures to protect the right to life, and concluded that adverse effects of climate change could fall within the scope of threats to life. However, the Committee found that the authors had not demonstrated that they faced a real and reasonably foreseeable risk of being exposed to a situation of physical endangerment or extreme precarity that could threaten their right to life. The Committee therefore found no violation of article 6, although certain members of the Committee, in their individual opinions,<sup>199</sup> noted that they disagreed and would have found a violation of article 6.

164. Regarding article 17 (right to be free from arbitrary interference with privacy, family and home), the Committee noted the authors' claims that effects of climate change, such as erosion and flooding, had affected their private, family and home life. The Committee concluded that the State party's failure to take adequate adaptation measures to protect the authors' home, private life and family constituted a violation of their rights under article 17.

165. Regarding article 27 (rights of minorities to enjoyment of their own of culture), the Committee recognized that the authors' ability to maintain their culture had been impaired by the impact of climate change. The Committee found that the State party's failure to take timely and adequate adaptation measures to protect the authors' collective ability to maintain their traditional way of life and cultural integrity constituted a violation of their rights under article 27.

166. The Committee determined that, having found violations of articles 17 and 27 of the Covenant, it did not deem it necessary to examine the authors' claims under article 24.

167. The State party was called upon to provide an effective remedy, including providing adequate compensation, engaging in meaningful consultations with the authors' communities, continuing its implementation of measures necessary to secure the communities' continued safe existence on the islands and taking steps to prevent similar violations from occurring in the future.

<sup>199</sup> *Ibid.*, annexes II, III and V.

**(b) Committee on the Rights of the Child**

168. In its general comment No. 26 (2023) on children's rights and the environment, with a special focus on climate change, the Committee on the Rights of the Child highlights the urgent and systemic threat that environmental harm poses to children's rights globally. The general comment was based on extensive consultations with children worldwide, who reported on the negative effects of environmental degradation and climate change on their lives and communities.

169. In the general comment, the Committee aimed to clarify the obligations of States parties to the Convention on the Rights of the Child and provide authoritative guidance on legislative, administrative and other appropriate measures to address environmental harm, with a particular focus on climate change.<sup>200</sup> The Convention explicitly addresses environmental issues in articles 24 (2) (c), by which States are obliged to take measures to combat disease and malnutrition, taking into consideration the dangers and risks of environmental pollution, and article 29 (1) (e), by which they are required to direct the education of children to the development of respect for the natural environment.<sup>201</sup>

170. The Committee recalls, in the general comment, that children have the right to a clean, healthy and sustainable environment, noting that this right is implicit in and directly linked to various specific articles of the Convention. Elements of this right include clean air (art. 6), safe and sufficient water (art. 24), healthy and sustainable food (art. 27) and education towards the development of respect for the natural environment (art. 29). Immediate action that States should take towards the realization of this right for children include improving air quality, ensuring access to safe and sufficient water, transforming industrial agriculture and fisheries to produce healthy and sustainable food, transitioning to renewable energy, conserving biodiversity and preventing marine pollution. Procedural elements, including access to information (art. 13), participation in decision-making (art. 12) and child-friendly access to justice, with effective remedies, have equal importance to the empowerment of children to become agents of their own destiny.<sup>202</sup>

171. The Committee considers that international cooperation is crucial, and that States are required to work together to address global threats such as climate change. Cooperation is also necessary to address climate-related loss and damage, safeguard the rights of children in vulnerable situations and mitigate the impact of climate disruption on children and their communities.<sup>203</sup>

172. In relation to climate change, the Committee considers specific obligations, implementation measures and accountability to respect, protect and fulfil children's rights. These obligations apply both to the causes and effects of climate change and to the measures taken to address it. States are obligated to respect children's rights by refraining from violating them by causing environmental harm. They must protect children's rights by regulating non-State actors, especially business enterprises, to prevent their action from worsening the effects of climate change. States should also fulfil children's rights by taking measures that promote environmentally sustainable modes of production and consumption and enhance the resilience of children and their communities.

<sup>200</sup> General comment No. 26 (2023), para. 12 (c). Convention on the Rights of the Child (New York, 20 November 1989), United Nations, *Treaty Series*, vol. 1577, No. 27531, p. 3.

<sup>201</sup> General comment No. 26 (2023), para. 9.

<sup>202</sup> *Ibid.*, paras. 63–66.

<sup>203</sup> *Ibid.*, paras. 92 and 94.

## 2. Human Rights Council: Special Rapporteur on the promotion and protection of human rights in the context of climate change

173. The Special Rapporteur on the promotion and protection of human rights in the context of climate change, Ian Fry, produced two reports in 2023.<sup>204</sup> The present section focuses on his report to the Human Rights Council, in which the Special Rapporteur considers various international, regional and national legal approaches to address the rights of persons displaced across international borders due to climate change. International human rights treaties provide some protections, including the principle of *non-refoulement*, which entails an obligation not to remove individuals when there are substantial grounds for believing that they would be at risk of being subjected to serious violations of human rights. Other relevant human rights include the rights to life, to leave and enter or return to one's country, to food, to adequate housing, to health and to water and sanitation.<sup>205</sup>

174. The Special Rapporteur considers that some regions have broadened the definition of refugees to potentially include persons internationally displaced owing to climate change. For example, the African Union includes events seriously disturbing public order in the circumstances defining refugees, which could be interpreted as encompassing climate change events, and the Central America Four Free Mobility Agreement allows for the free movement of persons between the borders of Guatemala, Nicaragua, El Salvador and Honduras, taking into account such factors as the post-disaster situation in the country of origin and specific individual vulnerabilities.<sup>206</sup> At the national level, some Governments have afforded certain levels of protection for persons internationally displaced due to climate change. For instance, Italy and Sweden have a specific protection status in place for reasons of calamity or natural disaster, while the United States offers temporary protection status or deferred enforced departure for citizens of designated countries facing conflict or natural disasters. Argentina, Bolivia (Plurinational State of), Brazil and Canada have also taken measures to protect individuals affected by environmental disasters. There is jurisprudence to suggest that courts in some countries are taking a broader perspective with respect to providing protective measures for persons internationally displaced owing to climate change. For example, the Constitutional Court of Austria has concluded that disasters can be considered when analysing subsidiary protection, and the Supreme Court of Italy granted an appeal for a refugee on the basis of a serious environmental disaster. However, the Special Rapporteur concludes that there is a lack of uniformity and consistency at the international level regarding protection by law of persons internationally displaced owing to climate change.<sup>207</sup>

175. The Special Rapporteur acknowledges that there are a number of policy instruments related to climate change displacement, such as the Cartagena Declaration on Refugees,<sup>208</sup> the Guiding Principles on Internal Displacement, the United Nations Declaration on the Rights of Indigenous Peoples,<sup>209</sup> the Agenda for the Protection of Cross-Border Displaced Persons in the Context of Disasters and Climate Change,<sup>210</sup>

<sup>204</sup> [A/HRC/53/34](#) and [A/78/255](#).

<sup>205</sup> [A/HRC/53/34](#), para. 30.

<sup>206</sup> *Ibid.*, paras. 33–34.

<sup>207</sup> *Ibid.*, paras. 39–46.

<sup>208</sup> Cartagena Declaration on Refugees, adopted at the Colloquium on the International Protection of Refugees in Central America, Mexico and Panama: Legal and Humanitarian Problems, held in Cartagena, Colombia, 19–22 November 1984, available at [www.oas.org/dil/1984\\_Cartagena\\_Declaration\\_on\\_Refugees.pdf](http://www.oas.org/dil/1984_Cartagena_Declaration_on_Refugees.pdf).

<sup>209</sup> General Assembly resolution 61/295 of 13 September 2007, annex.

<sup>210</sup> Nansen Initiative, *Agenda for the Protection of Cross-Border Displaced Persons* (see footnote 162 above).

the Peninsula Principles on Climate Displacement within States,<sup>211</sup> the Guidance for Protecting People from Disasters and Environmental Change through Planned Relocation<sup>212</sup> and the Global Compact for Safe, Orderly and Regular Migration. He goes on to identify several normative gaps in the protection of persons displaced across international borders due to climate change, including the following:

- (a) Existing human rights treaties do not adequately address the specific circumstances and vulnerabilities of such individuals, leading to abuse, exploitation, discrimination and other human rights violations, particularly for women and children;
- (b) International law lacks appropriate protection for persons displaced across international borders due to climate change, as it fails to address such critical issues as their admission, stay and conditions for return; exceptions include *non-refoulement* obligations;
- (c) While some States have specific laws or agreements that specifically address the admission or temporary stay of climate-displaced individuals, the majority lack any normative framework, leaving such individuals at risk of human rights violations;
- (d) The international community has a duty of care to protect climate-displaced individuals, and countries most affected by climate change should not bear sole responsibility;
- (e) The increase in the number of children being displaced across borders due to climate change demands urgent action and normative protection.

176. The Special Rapporteur concludes by making, *inter alia*, the following recommendations:

- (a) The Human Rights Council should make a recommendation to the General Assembly to commence negotiations on an optional protocol to the Convention relating to the Status of Refugees to define and give legal protection to persons displaced across international borders due to climate change;
- (b) The United Nations Children's Fund Guiding Principles for Children on the Move in the Context of Climate Change should be incorporated into the new legal protocol;
- (c) Regional organizations should be encouraged to expand their legal arrangements to include the legal protection of persons displaced across international borders due to climate change and, in regions where there are no regional organizations, Governments within those regions should collaborate to explore options for developing such arrangements;
- (d) National Governments should be encouraged to develop national legislation providing for humanitarian visas for persons displaced across international borders due to climate change.<sup>213</sup>

### 3. Security Council

177. The Security Council considered the agenda item entitled "Sea-level rise: implications for international peace and security" at its 9260th meeting, held on 14 February 2023, under the presidency of Malta.<sup>214</sup> The debate revealed great

<sup>211</sup> See <https://www.displacementsolutions.org/peninsula-principles>.

<sup>212</sup> See <https://www.brookings.edu/articles/guidance-on-protecting-people-from-disasters-and-environmental-change-through-planned-relocation>.

<sup>213</sup> A/HRC/53/34, para. 71.

<sup>214</sup> See S/PV.9260 and S/PV.9260 (Resumption 1).

interest and support in regard to the work done so far by the Study Group, represented by one of the Co-Chairs, on the three subtopics. With regard to the subtopic of the protection of persons affected by sea-level rise, the Secretary-General referred to the prospect of “a mass exodus of entire populations on a biblical scale”, and called for the international community to address the consequences of rising sea levels for legal frameworks and human rights, to address any gaps in existing frameworks, including international refugee law, and to put in place innovative legal and practical solutions to address the impact of sea-level rise on forced displacement. Noting that the human rights of people did not disappear when their homes disappeared, the Secretary-General stressed the importance of continuing to work in order to protect the affected populations and secure their basic human rights.<sup>215</sup>

#### 4. General Assembly

178. The General Assembly held an informal plenary meeting on existential threats of sea-level rise amid the climate crisis on 3 November 2023, convened by the President of the Assembly.<sup>216</sup> Two Co-Chairs of the Study Group participated as panellists. There was general support for the work done so far by the Study Group. The meeting also revealed strong support among Member States for, *inter alia*, the protection of the livelihood, culture and heritage of affected peoples, given that sea-level rise threatened the rich cultures and traditions of small island developing States and low-lying communities. On 16 January 2024, the Assembly decided that it would convene a follow-up high-level plenary meeting on 25 September 2024 to address existential threats posed by sea-level rise.<sup>217</sup>

179. On 28 July 2022, the General Assembly adopted a resolution in which it recognized the human right to a clean, healthy and sustainable environment.<sup>218</sup> This adoption followed the recognition of the right by the Human Rights Council in October 2021, as referred to in the second issues paper.<sup>219</sup> The Assembly resolution was adopted with large support (by 161 votes to none, with 8 abstentions),<sup>220</sup> which demonstrates that there is widespread, worldwide support for this right, already recognized in 156 countries at the national and regional levels. As human rights and the environment are interdependent, a clean, healthy and sustainable environment is necessary for the full enjoyment of a wide range of human rights, such as the rights to life, health, food, water and sanitation and development. An important dimension of this right is also a safe and stable climate.

#### 5. International Court of Justice and other courts: pending advisory opinions

180. The General Assembly, at its 64th plenary meeting of its seventy-seventh session, held on 29 March 2023, unanimously adopted resolution 77/276, entitled “Request for an advisory opinion of the International Court of Justice on the obligations of States in respect of climate change”.<sup>221</sup>

181. In this resolution, the General Assembly decided, in accordance with Article 96 of the Charter of the United Nations, to request the International Court of Justice,

<sup>215</sup> See S/PV.9260.

<sup>216</sup> See <https://www.un.org/pga/78/2023/10/20/letter-from-the-president-of-the-general-assembly-informal-plenary-meeting-on-sea-level-rise-3-nov-concept-note/>.

<sup>217</sup> Seventy-eighth session, 53rd plenary meeting, 16 January 2024; see <https://press.un.org/en/2024/ga11258.doc.htm>.

<sup>218</sup> General Assembly resolution 76/300.

<sup>219</sup> Human Rights Council resolution 48/13 of 18 October 2021. See also A/CN.4/752, para. 247.

<sup>220</sup> See A/76/PV.97.

<sup>221</sup> For further information on the work of the International Court of Justice with regard to the obligations of States in respect of climate change, see <https://www.icj-cij.org/case/187>.



pursuant to Article 65 of the Statute of the Court, to render an advisory opinion on the following question:

Having particular regard to the Charter of the United Nations, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the United Nations Framework Convention on Climate Change, the Paris Agreement, the United Nations Convention on the Law of the Sea, the duty of due diligence, the rights recognized in the Universal Declaration of Human Rights, the principle of prevention of significant harm to the environment and the duty to protect and preserve the marine environment,

(a) What are the obligations of States under international law to ensure the protection of the climate system and other parts of the environment from anthropogenic emissions of greenhouse gases for States and for present and future generations;

(b) What are the legal consequences under these obligations for States where they, by their acts and omissions, have caused significant harm to the climate system and other parts of the environment, with respect to:

(i) States, including, in particular, small island developing States, which due to their geographical circumstances and level of development, are injured or specially affected by or are particularly vulnerable to the adverse effects of climate change?

(ii) Peoples and individuals of the present and future generations affected by the adverse effects of climate change?<sup>222</sup>

182. Two other related requests for advisory opinions on climate change also pending before other courts: one before the International Tribunal for the Law of the Sea, though this one less relevant to the subtopic of the protection of persons affected by sea-level rise;<sup>223</sup> and the other before the Inter-American Court of Human Rights.<sup>224</sup>

183. Given that the International Court of Justice is expected to render its advisory opinion after the current session of the Commission, and that the same seems to apply to the International Tribunal for the Law of the Sea and the Inter-American Court of Human Rights, the Study Group may, as appropriate, revert to these cases at a later stage.

### III. Analysis of relevant legal issues

184. Following the conclusions of the Study Group in 2022, in particular the points identified for further study,<sup>225</sup> the analysis below covers legal issues that could

<sup>222</sup> General Assembly resolution 77/276 of 29 March 2023. International Covenant on Economic, Social and Cultural Rights (New York, 16 December 1966), United Nations, *Treaty Series*, vol. 993, No. 14531, p. 3, United Nations Framework Convention on Climate Change (New York, 9 May 1992), *ibid.*, vol. 1771, No. 30822, p. 107; Paris Agreement (Paris, 12 December 2015), *ibid.*, vol. 3156, No. 54113, p. 79; United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982), *ibid.*, vol. 1833, No. 31363, p. 3; and Universal Declaration of Human Rights, General Assembly resolution 217 A (III) of 10 December 1948.

<sup>223</sup> For further information, see <https://www.itlos.org/en/main/cases/list-of-cases/request-for-an-advisory-opinion-submitted-by-the-commission-of-small-island-states-on-climate-change-and-international-law-request-for-advisory-opinion-submitted-to-the-tribunal/>.

<sup>224</sup> For further information, see [https://www.corteidh.or.cr/docs/opiniones/soc\\_1\\_2023\\_en.pdf](https://www.corteidh.or.cr/docs/opiniones/soc_1_2023_en.pdf).

<sup>225</sup> A/77/10, para. 236.

constitute possible elements for legal protection of persons affected by sea-level rise. The possible future outcomes are also briefly discussed.

185. In accordance with the syllabus for the topic prepared in 2018, the Commission will deal only with “the legal implications of sea-level rise”, and not with “protection of environment, climate change *per se*, causation, responsibility and liability”.<sup>226</sup> The following legal analysis does not, therefore, address such issues, or related issues such as the principle of common but differentiated responsibilities or loss and damage.

## **A. Possible elements for legal protection of persons affected by sea-level rise**

### **1. Human dignity as an overarching principle**

186. In the context of the protection of persons affected by sea-level rise, respect for human dignity should constitute a guiding principle for any action to be taken.

187. The principle underpins international human rights instruments and has been interpreted as providing the ultimate foundation of human rights law. The preamble to the Charter of the United Nations contains a reference to reaffirming faith in “the dignity and worth of the human person”, while the preamble to the Universal Declaration of Human Rights notes that “recognition of the inherent dignity ... of all members of the human family is the foundation of freedom, justice and peace in the world”. Affirmation of the principle of human dignity can be found in the International Covenant on Civil and Political Rights,<sup>227</sup> the International Covenant on Economic, Social and Cultural Rights,<sup>228</sup> the International Convention on the Elimination of All Forms of Racial Discrimination,<sup>229</sup> the Convention on the Elimination of All Forms of Discrimination against Women,<sup>230</sup> the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,<sup>231</sup> the Convention on the Rights of the Child<sup>232</sup> and the Convention on the Rights of Persons with Disabilities.<sup>233</sup>

188. The principle is also central to the field of international humanitarian law. The concept of personal dignity is recognized in common article 3 (1) (c) of the Geneva Conventions of 1949<sup>234</sup> and in several articles of the Protocols additional thereto of 1977.<sup>235</sup>

<sup>226</sup> A/73/10, annex B, para. 14.

<sup>227</sup> Preamble and art. 10(1).

<sup>228</sup> Preamble and art. 13(1).

<sup>229</sup> International Convention on the Elimination of All Forms of Racial Discrimination (New York, 21 December 1965), United Nations, *Treaty Series*, vol. 660, No. 9464, p. 195, preamble.

<sup>230</sup> Convention on the Elimination of All Forms of Discrimination against Women (New York, 18 December 1979), *ibid.*, vol. 1249, No. 20378, p. 13, preamble.

<sup>231</sup> Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (New York, 10 December 1984), *ibid.*, vol. 1465, No. 24841, p. 85, preamble.

<sup>232</sup> Preamble and arts. 23 (1), 28 (2), 37 (c), 39 and 40 (1).

<sup>233</sup> Convention on the Rights of Persons with Disabilities (New York, 13 December 2006), United Nations, *Treaty Series*, vol. 2515, No. 44910, p. 3, preamble and arts. 1, 3, 16 (4), 24 (1) and 25.

<sup>234</sup> Geneva Conventions for the protection of war victims (Geneva, 12 August 1949), United Nations, *Treaty Series*, vol. 75, Nos. 970–973, p. 31. Common art. 3 (1) of the Geneva Conventions concerns the prohibition of “outrages upon personal dignity, in particular humiliating and degrading treatment”.

<sup>235</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) (Geneva, 8 June 1977), United Nations, *Treaty Series*, vol. 1125, No. 17512, p. 3; and Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) (Geneva, 8 June 1977), *ibid.*, No. 17513, p. 609. Art. 75 (2) (b) of Protocol I

189. Human dignity is an overarching principle of the whole body of human rights law and international humanitarian law, as held by the International Criminal Tribunal for the Former Yugoslavia in *Prosecutor v. Furundžija*:

The essence of the whole corpus of international humanitarian law as well as human rights law lies in the protection of the human dignity of every person ... The general principle of respect for human dignity is ... the very *raison d'être* of international humanitarian law and human rights law; indeed in modern times it has become of such paramount importance as to permeate the whole body of international law.<sup>236</sup>

190. The concept of human dignity lies at the core of numerous instruments at the international level directed towards the provision of humanitarian relief in the event of disasters. The International Federation of Red Cross and Red Crescent Societies states the following in its guidelines on disaster relief: “Assisting actors and their personnel should ... respect the human dignity of disaster-affected persons at all times.”<sup>237</sup> The General Assembly, in the preamble to its resolution 45/100 of 14 December 1990, considers that “the abandonment of the victims of natural disasters and similar emergency situations without humanitarian assistance constitutes a threat to human life and an offence to human dignity”. The Institute of International Law, likewise, is of the view that a failure to provide humanitarian assistance to those affected by disasters constitutes “an offence to human dignity”.<sup>238</sup>

191. As recalled in the memorandum by the Secretariat, the protection of human dignity as a general human rights obligation was fundamental in the work undertaken by the Commission for the topics on the protection of persons in the event of disasters and on the expulsion of aliens.<sup>239</sup>

192. In particular, it is worth recalling the text of draft article 4 of the draft articles on the protection of persons in the event of disasters, entitled “Human dignity”, which reads as follows: “The inherent dignity of the human person shall be respected and protected in the event of disasters.”<sup>240</sup>

193. Furthermore, as discussed in the second issues paper, the Nansen Initiative identified key principles and elements to address the protection and assistance needs of persons displaced across borders in the context of disasters, including the adverse

---

concerns the prohibition of “[o]utrages upon personal dignity, in particular humiliating and degrading treatment, enforced prostitution and any form of indecent assault”; and under art. 85 (4) (c), “[p]ractices of apartheid and other inhuman and degrading practices involving outrages upon personal dignity, based on racial discrimination”, when committed wilfully and in violation of the Conventions or the Protocol, are regarded as grave breaches of the Protocol. Art. 4 (2) (e) of Protocol II concerns the prohibition of “[o]utrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form or indecent assault”.

<sup>236</sup> International Criminal Tribunal for the Former Yugoslavia, *Prosecutor v. Anto Furundžija*, Case No. IT-95-17/1-T, Judgment, 10 December 1998, Trial Chamber, p. 467, at p. 593, para. 183.

<sup>237</sup> International Federation of Red Cross and Red Crescent Societies, Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance (November 2007), guideline 4.

<sup>238</sup> Institute of International Law, resolution on humanitarian assistance, *Yearbook*, vol. 70 (2004), Session of Bruges (2003), Part II, p. 263, at p. 269. Also available from [www.idi-iil.org](http://www.idi-iil.org).

<sup>239</sup> A/CN.4/768, paras. 32–34 and 65–66. See draft articles 4, 5 and 13 of the draft articles on the protection of persons in the event of disasters and the commentaries thereto (*Yearbook ... 2016*, vol. II (Part Two), paras. 48–49) and draft article 13 of the draft articles on the expulsion of aliens and the commentary thereto (*Yearbook ... 2014*, vol. II (Part Two), paras. 44–45).

<sup>240</sup> *Yearbook ... 2016*, vol. II (Part Two), para. 48.

effects of climate change, many of which were also grounded in the principle of the protection of human dignity.<sup>241</sup>

## 2. **Combination of needs-based and rights-based approaches as the basis for the protection of persons affected by sea-level rise**

194. Concerning the debate as to whether a rights-based approach or a more traditional needs-based approach is to be preferred as the basis for the protection of persons affected by sea-level rise, it should be recalled that the two approaches are not necessarily mutually exclusive and are best viewed as complementary. As proposed in the second issues paper, adequate and effective protection of persons affected by sea-level rise should meet their needs, and such protection must be undertaken with full respect for their rights.<sup>242</sup>

195. There is general recognition within the international community – as evidenced, for example, in the Sendai Framework for Disaster Risk Reduction 2015–2030, adopted in 2015 – of the essential role of disaster risk reduction. The notion of adequate and effective action to meet the essential needs of the persons concerned, with full respect for their rights, applies both to disaster response and to disaster risk reduction, and should also be applied in the context of the protection of persons affected by sea-level rise.

196. The compromise between the rights-based and the needs-based approaches resulted in draft article 2 in the draft articles on the protection of persons in the event of disaster, which reads as follows: “The purpose of the present draft articles is to facilitate the adequate and effective response to disasters, and reduction of the risk of disasters, so as to meet the essential needs of the persons concerned, with full respect for their rights.”<sup>243</sup>

197. As mentioned in the second issues paper, the protection of persons affected by sea-level rise should be understood, for the purposes of this subtopic, as all activities aimed at ensuring full respect for the rights of persons affected, in accordance with the relevant and applicable bodies of international law.<sup>244</sup>

198. A similar approach to that adopted in regard to the draft articles on the protection of persons in the event of disasters would therefore seem justified in regard to the protection of persons affected by sea-level rise, since the two approaches (rights-based and needs-based) are not mutually exclusive and are complementary, and sea-level rise can be considered as a type of disaster. Thus, the protection of persons affected by sea-level rise should meet their needs, with full respect for their rights.

## 3. **General human rights obligations – including with regard to civil, political, economic, social and cultural rights – in the context of the protection of persons affected by sea-level rise**<sup>245</sup>

199. International human rights law should be the common framework to govern the protection of persons affected by sea-level rise. It provides the core content of rights

<sup>241</sup> Nansen Initiative, *Agenda for the Protection of Cross-Border Displaced Persons* (see footnote 162 above). See also [A/CN.4/752](#), paras. 297–305.

<sup>242</sup> [A/CN.4/752](#), paras. 236–239.

<sup>243</sup> *Yearbook ... 2016*, vol. II (Part Two), para. 48.

<sup>244</sup> [A/CN.4/752](#), para. 236.

<sup>245</sup> This section draws on the work of the Committee on International Law and Sea-Level Rise of the International Law Association, of which Ms. Galvão Teles is also a member. See the forthcoming final report of the Committee (to be presented at the Eighty-First Conference, due to be held in Athens, 25–28 June 2024).

obligations that are binding on States parties to the various human rights treaties. Many human rights also now form part of customary international law.

200. Although international human rights law was not conceived having in mind the adverse effects of climate change, including sea-level rise, the issue may be addressed through contextual interpretation and application.

201. Persons affected by sea-level rise have a general entitlement to protection of their human rights. States must ensure compliance with all relevant human rights obligations applicable in connection with the protection of persons affected by sea-level rise. There is an intimate connection between human rights and the principle of human dignity, as mentioned above. The general reference to “human rights” encompasses human rights obligations set forth in relevant international agreements and in customary international law.

202. This approach was the same as that taken by the Commission in regard to the draft articles on the protection of persons in the event of disasters, draft article 5 of which, entitled “Human rights”, provides the following: “Persons affected by disasters are entitled to the respect for and protection of their human rights in accordance with international law.”<sup>246</sup>

203. The memorandum by the Secretariat contains further examples of topics in which the Commission addressed general human rights and humanitarian obligations that could also be applicable in the context of sea-level rise.<sup>247</sup>

204. The field of human rights obligations is broad, and distinct obligations will be held by affected States (States of origin), transit States and receiving States (States of destination), respectively. These distinct obligations are explored further in the next section, taking into consideration the fact that individuals would remain rights holders even in the case of the eventual demise of their State as a result of sea-level rise.

205. The second issues paper sets out the human rights most commonly understood to be affected by sea-level rise.<sup>248</sup> There is growing recognition that duties inherent in existing human rights obligations require States to safeguard the enjoyment of human rights by those particularly affected by the adverse effects of climate change, including sea-level rise.<sup>249</sup> While action to ensure the enjoyment by all persons of their human rights in the context of climate change is demanding and complex, international human rights law already provides a series of key principles that contribute to legal certainty and stability and ensure predictability as to who is obliged to protect the human rights of persons affected by the adverse effects of climate change. International human rights law also provides procedural mechanisms for the protection of such human rights, including potentially for redress.

206. In particular, persons affected by climate change remain rights holders under international human rights law at all times. All individuals are entitled to human rights because they are human beings,<sup>250</sup> and, with only a few exceptions,<sup>251</sup> human rights are universally enjoyed regardless of nationality. Rights may be held individually, or as individual members of specific groups, such as religious minorities.<sup>252</sup> Status as a

<sup>246</sup> *Yearbook ... 2016*, vol. II (Part Two), para. 48.

<sup>247</sup> [A/CN.4/768](#), paras. 31–49.

<sup>248</sup> [A/CN.4/752](#), paras. 249–254.

<sup>249</sup> See, for example, the Nansen Initiative’s Agenda for the Protection of Cross-Border Displaced Persons in the Context of Disasters and Climate Change, endorsed by 109 States in 2015. See also [A/77/226](#), [A/HRC/53/34](#), [A/77/549](#), [A/77/189](#), [A/77/136](#) and [A/75/207](#).

<sup>250</sup> See Universal Declaration of Human Rights, art. 1.

<sup>251</sup> See, in particular, International Covenant on Civil and Political Rights, art. 25, whose guarantees are limited to “citizens”.

<sup>252</sup> See, for example, *ibid.*, arts. 18 (1) and 27, which guarantee, respectively, the freedom of all

rights holder is not lost when a person becomes a refugee or a migrant, although limitations may be permissible in respect of some rights, and additional rights – most notably guarantees derived from the principle of *non-refoulement*<sup>253</sup> – may also accrue. Groups such as peoples whose right of self-determination is protected under common article 1 of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, or Indigenous communities, may also be rights holders.

207. According to a scenario-based approach, taking into account the slow-onset character of sea-level rise, as described in the second issues paper,<sup>254</sup> matters related to the need to respect, fulfil and protect economic, social and cultural rights will likely come first in time, before civil and political rights. For the majority of the persons affected by sea-level rise, the rights most likely to be affected over the short to medium term are economic, social and cultural rights, which States have an obligation to realize progressively, including minimum core obligations in relation to the provision of, for example, essential foodstuffs and water, essential health care, basic shelter and housing and education.

208. Among civil and political rights, a particularly relevant right is the right to life, as recognized in article 6 (1) of the International Covenant on Civil and Political Rights, in particular if a State is refusing to take positive measures to prevent or respond to sea-level rise that in extreme circumstances could cause loss of life. However, in terms of the impact of sea-level rise on the right to life (art. 6 of the Covenant) and of the prohibition of cruel, inhuman or degrading treatment (art. 7) – which can trigger international protection obligations under international law such as *non-refoulement* – it is clear from *Teitiota v. New Zealand*<sup>255</sup> and *Billy et al. v. Australia*<sup>256</sup> that the threshold requirements are relatively high, as a real and foreseeable risk has so far been required by the Human Rights Committee, albeit not without dissenting views.<sup>257</sup>

209. Among other civil and political rights, it is worth mentioning that the Human Rights Committee has recognized that the adverse effects of climate change, including sea-level rise, can violate the rights to privacy, family and home life (art. 17 of the Covenant) and the right of persons belonging to minorities, in community with the other members of their group, to enjoy their own culture (art. 27).<sup>258</sup>

210. A prominent place needs to be given also to participatory rights, such as the rights of public participation, access to information and access to justice, as mentioned in the second issues paper.<sup>259</sup> Persons affected by sea-level rise, many of them being from Indigenous and/or marginalized communities, should be active participants in efforts to find rights-sensitive and durable solutions and should be

---

persons to manifest their religion or belief, and the right of persons belonging to minorities, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

<sup>253</sup> These obligations may become increasingly important in relation to receiving States at certain thresholds of climate change. See Human Rights Committee, *Teitiota v. New Zealand*, CCPR/C/127/D/2728/2016, para. 9.11.

<sup>254</sup> A/CN.4/752, paras. 251, 289 and 427.

<sup>255</sup> CCPR/C/127/D/2728/2016.

<sup>256</sup> CCPR/C/135/D/3624/2019.

<sup>257</sup> See the individual opinions of Committee members Duncan Laki Muhumuza and Vasilka Sancin in *Teitiota v. New Zealand* (CCPR/C/127/D/2728/2016, annexes I and II), and the individual opinions of Committee members Duncan Laki Muhumuza, Hernán Quezada Cabrera, Arif Bulkan, Marcia V.J. Kran and Vasilka Sancin in *Billy et al. v. Australia* (CCPR/C/135/D/3624/2019, annexes II, III and V).

<sup>258</sup> See *Billy et al. v. Australia* (CCPR/C/135/D/3624/2019).

<sup>259</sup> A/CN.4/752, para. 252.



empowered to that end. In this context, there may be special rights accruing to particularly vulnerable persons, as will be discussed further below.

211. The memorandum by the Secretariat points to two useful examples in the prior work of the Commission in this regard that could be applicable *mutatis mutandis* in the context of sea-level rise.<sup>260</sup> First, paragraph 2 of draft principle 5 of the draft principles on protection of the environment in relation to armed conflicts contains a requirement that States engage in consultations and cooperation with Indigenous peoples when their lands and territories suffer certain adverse effects in the context of armed conflict.<sup>261</sup> Second, the draft articles on prevention of transboundary harm from hazardous activities include several provisions containing general human rights obligations, including on the right to access to information, that could be of relevance. According to draft article 13, entitled “Information to the public”, States are under an obligation to “provide the public likely to be affected by an activity within the scope of the present articles with relevant information relating to that activity, the risk involved and the harm which might result and ascertain their views”.<sup>262</sup>

#### **4. Different human rights duties and different human rights duty bearers in the context of sea-level rise<sup>263</sup>**

212. The inhabitants of small island and low-lying coastal States will face a substantial impact from the effects of sea-level rise on the enjoyment of their human rights, from economic, social and cultural rights to civil and political rights, and including, as discussed above, the rights to life, to adequate food, to water, to health and to adequate housing. While such States, as duty bearers, will remain obliged to respect, protect and fulfil the human rights of their population, and while a negative duty to refrain from violations will not be affected by diminishing State capacity, the ability of States to fulfil their positive obligations might be affected.

213. On the other hand, while it can be expected that people will remain in their homeland for as long as possible, the adverse effects of sea-level rise may trigger internal or cross-border displacement, creating specific human rights challenges. As habitable territory diminishes over time, people may gradually be less inclined to stay, and instead seek to move abroad. The ability to do so will be influenced by socioeconomic and political factors, 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 relocation to another State becomes unavoidable. While these persons remain rights holders, and while it is clear that the duty bearers are those States under whose jurisdiction they find themselves, further examination is needed to determine the exact implications for the State of origin and the State of destination.

214. A more granular approach is thus needed to determine the different human rights duties and different human rights duty bearers in the context of sea-level rise, bearing in mind that international human rights law determines at all times who the duty bearers are and, particularly in the context of internal and cross-border displacement, regulates the distribution of human rights duties and responsibilities among States.

215. Human rights are entitlements of persons against specific duty bearers who are accountable for addressing such claims. The exercise of jurisdiction over a person,

<sup>260</sup> A/CN.4/768, paras. 42–49.

<sup>261</sup> A/77/10, para. 58.

<sup>262</sup> *Yearbook ... 2001*, vol. II (Part Two), para. 97.

<sup>263</sup> This section draws on the work of the Committee on International Law and Sea-Level Rise of the International Law Association, of which Ms. Galvão Teles is also a member. See the forthcoming final report of the Committee (to be presented at the Eighty-First Conference, due to be held in Athens, 25–28 June 2024).

irrespective of whether it is exercised territorially or extraterritorially,<sup>264</sup> is the criterion for determining who is the duty bearer. If a State other than the affected State also exercises jurisdiction over persons, that State too will assume certain obligations towards them. Consequently, as a rule, there will be at least one State (or other entity with international legal personality) exercising jurisdiction over persons affected by sea-level rise.

216. At the same time, understanding the dynamics of human mobility (including immobility or staying at home) in the context of climate change is critical to determining the distribution of human rights obligations among affected States, States that temporarily or permanently receive members of the population of affected States (host States), and the international community. At any given time, multiple types of internal and cross-border mobility will coexist, also influencing the distribution of obligations between States. In the short term, most duties vis-à-vis individual rights will be borne by affected States, subject to duties of transit, and by host States, with regard to rights to which migrants are entitled. The balance of obligations between affected and host States, as they relate to individuals, can be expected to adjust with changes in the distribution of at-risk populations between them.

217. A granular approach is warranted also to take into consideration the fact that under existing international human rights law, States have different duties to respect, protect and fulfil human rights in accordance with universal human rights instruments and customary international law.

218. The obligation to respect human rights – a negative obligation – requires States to refrain from violating human rights guarantees. This includes the duty to respect rights without discrimination. Rising sea levels do not affect the ability of affected States to refrain from violations, but may entail the risk of authorities restricting certain rights beyond what is permissible under international law, by, for instance, limiting liberty of movement during a disaster to a greater extent than is necessary to protect public order or public health,<sup>265</sup> if stressors increase with the rise of environmental crises.

219. The obligation to protect human rights – a positive obligation – requires States to take steps to protect against breaches of rights emanating from third parties or in specific situations. This duty becomes relevant not only for States affected by sea-level rise – for instance, when cultural heritage sites are at risk of being destroyed with the erosion of coastlines, or when the loss of territory triggers violent conflicts over land – but also for host States, such as in the context of deportation to affected countries. In the *Billy et al. v. Australia*, the Human Rights Committee found a violation of article 17 of the International Covenant on Civil and Political Rights when the State party failed to protect an Indigenous community by building sea walls in a timely manner:

The Committee considers that when climate change impacts, including environmental degradation on traditional (Indigenous) lands in communities where subsistence is highly dependent on available natural resources and where alternative means of subsistence and humanitarian aid are unavailable, have direct repercussions on the right to one's home, and the adverse consequences of those impacts are serious because of their intensity or duration and the physical or mental harm that they cause, the degradation of the environment may then adversely affect the well-being of

<sup>264</sup> This principle is embedded in, *inter alia*, the jurisprudence of the Human Rights Committee: see *López Burgos v. Uruguay*, communication No. 52/1979, and *Celiberti de Casariego v. Uruguay*, communication No. 56/1979. See also Inter-American Court of Human Rights, Advisory Opinion OC-23/17, on "The environment and human rights" (requested by Colombia), 15 November 2017.

<sup>265</sup> International Covenant on Civil and Political Rights, art. 12 (3).



individuals and constitute foreseeable and serious violations of private and family life and the home.<sup>266</sup>

220. The obligation to fulfil human rights – another positive obligation – requires the State to create the legal, institutional and procedural conditions that rights holders need in order to realize their rights in full. While limited in practical terms, positive obligations also exist with regard to certain civil and political rights.<sup>267</sup> An example is where the obligation to respect the right to freedom of expression, which includes the freedom to receive information,<sup>268</sup> requires authorities to provide information and take positive measures to ensure the participation of affected persons, including women<sup>269</sup> and marginalized groups, as key elements of a human-rights based approach to evacuation or planned relocation.<sup>270</sup> Fulfilling obligations arising out of economic, social and cultural rights can, on the other hand, become particularly challenging when the salinization of groundwater and soil and the ultimate loss of habitable territory vastly increase the needs and numbers of affected persons at a time when State capacity may decline as authorities have to address a multitude of increasingly serious environmental, economic and social crises.<sup>271</sup> However, even in times of disasters,<sup>272</sup> an affected State continues to have the minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights. Consequently, for example, a State party to the International Covenant on Economic, Social and Cultural Rights in which, for instance, any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is, *prima facie*, failing to discharge its obligations under the Covenant.<sup>273</sup> To the extent that the affected State does not possess the resources and capacity to take the necessary measures, it has a duty to appeal to other States and the international community, in accordance with the obligation under article 2 (1) of the Covenant to take steps with a view to achieving progressively the full realization of relevant rights not only individually, but also through international assistance and cooperation.<sup>274</sup>

221. At the same time, it has to be taken into account that States may limit the exercise of certain rights and derogate from certain human rights obligations.

<sup>266</sup> [CCPR/C/135/D/3624/2019](#), para. 8.12.

<sup>267</sup> See, for example, International Covenant on Civil and Political Rights, arts. 10 (3) and 14 (3) (d); see also art. 27.

<sup>268</sup> *Ibid.*, art. 19 (2).

<sup>269</sup> The Committee on the Elimination of Discrimination against Women has called on States parties to ensure the representation of women “in decision-making processes ..., including with regard to policies concerning disaster risk reduction, post-disaster management and climate change” ([CEDAW/C/ARG/CO/7](#), para. 39 (d)) and to strengthen “a gender-sensitive approach to ... disaster risk reduction, preparedness and response, and the mitigation of the negative impacts of climate change” ([CEDAW/C/PHL/CO/7-8](#), para. 9).

<sup>270</sup> See, for example, Paris Agreement, arts. 7 (5) and 12. See also International Law Association, Sydney Declaration of Principles, resolution 6/2018, annex, in International Law Association, *Report of the Seventy-Eighth Conference* (see footnote 163 above), p. 35, at p. 38, principle 6, para. 5.

<sup>271</sup> For the relevance of positive obligations in disaster situations more generally, see Committee on Economic, Social and Cultural Rights, general comment No. 12 (1999) on the right to adequate food, para. 15; general comment No. 14 (2000) on the right to the highest attainable standard of health, para. 40; and general comment No. 15 (2002) on the right to water, para. 16 (h).

<sup>272</sup> As highlighted by Committee on Economic, Social and Cultural Rights, general comment No. 12 (1999), para. 6, “States have a core obligation to take the necessary action to mitigate and alleviate hunger ... even in times of natural or other disasters”.

<sup>273</sup> Committee on Economic, Social and Cultural Rights, general comment No. 3 (1990) on the nature of States parties’ obligations, para. 10.

<sup>274</sup> See also draft article 11 of the draft articles on the protection of persons in the event of disasters, on the duty of the affected State to seek external assistance (*Yearbook ... 2016*, vol. II (Part Two), para. 48).

However, in climate change contexts, the threshold for doing so is high. International human rights law, such as the International Covenant on Civil and Political Rights, permits limitations to rights only as provided for by domestic law and as necessary for the protection of national security, public order, public health or morals or the rights and freedoms of others.<sup>275</sup> The Covenant also allows States parties to derogate from their obligations thereunder “[i]n time of public emergency which threatens the life of the nation”.<sup>276</sup> States parties have invoked this provision to suspend the right of liberty of movement during the emergency phase of a disaster.<sup>277</sup> However, derogation measures must be non-discriminatory and proportionate and must not last longer than strictly required by the circumstances.<sup>278</sup> Thus, permanent or absolute derogations would be impermissible even in the face of sea-level rise.

##### 5. Protection of persons in vulnerable situations in the context of sea-level rise and the principle of non-discrimination

222. Draft article 6 of the draft articles on the protection of persons in the event of disasters reads as follows: “Response to disasters shall take place in accordance with the principles of humanity, neutrality and impartiality, and on the basis of non-discrimination, while taking into account the needs of the particularly vulnerable.”<sup>279</sup> The meaning of this wording is twofold. First, it establishes a positive need to respect the right of particularly vulnerable groups to have their special protection and assistance needs taken into account, as a necessary part of respecting and protecting their human rights. Second, it makes clear that the humanitarian principle of non-discrimination is not to be taken as excluding the prospect of “positive discrimination” as appropriate, a position that is reflected in the inclusion of the phrase “while taking into account the needs of the particularly vulnerable”.<sup>280</sup>

223. The memorandum by the Secretariat, besides pointing to the draft articles on the protection of persons in the event of disasters as being relevant in the context of the protection of particular vulnerable groups, also mentions that the plight of vulnerable persons was also dealt with in the draft articles on the expulsion of aliens.<sup>281</sup>

224. The wording used to describe vulnerable persons and groups varies slightly across different legal contexts. While, in the context of the previous work of the Commission and existing instruments on disaster protection, the phrasing “particularly vulnerable groups” has been used, in the context of climate frameworks the terms “vulnerable groups, communities and ecosystems” and “people in vulnerable situations” are used, the latter with regard to the application of the human rights.<sup>282</sup> The Office of the United Nations High Commissioner for Human Rights also uses the wording “vulnerable situations” in its key messages on human rights, climate change and migration, including with regard to the need to protect the human rights of people who are in particularly vulnerable situations.<sup>283</sup> Similarly, the Human Rights Council uses the phrase “people in vulnerable situations” in its resolution 47/24,<sup>284</sup> as does the Secretary-General in his report to the Council, submitted

<sup>275</sup> See, for example, art. 12 (3) of the Covenant, with regard to the right to liberty of movement and freedom to choose one’s residence.

<sup>276</sup> Art. 4 (1).

<sup>277</sup> See, for example, Guatemala, Depositary Notification C.N.839.2016.TREATIES-IV.4, 30 September 2016.

<sup>278</sup> See Human Rights Committee, general comment No. 29 (2001).

<sup>279</sup> *Yearbook ... 2016*, vol. II (Part Two), para. 48.

<sup>280</sup> *Ibid.*, para. 49, para. (7) of the commentary to draft article 6.

<sup>281</sup> A/CN.4/768, paras. 38–40. See *Yearbook ... 2014*, vol. II (Part Two), para. 44.

<sup>282</sup> See Paris Agreement, and the Glasgow Climate Pact (FCCC/PA/CMA/2021/10/Add.1).

<sup>283</sup> OHCHR, “OHCHR’s key messages on human rights, climate change and migration”. Available at <https://www.ohchr.org/en/climate-change/human-rights-climate-change-and-migration>.

<sup>284</sup> Human Rights Council resolution 47/24 of 14 July 2021.

pursuant to that resolution, on the impact of climate change on the human rights of people in vulnerable situations.<sup>285</sup>

225. Vulnerability in the context of climate change and sea-level rise can be broken down into intersecting layers. First, certain areas may be particularly exposed to a climate-related hazard. In the case of sea-level rise, low-lying small island States and atolls are particularly exposed to hazards, together with low-lying coastal zones, deltaic regions and Arctic communities. Vulnerability to exposure – the first layer of vulnerability – may be exacerbated or reduced by intersecting layers of further vulnerability, which will influence the level of risk of impact for the population concerned.

226. As to the second layer of vulnerability, some countries or regional groupings will be more vulnerable than others as a result of intersecting socioeconomic development, inequity, marginalization, historical and ongoing patterns such as colonialism, governance challenges, limited access to basic services or resources, and violent conflict. On the other hand, the same factors may act to lessen vulnerability, including through the capacity to adapt.

227. Thus, the same level of exposure will not necessarily lead to the same risk of impact in each country or region exposed. For example, among the small islands or atolls, it is the small island developing States that are most vulnerable to the impact of sea-level rise, partly because of lack of capacity to adapt or to buffer negative effects. Within countries or regional clusters, some groups will be more vulnerable than others. For example, vulnerability is higher in locations with “high levels of climate-sensitive livelihoods (e.g., smallholder farmers, pastoralists, fishing communities)”.<sup>286</sup> Similarly, Indigenous groups are highly vulnerable. This vulnerability may be due to a range of factors, including inequality or discrimination within the State, a history of colonialism, social or economic exclusion or disadvantage, type of livelihood or source of income, and location (that is, rural communities may face particular vulnerabilities).

228. Lastly, personal vulnerabilities may mean that some individuals, including individuals within groups that are highly vulnerable, will be more vulnerable than others owing to factors such as race, gender, religion, age, ethnicity, indigeneity, socioeconomic status, disability, education and social class.

229. In 2022, in the above-mentioned report of the Secretary-General, submitted to the Human Rights Council pursuant to its resolution [47/24](#), on the impact of climate change on the human rights of people in vulnerable situations, the Secretary-General stated the following:

People who are disproportionately at risk from the adverse impacts of climate change may include indigenous peoples, local communities, peasants, migrants, children, women, persons with disabilities, people living in small island developing States and least developed countries, persons living in conditions of water scarcity, desertification, land degradation and drought, and others in vulnerable situations who are at risk of being left behind. Climate change impacts can vary based on a number of factors, including geography, poverty, age, gender, sex, disability, migration status, religion, race and cultural or ethnic background. Multiple forms of discrimination, including racism, sexism and classism, may combine, overlap, or intersect, especially in the experiences of people in vulnerable situations.<sup>287</sup>

<sup>285</sup> [A/HRC/50/57](#).

<sup>286</sup> “Summary for policymakers”, in Intergovernmental Panel on Climate Change, *Climate Change 2022* (see footnote 155 above), para. B.2.4.

<sup>287</sup> [A/HRC/50/57](#), para. 4.

230. The Commission, in the context of draft article 6 of the draft articles on the protection of persons in the event of disasters, decided against including a list of vulnerable groups in the draft article itself, in recognition of the relative nature of vulnerability and the need for an open-ended category. The same seems advisable in the present context, particularly in the light of the complex and changing character of vulnerability to climate change more broadly, and to sea-level rise specifically, and the need to remain responsive to scientific findings over time.

231. As was recognized by the Commission in its commentary to that draft article, the specific protection and assistance needs of those in vulnerable situations should be taken into account, and meeting those needs in the form of positive discrimination does not contradict the humanitarian principle of non-discrimination. The Commission understood the reference to “taking into account” in a broad sense, so as also to cover, *inter alia*, accessibility of information and community participation, including engagement of vulnerable groups in the design, implementation, monitoring and evaluation of assistance provided in the event of a disaster, as well as in preparing for the possibility of a disaster.<sup>288</sup>

232. The obligations of States to refrain from both direct and indirect discrimination,<sup>289</sup> to effectively prevent, protect against and provide remedies for discrimination<sup>290</sup> and to take positive measures to address its structural causes through special measures, such as “affirmative action” aimed at achieving *de facto* substantive equality,<sup>291</sup> are particularly important in the context of sea-level rise because, as widely recognized, environmental crises exacerbate pre-existing vulnerabilities and discrimination and intersect with social inequalities regarding class, gender and

<sup>288</sup> *Yearbook ... 2016*, vol. II (Part Two), para. 49, paras. (7) and (8) of the commentary to draft article 6.

<sup>289</sup> The Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, noted the following in the commentary to framework principle 3 of the framework principles on human rights and the environment (A/HRC/37/59, annex, paras. 8 and 9):

In the environmental context, direct discrimination may include, for example, failing to ensure that members of disfavoured groups have the same access as others to information about environmental matters, to participation in environmental decision-making, or to remedies for environmental harm ... Indirect discrimination may arise, for example, when measures that adversely affect ecosystems, such as mining and logging concessions, have disproportionately severe effects on communities that rely on the ecosystems.

<sup>290</sup> International Covenant on Civil and Political Rights, art. 2; International Covenant on Economic, Social and Cultural Rights, art. 2; Convention on the Rights of the Child, art. 2; International Convention on the Elimination of All Forms of Racial Discrimination, art. 1; Convention on the Elimination of All Forms of Discrimination against Women, arts. 1 and 2; and Convention on the Rights of Persons with Disabilities, art. 2.

<sup>291</sup> Several affected countries have already taken important steps in this regard. For instance, in 2017, the Government of Fiji highlighted local measures that it had taken, such as the establishment of a regional training facility for women, aimed at empowering rural women as agents of change in building a more climate-resilient Fiji, and the drawing up of gender-responsive relocation plans to take account of women’s needs (CEDAW/C/SR.1578, para. 8). The National Climate Change Policy 2018–2030 includes Sustainable Development Goal 5, on gender equality, to empower women by adopting a whole-of-economy approach (see Asian Development Bank, *Women’s Resilience in Fiji: How Laws and Policies Promote Gender Equality in Climate Change and Disaster Risk Management* (Manila, 2022)). In Kiribati, the Disaster Risk Management and Climate Change Act of 2019 mainstreams the needs of women, children and persons with disabilities (A/HRC/44/15, para. 10). The Marshall Islands adopted the Gender Equality Act in 2019 to achieve women’s participation and gender-responsive development. In Palau, the National Gender Mainstreaming Policy (2018–2023) was endorsed in 2018. In Samoa, the policy on gender in disaster risk management focuses on involving women across all phases of disaster risk management. Vanuatu adopted key gender policy measures, including the National Gender Equality Policy 2015–2019.

race.<sup>292</sup> Moreover, due to poverty, discrimination and systemic marginalization, groups, communities and individuals could be in a weaker position in terms of their ability to anticipate and respond to environmental change, resulting in the paradox that particularly vulnerable individuals, such as persons with disabilities or chronic illnesses and older people, and the poorest and most marginalized communities could be the least able to move. In a similar vein, the Special Rapporteur on violence against women and girls, its causes and consequences, in her 2022 report to the General Assembly, provides a critical assessment of how climate change risks disproportionately affect women and girls. The Special Rapporteur warns that the escalating effects of sea-level rise could deepen gender inequality, with climate change aggravating “all types of gender-based violence against women and girls, which are exacerbated by discriminatory legal systems and governance structure and unequal power distribution, resulting in limited avenues of participation”, and that particular groups of women, including older women, adolescent girls and women with disabilities, are particularly at risk as a result of their intersecting vulnerabilities.<sup>293</sup> Intersectionality can also become an issue when affected populations face discrimination on the basis of their ethnic, national or social origin when they decide to migrate to other countries to cope with the effects of sea-level rise, or if they are forced to do so because their place of habitual residence has become uninhabitable.<sup>294</sup>

## 6. Principle of *non-refoulement* in the context of the protection of persons affected by sea-level rise

233. As noted in the second issues paper,<sup>295</sup> *non-refoulement* obligations are particularly relevant for the protection of persons affected by sea-level rise. Where such individuals qualify for refugee status, they will be protected from *refoulement* under article 33 of the Convention relating to the Status of Refugees, and will be subject to the exceptions provided therein. Such cases, however, are likely to be the exception, as persons displaced by climate change in general – and by sea-level rise in particular – do not, in principle, meet the criteria set forth in article 1 (A) (2) of the Convention.<sup>296</sup>

234. Yet, the prohibition of compulsory removal or transfer of individuals to territories where there are substantial grounds for believing that they would be at risk of irreparable harm is now well established in both positive and customary international law. For one, *non-refoulement* obligations can be triggered under various legal regimes, thus protecting individuals, irrespective of their status, from removal

<sup>292</sup> The Committee on the Elimination of Discrimination against Women, for example, addressed the complex nexus between women and environmental issues with the adoption of its general recommendation No. 34 (2016), in which it made a significant link between the rights of rural women and environmental degradation, and of its general recommendation No. 37 (2018) on the gender-related dimensions of disaster risk reduction in the context of climate change. Various special rapporteurs have also addressed the issue (see [A/HRC/49/53](#), [A/77/549](#) and [A/HRC/52/33](#)).

<sup>293</sup> [A/77/136](#), paras. 23, 48, 53 and 54.

<sup>294</sup> On these issues, see also the forthcoming final report of the Committee on International Law and Sea-Level Rise of the International Law Association (to be presented at the Eighty-First Conference, due to be held in Athens, 25–28 June 2024).

<sup>295</sup> [A/CN.4/752](#), para. 252 (b).

<sup>296</sup> According to article 1 (A) (2) of the Convention relating to the Status of Refugees, as modified by the Protocol thereto, the term “refugee” applies to the following:

[A]ny person who ... owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

to any territory where their life or freedom may be under threat owing to the risk of being subjected to torture and other cruel, inhuman or degrading treatment or punishment,<sup>297</sup> enforced disappearance,<sup>298</sup> crimes against humanity<sup>299</sup> or any other serious violations of human rights and international humanitarian law.<sup>300</sup>

235. Various courts, tribunals and human rights treaty bodies have also recognized the existence of a duty not to expel or return as an implicit element of certain rights, in conjunction with the general obligations to protect and fulfil human rights.<sup>301</sup> This recognition has allowed them to further expand *non-refoulement* obligations to cover other forms of ill-treatment, including gender-based violence,<sup>302</sup> denial of the right to a fair trial,<sup>303</sup> the death penalty<sup>304</sup> and prolonged confinement in inhuman conditions.<sup>305</sup> *Non-refoulement* obligations have also been applied in relation to serious violations of economic, social and cultural rights, such as where there is a risk of degrading living conditions<sup>306</sup> or an absence of specific medical treatment for individuals with serious illnesses.<sup>307</sup> Moreover, an additional layer of protection has been afforded in the best interests of the child; hence, States are to refrain from removing a child where there are substantial grounds for believing that there is a real risk to their fundamental rights.<sup>308</sup> Indirect *refoulement* – that is, removal to a third

<sup>297</sup> Convention against Torture, art. 3; and Inter-American Convention to Prevent and Punish Torture (Cartagena de Indias, 9 December 1985), Organization of American States (OAS), *Treaty Series*, No. 67, art. 13.

<sup>298</sup> International Convention for the Protection of All Persons from Enforced Disappearance (New York, 20 December 2006), United Nations, *Treaty Series*, vol. 2716, No. 48088, p. 3, art. 16 (1).

<sup>299</sup> Draft article 5 (1) of the draft articles on prevention and punishment of crimes against humanity (A/74/10, para. 44).

<sup>300</sup> Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Convention IV) (Geneva, 12 August 1949), United Nations, *Treaty Series*, vol. 75, No. 973, p. 287, art. 45. The International Committee of the Red Cross (ICRC) has also interpreted common article 3 of the Geneva Conventions as implicitly including a *non-refoulement* obligation. See ICRC commentary (2016) to the First Geneva Convention, art. 3 (available at <https://ihl-databases.icrc.org/en/ihl-treaties/>), paras. 708–716.

<sup>301</sup> See, for instance, European Court of Human Rights, *Soering v. the United Kingdom*, Application No. 14038/88, Judgment, 7 July 1989, para. 82; European Court of Human Rights, *Jabari v. Turkey*, Application No. 40035/98, Judgment, 11 July 2000, para. 50; and Inter-American Court of Human Rights, *Pacheco Tineo family v. Plurinational State of Bolivia*, Judgment (Preliminary Objections, Merits, Reparations and Costs), 25 November 2013, para. 135. The Human Rights Committee reached a similar conclusion in *Kindler v. Canada* (CCPR/C/48/D/470/1991), in which it found that a State party to the International Covenant on Civil and Political Rights might be in breach of the Covenant if it removed persons to another jurisdiction where their Covenant rights were at the risk of being violated.

<sup>302</sup> Committee against Torture, *Njamba and Balikosa v. Sweden* (CAT/C/44/D/322/2007), para. 9.5; Human Rights Committee, *Kaba and Kaba v. Canada* (CCPR/C/98/D/1465/2006), para. 10.1; and Committee on the Elimination of Discrimination against Women, general recommendation No. 32 (2014), para. 23.

<sup>303</sup> European Court of Human Rights, *Othman (Abu Qatada) v. the United Kingdom*, Application No. 8139/09, Judgment, 17 January 2012, paras. 235 and 258.

<sup>304</sup> See Human Rights Committee, *Judge v. Canada* (2003) (CCPR/C/78/D/829/1998); and Inter-American Court of Human Rights, *Wong Ho Wing v. Peru*, Judgement (Preliminary Objection, Merits, Reparations and Costs), 30 June 2015, para. 134.

<sup>305</sup> For example, Human Rights Committee, general comment No. 20 (1992), para. 6.

<sup>306</sup> European Court of Human Rights, *M.S.S. v. Belgium and Greece*, Application No. 30696/09, Judgment, 21 January 2011, para. 367.

<sup>307</sup> See Human Rights Committee, *C v. Australia* (CCPR/C/76/D/900/1999); and European Court of Human Rights, *Paposhvili v. Belgium*, Application No. 41738/10, Judgment, 13 December 2016, para. 168.

<sup>308</sup> Inter-American Court of Human Rights, Advisory Opinion OC-21/14, on “Rights and guarantees of children in the context of migration and/or in need of international protection” (requested by Argentina, Brazil, Paraguay and Uruguay), 19 August 2014, para. 229; and Committee on the Rights of the Child, general comment No. 6 (2005), para. 27.



country from which the individual may then be removed to a territory where they may face the proscribed ill-treatment – is equally prohibited.<sup>309</sup>

236. Accordingly, the prohibition of *refoulement* under international human rights law may offer a robust umbrella of protection for persons displaced by sea-level rise, especially when their rights are at risk of being violated upon removal. This was the conclusion reached by the Human Rights Committee in *Teitiota v. New Zealand*.<sup>310</sup> As mentioned in the second issues paper,<sup>311</sup> the case concerned a communication submitted by Ioane Teitiota, a national of Kiribati who had sought asylum in New Zealand, claiming that the severe impact of climate change on his country threatened his rights under article 6 (1) of the International Covenant on Civil and Political Rights, thus preventing his compulsory return. Though the Committee eventually concluded that Teitiota's removal by the State party to Kiribati did not violate the Covenant, it recognized that where the effects of climate change (including sea-level rise) in receiving States might expose individuals to a violation of their rights under articles 6 (right to life) or 7 (right not to be subjected to torture or cruel, inhuman or degrading treatment or punishment) of the Covenant, the *non-refoulement* obligations of sending States would be triggered.<sup>312</sup> Furthermore, the Committee observed that, given that the risk of an entire country becoming submerged under water was such an extreme risk, the conditions of life in such a country might become incompatible with the right to life with dignity before the risk was realized.<sup>313</sup>

237. While the precedent set in *Teitiota v. New Zealand* broke new ground for the protection of persons affected by sea-level rise, it remains to be seen whether a similar approach will be taken by other international bodies, and whether the same conclusion can be reached in relation to violations of other human rights, particularly economic, social and cultural rights.

238. Aside from the duty not to expel or transfer, the prohibition of *refoulement* under international human rights law also includes positive obligations. While States are required to abstain from exposing individuals to a risk of irreparable harm by removing them to another territory, they are also requested to take proactive measures both to prevent this undesirable result and to ensure that other rights are respected during the individuals' stay in the State's territory. Such measures may cover, for example, a duty to conduct an individualized risk assessment,<sup>314</sup> or an obligation to admit those seeking protection<sup>315</sup> and even to issue temporary residence permits on their behalf.<sup>316</sup> States are also required to take appropriate protective measures against arbitrary detention and acts by non-State actors that may lead to *refoulement*.

<sup>309</sup> Inter-American Court of Human Rights, Advisory Opinion OC-21/14 (see footnote 308 above), para. 212.

<sup>310</sup> [CCPR/C/127/D/2728/2016](#).

<sup>311</sup> [A/CN.4/752](#), paras. 375–382.

<sup>312</sup> [CCPR/C/127/D/2728/2016](#), para. 9.11.

<sup>313</sup> *Ibid.*

<sup>314</sup> Such an assessment must take into account both the general situation in the receiving State and the individual's personal circumstances. See Inter-American Court of Human Rights, Advisory Opinion OC-21/14 (see footnote 308 above), para. 210; and European Court of Human Rights, *Paposhvili v. Belgium* (see footnote 307 above), para. 205. See also draft article 5 (2) of the draft articles on prevention and punishment of crimes against humanity ([A/74/10](#), para. 44).

<sup>315</sup> Inter-American Court of Human Rights, Advisory Opinion OC-25/18, on “The institution of asylum and its recognition as a human right in the inter-American protection system (interpretation and scope of articles 5, 22 (7) and 22 (8), in relation to article 1 (a) of the American Convention on Human Rights)” (requested by Ecuador), 30 May 2018, para. 190; and European Court of Human Rights, *M.K. and others v. Poland*, Applications No. 40503/17, No. 42902/17 and No. 43643/17, Judgment, 23 July 2020, para. 178.

<sup>316</sup> See, for instance, Committee against Torture, *Aemei et al. V. Switzerland* ([CAT/C/18/D/34/1995](#)).

Ultimately, an additional set of positive measures may be required depending on the rights being safeguarded by the *non-refoulement* obligations.<sup>317</sup>

239. As pointed out in the memorandum by the Secretariat,<sup>318</sup> since such a broader understanding of the principle of *non-refoulement* includes not only return but also expulsion, the draft articles on the expulsion of aliens are also of particular relevance to the topic at hand.

## **7. Guidelines in the Global Compact for Safe, Orderly and Regular Migration and other soft-law instruments relevant to the protection of persons displaced as a result of sea-level rise**

240. The Special Rapporteur on the human rights of migrants has stated that migration should serve as an important adaptation strategy to climate change and that it has been a traditional coping mechanism to adapt to changing environments; if properly managed, migration could therefore be a solution to cope with climate change.<sup>319</sup>

241. The applicability of international law concerning refugees, internally displaced persons and migrants to persons affected by sea-level rise has already been discussed in the second issues paper,<sup>320</sup> including an analysis of hard-law instruments, such as the Kampala Convention, and soft-law instruments, such as the Global Compact for Safe, Orderly and Regular Migration,<sup>321</sup> the Global Compact on Refugees,<sup>322</sup> the Guiding Principles on Internal Displacement and the Nansen Initiative's Agenda for the Protection of Cross-Border Displaced Persons in the Context of Disasters and Climate Change.<sup>323</sup>

242. The second issues paper also drew attention to other useful documents, such as the International Law Association's Sydney Declaration of Principles on the Protection of Persons Displaced in the Context of Sea-Level Rise.<sup>324</sup> Other more recent relevant initiatives include, for instance, the Kaldor Centre Principles on Climate Mobility.<sup>325</sup> These principles are grounded in evidence and informed by good practices. The recommendations contained therein are not prescriptive – there is no one-size-fits-all approach to climate mobility. Instead, they constitute a toolkit that can be tailored to specific circumstances. The Kaldor Centre Principles address a broad range of laws, policies and practices that can affect those who want to remain at home, as well as those who move. Holistic, interconnected, comprehensive and adaptable, they address all forms of mobility – displacement, migration, evacuation and planned relocation – and immobility.

243. Building on the analysis in the second issues paper,<sup>326</sup> the present section briefly focuses further on the Global Compact for Migration. The Global Compact is an

<sup>317</sup> European Court of Human Rights, *Tarakhel v. Switzerland*, Application No. 29217/12, Judgment, 4 November 2014, para. 120.

<sup>318</sup> A/CN.4/768, para. 53.

<sup>319</sup> A/77/189, para. 38.

<sup>320</sup> A/CN.4/752, paras. 262–283.

<sup>321</sup> General Assembly resolution 73/195, annex.

<sup>322</sup> A/73/12 (Part II), affirmed by the General Assembly in its resolution 73/151 of 17 December 2018.

<sup>323</sup> Nansen Initiative, *Agenda for the Protection of Cross-Border Displaced Persons* (see footnote 162 above).

<sup>324</sup> Resolution 6/2018, annex, in International Law Association, *Report of the Seventy-Eighth Conference* (see footnote 163 above), p. 35.

<sup>325</sup> Jane McAdam and Tamara Wood, Kaldor Centre for International Refugee Law, University of New South Wales, “UNSW Law and Justice: Kaldor Centre Principles on Climate Mobility”, 16 November 2023.

<sup>326</sup> A/CN.4/752, paras. 280–283.



internationally negotiated non-binding agreement, adopted in 2018, that deals with migration in a holistic manner, incorporating those displaced by sea-level rise in a manner that is innovative when compared to previous agreements.<sup>327</sup> It contains relevant guidelines for States and other stakeholders when dealing with climate migration, including migration of persons affected by sea-level rise.

244. The Global Compact specifically addresses climate migration, the first reference appearing in paragraph 2, where it affirms that it rests on the United Nations Framework Convention on Climate, the Paris Agreement and the Sendai Framework for Disaster Risk Reduction 2015–2030, *inter alia*. Climate migration is further recognized under objectives 2 and 5 of the cooperative framework, which refer expressly to sea-level rise among other adverse impacts of climate change.<sup>328</sup> Furthermore, objective 23 addresses the need for international cooperation, discussed below.

245. Objective 2 is to minimize the adverse drivers and structural factors that compel people to leave their country of origin, and climate change is recognized as an important driver of migration. Under the Global Compact, States commit to ensuring that deteriorating environments do not compel people to seek a livelihood elsewhere through irregular migration, including by promoting the implementation of the Paris Agreement,<sup>329</sup> investing in climate change mitigation and adaptation<sup>330</sup> and strengthening early warning systems.<sup>331</sup>

246. Under the subheading “Natural disasters, the adverse effects of climate change, and environmental degradation”, a series of actions are set out, including strengthening joint analysis and sharing of information,<sup>332</sup> developing strategies for adaptation and resilience,<sup>333</sup> integrating displacement considerations into disaster preparedness strategies,<sup>334</sup> harmonizing approaches and mechanisms to address the vulnerabilities of persons affected<sup>335</sup> and developing coherent approaches to address the challenges of migration movements in the context of disasters, including by taking into consideration relevant recommendations from State-led consultative processes.<sup>336</sup>

247. The specific recognition that the inclusion of this subheading under objective 2 entails is an important step in dealing with climate migration. With the Global Compact, for the first time, the international community has made specific commitments not only to address disasters and climate change as drivers of migration, but also to protect those who are compelled to leave their countries because of such events.

248. Objective 5 is to enhance availability and flexibility of pathways for regular migration, including the facilitation of labour mobility and decent work. Specific reference is made to migrants displaced owing to natural disasters and the adverse effects of climate change: actions set out include developing or building on existing national or regional practices for admission and stay for migrants compelled to leave their countries of origin owing to sudden-onset natural disasters and other precarious

<sup>327</sup> See <https://disasterdisplacement.org/perspectives/the-global-compact-for-migration-a-breakthrough-for-disaster-displaced-persons-and-the-beginning-of-a-long-process/>.

<sup>328</sup> General Assembly resolution 73/195, annex, paras. 18 (i) and 21 (h).

<sup>329</sup> *Ibid.*, para. 18 (a).

<sup>330</sup> *Ibid.*, para. 18 (b).

<sup>331</sup> *Ibid.*, para. 18 (c).

<sup>332</sup> *Ibid.*, para. 18 (h).

<sup>333</sup> *Ibid.*, para. 18 (i).

<sup>334</sup> *Ibid.*, para. 18 (j).

<sup>335</sup> *Ibid.*, para. 18 (k).

<sup>336</sup> *Ibid.*, para. 18 (l).

situations;<sup>337</sup> and cooperating to identify, develop and strengthen solutions for migrants compelled to leave their countries of origin owing, *inter alia*, to the adverse effects of climate change, such as sea-level rise, including by devising planned relocation and visa options, in cases where adaptation in or return to the country of origin is not possible.<sup>338</sup>

249. Climate change is also mentioned under objective 23, which is to strengthen international cooperation and global partnerships for safe, orderly and regular migration. Actions set out include increasing international and regional cooperation to accelerate the implementation of the 2030 Agenda for Sustainable Development in geographical areas from which irregular migration systematically originates owing, *inter alia*, to climate change and disasters.<sup>339</sup> The principle of international cooperation is addressed below.

## 8. Applicability of complementary protection in the context of refugee law to persons affected by sea-level rise

250. Complementary protection refers to protection, through the granting of a visa, accorded to non-citizens who are subject to *non-refoulement* obligations but do not qualify for refugee status.<sup>340</sup> Since the adoption of the Convention relating to the Status of Refugees in 1951, the principle of *non-refoulement* has grown as a concept in international law and is now included in international human rights treaties beyond the scope of that Convention. For example, an express prohibition of *refoulement* is contained in the Convention against Torture (art. 3), and the duty of *non-refoulement* with regard to the right to life is implied in the International Covenant on Civil and Political Rights (arts. 6 and 7) and other human rights treaties.<sup>341</sup> While the right to life and the right not to be subjected to torture and other cruel, inhuman or degrading treatment or punishment are the primary rights with which *non-refoulement* obligations are associated, there are potentially others. Thus, complementary protection operates to protect non-citizens who are in need of protection from serious human rights violations in their countries of origin, but who do not fall within the relatively narrow grounds for protection under the 1951 Convention.<sup>342</sup>

<sup>337</sup> *Ibid.*, para. 21 (g).

<sup>338</sup> *Ibid.*, para. 21 (h).

<sup>339</sup> *Ibid.*, para. 39 (b). For the 2030 Agenda, see General Assembly resolution 70/1 of 25 September 2015.

<sup>340</sup> See Erika Feller, Volker Türk and Frances Nicholson, eds. *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (Cambridge, Cambridge University Press, 2003).

<sup>341</sup> Universal Declaration of Human Rights, art. 3; Convention on the Rights of the Child, art. 6; Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) (Rome, 4 November 1950), United Nations, *Treaty Series*, vol. 213, No. 2889, p. 221, art. 2; American Convention on Human Rights: "Pact of San José, Costa Rica" (San José, 22 November 1969), *ibid.*, vol. 1144, No. 17955, p. 123, art. 4; African Charter on Human and Peoples' Rights (Nairobi, 27 June 1981), *ibid.*, vol. 1520, No. 26363, p. 217, art. 4; and Arab Charter on Human Rights, adopted at Tunis in May 2004, at the 16th Summit of the League of Arab States (CHR/NONE/2004/40/Rev.1; for a revised and updated version (Tunis, 22 and 23 May 2004), see Boston University International Law Journal, vol. 24, No. 2 (2006), p. 147), art. 5. *Non-refoulement* obligations regarding the right to life are recognized in Human Rights Committee, *Ahani v. Canada* (CCPR/C/80/D/1051/2002), and Human Rights Committee, general comment No. 31 (2004), para. 12. See also Committee on the Rights of the Child, general comment No. 6 (2005), para. 27.

<sup>342</sup> Nicole Dicker and Joanna Mansfield, "Filling the protection gap: current trends in complementary protection in Canada, Mexico and Australia", New Issues in Refugee Research, Research Paper No. 238 (Geneva, United Nations High Commissioner for Refugees (UNHCR), 2012), p. 2, citing conference paper of the Standing Committee of the Executive Committee of the Programme of the United Nations High Commissioner for Refugees on providing

251. For a claim for complementary protection regarding environmental impact, including sea-level rise, the relevant test concerns what the harm is likely to entail for the person upon their return, which means establishing whether the State is able or willing to mitigate the harm. In general, it appears that there are several criteria that must be met: the risk to life must be actual or imminent; the harm must personally affect the applicant, rather than posing a threat to society as a whole; while environmental contamination with proven long-term health effects may be a sufficient threat, there must be sufficient evidence that harmful quantities of contaminants have reached, or will reach, the human environment; a hypothetical risk is insufficient to constitute a violation of the right to life; and in the absence of an actual or imminent threat, cases challenging public policy will be considered inadmissible. In regard to European regional protection on the right to life, covered by article 2 of the European Convention on Human Rights, it is unlikely that climate change-induced threats to the right to life would assist an applicant in gaining complementary protection, since a breach of this right, and thus complementary protection, would depend on the requirement that the State of origin had been deficient in its response, in that the environmental harm was caused or perpetrated by the State, and the burden placed on the State to act must be reasonable. Claims based on the right not to be subjected to cruel, inhuman or degrading treatment are equally difficult to establish regarding sea-level rise, as the requirements for complementary protection have been carefully circumscribed such that a State's lack of resources alone would not qualify as grounds for such protection except in the most exceptional of circumstances.

252. Many of these issues can be seen in the case of *Teitiota v. New Zealand*, discussed above, in which the domestic court had rejected Teitiota's claim for complementary protection, while the Human Rights Committee recognized, although it was not the case *sub judice*, that where the effects of climate change (including sea-level rise) in receiving States might expose individuals to a violation of their rights under articles 6 (right to life) or 7 (right not to be subjected to torture or cruel, inhuman or degrading treatment or punishment) of the International Covenant on Civil and Political Rights, the *non-refoulement* obligations of sending States would be triggered.<sup>343</sup>

253. Thus, while complementary protection can provide a pathway to granting asylum for applicants who do not fulfil the requirements of the Convention relating to the Status of Refugees, this mechanism does not seem currently to provide a compelling avenue for relief of those displaced as a result of sea-level rise. However, complementary protection could become a more promising, yet still limited, avenue when the effects of sea-level rise are materializing and there is a real risk of violation of the right to life, the right to respect for personal integrity or other rights.

254. Broader definitions of the term "refugee" have been adopted at the regional level in the Organization of African Unity (OAU) Convention Governing the Specific Aspects of Refugee Problems in Africa and the Cartagena Declaration on Refugees, thus increasing the possibility of refugee status and protections applying to persons displaced by climate change, including sea-level rise.<sup>344</sup>

---

international protection including through complementary forms of protection (2 June 2005), available at <https://www.unhcr.org/media/providing-international-protection-including-through-complementary-forms-protection>, para. 21.

<sup>343</sup> CCPR/C/127/D/2728/2016, para. 9.11.

<sup>344</sup> A/77/189, para. 20. OAU Convention Governing the Specific Aspects of Refugee Problems in Africa (Addis Ababa, 10 September 1969), United Nations, *Treaty Series*, vol. 1001, No. 14691, p. 45.

255. The memorandum by the Secretariat points to the fact that the Commission, in its work on the expulsion of aliens, also used a broader definition of refugees.<sup>345</sup>

## 9. Humanitarian visas and similar administrative policies for the protection of persons affected by sea-level rise

256. Humanitarian pathways are a set of policies and administrative measures, including humanitarian visas, taken by States to expedite immigration processes and enable safer routes for certain individuals seeking international protection. They are also used to facilitate admission and stay for persons displaced as a result of armed violence, civil unrest, foreign occupation,<sup>346</sup> and earthquakes, floods and other disasters,<sup>347</sup> especially in cases of mass displacement. In practice, however, the implementation of these measures varies considerably. For instance, although humanitarian visas are normally issued by consular and diplomatic authorities before admission into the host State, they may also be given to individuals upon arrival, or the individuals concerned may even simply be exempted from visa requirements.

257. Furthermore, when converted into special permits, humanitarian pathways can help regularize the stay of persons who, although not qualifying for refugee status, cannot be returned to their country of nationality or habitual residence. The measures allow individuals access to basic, fundamental rights while avoiding social marginalization and exclusion. They may also promote family reunification for migrants and help realize the right to family life and the best interests of the child.

258. Various States have adopted such policies in different forms, including Argentina,<sup>348</sup> Australia,<sup>349</sup> Austria,<sup>350</sup> Bolivia (Plurinational State of),<sup>351</sup> Brazil,<sup>352</sup> Colombia,<sup>353</sup> Costa Rica,<sup>354</sup> Croatia,<sup>355</sup> Ecuador,<sup>356</sup> Finland,<sup>357</sup> France,<sup>358</sup>

<sup>345</sup> A/CN.4/768, para. 80.

<sup>346</sup> States such as Argentina, Brazil, France and Switzerland have introduced humanitarian visa programmes to facilitate access for refugees and asylum-seekers from the Syrian Arab Republic (UNHCR, “Global responsibility sharing: through pathways for admission of Syrian refugees”, 23 March 2016, p. 8). Similarly, several member States of the European Union, the United Kingdom and the United States have adopted humanitarian admission programmes to expedite the entry and stay of Ukrainian refugees and asylum-seekers.

<sup>347</sup> For instance, after the earthquake in Haiti in 2010 and the subsequent cholera outbreak, a number of Latin American countries issued humanitarian visas to Haitian nationals. Similar measures would later be taken in relation to nationals of the Bolivarian Republic of Venezuela, who in principle would not qualify for refugee protection.

<sup>348</sup> Decree No. 616/2010 of 6 May 2010 on regulations implementing the Migration Act (Act No. 25.871) (as amended), annex, art. 23 (m).

<sup>349</sup> Migration Regulations 1994, compilation No. 251, vol. 1 (20 December 2023), schedule 1, items 1223C and 1402.

<sup>350</sup> Federal Act concerning the granting of asylum (2005 Asylum Act), 23 December 2020, sect. 3 (a).

<sup>351</sup> Migration Act (Act No. 370), 8 May 2013, art. 30 (4).

<sup>352</sup> Migration Act (Act No. 13.445), 24 May 2017, art. 14 (c).

<sup>353</sup> Resolution No. 1272 of 28 July 2017, implementing the special residence permits introduced by Resolution No. 5797 of 25 July 2017 of the Ministry of Foreign Affairs and establishing the procedure for their issuance to nationals of the Bolivarian Republic of Venezuela.

<sup>354</sup> General Act on Migration (Act No. 8764), 1 September 2009, arts. 6 (6) and 94 (12).

<sup>355</sup> Act on International and Temporary Protection (as amended), 1 January 2018, art. 3 (1).

<sup>356</sup> Organic Act on Human Mobility, 6 February 2017, arts. 57, 58 and 66 (5).

<sup>357</sup> Aliens Act (Act No. 301/2004 of 30 April 2004) (as amended), sect. 52.

<sup>358</sup> Order No. 2020-1733 of 16 December 2020 on the legislative part of the Code on the Entry and Stay of Aliens and the Right to Asylum, arts. L. 425-1 to L. 425-10.

Guatemala,<sup>359</sup> Honduras,<sup>360</sup> Italy,<sup>361</sup> Jamaica,<sup>362</sup> Mexico,<sup>363</sup> Nicaragua,<sup>364</sup> Panama,<sup>365</sup> Peru,<sup>366</sup> Poland,<sup>367</sup> Portugal,<sup>368</sup> Russian Federation,<sup>369</sup> Switzerland<sup>370</sup> and Uruguay.<sup>371</sup>

259. It is important, however, to emphasize that since the admission of foreign nationals is in principle a matter that falls within the domestic jurisdiction of States, the issuance of humanitarian visas or the adoption of similar administrative measures benefiting non-nationals is not in itself an international obligation.<sup>372</sup>

260. Although humanitarian pathways are normally implemented according to the national legislation of the State concerned, there have been efforts to coordinate international action in this respect. For example, as discussed above, as part of the normative commitments under the Global Compact for Migration to enhance the availability of pathways for regular migration, actions set out in the Global Compact include developing or building on existing national and regional practices for admission and stay for migrants compelled to leave their countries of origin owing to “sudden-onset natural disasters and other precarious situations”.<sup>373</sup> Such practices should include, for example, the provision of “humanitarian visas, private sponsorships, access to education for children, and temporary work permits, while adaptation in or return to their country of origin is not possible”.<sup>374</sup> Moreover, where individuals are compelled to leave their countries of origin owing to “slow-onset natural disasters, the adverse effects of climate change, and environmental degradation, such as desertification, land degradation, drought and sea-level rise”,<sup>375</sup> actions set out in the Global Compact for Migration include cooperating to identify, develop and strengthen solutions, including “by devising planned relocation and visa options” when adaptation in or return to their country of origin is not possible.<sup>376</sup> Similarly, the Global Compact on Refugees refers to measures to assist those forcibly displaced by natural disasters, taking into account national laws and regional instruments as applicable, and practices such as “temporary protection and humanitarian stay arrangements”, where appropriate.<sup>377</sup>

261. In the same vein, initiatives in Latin America and the Caribbean have been reaffirming the region’s good practices in regulating the granting of humanitarian visas to individuals who may not necessarily qualify for refugee status, but are nevertheless in need of international protection. These include the 2004 Mexico Declaration and Plan of Action,<sup>378</sup> and in particular the regional Solidarity

<sup>359</sup> Migration Code (Decree No. 44-2016), 18 October 2016, art. 68.

<sup>360</sup> Migration and Aliens Act (Decree No. 208-2003), 3 March 2004, art. 39 (13).

<sup>361</sup> Legislative Decree No. 142, 18 August 2015, art. 17.

<sup>362</sup> Refugee Policy, 11 March 2009, paras. 12 (a) (iii) and (b) and 13 (f).

<sup>363</sup> Refugees and Complementary Protection Act, 27 January 2011, art. 2 (IV).

<sup>364</sup> General Act on Migration (Act No. 761), 6 July 2011, art. 220.

<sup>365</sup> Decree-Law No. 3 of 2008, 22 February 2008, arts. 6 (9) and 18.

<sup>366</sup> Legislative Decree on Migration (Legislative Decree No. 1350), 7 January 2017, art. 29.2 (k).

<sup>367</sup> Act on Foreigners, 12 December 2013, art. 16 (4).

<sup>368</sup> Act No. 23/2007, 4 July 2007, art. 68.

<sup>369</sup> Federal Act No. 114-FZ on the procedure for exiting and entering the Russian Federation, 15 August 1996, art. 25 (7).

<sup>370</sup> Order on entry and the granting of visas (No. 142.204), 15 August 2018, art. 4 (2).

<sup>371</sup> Migration Act (Act No. 18.250), 17 January 2008, arts. 34, 43 and 44.

<sup>372</sup> Except, for instance, where required as positive measures stemming from *non-refoulement* obligations.

<sup>373</sup> General Assembly resolution 73/195, annex, para. 21 (g).

<sup>374</sup> *Ibid.*, para. 21 (g).

<sup>375</sup> *Ibid.*, para. 21 (h).

<sup>376</sup> *Ibid.*, para. 21 (h).

<sup>377</sup> A/73/12 (Part II), para. 63.

<sup>378</sup> Mexico Declaration and Plan of Action to Strengthen the International Protection of Refugees in Latin America (Mexico City, 16 November 2004).

Resettlement programme established therein, and the 2014 Brazil Declaration and Plan of Action.<sup>379</sup>

262. Humanitarian arrangements could thus be used to establish regular pathways for admission and stay for persons affected by sea-level rise, even before their communities become completely uninhabitable. Though States may adapt their already existing national legal frameworks on the admission and stay of non-nationals on humanitarian grounds to cover persons fleeing the effects of sea-level rise, more predictable and coherent solutions based on international cooperation are necessary. Such solutions could be achieved, for instance, through the adoption of bilateral and regional mobility agreements, including for labour migration and education.

263. An example is the recently adopted treaty as part of the Australia-Tuvalu Falepili Union,<sup>380</sup> as discussed above. Article 3 (1) of this bilateral treaty provides for a special human mobility pathway for nationals of Tuvalu to move to Australia to live, study, work and access public health and family support services.

#### 10. Tools for the avoidance of statelessness in the context of sea-level rise

264. Statelessness has long been the object of international concern. The 1930 Hague Convention on Certain Questions relating to the Conflict of Nationality Laws,<sup>381</sup> the first multilateral agreement designed to avoid the effects of both positive and negative conflicts of nationality laws, incorporated normative commitments to avoid and reduce statelessness.<sup>382</sup> Although the Convention recognized limitations to States' discretion in nationality matters, these limitations were chiefly based on elements with a bearing on relations between States, and not the protection of the individual as such. At that moment in time, when there was a lack of focus on individuals in the international plane, the importance of nationality was to a great extent limited to the exercise of diplomatic protection, which was (and still is) overtly regarded as a right of the State.<sup>383</sup> The regime established under the 1930 Hague Convention would later be complemented by the recognition of the right to a nationality,<sup>384</sup> the 1954 Convention on the Status of Stateless Persons, the 1961 Convention on the Reduction of Statelessness (which aims to prevent and reduce statelessness in the long term) and regional arrangements.

265. It is also worth recalling that the Commission, in draft article 8 of the 2006 draft articles on diplomatic protection, extended the scope of diplomatic protection to

<sup>379</sup> Brazil Declaration: A Framework for Cooperation and Regional Solidarity to Strengthen the International Protection of Refugees and Displaced and Stateless Persons in Latin America and the Caribbean, and Brazil Plan of Action: A Common Road Map to Strengthen Protection and Promote Sustainable Solutions for Refugees and Displaced and Stateless Persons in Latin America and the Caribbean within a Framework of Cooperation and Solidarity (Brasilia, 3 December 2014).

<sup>380</sup> Available at <https://www.dfat.gov.au/geo/tuvalu/australia-tuvalu-falepili-union-treaty>.

<sup>381</sup> Convention on Certain Questions relating to the Conflict of Nationality Laws (The Hague, 12 April 1930), League of Nations, *Treaty Series*, vol. 179, No. 4137, p. 89.

<sup>382</sup> See the preamble: "Recognising accordingly that the ideal towards which the efforts of humanity should be directed in this domain is the abolition of all cases both of statelessness and of double nationality." See also Special Protocol concerning Statelessness (The Hague, 12 April 1930), United Nations, *Treaty Series*, vol. 2252, No. 40153, p. 435.

<sup>383</sup> As the Permanent Court of International Justice concluded in the *Mavrommatis Palestine Concessions* case: "By taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own rights – its right to ensure, in the person of its subjects, respect for the rules of international law." See Permanent Court of International Justice, *Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*, p. 12. See also draft article 2 of the draft articles on diplomatic protection, *Yearbook ... 2006*, vol. II, Part Two, para. 49.

<sup>384</sup> Universal Declaration of Human Rights, art. 15.



include stateless persons and refugees, by way of progressive development of international law.<sup>385</sup>

266. Thus, if in the past the lack of nationality was regarded as a technical issue encroaching on the interests of States, the intersection between statelessness and the exercise of human rights is today widely recognized. Where formal nationality is a prerequisite for the exercise of certain human rights, statelessness may hamper their full enjoyment and realization. This interrelationship has been reaffirmed to a certain extent by all three regional human rights courts. For instance, in *Yean and Bosico children v. Dominican Republic*, the Inter-American Court of Human Rights concluded that stateless children were left in a legal limbo, as they did not have a recognized “juridical personality” or access to basic rights under the American Convention on Human Rights.<sup>386</sup> A similar conclusion was reached by the African Court on Human and Peoples’ Rights in *Penessis v. United Republic of Tanzania*, in which it noted that the right to nationality was a “fundamental aspect of the dignity of the human person”.<sup>387</sup> In the same vein, the European Court of Human Rights noted in *Ramadan v. Malta* that an arbitrary denial of nationality might in certain circumstances result in a violation of the right to respect for private and family life.<sup>388</sup>

267. Statelessness has also been considered in relation to the right of children to acquire a nationality. In *D.Z. v. Netherlands*, the Human Rights Committee found that the Netherlands had violated a child’s right to a nationality under article 24 (3) of the International Covenant on Civil and Political Rights by including the annotation “unknown nationality” in his record in the civil registry.<sup>389</sup> According to the Committee, this measure had prevented him from having access to international protection as a stateless child and left him with no prospect of acquiring a nationality.<sup>390</sup>

268. As identified by the Commission in one of its early reports on the issue,<sup>391</sup> statelessness is often a product of conflicts of nationality laws, especially regarding the *jus soli* and *jus sanguinis* criteria for acquisition of nationality by birth, deprivation of nationality, State succession and changes of the status of parents.

269. As discussed in the second issues paper,<sup>392</sup> while sea-level rise may create an additional risk of statelessness if a State loses its statehood together with its territory in a worst-case scenario, persons affected by sea-level rise may become stateless long before that happens or irrespectively. The lack of a specific legal status for persons displaced as a result of the effects of climate change, coupled with the conflicting nationality laws across the world, may create a real risk of statelessness for persons forced to leave their countries of nationality or habitual residence owing to sea-level rise. For instance, under the nationality laws of certain States, children may be prevented from acquiring the nationality of the country in which they were born owing to the irregular migratory status of their parents. Similarly, parents may be unable to pass on their nationality to their children if their country of origin abides by the *jus soli* principle or one of its variations. There may be instances where individuals affected by sea-level rise lose their nationality by settling in a foreign country, without

<sup>385</sup> *Yearbook ... 2006*, vol. II, Part Two, para. 49.

<sup>386</sup> Inter-American Court of Human Rights, *Yean and Bosico children v. Dominican Republic*, Judgment (Preliminary Objections, Merits, Reparations and Costs), 8 September 2005, para. 180.

<sup>387</sup> African Court on Human and Peoples’ Rights, *Penessis v. United Republic of Tanzania*, Application No. 013/2015, Judgment (Merits and Reparations), 28 November 2019, para. 87.

<sup>388</sup> European Court of Human Rights, *Ramadan v. Malta*, Application No. 76136/12, Judgment, 21 June 2016, para. 84.

<sup>389</sup> Human Rights Committee, *D.Z. v. Netherlands* (CCPR/C/130/D/2918/2016), para. 8.5.

<sup>390</sup> *Ibid.* See also Human Rights Committee, general comment No. 17 (1989), para. 5.

<sup>391</sup> See *Yearbook ... 1952*, vol. II, document A/CN.4/50, p. 3, annex III, pp. 17–19.

<sup>392</sup> A/CN.4/752, paras. 196, 200, 252, 398 and 419.

necessarily acquiring the latter's nationality. Hence, these real issues should be taken into consideration when designing adaptive measures to sea-level rise.<sup>393</sup>

270. Measures to avoid statelessness in the context of sea-level rise should include legal pathways for admission and stay for persons displaced across borders, and adaptation of nationality laws and administrative practices to avoid a risk of statelessness, including by preventing discriminatory measures, expediting birth registration, implementing statelessness determination procedures and facilitating the acquisition of nationality by individuals who would otherwise become stateless.

# **11. Principle of international cooperation as key to ensuring the protection of persons affected by sea-level rise<sup>394</sup>**

271. The essence of the principle of cooperation can be found in the Charter of the United Nations, according to which the purposes of the United Nations include maintaining international peace and security by taking effective collective measures, and achieving international cooperation in solving international problems of an economic, social, cultural or humanitarian character.<sup>395</sup> States have reiterated their commitment to international cooperation on many occasions. The 1970 Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations refers to cooperation as one of the seven fundamental principles of international law.<sup>396</sup> Cooperation has indeed been repeatedly framed as a global imperative. In 2015, international cooperation found expression in the Sustainable Development Goals, with the adoption by the General Assembly of the 2030 Agenda for Sustainable Development, in which States stressed the need for cooperation on the path towards sustainable development.<sup>397</sup> States once more acknowledged the need to strengthen international cooperation in 2020, on the occasion of the commemoration of the seventy-fifth anniversary of the United Nations in 2020.<sup>398</sup>

272. The role of the duty to cooperate for the realization of human rights is becoming increasingly significant, particularly where the impact of climate change undermines the capacities of affected States to discharge their enduring obligation to protect and fulfil rights. The duty to cooperate is firmly established within international human rights law. The Universal Declaration of Human Rights states that all persons are "entitled to the realization, through national effort and international cooperation ..., of the economic, social and cultural rights indispensable for [their] dignity and the free development of [their] personality" (art. 22), and to an "international order in which the rights and freedoms set forth in this Declaration can be realized" (art. 28). Under article 2 (1) of the International Covenant on Economic, Social and Cultural Rights, each State party is required "to take steps, individually and through international assistance and cooperation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means". The Covenant further entails the obligations that States parties cooperate in the scientific and cultural fields (art. 15 (4)) and in ensuring the right of everyone to be

<sup>393</sup> See, generally, Michelle Foster *et al.*, "The future of nationality in the Pacific: preventing statelessness and nationality loss in the context of climate change", May 2022.

<sup>394</sup> This section draws on the work of the Committee on International Law and Sea-Level Rise of the International Law Association, of which Ms. Galvão Teles is also a member. See the forthcoming final report of the Committee (to be presented at the Eighty-First Conference, due to be held in Athens, 25–28 June 2024).

<sup>395</sup> Charter of the United Nations, Art. 1 (1) and (3).

<sup>396</sup> General Assembly resolution 2625 (XXV) of 24 October 1970, annex.

<sup>397</sup> General Assembly resolution 70/1.

<sup>398</sup> General Assembly resolution 75/1 of 21 September 2020, paras. 6 and 18.



free from hunger (art. 11). It refers to ways in which international assistance and cooperation may be provided, thereby indicating the minimum positive action within its ambit.

273. The institutionalization of international cooperation in the legal framework of the United Nations reflects a consensus on the centrality of cooperation in international legal relations and confirms the existence of a general duty for States to engage with each other. Moreover, in relevant specialized areas of international law, such as international disaster law, existing agreements provide specifications for the meaning of such cooperation,<sup>399</sup> such as the commitment to exchange information and communicate with other States and relevant actors,<sup>400</sup> including providing early warning, and to provide scientific and technical assistance.<sup>401</sup> Another type of cooperative conduct relates to arrangements to facilitate the provision of the necessary relief personnel, supplies and equipment, and the actual provision of assistance once a disaster has occurred.<sup>402</sup> Regarding other instruments in this field, the Sendai Framework for Disaster Risk Reduction 2015–2030, in particular, highlights the importance of international cooperation,<sup>403</sup> specifically stating that “developing countries require an enhanced provision of means of implementation, including adequate, sustainable and timely resources, through international cooperation and global partnerships for development, and continued international support, so as to strengthen their efforts to reduce disaster risk”.<sup>404</sup> The Sendai Framework goes on to stress the significance of support from international organizations, including the United Nations and other international and regional organizations, international and regional financial institutions and donor agencies engaged in disaster risk reduction, for the implementation of the Framework and its priorities.<sup>405</sup>

274. Draft article 7 of the draft articles on the protection of persons in the event of disasters, entitled “Duty to cooperate”, reads as follows: “In the application of the present draft articles, States shall, as appropriate, cooperate among themselves, with the United Nations, with the components of the International Red Cross and Red Crescent Movement, and with other assisting actors.”<sup>406</sup>

275. Besides the relevance of international cooperation in the context of the protection of persons in the event of disasters, the memorandum by the Secretariat highlights other topics on which the Commission has worked previously that further address the issue of international cooperation, including in emergency situations.<sup>407</sup>

276. In the context of sea-level rise and its impact on human mobility, and as mentioned above, the role of cooperation as highlighted under the Global Compact

<sup>399</sup> For an analysis of the duty to cooperate, see [A/CN.4/652](#), paras. 79–116.

<sup>400</sup> See, for example, Tampere Convention on the Provision of Telecommunication Resources for Disaster Mitigation and Relief Operations (Tampere, 18 June 1998), United Nations, *Treaty Series*, vol. 2296, No. 40906, p. 5; Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency (Vienna, 26 September 1986), *ibid.*, vol. 1457, No. 24643, p. 133; and Framework Convention on Civil Defence Assistance (Geneva, 22 May 2000), *ibid.*, vol. 2172, No. 38131, p. 213.

<sup>401</sup> For one of the most detailed examples in that regard, see Association of Southeast Asian Nations (ASEAN) Agreement on Disaster Management and Emergency Response (Vientiane, 26 July 2005), *ASEAN Documents Series 2005*, p. 157, arts. 18 and 19.

<sup>402</sup> For a useful overview of forms of cooperation in response to disasters, see draft articles on the protection of persons in the event of disasters and commentaries thereto, *Yearbook ... 2016*, vol. II (Part Two), paras. 48–49.

<sup>403</sup> General Assembly resolution [69/283](#), annex II, paras. 38, 40, 41 and 46.

<sup>404</sup> *Ibid.*, para. 38.

<sup>405</sup> *Ibid.*, para. 48 (b).

<sup>406</sup> *Yearbook ... 2016*, vol. II (Part Two), para. 48.

<sup>407</sup> [A/CN.4/768](#), paras. 81–120.

for Migration becomes particularly important. Among the aims of the Global Compact is “to facilitate safe, orderly and regular migration, while reducing the incidence and negative impact of irregular migration through international cooperation”,<sup>408</sup> and it “fosters international cooperation among all relevant actors on migration, acknowledging that no State can address migration alone”.<sup>409</sup> Such cooperation takes various forms, including the following:

- (a) cooperation to develop research, studies and surveys;<sup>410</sup>
- (b) cooperation to minimize the adverse drivers and structural factors that compel people to leave their country of origin, by, for example:
  - (i) strengthening joint analysis and sharing of information;
  - (ii) preparing for early warning, contingency planning and evacuation planning;
  - (iii) harmonizing and developing approaches and mechanisms to address the vulnerabilities of persons affected by natural disasters, by ensuring they have access to humanitarian assistance that meets their essential needs with full respect for their rights;<sup>411</sup>
- (c) cooperation to enhance the availability and flexibility of pathways for regular migration, by, for example:
  - (i) developing human rights-based and gender-responsive bilateral, regional and multilateral labour mobility agreements;
  - (ii) facilitating regional and cross-regional labour mobility through international and bilateral cooperation arrangements;
  - (iii) identifying, developing and strengthening solutions for migrants compelled to leave their countries of origin owing to slow-onset natural disasters, the adverse effects of climate change, and environmental degradation, including by devising planned relocation and visa options, in cases where adaptation in or return to their country of origin is not possible.<sup>412</sup>

Objective 23 focuses on strengthening international cooperation and global partnerships for safe, orderly and regular migration, including through “the provision of financial and technical assistance, in line with national priorities, policies, action plans and strategies, through a whole-of-government and whole-of-society approach”.<sup>413</sup>

277. International cooperation has been also enshrined in general environmental law.<sup>414</sup> Over time, the duty to cooperate has evolved into a range of specific obligations under international environmental law, including the exchange of information between States, scientific research and systematic observations, prior notification,<sup>415</sup> consultation, prior informed consent, notification in the case of an

<sup>408</sup> General Assembly resolution 73/195, annex, para. 11.

<sup>409</sup> *Ibid.*, para. 7.

<sup>410</sup> *Ibid.*, para. 17 (k).

<sup>411</sup> *Ibid.*, para. 18 (h), (j) and (k).

<sup>412</sup> *Ibid.*, para. 21 (a), (b) and (h).

<sup>413</sup> *Ibid.*, para. 39 (a).

<sup>414</sup> For example, International Tribunal for the Law of the Sea, *MOX Plant (Ireland v. United Kingdom), Provisional Measures, Order of 3 December 2001, Reports of Judgments, Advisory Opinions and Orders 2001*, p. 95, at p. 110, para. 82, in which the Tribunal notes that “the duty to cooperate is a fundamental principle in the prevention of pollution of the marine environment”.

<sup>415</sup> For example, International Court of Justice, *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, I.C.J. Reports 2010, p. 14, at p. 49, para. 77.

emergency or emergency assistance and joint environmental impact assessments.<sup>416</sup> The principle of common but differentiated responsibilities, which was included among the principles in the declaration adopted in 1992 by the United Nations Conference on Environment and Development, has been instrumental in the implementation of cooperative efforts in this area.<sup>417</sup>

278. The United Nations Framework Convention on Climate Change, adopted in 1992, and international climate change regime in general has evolved around the idea of the international community taking collective responsibility in the light of the principle of common but differentiated responsibilities. Under the climate change regime, institutional machinery is being created for international cooperation in this area. The Paris Agreement has been particularly important in institutionalizing the duty to cooperate in important ways, including through transparency and accountability systems as they become important tools for the implementation of cooperation. Both the Framework Convention<sup>418</sup> and the 1997 Kyoto Protocol thereto<sup>419</sup> refer to international cooperation in several provisions. Similarly, international cooperation is reflected throughout the Paris Agreement.<sup>420</sup> An important aspect of international cooperation under the climate regime is loss and damage.

279. As mentioned in the second issues paper in relation to 2021,<sup>421</sup> international cooperation, including the duty to cooperate, in the context of climate change-induced sea-level rise was among the issues commanding widest support in statements by Member States in the debate in the Sixth Committee on the topic of sea-level rise in relation to international law in 2022.<sup>422</sup>

280. In the context of sea-level rise, international cooperation can be characterized as both a practical necessity and a moral imperative, as well as being part of a duty imposed by international law. Although the affected State bears the primary responsibility for the protection of its own population, the protection of persons affected by sea-level rise can ultimately be fully achieved only through international cooperation. The legal and practical effectiveness of a general duty to cooperate to protect persons in the event of sea-level rise depends on the striking of a fine balance between different considerations, including the sovereignty of the affected State, the clear delimitation of the burden on assisting States and the careful consideration of the forms that cooperation may take.

281. As international law seems to stand now, the duty to cooperate does not encompass an automatic duty for States to provide assistance. Offers of assistance, “whether made unilaterally or in response to a request, are essentially voluntary and

<sup>416</sup> See, for example, International Court of Justice, *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, Provisional Measures, Order of 8 March 2011, *I.C.J. Reports 2011*, p. 6.

<sup>417</sup> See Rio Declaration on Environment and Development, principles 6 and 7.

<sup>418</sup> Preamble and arts 3–7 and 9.

<sup>419</sup> Kyoto Protocol to the United Nations Framework Convention on Climate Change (Kyoto, 11 December 1997), United Nations, *Treaty Series*, vol. 2303, No. 30822, p. 162, arts. 2, 10 and 13.

<sup>420</sup> See, in particular, preamble and arts. 6–8, 10–12 and 14.

<sup>421</sup> A/CN.4/752, para. 436.

<sup>422</sup> See, for example, statements by Antigua and Barbuda (on behalf of the Alliance of Small Island States) (A/C.6/77/SR.28), Brazil (A/C.6/77/SR.27), Croatia (A/C.6/77/SR.25), Germany (A/C.6/77/SR.27), India (A/C.6/77/SR.26), Jamaica (A/C.6/77/SR.29), Malaysia (A/C.6/77/SR.27), Netherlands (A/C.6/77/SR.27), Papua New Guinea (A/C.6/77/SR.29), Samoa (on behalf of the Pacific small island developing States) (A/C.6/77/SR.28) and Sierra Leone (A/C.6/77/SR.27). The full text of the statements are available at <https://www.un.org/en/ga/sixth/>.

should not be construed as recognition of the existence of a legal duty to assist”.<sup>423</sup> Non-affected States, in other words, do not have an obligation to provide assistance upon request.

282. However, this is without prejudice to the possible existence of a special obligation to provide assistance upon request under specific treaties or in specific institutional contexts. Such an obligation is present in the field of disasters in many bilateral arrangements,<sup>424</sup> and appears in some regional treaties.<sup>425</sup> The pending request for an advisory opinion from the International Court of Justice on the obligations of States in respect of climate change could eventually clarify the extent to which there might be a positive duty to provide assistance in the context of climate change, including sea-level rise, in the framework, *inter alia*, of the commitments undertaken by States under the Paris Agreement.

283. Despite the absence of a general, unqualified duty to “provide” assistance, it could be argued, in view of the above-mentioned bodies of specialized areas of international law, that international law is moving towards a general duty of States to “consider offering” assistance, as a minimum, which could be applicable in the context of climate change-induced sea-level rise.

284. Cooperation by other actors, such as international organizations and other relevant key stakeholders, is also of the utmost importance for the effective protection of persons affected by rising sea levels.

## **12. Protection of the cultural heritage of individuals and groups that might be affected by sea-level rise**

285. Although not included among the issues to be addressed in the present paper, as mentioned above, the protection of the cultural heritage of individuals and groups that might be affected by sea-level rise is an additional element that is worth considering, in particular in view of the Pacific Islands Forum Leaders’ Declaration on the Continuity of Statehood and the Protection of Persons in the Face of Climate Change-Related Sea-Level Rise, endorsed in 2023,<sup>426</sup> which specifically mentions the protection of culture and cultural heritage.

286. Sea-level rise threatens the cultural heritage of individuals and groups. Cultural heritage comprises elements of culture that are passed from one generation to the next,<sup>427</sup> and can take one of three forms: (a) tangible heritage, including sites, structures and remains of archaeological, historical, religious, cultural or aesthetic value;<sup>428</sup> (b) intangible heritage, including oral traditions, performing arts, social practices, rituals, festive events, knowledge and practices concerning nature and the universe, and the knowledge and skills for producing traditional crafts;<sup>429</sup> or

<sup>423</sup> Para. (2) of the commentary to draft article 12 of the draft articles on the protection of persons in the event of disasters (*Yearbook ... 2016*, vol. II (Part Two), para. 49).

<sup>424</sup> For details of instruments relevant to offers of assistance in the event of disasters, compiled by the Secretariat in 2007, see A/CN.4/590, paras. 60–63.

<sup>425</sup> For example, Agreement establishing the Caribbean Disaster Emergency Response Agency (Port of Spain, 26 February 1991), United Nations, *Treaty Series*, vol. 2256, No. 40212, p. 53, art. 13; Treaty on the Functioning of the European Union (Rome, 25 March 1957), as amended, *Official Journal of the European Union*, C 202, 7 June 2016, p. 47, art. 222 (2); and Agreement among the Governments of the Participating States of the Black Sea Economic Cooperation on Collaboration in Emergency Assistance and Emergency Response to Natural and Man-made Disasters (Sochi, 15 April 1998), arts. 3 (2) and (3) and 4 (2).

<sup>426</sup> Submission of the Pacific Islands Forum (available at [https://legal.un.org/ilc/guide/8\\_9.shtml](https://legal.un.org/ilc/guide/8_9.shtml)).

<sup>427</sup> A/HRC/17/38, para. 5.

<sup>428</sup> Convention for the Protection of the World Cultural and Natural Heritage (Paris, 16 November 1972), United Nations, *Treaty Series*, vol. 1037, No. 15511, p. 151, art. 1.

<sup>429</sup> Convention for the Safeguarding of the Intangible Cultural Heritage (Paris, 17 October 2003),

(c) natural heritage, including protected natural reserves, other biologically diverse areas under protection, historic parks and gardens and cultural landscapes.<sup>430</sup>

287. All three forms of heritage can be at risk due to sea-level rise. Sea-level rise threats to cultural heritage have been reported globally,<sup>431</sup> including, for example, across the African Continent,<sup>432</sup> Canada,<sup>433</sup> China,<sup>434</sup> Chile,<sup>435</sup> the Mediterranean<sup>436</sup> and the United Kingdom.<sup>437</sup> Many of these reports relate to tangible cultural heritage in those areas. Sites identified by the United Nations Educational, Scientific and Cultural Organization (UNESCO) for their natural heritage value are particularly at risk from climate change generally, and several, including those on small islands, are at particular risk from sea-level rise.<sup>438</sup> In this category, UNESCO has reported endangerment owing to sea-level rise to Komodo National Park in Indonesia, Ichkeul National Park in Tunisia and the Sundarbans in India and Bangladesh.<sup>439</sup> Less well documented is the potential impact of sea-level rise on intangible cultural heritage globally, and the associated impact on human rights regarding loss of culture.

---

United Nations, *Treaty Series*, vol. 2368, No. 42671, p. 3, art. 2 (2). See also the Council of Europe Framework Convention on the Value of Cultural Heritage for Society (Faro, 27 October 2005), Council of Europe, *Treaty Series*, No. 199, under article 2 of which cultural heritage is defined as follows: “[A] group of resources inherited from the past which people identify, independently of ownership, as a reflection and expression of their constantly evolving values, beliefs, knowledge and traditions. It includes all aspects of the environment resulting from the interaction between people and places through time.”

<sup>430</sup> Convention for the Protection of the World Cultural and Natural Heritage, art. 2; and A/HRC/17/38, para. 4.

<sup>431</sup> See Ben Marzeion and Anders Levermann, “Loss of cultural world heritage and currently inhabited places to sea-level rise”, *Environmental Research Letters*, vol. 9, No. 3 (March 2014); and Intergovernmental Panel on Climate Change, *Climate Change 2022* (see footnote 155 above), pp. 477–480.

<sup>432</sup> Michalis I. Voutsoukas *et al.*, “African heritage sites threatened as sea-level rise accelerates”, *Nature Climate Change*, vol. 12, March 2022, pp. 256–262.

<sup>433</sup> Nicole F. Smith and ICLEI Canada, ICLEI – Local Governments for Sustainability, “Considering sea-level rise and cultural heritage: a resource for municipalities”, 2010. Available at [https://icleicanada.org/wp-content/uploads/2020/10/Considering-Sea-Level-Rise-and-Cultural-Heritage\\_FINAL.pdf](https://icleicanada.org/wp-content/uploads/2020/10/Considering-Sea-Level-Rise-and-Cultural-Heritage_FINAL.pdf).

<sup>434</sup> Yuqi Li *et al.*, “The potential impact of rising sea levels on China’s coastal cultural heritage: a GIS risk assessment”, *Antiquity*, vol. 96, No. 386 (April 2022), pp. 406–421.

<sup>435</sup> Lincoln Quilliam *et al.*, “Coastal climate change impacts for Easter Island in 2100”, in *Coasts and Ports 2011: Diverse and Developing – Proceedings of the 20th Australasian Coastal and Ocean Engineering Conference and the 13th Australasian Port and Harbour Conference* (Barton, Australian Capital Territory, Engineers Australia, 2011).

<sup>436</sup> Lena Reimann *et al.*, “Mediterranean UNESCO World Heritage at risk from coastal flooding and erosion due to sea-level rise”, *Nature Communications*, vol. 9, art. No. 4161, 16 October 2018; Dario Camuffo, Chiara Bertolin and Patrizia Schenal, “Climate change, sea level rise and impact on monuments in Venice”, in *Science, Technology and Cultural Heritage*, Miguel Ángel Rogerio-Candelera (ed.) (London, Taylor and Francis Group, 2014), pp. 1–18; Francisco García Sánchez, Héctor García Sánchez and Cecilia Ribalaygua, “Cultural heritage and sea level rise threat: risk assessment of coastal fortifications in the Canary Islands”, *Journal of Cultural Heritage*, vol. 44, July–August 2020, pp. 211–217; Sayed Hemeda, “Geotechnical modelling of the climate change impact on world heritage properties in Alexandria, Egypt”, *Heritage Science*, vol. 9, art. No. 73, 17 June 2021; and United Nations Educational, Scientific and Cultural Organization (UNESCO), *Case Studies on Climate Change and World Heritage* (Paris, UNESCO World Heritage Centre, 2007), p. 70.

<sup>437</sup> Ellie Graham, Joanna Hambly and Tom Dawson, “Learning from loss: eroding coastal heritage in Scotland”, *Humanities*, vol. 6, No. 4 (December 2017), art. no. 87; and UNESCO, *Case Studies* (see footnote 436 above), p. 67.

<sup>438</sup> Jim Perry, “World Heritage hot spots: a global model identifies the 16 natural heritage properties on the World Heritage List most at risk from climate change”, *International Journal of Heritage Studies*, vol. 17, No. 5 (September 2011), pp. 426–441, at pp. 431–436.

<sup>439</sup> UNESCO, *Case Studies* (see footnote 436 above), pp. 36–39, 48 and 49.

288. One layer of protection of cultural heritage, incorporated into a number of legal instruments that protect cultural heritage in both in wartime<sup>440</sup> and peacetime,<sup>441</sup> stems from the “outstanding universal value” of cultural heritage.<sup>442</sup> A second layer of protection of cultural heritage connects that heritage with peoples through a human rights-based approach and is provided through human rights instruments.<sup>443</sup> The independent expert in the field of cultural rights has noted a shift “from the preservation/safeguard of cultural heritage as such, based on its outstanding value for humanity, to the protection of cultural heritage as being of crucial value for individuals and communities in relation to their cultural identity”, and an increased emphasis on the link between cultural heritage and cultural identity and on the interdependence between intangible and tangible heritage.<sup>444</sup> The independent expert observes that this shift towards a rights-based approach can be seen in UNESCO instruments, in particular towards “the preservation/safeguarding of cultural heritage of and for communities, involving them in the processes of identification and

<sup>440</sup> The Hague Conventions and Regulations of 1899 and 1907 (Conventions (I) of 1899 and 1907 for the Pacific Settlement of International Disputes (The Hague, 29 July and 18 October 1907), James Brown Scott (ed.), *The Hague Conventions and Declarations of 1899 and 1907*, 3rd ed. (New York, Oxford University Press, 1915), p. 41; Convention (II) (The Hague, 29 July 1899) and Convention (IV) (The Hague, 18 October 1907) with Respect to the Laws and Customs of War on Land, *ibid.*, p. 100; and Regulations concerning the Laws and Customs of War on Land (the Hague Regulations) (annex to the Hague Conventions II and IV of 1899 and 1907), *ibid.*, p. 100); Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Convention IV) (Geneva, 12 August 1949), United Nations, *Treaty Series*, vol. 75, No. 973, p. 287; Protocols I and II to the Geneva Conventions of 12 August 1949; Convention for the Protection of Cultural Property in the Event of Armed Conflict and Regulations for the Execution of the Said Convention (The Hague, 14 May 1954), United Nations, *Treaty Series*, vol. 249, No. 3511, p. 215; Protocol for the Protection of Cultural Property in the Event of Armed Conflict (The Hague, 14 May 1954), *ibid.*, vol. 249, No. 3511, p. 215; Second Protocol to the Hague Convention for the Protection of Cultural Property (The Hague, 26 March 1999), *ibid.*, vol. 2253, No. 3511, p. 172; Statute of the International Criminal Tribunal for the Former Yugoslavia, adopted by the Security Council in its resolution [827 \(1993\)](#) of 25 May 1993 and contained in the report of the Secretary-General pursuant to paragraph 2 of Security Council resolution [808 \(1993\)](#) (S/25704 and Corr.1 and Add.1), annex, art. 3 (d); Rome Statute of the International Criminal Court (Rome, 17 July 1998), United Nations, *Treaty Series*, vol. 2187, No. 38544, p. 3, art. 8 (2) (b) (ix) and (e) (iv); International Criminal Tribunal for the Former Yugoslavia, *Prosecutor v. Dario Kordić and Mario Čerkez*, Case No. IT-95-14/2-T, Judgment, 26 February 2001, Trial Chamber, paras. 206–207; and International Criminal Tribunal for the Former Yugoslavia, *Prosecutor v. Radislav Krstić*, Case No. IT-98-33-T, Judgment, 2 August 2001, Trial Chamber, para. 580.

<sup>441</sup> Convention for the Protection of the World Cultural and Natural Heritage; the Convention on the Protection of the Underwater Cultural Heritage (Paris, 2 November 2001), United Nations, *Treaty Series*, vol. 2562 – Part I, No. 45694, p. 3; Convention for the Safeguarding of the Intangible Cultural Heritage; Convention on the Protection of the Archeological, Historical and Artistic Heritage of the American Nations (Santiago, 16 June 1976), OAS, *Treaty Series*, No. 47; OAU, Cultural Charter for Africa (Port Louis, 5 July 1976); African Union, Charter for African Cultural Renaissance (Khartoum, 24 January 2006); ASEAN Declaration on Cultural Heritage (Bangkok, 25 July 2000); and, among other instruments of the Council of Europe, the European Framework Convention on the Value of Cultural Heritage for Society.

<sup>442</sup> Convention for the Protection of the World Cultural and Natural Heritage, arts 1 and 2. UNESCO defines “outstanding universal value” as follows: “Outstanding Universal Value means cultural and/or natural significance which is so exceptional as to transcend national boundaries and to be of common importance for present and future generations of all humanity. As such, the permanent protection of this heritage is of the highest importance to the international community as a whole.” UNESCO, *Operational Guidelines for the Implementation of the World Heritage Convention* (document WHC.23/01) (Paris, UNESCO World Heritage Centre, 2023), para. 49.

<sup>443</sup> In particular, the right to take part in cultural life, the right of members of minorities to enjoy their own culture, and the right of Indigenous peoples to self-determination and to maintain, control, protect and develop cultural heritage ([A/HRC/17/38](#), para. 78).

<sup>444</sup> [A/HRC/17/38](#), para. 20.



stewardship”.<sup>445</sup> For example, it is recognized in the preamble to the Convention for the Safeguarding of Intangible Cultural Heritage that “communities, in particular [I]ndigenous communities, groups and, in some cases, individuals play an important role in the production, safeguarding, maintenance and recreation of the intangible cultural heritage”.

289. A rights-centred approach to cultural heritage, and the impact of sea-level rise on intangible heritage, are particularly pertinent regarding minority and Indigenous rights to culture, enshrined in the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities,<sup>446</sup> in article 2, and in the United Nations Declaration on the Rights of Indigenous Peoples, in articles 11 (the right to practice and revitalize their cultural traditions and customs, including the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites and artefacts), 25 (the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard) and 31 (the right to maintain, control, protect and develop their cultural heritage). Owing to the relationship that Indigenous peoples have with the land, changes to and loss of land and natural ecosystems concurrently affect tangible, intangible and natural elements of their cultural heritage, and thus have a dramatic impact on their cultural rights. This factor is one that makes Indigenous peoples particularly vulnerable to sea-level rise.<sup>447</sup> It affects both populations that remain in locations altered by the rising sea, since loss of physical landscapes can result in the discontinuation of cultural knowledge, traditions and practices, and, especially, those that relocate, since climate-driven loss of land inevitably causes climate-displaced communities to lose aspects of their cultural practices.

290. Through the Rising Nations Initiative, the Pacific islands, including Tuvalu, aimed to preserve not only maritime boundaries and sovereignty, but also cultural heritage, by recording dances, songs and interviews for registration with UNESCO as protected intangible heritage so that future generations are able to learn about their cultures and traditions.<sup>448</sup> In a related development, the Coalition for Addressing Sea-Level Rise and its Existential Threats was established in 2023, co-chaired by Tuvalu and Germany, in order to promote people-centred climate action, pressing forward efforts to protect the livelihoods of affected communities and safeguard their culture and heritage.<sup>449</sup>

## B. Possible future outcomes

291. It is clear that no specific and dedicated legal framework for the protection of persons affected by sea-level rise currently exists. However, in the second issues paper and the present additional paper, further avenues to enhance such protection

<sup>445</sup> *Ibid.*, para. 23.

<sup>446</sup> General Assembly resolution 47/135 of 18 December 1992, annex.

<sup>447</sup> See A/HRC/50/57.

<sup>448</sup> Makereta Komai, “Tuvalu’s innovative contingency plan to address scientific predictions of being uninhabitable by 2050”, Secretariat of the Pacific Regional Environment Programme, 15 November 2022. The Rising Nations Initiative was launched by Heads of States of Pacific atoll States in 2021, supported by a core group of champion countries. It is enabled by the Global Centre for Climate Mobility and a partnership of Member States, relevant agencies of the United Nations system, the World Bank and regional intergovernmental organizations. For further information, see <https://sdgs.un.org/partnerships/rising-nations-initiative>.

<sup>449</sup> See International Institute for Sustainable Development, “UNGA informal plenary meeting on existential threats of sea-level rise amidst the climate crisis”, 3 November 2023.



have been explored, both by examining existing legal protection frameworks that could be applied *mutatis mutandis* to the protection of persons affected by sea-level rise, and by considering how to tailor such interpretation and application to reflect the specificities of the adverse impact of sea-level rise when compared with traditional human rights violations or the protection of persons in the event of disasters.

292. Discussions both in the Study Group and in the Sixth Committee have revealed different views as to possible future outcomes of the work of the Study Group and of the Commission with regard to the subtopic, ranging from a study or report, to conclusions with practical guidance for States, to a draft instrument or framework convention.

293. From a legal policy perspective with regard to the subtopic, international law could be developed through the interpretation and application of the multiple existing hard- and soft-law instruments, or the subtopic could be the subject of a dedicated hard- or soft-law instrument at the regional or international level, or both.

## **Part Three: Preliminary observations and future work of the Study Group**

### **I. Preliminary observations**

#### **A. Statehood**

294. The treatment of the relevant legal aspects related to the matter has focused successively on the following points: analysis of the configuration of the State as a subject of international law and the continuity of its existence; scenarios linked to statehood in the context of sea-level rise and the right of the State to provide for its conservation; and eventual alternatives to face the phenomenon in relation to statehood.

295. A central aspect is the distinction between situations where article 1 of the Convention on the Rights and Duties of States – the general reference when assessing the creation of a State and its constitution as a subject of international law – is applicable, and situations where, although States already exist as subjects of international law, circumstances arise in which one of the requirements of article 1 of the Convention is no longer met.

296. As observed in the second issues paper, there is a strong presumption of continuity in the case of States whose land surface may be totally or partially submerged or rendered uninhabitable by rising sea levels caused by climate change, an anthropogenic phenomenon beyond the behaviour and will of the States most directly affected. In this regard, the Declaration on the Continuity of Statehood and the Protection of Persons in the Face of Climate Change-Related Sea-Level Rise, endorsed by the leaders of members of the Pacific Islands Forum in November 2023, is particularly relevant.

297. It is essential, therefore, to emphasize the right of the State concerned to safeguard its own existence, by taking measures to ensure the following: (a) the maintenance of its territory, which is understood to be a unit under its sovereignty and subject to its sovereignty rights, comprising both the land surface and the maritime spaces under its jurisdiction; and (b) the conservation and sustainable use of the natural resources existing therein and the preservation of its biodiversity and ecosystems, thus safeguarding its population and taking account of present and future generations.

298. Emphasis is placed, in turn, on the applicability of the principles of self-determination, protection of the territorial integrity of the State, sovereign equality of States and their permanent sovereignty over their natural resources, the maintenance of international peace and security, and the stability of international relations.

299. Likewise, when addressing aspects related to statehood and considering the progressive nature of the phenomenon of sea-level rise, two different scenarios may be distinguished: (a) that the land surface of the State concerned is affected by erosion, salinization and partial submergence, and may become uninhabitable despite not being totally covered by the sea; or (b) that the land surface of the State concerned is totally submerged.

300. As the Secretary-General observed to the Security Council,<sup>450</sup> innovative legal and practical solutions are required to address the legal and human rights effects of sea-level rise.

301. On the basis of the strong presumption of continuity of the State, and always with respect for the right to self-determination of the populations of the countries most directly affected, modalities may be suggested but are not intended to be univocal answers. Depending on the circumstances of each case, on consultations with the populations concerned and on agreements that could be reached with other States or international organizations, such modalities could include the following: the cession of a portion of territory, with or without transfer of sovereignty; association with other States; the establishment of a confederation; integration into a federation; unification with another State, including the possibility of a merger; or *ad hoc* formulas or regimes.

## **B. Protection of persons affected by sea-level rise**

302. Developments since 2022, when the second issues paper was prepared, reveal that State practice and the practice of international organizations is continuing to evolve with regard to the protection of persons affected by sea-level rise. Such practice will likely develop further as several important advisory opinions are expected to be issued soon by international courts and tribunals, in particular the International Court of Justice and the Inter-American Court of Human Rights.

303. The development of such practice allows some clarification as to existing levels of protection and existing protection frameworks, leaving room, however, for further development and clarification.

304. In the second issues paper and the present additional paper, and although no specific, dedicated legal framework exists, possibilities have been explored with regard to the extent to which existing principles and rules may apply to the protection of persons, in relation to such elements as human dignity, protection of persons in vulnerable situations, non-discrimination, protection of displaced persons, *non-refoulement*, avoidance of statelessness and the protection of cultural heritage. The present paper has also covered the different obligations of different duty bearers, the importance of combining a needs-based and rights-based approach and the key relevance of international cooperation for the protection of persons affected by sea-level rise.

305. The following have therefore been proposed as elements for legal protection of persons affected by sea-level rise:

<sup>450</sup> See [S/PV.9260](#).

- (a) the protection of human dignity applies as an overarching principle in the protection of persons affected by sea-level rise;
- (b) a combination of needs-based and rights-based approaches should be taken as the basis for the protection of persons affected by sea-level rise;
- (c) general human rights obligations – including regard to civil, political, economic, social and cultural rights – apply in the context of the protection of persons affected by sea-level rise;
- (d) there are different human rights duty bearers in the context of sea-level rise and the scope of their obligations may differ;
- (e) the protection of persons in vulnerable situations must be ensured in the context of sea-level rise, and the principle of non-discrimination respected;
- (f) the principle of *non-refoulement* is significantly relevant in the context of the protection of persons affected by sea-level rise;
- (g) the Global Compact for Safe, Orderly and Regular Migration and other soft-law instruments contain guidelines relevant to the protection of persons displaced as a result of sea-level rise;
- (h) complementary protection in the context of refugee law may be applicable to persons affected by sea-level rise;
- (i) States could develop humanitarian visas and similar administrative policies for the protection of persons affected by sea-level rise;
- (j) States could develop tools for the avoidance of statelessness in the context of sea-level rise;
- (k) the principle of international cooperation, including through institutional pathways for inter-State, regional and international cooperation, is key to ensuring the protection of persons affected by sea-level rise;
- (l) the cultural heritage of individuals and groups that might be affected by sea-level rise should be protected.

306. As to possible future outcomes, these elements, and potentially others, could be used for the interpretation and application of hard- and soft-law instruments that are applicable *mutatis mutandis* to the protection of persons affected by sea-level rise, and/or could be included in a dedicated hard- or soft-law instrument at the regional or international level for the protection of persons affected by sea-level rise.

## II. Future work of the Study Group

307. In 2025, the Study Group will finalize a substantive report on the topic as a whole by consolidating the results of the work undertaken.

308. In 2022<sup>451</sup> and 2023,<sup>452</sup> members of the Study Group made various suggestions and outlined several options during their exchange of views concerning the working methods of the Study Group and future work on the topic.

309. It was emphasized that a clearer road map was required to meet the expectations of States, including in determining the form and content of the Study Group's final report, to be issued in 2025, and the outcomes to be delivered. The prioritization of issues that the Commission was in a position to address was also recommended.

<sup>451</sup> A/77/10, paras. 221–224.

<sup>452</sup> A/78/10, paras. 222–230.

310. Some members suggested that the Study Group proceed to an operative phase and propose concrete solutions to practical problems caused by sea-level rise. It was accordingly suggested that the Study Group should contemplate providing some practical guidance to States, possibly through a set of conclusions.

311. With regard to the outcome of the Study Group's work, various proposals were made, including a draft framework convention on issues related to sea-level rise that could be used as a basis for further negotiations within the United Nations system, following the example of the United Nations Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, particularly in Africa.<sup>453</sup>

312. In the light of recent requests for advisory opinions addressed to the International Tribunal for the Law of the Sea, the International Court of Justice and the Inter-American Court of Human Rights, a view was expressed that the Study Group should exercise caution in considering issues addressed by other bodies.

313. Given these proposals, and the views expressed in the debates in the Sixth Committee, the Co-Chairs of the Study Group will, in 2025, produce a joint final report on the topic as a whole by consolidating the work undertaken so far on the three subtopics with a set of conclusions to be discussed by the Study Group. It will be left for States, in the framework of the Sixth Committee or other appropriate forums, to discuss follow-up to the work of the Commission on the topic.

314. The Co-Chairs will also address the possible linkages between the three subtopics – the law of the sea, statehood and the protection of persons affected by sea-level rise – in the joint final report.

---

<sup>453</sup> United Nations Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, particularly in Africa (Paris, 14 October 1994), United Nations, *Treaty Series*, vol. 1954, No. 33480, p. 3.