B. Sea-level rise in relation to international law

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I. Introduction

1. Sea-level rise has become in recent years a subject of increasing importance for a significant part of the international community — more than 70 States are or are likely to be directly affected by sea-level rise, a group which represents more than one third of the States of the international community. Indeed, as is well known, this phenomenon is already having an increasing impact upon many essential aspects of life for coastal areas, for low-lying coastal States and small island States, and especially for their populations. Another quite large number of States is likely to be indirectly affected (for instance, by the displacement of people or the lack of access to resources). Sea-level rise has become a global phenomenon and thus creates global problems, impacting on the international community as a whole.

2. In 2015, in paragraph 14 of the 2030 Agenda for Sustainable Development, the U.N. General Assembly recognised that: "Climate change is one of the greatest challenges of our time and its adverse impacts undermine the ability of all countries to achieve sustainable development. Increases in global temperature, *sea-level rise*, ocean acidification and other climate change impacts are seriously affecting coastal areas and low-lying coastal countries, including many least developed countries and small island developing States. The survival of many societies, and of the biological support systems of the planet, is at risk."[1]

3. Thus, among the several impacts of climate change is sea-level rise. According to scientific studies and reports, such as the Fifth Assessment Report of the Intergovernmental Panel on Climate Change, this phenomenon is likely to accelerate in the future.[2] As a result, the inundation of low-lying coastal areas and of islands will make these zones less and less habitable or uninhabitable, resulting in their partial or full depopulation.

4. These factual consequences of sea-level rise prompt a number of important questions relevant to international law. For instance, what are the legal implications of the inundation of low-lying coastal areas and of islands upon their baselines, upon maritime zones extending from those baselines and upon delimitation of maritime zones, whether by agreement or adjudication? What are the effects upon the rights of States in relation to those maritime zones? What are the consequences for statehood under international law should the territory and population of a State disappear? What protection do persons directly affected by sea-level rise enjoy under international law?

5. These questions should be examined through an in-depth analysis of existing international law, including treaty and customary international law, in accordance with the mandate of the International Law Commission, which is the progressive development of international law and its codification. This effort could contribute to the endeavours of the international community to ascertain the degree to which current international law is able to respond to these issues and where there is a need for States to develop practicable solutions in order to respond effectively to the issues prompted by sea-level rise.

6. There has been a high level of interest and support for the topic by States. Fifteen delegations in the Sixth Committee during the 72nd session of the U.N. General Assembly requested its inclusion in the work programme of the Commission,[3] while other nine

[1] A/RES/70/1. Emphasis added.

[2] The Fifth Assessment Report of the Intergovernmental Panel on Climate Change estimates that the global mean sea-level rise is likely to be between 26 cm and 98 cm by the year 2100. See Intergovernmental Panel on Climate Change, *Climate Change 2013: The Physical Science Basis. Working Group I Contribution to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge, United Kingdom, Cambridge University Press, 2013), p. 25.

[3] Indonesia, Micronesia, Peru, Romania, Tonga and the Pacific Small Island Developing States (Micronesia, Fiji, Kiribati, Nauru, Palau, Papua New Guinea, Marshall Islands, Samoa, Solomon

delegations mentioned, in their national statements, the importance of the problem.[4] Furthermore, during an informal meeting held on 26 October 2017, in New York, at the Permanent Mission of Romania, 35 States which attended showed a positive interest for the Commission to undertake this topic.

7. Furthermore, the Government of the Federated States of Micronesia has put forward a proposal dated 31 January 2018 for inclusion of a topic on the Long-Term Programme of Work of the International Law Commission entitled "Legal Implications of Sea-level Rise",[5] which was taken into account in the preparation of the present syllabus.

II. Previous references to this topic in the works of the International Law Commission

8. The topic was referred to in the Fourth Report on the *Protection of the atmosphere* (in paragraphs 66–67), examined during the 69th session of the Commission in 2017. As a result of the debates during the session, the Commission decided in that topic to provisionally adopt, *inter alia*, a paragraph in the preamble[6] and another paragraph[7] where sea-level rise is mentioned. On that occasion, several members of the Commission suggested that the issue of the sea-level rise be treated in a more comprehensive manner, as a matter of priority, as a separate topic of the Commission.

9. With regard to the topic *Protection of persons in the event of disasters*, completed by the Commission in 2016,[8] the draft articles were considered in the commentary to be applicable to different types of "disasters",[9] including with regard to "sudden-onset events (such as an earthquake or tsunami) and to slow-onset events (such as drought or "sea-level rise"), as well as frequent small-scale events (floods or landslides)".[10]

III. Consideration of the topic by other bodies

10. The topic of sea-level rise was initially examined by the International Law Association (ILA) Committee on *Baselines under the International Law of the Sea*, whose final report was considered at the Sofia Conference (2012).[11] The 2012 report recognized "that substantial territorial loss resulting from sea-level rise is an issue that extends beyond

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Islands, Tonga, Tuvalu and Vanuatu). See http://statements.unmeetings.org/media2/16154559/marshall-islands-on-behalf-of-pacific-small-island-developing-states-.pdf.

4 Austria, Chile, India, Israel, Malaysia, New Zealand, Republic of Korea, Singapore and Sri Lanka.

5 See document ILC(LXX)/LT/INFORMAL/1 of 31 January 2018.

6 "*Aware also, in particular, of the special situation of low-lying coastal areas and small island developing States due to sea level rise*,". See Report of the International Law Commission on the work of the sixty-ninth session (2017), document A/72/10, http://legal.un.org/docs/?path=../ilc/reports/2017/english/chp6.pdf&lang=EFSRAC, p. 152.

7 *3. When applying paragraphs 1 and 2, special consideration should be given to persons and groups particularly vulnerable to atmospheric pollution and atmospheric degradation. Such groups may include, inter alia, indigenous peoples, people of the least developed countries and people of low-lying coastal areas and small island developing States affected by sea level rise*." See Report of the International Law Commission on the work of the sixty-ninth session (2017), document A/72/10, http://legal.un.org/docs/?path=../ilc/reports/2017/english/chp6.pdf&lang=EFSRAC, p. 157.

8 Adopted by the International Law Commission at its sixty-eighth session, in 2016, and submitted to the General Assembly as a part of the Commission's report covering the work of that session (A/71/10), para. 48. The report will appear in *Yearbook of the International Law Commission*, 2016, vol. II, Part Two.

9 Defined in Draft Article 3 (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."

10 Paragraph 4 of the Commentary to Draft Article 3.

11 See International Law Association Committee on Baselines under the International Law of the Sea, Final Report (2012), Sofia Conference, at 30, available at http://ilareporter.org.au/wp-content/uploads/2015/07/Source-1-Baselines-Final-Report-Sofia-2012.pdf. This report stated that "the existing law of normal baseline applies in situations of significant coastal change caused by both territorial gain and territorial loss. Coastal states may protect and preserve territory through physical reinforcement, but not through the legal fiction of a charted line that is unrepresentative of the actual low-water line."

baselines and the law of the sea and encompasses consideration at a junction of several parts of international law."

11. As a consequence, the ILA in 2012 established a new Committee on *International Law and Sea Level Rise*. That Committee decided to focus its work on three main issue areas: the law of the sea; forced migration and human rights; and issues of statehood and international security. An interim report of that Committee, which was presented at the Johannesburg Conference in 2016,[12] focused on issues regarding the law of the sea and migration/human rights. Another report was considered at the Sydney Conference, which completed the Committee's work on law of the sea issues.[13] Further, the 2018 report proposed 12 principles with commentary comprising a "Declaration of Principles on the Protection of Persons Displaced in the Context of Sea Level Rise." The mandate of the Committee is expected to be extended to continue the study of the statehood question and other relevant issues of international law.

IV. Consequences of sea-level rise

12. As already mentioned, sea-level rise produces the inundation of low-lying coastal areas and of islands, which has consequences in three main areas: A) law of the sea; B) statehood; and C) protection of persons affected by sea-level rise.

13. These three issues reflect the legal implications of sea-level rise for the constituent elements of the State (territory, population and government/Statehood) and are thus interconnected and should be examined together.

V. Scope of the topic and questions to be addressed

14. This topic deals only with the legal implications of sea-level rise. It does not deal with protection of environment, climate change *per se*, causation, responsibility and liability. It does not intend to provide a comprehensive and exhaustive scoping of the application of international law to the questions raised by sea-level rise, but to outline some key issues. The three areas to be examined should be analysed only within the context of sea-level rise notwithstanding other causal factors that may lead to similar consequences. Due attention should be paid, where possible, to distinguish between consequences related to sea-level rise and those from other factors. This topic will not propose modifications to existing international law, such as the 1982 U.N. Convention on the Law of the Sea (UNCLOS). Other questions may arise in the future requiring analysis. Having in mind the above considerations, the Commission could analyse the following questions related to the legal implications sea-level rise.

15. ***Law of the Sea issues***

(i) Possible legal effects of sea-level rise on the baselines and outer limits of the maritime spaces which are measured from the baselines;

(ii) Possible legal effects of sea-level rise on maritime delimitations;

(iii) Possible legal effects of sea-level rise on islands as far as their role in the construction of baselines and in maritime delimitations;

[12] See the Interim Report of the ILA Committee on International Law and Sea Level Rise (2016), Johannesburg Conference, available at http://www.ila-hq.org/index.php/committees.

[13] See the Draft Report of the ILA Committee on International Law and Sea Level Rise (2018), Sydney Conference, p. 19, available at http://www.ila-hq.org/images/ILA/DraftReports/DraftReport_SeaLevelRise.pdf. The committee recommended that the ILA adopt a resolution containing two "*de lege ferenda*" proposals: (1) "proposing that States should accept that, once the baselines and the outer limits of the maritime zones of a coastal or an archipelagic State have been properly determined in accordance with the detailed requirements of the 1982 Law of the Sea Convention, these baselines and limits should not be required to be recalculated should sea level change affect the geographical reality of the coastline"; and (2) proposing "that, on the grounds of legal certainty and stability, the impacts of sea level rise on maritime boundaries, whether contemplated or not by the parties at the time of the negotiation of the maritime boundary, should not be regarded as a fundamental change of circumstances."

(iv) Possible legal effects of sea-level rise on the exercise of sovereign rights and jurisdiction of the coastal State and its nationals in maritime spaces in which boundaries or baselines have been established, especially regarding the exploration, exploitation and conservation of their resources, as well as the rights of third States and their nationals (e.g., innocent passage, freedom of navigation, fishing rights);

(v) Possible legal effects of sea-level rise on the status of islands, including rocks and on the maritime entitlements of a coastal State with fringing islands;

(vi) Legal status of artificial islands, reclamation or island fortification activities under international law as a response/adaptive measures to sea-level rise.

16. ***Statehood issues***

(i) Analysis of the possible legal effects on the continuity or loss of statehood in cases where the territory of island States is completely covered by the sea or becomes uninhabitable;

(ii) Legal assessment regarding the reinforcement of islands with barriers or the erection of artificial islands as a means to preserve the statehood of island States against the risk that their land territory might be completely covered by the sea or become uninhabitable;

(iii) Analysis of the legal fiction according to which, considering the freezing of baselines and the respect of the boundaries established by treaties, judicial judgments or arbitral awards, it could be admitted the continuity of statehood of the island States due to the maritime territory established as a result of territories under their sovereignty before the latter become completely covered by the sea or uninhabitable;

(iv) Assessment of the possible legal effects regarding the transfer — either with or without transfer of sovereignty — of a strip or portion of territory of a third State in favour of an island State whose terrestrial territory is at risk of becoming completely covered by the sea or uninhabitable, in order to maintain its statehood or any form of international legal personality;

(v) Analysis of the possible legal effects of a merger between the island developing State whose land territory is at risk of becoming completely covered by the sea or uninhabitable and another State, or of the creation of a federation or association between them regarding the maintenance of statehood or of any form of international legal personality of the island State.

17. ***Issues related to the protection of persons affected by sea-level rise***

(i) The extent to which the duty of States to protect the human rights of individuals under their jurisdiction apply to consequences related to sea-level rise;

(ii) Whether the principle of international cooperation be applied to help States cope with the adverse effects of sea-level rise on their population;

(iii) Whether there are any international legal principles applicable to measures to be taken by States to help their population to remain *in situ*, despite rising sea levels;

(iv) Whether there are any international legal principles applicable to the evacuation, relocation and migration abroad of persons caused by the adverse effects of sea-level rise;

(vi) Possible principles applicable to the protection of the human rights of persons displaced internally or that migrate due to the adverse effects of sea-level rise.

VI. Method of work of the Commission on this topic

18. The format of a Study Group would allow for a mapping exercise of the legal questions raised by sea-level rise and its interrelated issues. The Study Group would analyse the existing international law, including treaty and customary international law, in accordance with the mandate of the International Law Commission, which is to perform codification of customary international law and its progressive development. This effort could contribute to the endeavours of the international community to respond to these issues

and to assist States in developing practicable solutions in order to respond effectively to the issues prompted by sea-level rise.

19. The work of the Study Group would be based on papers that would address the different issues raised by the topic, namely with regard to A) law of the sea, B) statehood and C) protection of persons affected by sea-level rise. This approach would allow for sufficient flexibility of approach and would be able to actively involve members of the Commission in the work on this topic. It is to be recalled that the Commission has used this method successfully in the past, a relevant example being the Study Group on the Fragmentation of International Law (2002–2006).[14]

20. The work of the Study Group would be based on the practice of States, international treaties, other international instruments, judicial decisions of international and national courts and tribunals, and the analyses of scholars — all these in a systemic and integrative approach.

VII. The topic satisfies the requirements for selection of a new topic

21. In order to select new topics for inclusion in its programme of work, the Commission is guided by the criteria that it had agreed upon at its fiftieth session (1998),[15] namely that the topic: (a) should reflect the needs of States in respect of the progressive development and codification of international law; (b) should be at a sufficiently advanced stage in terms of State practice to permit progressive development and codification; (c) should be concrete and feasible for progressive development and codification; and (d) that the Commission should not restrict itself to traditional topics, but could also consider those that reflect new developments in international law and pressing concerns of the international community as a whole.

22. *First*, the topic "**Sea-Level Rise in relation to International Law**" reflects the needs of States: more than a third of the existing States of the international community are likely to be directly affected by the sea-level rise and are keenly interested in this topic. Moreover, there may be broader impacts to the international community at large, since another large number of States are likely to be indirectly affected by sea-level rise (for instance, by the displacement of people, the lack of access to resources). Sea-level rise has become a global phenomenon, and thus creates global problems, impacting in general on the international community of States as a whole. This interest is shared by a variety of States, from very different geographic locations, including landlocked countries, which shows the amplitude of the States' interest.

23. *Second*, there is an emerging State practice — namely with regard to issues related to the law of the sea (such as maintaining baselines, construction of artificial islands, and coastal fortifications) and the protection of persons affected by sea-level rise (such as the relocation of local communities within the country or to other countries, and the creation of humanitarian visa categories). In addition, relevant practice exists, *inter alia*, in relation to governments in exile as examples of maintaining statehood in absence of control over territory. The consequences of sea-level rise, which may be defined as affecting the very existence of a number of the States concerned, and, in any case, essential parameters of statehood like territory, population and governance as well as the enjoyment of the essential resources for the prosperity of these nations, call for an early analysis of its legal implications.

24. That is why, *third*, the topic is feasible because the work of the Study Group will be able to identify areas ripe for possible codification and progressive development of international law and where there are gaps. At the same time, the aspects to be examined have a high degree of concreteness, as shown above in sections IV and V.

25. *Fourth*, it is beyond any doubt that this topic, in the light of the arguments presented, reflects new developments in international law and pressing concerns of the international community as a whole.

[14] Followed by Study Groups on "Treaties over Time" (2009–2012) and "The Most-Favoured-Nation Clause" (2009–2015).

[15] Report of the fiftieth session, A/53/10 (1998), chap. X(C), para. 553. See also Report of the sixty-ninth session, A/72/10 (2017), chapter III(C), para. 32.

VIII. Conclusion

26. The final outcome would be a Final Report of the Study Group on "**Sea-Level Rise in relation to International Law**", accompanied by a set of Conclusions of the work of the Study Group. After the presentation of the Final Report of the Study Group, it could be considered whether and how to pursue further the development of the topic or parts of it within the Commission or other fora.

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Chapter IX
Sea-level rise in relation to international law

A. Introduction

240. At its seventieth session (2018), the Commission decided to include the topic "Sea-level rise in relation to international law" in its long-term programme of work.[431]

241. In its resolution 73/265 of 22 December 2018, the General Assembly subsequently noted the inclusion of the topic in the long-term programme of work of the Commission, and in that regard called upon the Commission to take into consideration the comments, concerns and observations expressed by Governments during the debate in the Sixth Committee.

242. 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. The Commission further took note of the joint oral report of the Co-Chairs of the Study Group.[432]

243. Also during that session, the Study Group, co-chaired by Ms. Patrícia Galvão Teles and Ms. Nilüfer Oral, held a meeting on 6 June 2019. The Study Group considered an informal paper on the organization of its work containing a road map for 2019 to 2021. The discussion of the Study Group focused on its composition, its proposed calendar and programme of work, and its methods of work.[433]

244. With regard to the programme of work, and subject to adjustment in the light of the complexity of the issues to be considered, the Study Group was expected to work on the three subtopics identified in the syllabus prepared in 2018,[434] namely: issues related to the law of the sea, under the co-chairpersonship of Mr. Bogdan Aurescu and Ms. Nilüfer Oral; and issues related to statehood, as well as issues related to the protection of persons affected by sea-level rise, under the co-chairpersonship of Ms. Patrícia Galvão Teles and Mr. Juan José Ruda Santolaria.

245. As to the methods of work, it was anticipated that approximately five meetings of the Study Group would take place at each session. It was agreed that, prior to each session, the Co-Chairs would prepare an issues paper. The issues papers would be edited, translated and circulated as official documents to serve as the basis for the discussion and for the annual contribution of the members of the Study Group. They would also serve as the basis for subsequent reports of the Study Group on each subtopic. Members of the Study Group would then be invited to put forward contribution papers that could comment upon, or complement, the issues paper prepared by the Co-Chairs (by addressing, for example, regional practice, case law or any other aspects of the subtopic). Recommendations would be made at a later stage regarding the format of the outcome of the work of the Study Group.

246. It was also agreed that, at the end of each session of the Commission, the work of the Study Group would be reflected in a report, taking due account of the issues paper prepared by the Co-Chairs and the related contribution papers by members, while summarizing the discussion of the Study Group. That report would be agreed upon in the Study Group and subsequently presented by the Co-Chairs to the Commission, so that a summary could be included in the annual report of the Commission.

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

[432] *Official Records of the General Assembly, Seventy-fourth Session, Supplement No. 10* (A/74/10), paras. 265–273.

[433] *Ibid*., para. 269.

[434] *Official Records of the General Assembly, Seventy-third Session, Supplement No. 10* (A/73/10), Annex B.

B. Consideration of the topic at the present session

247. At the present session, the Commission reconstituted the Study Group on sea-level rise in relation to international law, chaired by the two Co-Chairs on issues related to the law of the sea, namely Mr. Bogdan Aurescu and Ms. Nilüfer Oral.

248. In accordance with the agreed programme of work and methods of work, the Study Group had before it the first issues paper on the topic (A/CN.4/740 and Corr.1), which was issued together with a preliminary bibliography (A/CN.4/740/Add.1), prepared by Mr. Aurescu and Ms. Oral.

249. Owing to the outbreak of the COVID-19 pandemic, and the ensuing postponement of the seventy-second session of the Commission, the Co-Chairs invited the Commission's members to transmit written comments on the first issues paper directly to them. After the completion of the first issues paper, Antigua and Barbuda and the Russian Federation submitted information, which was posted on the Commission's website together with the information previously received from Governments[435] in response to the request by the Commission in chapter III of its 2019 annual report.[436] Comments from the Pacific Islands Forum relating to the first issues paper were circulated to all members of the Study Group on 31 May 2021.

250. The Study Group held eight meetings, from 1 to 4 June and on 6, 7, 8 and 19 July 2021.[437]

251. 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.[438]

Discussions held in the Study Group

252. At the first meeting of the Study Group, held on 1 June 2021, the Co-Chair (Ms. Oral) indicated that the purpose of the initial four meetings to be held during the first part of the session was to allow for a substantive exchange, in the manner of a plenary, on the first issues paper and on any relevant matters that members might wish to address. A summary of that exchange, in the form of an interim report, would then serve as a basis for discussion at the meetings of the Study Group scheduled for the second part of the session. Following those discussions during the second part of the session, that report would be consolidated, agreed upon in the Study Group, and subsequently presented by the Co-Chairs to the Commission, with a view to being included in the annual report of the Commission. That procedure, agreed upon by the Study Group, was based on the 2019 report of the Commission.

253. With regard to the substance of the topic, as also indicated in the syllabus prepared in 2018, it was recalled that the factual consequences of sea-level rise prompt a number of important questions relevant to international law. To the extent that they concern issues related to the law of the sea, these questions include that of the legal implications of the inundation of low-lying coastal areas and of islands upon their baselines, upon maritime zones extending from those baselines and upon delimitation of maritime zones, whether by agreement or adjudication. The 2018 syllabus also provided that these questions are to be examined through an in-depth analysis of existing international law, including treaty and customary international law, in accordance with the mandate of the Commission, which is the progressive development of international law and its codification.[439] This effort could

[435] Croatia, Maldives, the Federated States of Micronesia, the Netherlands, Romania, Singapore, the United Kingdom of Great Britain and Northern Ireland, and the United States of America. Information was also received from the Pacific Islands Forum. The information submitted is available from: https://legal.un.org/ilc/guide/8_9.shtml.

[436] *Official Records of the General Assembly, Seventy-fourth Session, Supplement No. 10* (A/74/10), paras. 31–33.

[437] See chapter I, above, for the membership of the Study Group.

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

[439] *Official Records of the General Assembly, Seventy-third Session, Supplement No. 10* (A/73/10), Annex B, para. 5. Paragraph 14 of the 2018 syllabus provides, in part: "This topic deals only with the legal implications of sea-level rise. It does not deal with protection of environment, climate change

contribute to the endeavours of the international community to ascertain the degree to which current international law is able to respond to these issues and where there is a need for States to develop practicable solutions in order to respond effectively to the issues prompted by sea-level rise.

(a) First issues paper

254. The first issues paper was introduced by the Co-Chairs of the Study Group (Mr. Aurescu and Ms. Oral) at the first meeting of the Study Group with a summary of key points and preliminary observations.

255. The Co-Chair (Mr. Aurescu) presented the introduction, Part One and Part Two of the first issues paper. He recalled, *inter alia*, that the introduction to the first issues paper contained a summary of the views expressed by Member States in the Sixth Committee, and also drew the attention of the Study Group to the comments made by delegations in the Sixth Committee, during the seventy-fifth session of the General Assembly (2020), after the issuance of the first issues paper. A number of delegations had expressed appreciation for the first issues paper,[440] while a few others had simply referred to it.[441] The scope and suggested final outcome of the topic, the limitations on the scope of the work of the Study Group, as agreed by the Commission, the focus on the practice of States and of regional and international organizations were recalled.

256. The Co-Chair (Mr. Aurescu) presented the analysis of the first issues paper on the possible legal effects of sea-level rise on the baselines and outer limits of the maritime spaces that are measured from the baselines, including an analysis of the effects of the ambulation of the baselines as a result of sea-level rise. He then introduced the analysis of the first issues paper on the possible legal effects of sea-level rise on maritime delimitations, as well as on the issue of whether sea-level rise constituted a fundamental change of circumstances, in accordance with article 62, paragraph 2, of the 1969 Vienna Convention on the Law of Treaties.[442] The Co-Chair (Mr. Aurescu) also presented the main preliminary observations of the Co-Chairs' analysis on the possible legal effects of sea-level rise on the baselines and outer limits of the maritime spaces measured from the baselines, as well as on maritime delimitations, effected either by agreement or by adjudication, as presented in paragraphs 104 and 141 of the first issues paper.

257. The Co-Chair (Ms. Oral) then presented the structure and content of Parts Three and Four of the first issues paper and pointed, *inter alia*, to the two central issues addressed therein: the potential legal consequences of the landward shift of a newly drawn baseline due to sea-level rise, and the impact of sea-level rise on the legal status of islands, rocks and low-tide elevations. This was followed by an overview of the possible consequences on the rights and jurisdiction of the coastal State, as well as third party States, in established maritime zones where maritime zones shift because part of the internal waters become territorial sea, part of the territorial sea becomes contiguous zone and/or exclusive economic zone, and part of the exclusive economic zone becomes high seas. The Co-Chair (Ms. Oral) also highlighted

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per se, causation, responsibility and liability. It does not intend to provide a comprehensive and exhaustive scoping of the application of international law to the questions raised by sea-level rise, but to outline some key issues. The three areas to be examined should be analysed only within the context of sea-level rise notwithstanding other causal factors that may lead to similar consequences. Due attention should be paid, where possible, to distinguish between consequences related to sea-level rise and those from other factors. This topic will not propose modifications to existing international law, such as the 1982 United Nations Convention on the Law of the Sea. Other questions may arise in the future requiring analysis."

[440] Eleven delegations, out of the 25 that made statements on the Commission's work, expressed appreciation for the first issues paper: Belize, on behalf of the Alliance of Small Island States; Fiji, on behalf of the Pacific small island developing States; Maldives; the Federated States of Micronesia; New Zealand; Papua New Guinea; Portugal; Solomon Islands; Tonga; Turkey; and Tuvalu, on behalf of the Pacific Islands Forum States.

[441] Three delegations made reference to the first issues paper: the Republic of Korea, Sierra Leone and the United States of America.

[442] Vienna Convention on the Law of Treaties (Vienna, 23 May 1969), United Nations, *Treaty Series*, vol. 1155, No. 18232, p. 331.

the case of an archipelagic State where, due to the inundation of small islands or drying reefs, the existing archipelagic baselines could be impacted, potentially resulting in the loss of archipelagic baseline status.

258. The Co-Chair (Ms. Oral) further discussed the status of islands and rocks under article 121 of the United Nations Convention on the Law of the Sea[443] and the potential significant consequences of being reclassified as a rock due to sea-level rise, possibly becoming a rock that "cannot sustain human habitation or economic life of their own" under article 121, paragraph 3, of the Convention. The Co-Chair (Ms. Oral) concluded by highlighting several of the preliminary observations made in the first issues paper (see paragraphs 190 and 218 thereof).

(b) Maritime delimitation practice of African States

259. The Co-Chair (Mr. Cissé) gave a presentation on the practice of African States regarding maritime delimitation. Since maritime delimitation was a recent process in Africa, with high stakes for coastal States, he had examined the legislative, constitutional and conventional practice of 38 African coastal States, as well as relevant judicial decisions rendered by international courts,[444] in order to assess whether coastal States were supportive of ambulatory or fixed maritime limits.

260. The outcome of the survey was that, while there was some African legislative and constitutional practice on baselines and maritime borders, such practice was diverse. As such, it was not possible to infer the existence of *opinio juris* in favour of or against permanent or ambulatory baselines or maritime boundaries. There was no generalized African practice since the geography of the coasts varied, such that the justification for the use of baselines, tide (high or low), ambulatory or permanent lines was dependent on the general configuration of the coasts.

261. Nonetheless, in the view of the Co-Chair, the application of principles of public international law in the African context could favour fixed baselines or permanent maritime boundaries, for the following reasons:

(a) In the light of the principle of the immutability of borders inherited from the colonial era, in accordance with the principle of *uti possidetis juris*, it could be assumed that a maritime boundary drawn by the former colonial powers continued to apply between newly independent States without the possibility of modification;

(b) The limitation on the application of the principle of *rebus sic stantibus*, as provided for in article 62, paragraph 2, of the Vienna Convention on the Law of Treaties, namely that boundary treaties could not be affected by a fundamental change of circumstances, seemed also applicable to maritime boundaries in the light of existing case law, which had recognized that there was no need to distinguish between land and maritime boundaries. As such, sea-level rise should not, in principle, have legal consequences in terms of maintaining boundaries already delimited or baselines or base points already defined. The freezing of baselines could address that concern;

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[443] United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982), *ibid.*, vol. 1833, No. 31363, p. 3.

[444] *Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Judgment, I.C.J. Reports 1982*, p. 18; *Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, I.C.J. Reports 1985*, p. 13; *Case concerning the delimitation of the maritime boundary between Guinea and Guinea-Bissau, Award of 14 February 1985*, United Nations, *Reports of International Arbitral Awards*, vol. XIX, part IV, pp. 149–196 (in French; English version available in *International Law Materials*, vol. 25 (1986), pp. 251–306); *Case concerning the delimitation of the maritime boundary between Guinea-Bissau and Senegal, Decision of 31 July 1989*, United Nations, *Reports of International Arbitral Awards*, vol. XX, part II, pp. 119–213; *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening), Judgment, I.C.J. Reports 2002*, p. 303; *Delimitation of the Maritime Boundary in the Atlantic Ocean (Ghana/Côte d'Ivoire), Judgment, ITLOS Reports 2017*, p. 4; and *Maritime Delimitation in the Indian Ocean (Somalia* v. *Kenya), Preliminary Objections, Judgment, I.C.J. Reports 2017*, p. 3.

(c) Given the obligation of States to cooperate when they are at an impasse or are having difficulty concluding an agreement on the delimitation of their maritime boundaries (recourse to article 83, paragraph 3, or article 74, paragraph 3, of the United Nations Convention on the Law of the Sea), the question of the unresolved maritime boundaries could be frozen in favour of other solutions, such as the establishment of joint development zones.

(c) Summary of the general exchange of views held during the first part of the session

(i) General comments on the topic

262. During the first part of the session, members of the Study Group presented comments on the first issues paper, in oral and written form.

263. The importance of the topic and the legitimacy of the concerns expressed by those States affected by sea-level rise, together with the need to approach the topic in full appreciation of its urgency, were emphasized. While some members stressed that sea-level rise was a modern phenomenon of the past few decades that was projected to have significant consequences – as noted in the first issues paper –, other members opined that it was not a new or a sudden phenomenon. It was also suggested that the existence and effects of two kinds of sea-level rise – natural and human-induced – should be identified and that coastlines may change as a result of natural sea-level rise and fall, or sea-level extremes, caused by earthquakes, tsunamis or other natural disasters. Referring to section III of the introduction of the first issues paper, on scientific findings and prospects of sea-level rise and their relationship with the topic, support was also expressed for treating sea-level rise as a scientifically proven fact of which the Commission could take notice for the limited purpose of its specific work on the international legal implications of sea-level rise. It was also noted that over time there are reasons other than sea-level rise that could cause a coastline to change location, as had been happening throughout history, and that any new rule justified by sea-level rise must have regard to practice in such cases and might need to identify the mechanism for distinguishing one case from another. It was also mentioned that the presumption in dealing with this topic is that this phenomenon is a result of climate change, and is as such (mainly) human-induced, while recalling that one of the limits of action by the Study Group, as outlined in the 2018 syllabus, was that the topic "does not deal with … causation". As a result, the Study Group ought to consider the present topic based on the premise that sea-level rise due to climate change is a fact already proven by science.

264. The immense challenge of understanding and seeking solutions to complex legal and technical issues without losing sight of their human dimension, as well as the difficulty of assessing the magnitude of the phenomenon and its consequences – including from the point of view of the law of the sea – was also underlined. Members, however, generally considered that the topic was of particular importance, and that it raised significant issues on which the Commission could shed light.

(ii) General comments on the first issues paper

265. Concerns were expressed that the first issues paper had been read as already reflecting the Commission's views and, as a consequence of the postponement of the Commission's seventy-second session, it had been widely discussed outside the Commission before the Commission itself had had the opportunity to consider it. It was noted that it was also due to the adoption of a procedure different than that adopted by previous study groups, which was necessitated by the urgency and importance attached to this topic. It was noted though that this was not unique to this topic, and that reports of Special Rapporteurs being referred to as the product of the Commission was a recurring problem.

266. Some members expressed support for the analysis, including the preliminary observations contained in the first issues paper, while other members expressed doubts regarding these preliminary observations. Some members agreed on the need for stability, security, certainty and predictability, and the need to preserve the balance of rights and obligations between coastal States and other States, yet did not agree on whether the first issues paper's preliminary observations reflected those needs. Further, some members took the view that the statements by States in favour of stability, certainty and predictability could be open to different interpretations, and called into question the first issues paper's repeated

reliance on "concerns expressed by Member States". A view was expressed that the desire of States for "stability" was not necessarily an "indication" of *opinio juris*, as suggested by the first issues paper, to the extent that it was difficult to qualify the preference for stability as reflecting "a sense of legal right or obligation" as stated in the Commission's conclusions on identification of customary international law.[445] It was noted that the terms "stability", "certainty" and "predictability" were referred in the jurisprudence in relation to land boundary delimitation and not maritime delimitation, where the considerations are different. It was also mentioned that they do not constitute a principle as such but a description of a phenomenon. While the Study Group welcomed the suggestion that the meaning of "legal stability" in connection with the present topic needed further clarification, including by addressing specific questions to the Member States, it was noted that the statements delivered in the Sixth Committee by the delegations of States affected by sea-level rise seemed to indicate that, by "legal stability", they meant the need to preserve the baselines and outer limits of maritime zones.

(iii) Consideration of views expressed in the Sixth Committee and State practice

267. Members acknowledged that those States that had made statements on the subject had been largely supportive of the inclusion of the topic in the Commission's programme of work. It was observed that States seemed to be generally in agreement that the outcome of the Commission's work on the topic should not interfere with or amend the United Nations Convention on the Law of the Sea. It was also noted that the principles of certainty, security and predictability and the preservation of the balance of rights and obligations between coastal States and other States had figured prominently in the statements delivered by States during the debate of the Sixth Committee in 2019.

268. The lack of State practice, especially from certain regions of the world, was highlighted. Questions were also posed as to whether the statements by States and their submissions on State practice should be considered as giving rise to *emerging* rules, or could be considered as subsequent practice for purposes of interpretation of the relevant provisions of the United Nations Convention on the Law of the Sea. Some members questioned whether the statements by States in response to the first issues paper were adequate as evidence of State practice in favour of fixed baselines. In light of the insufficient availability of State practice, the view was also expressed that such statements by States in the Sixth Committee were important and relevant. It was further suggested that, in addition to requesting information from States, the Commission should conduct research, including reviewing the legislation of all States and the maritime zone notifications circulated by the Secretary-General under the United Nations Convention on the Law of the Sea.

(iv) Work of the International Law Association

269. Some members highlighted the work of the International Law Association's Committee on Baselines under the International Law of the Sea and Committee on International Law and Sea Level Rise, suggesting that the Study Group add more detail on their work and use it as a basis for analysis. They noted that in 2012 the Committee on Baselines under the International Law of the Sea concluded that the normal baseline is ambulatory and that existing law does not offer an adequate solution to a total territorial loss, due to sea-level rise for example. It was also recalled that the subsequently established Committee on International Law and Sea Level Rise recommended that the International Law Association adopt a resolution containing *de lege ferenda* proposals that "baselines and limits should not be required to be readjusted should sea level change affect the geographic reality of the coastline". This was endorsed by resolution 5/2018 of the Seventy-eighth Conference of the International Law Association in Sydney.[446] There was also a suggestion that, like the International Law Association's report of its 2018 Sydney Conference on International Law and Sea Level Rise, the Study Group should conduct an analysis of the advantages and disadvantages of the different options. Further, it was noted that under the United Nations

[445] *Official Records of the General Assembly, Seventy-third Session, Supplement No. 10* (A/73/10), chapter V, section E, conclusion 9.

[446] *International Law and Sea Level Rise: Report of the International Law Association Committee on International Law and Sea Level Rise*, D. Vidas, *et al*. (eds.), Brill, Leiden, 2019, pp. 66–67.

Convention on the Law of the Sea, the baselines had to be in line with reality. It was further observed that the Committee on Baselines under the International Law of the Sea did not see its 2012 findings as the last word as far as sea-level rise effects were concerned, and that these effects should accordingly continue to be examined by the Committee on International Law and Sea Level Rise, which, in 2018, proposed that, if the baselines and the outer limits of maritime zones of a coastal or an archipelagic State had been properly determined in accordance with the United Nations Convention on the Law of the Sea, those baselines and outer limits should not be required to be recalculated should sea-level changes affect the geographical reality of the coastline. The fact that the Commission employs a different methodology than the International Law Association, which includes a close relationship with the Sixth Committee, was also underlined.

(v) Interpretation of the United Nations Convention on the Law of the Sea: ambulatory or fixed baselines

270. Some members noted that the normal baseline in article 5 of the United Nations Convention on the Law of the Sea is the low-water line, which they viewed as inherently ambulatory. Other members observed that the Convention was silent on whether baselines were ambulatory or had to be regularly updated. Members agreed on the importance of and need for assessing State practice on questions relating to the freezing of baselines and the updating (or not) of charts. Some members expressed the view that baselines were not established by charts or lists, but by the detailed rules set out in the Convention and other relevant sources, that the charts and lists referred to in article 16 of the Convention only concerned straight baselines or closing lines (not normal baselines), and that the Convention expressly required that such charts and lists be produced in accordance with the rules set forth in articles 7, 9, and 10 of the Convention. The importance of making a distinction between base points (which are relevant for maritime delimitations if selected as relevant points on the relevant coasts) and baselines (which are relevant for establishing the outer limits of maritime zones) was also underlined, given that rising sea-level affects them differently, which entails that they may require different legal solutions.

271. Some members regarded article 5 of the United Nations Convention on the Law of the Sea as clear on the question of whether normal baselines were ambulatory, while other members considered that article to be susceptible to a different interpretation. It was noted that sea-level rise had not been mentioned in the *travaux préparatoires* of the Convention. Some members maintained that the Convention was fully silent on the issue of sea-level rise, including in relation to baselines and the updating of charts. Other members took the view that, even if sea-level rise was not discussed, the issue of change in the location of baselines was discussed, including the circumstances where a baseline could be fixed within specific contexts (such as deltas). It was however noted that not too much should be read into any silence, as it could be interpreted in different ways. The view was nonetheless also expressed that, consequently, the Convention was not dispositive of the question as to whether baselines were ambulatory or not. It was also mentioned, however, that the United Nations Convention on the Law of the Sea does contemplate the change of baselines due to changes in the coast, although sea-level rise was not specifically discussed.

272. In response to the diverse views expressed by members as to the existence of ambulatory or fixed or permanent baselines, there was a suggestion that the Commission should conduct additional research into whether a principle of stability existed under general international law, including a study of the law of river delimitation. It was also deemed important to closely consider the judgment rendered by the International Court of Justice in the *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica* v. *Nicaragua)* case [447] in which the Court used a moving delimitation line for maritime delimitation.

273. Some members emphasized that, if ambulatory baselines were to be retained, landward movement could result in a significant loss of sovereignty and jurisdictional rights

[447] *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica v. Nicaragua)* and *Land Boundary in the Northern Part of Isla Portillos (Costa Rica v. Nicaragua), Judgment, I.C.J. Reports 2018*, p. 139.

for coastal States. It could also give rise to a significant loss of resources and protected maritime areas, while negatively affecting the conservation of biological diversity in areas beyond national jurisdiction. Those members commented that legal uncertainty regarding maritime boundaries would likely be a source of conflict and instability for coastal neighbouring States. It was further observed that States would have to dedicate significant resources for the purpose of regularly updating maritime charts or geographical data under an ambulatory system. Some members expressed agreement with the view of the Co-Chairs that the interpretation that baselines generally had an ambulatory character did not respond to the concerns of the States facing the effects of sea-level rise. It was thus suggested by some members that maintaining existing maritime baselines and limits was an optimal solution that responded to States' interests in connection with the effects of sea-level rise.

274. Other members were not convinced that shifting areas of maritime entitlements necessarily led to a loss of the total amount of such entitlements, as opposed to just changing their location. It was noted, also, that fixed baselines might not be required in all situations (for example, where the land surface of a State had actually increased owing to the shift of tectonic plates). The view was expressed that if baselines were fixed, States that may have their land surface increase would not be able to move their baselines seawards and claim larger areas, if they experienced such a phenomenon in the future. It was also mentioned that there may be specific situations where States facing the threat of sea-level rise may have erected coastal fortifications and may wish them to be treated as fixed baselines. As to the situation of increased land surface due to factors other than sea-level rise, it was stressed that this aspect is outside the mandate of the Study Group, which only deals with sea-level rise effects. It was also recalled that the final outcome of the Study Group should be clearly limited to sea-level rise due to climate change, according to the limits agreed to in the mandate of the Study Group.

275. Some members suggested that there might be a continuum of intermediate possibilities between the two options discussed in the first issues paper – ambulatory versus permanent baselines – that deserved a full and detailed examination. As the discussion was still of a preliminary nature, further in-depth analysis needed to be undertaken before the Study Group could take a position on what was a complex subject.

276. The issue of navigational charts was also raised, a view being expressed that updating them was important in the interests of navigational safety, while another view maintained that the potential dangers to navigation might be rather exceptional given that the coast receded landward in case of sea-level rise and that satellite technology was more accessible than ever. Support was expressed for the ensuing proposal made by the Co-Chairs that the issue of navigational charts could be subject to additional study. For example, such study could examine the different functions of navigational charts as required under the rules of the International Hydrographic Organization and of the charts that are deposited with the Secretary-General of the United Nations for purposes of registration of maritime zones.

277. Some members suggested that the Study Group take into account the possible situation where, as a result of sea-level rise and a landward shift of the coastline, the bilaterally-agreed delimitation of overlapping areas of exclusive economic zones of opposite coastal States no longer overlapped, as such a situation would result in States being trapped in an unreasonable legal fiction. Support was expressed for the examination of this hypothesis, including from the angle of concepts from the law of treaties, like obsolescence or the supervening impossibility of performance of a treaty. Another view expressed was that the preservation of existing baselines, when the natural baselines had shifted significantly, could lead to disproportionately large maritime zones – beyond what was permitted under the United Nations Convention on the Law of the Sea – which could benefit coastal States at the expense of the rights of other States or the international community. It was also agreed to examine in greater detail the possible loss or gain of benefits of third States, while it was noted that no State that had commented thus far on the topic had requested this analysis or mentioned the issue. Some members noted that, if the approach of fixed baselines were to be adopted, sea-level rise could result in large areas of internal waters that normally would be territorial sea (or even high seas), through which there would be no right of innocent passage. Similarly, fixed baselines could result in maintaining a straits regime in a channel that normally would not be a strait.

(vi) Other sources of international law

278. Some members expressed the view that, while the United Nations Convention on the Law of the Sea was a key source for its States parties, other sources should be analysed further. It was also recalled that, according to the preamble of the Convention, matters not regulated by the Convention continued to be governed by the rules and principles of general international law. Since the legal problems arising as a consequence of sea-level rise could not be fully addressed within the regime of the Convention, it was suggested that other relevant rules of general international law should be considered. Other members noted that the matter was covered by article 5 of the Convention. Such other sources included, notably, customary international law, the 1958 Geneva Conventions[448] and other multilateral and bilateral instruments concerning a whole range of aspects of the law of the sea and involving different zones that could be affected by sea-level rise. Some members suggested that other principles and rules also be examined in more detail, such as the principle that the land dominates the sea and the principle of freedom of the seas, as well as the role of the principle of equity, good faith, historic rights and title, the obligation to settle disputes peacefully, the maintenance of international peace and security, the protection of the rights of coastal States and non-coastal States, and the principle of permanent sovereignty over natural resources. The Study Group accordingly intends to follow up on these suggestions in its further work on the topic.

(vii) Permanency of the exclusive economic zone and the continental shelf

279. Some members raised specific questions concerning the relationship between the proposal of permanency of the continental shelf and the exclusive economic zone in relation to the reference, in the first issues paper, to a discrepancy that could emerge between the permanent outer limits of the continental shelf and possible ambulatory outer limits of the exclusive economic zone. A view was expressed that certain statements in the first issues paper regarding the permanency of the continental shelf were incorrect.

280. According to this view, there was no permanency: the argument made in the issues paper was premised on the identification of the continental shelf based on the geographical criteria; however, up to 200 nm, it is only the distance criteria that is applied, while, as per this view, the outer limits of the continental shelf and the exclusive economic zone depend on the location of baselines. Thus, it was argued, permanency of baselines cannot be asserted based on the continental shelf being the natural prolongation of the land territory.

(viii) Sea-level rise and article 62, paragraph 2, of the Vienna Convention on the Law of Treaties

281. Some members noted that maritime treaties and adjudicated boundaries should be final, while commenting that additional study was necessary. The relevance of the principle of *pacta sunt servanda* was noted. Several members commented on article 62 of the Vienna Convention on the Law of Treaties and the question as to whether sea-level rise would constitute an unforeseen change of circumstances. A number of members noted that there should be no distinction in that regard between land and maritime boundaries, as reflected in the international jurisprudence cited in the first issues paper. Other members were more reserved and considered that additional study should be undertaken on the issue, including an analysis of the pros and cons of each view. Support was expressed for this suggestion and it was recalled that on this matter doctrine and the 2018 conclusions of the International Law Association Committee on International Law and Sea Level Rise lean towards establishing that changes in land and maritime boundaries should not constitute an unforeseen change of circumstances. Some members noted that land boundaries are sometimes ambulatory, dependent upon the location of bank of a river or lake, the median point of a river or lake, or a river's thalweg, while a view was expressed that State practice has a different trend: in the case where the river flow is changed, the agreed river boundary is kept permanently. A view

[448] Convention on the Territorial Sea and the Contiguous Zone (Geneva, 29 April 1958), United Nations, *Treaty Series*, vol. 516, No. 7477, p. 205; Convention on the High Seas (Geneva, 29 April 1958), *ibid.*, vol. 450, No. 6465, p. 11; Convention on the Continental Shelf (Geneva, 29 April 1958), *ibid.*, vol. 499, No. 7302, p. 311; and Convention on Fishing and Conservation of the Living Resources of the High Seas (Geneva, 29 April 1958), *ibid.*, vol. 559, No. 8164, p. 285.

was expressed that whether maritime delimitation treaties were covered by article 62 was a matter of treaty interpretation, and that it was a matter for international courts and tribunals, and not for the Commission since that would be beyond its mandate. A point was also raised regarding the non-binding nature of bilateral maritime boundary agreements upon third States, which would therefore not be required to recognize agreements establishing or fixing maritime delimitation boundaries. Another view stated that maritime agreements establishing boundaries and fixing limits were treaties entered upon in accordance with the Vienna Convention on the Law of Treaties and are binding upon all States. This is without prejudice to the obligation of parties to such treaties to take due account of the legitimate rights of third States in regard to their maritime entitlements in accordance with the United Nations Convention on the Law of the Sea. It was noted that the matter needed to be further examined, including from the perspective of objective regimes in international law. It was also suggested that the Study Group examine the issue of the consequences for a maritime boundary if an agreed land boundary terminus ended up being located out at sea because of sea-level rise.

(ix) Islands, artificial islands and rocks

282. Some members called for caution in addressing the topic of islands under article 121 of the United Nations Convention on the Law of the Sea. Other members expressed the view that more attention should have been given to the arbitral award in *The South China Sea Arbitration between the Republic of the Philippines and the People's Republic of China*[449] on the issue of the status of islands under article 121 and the reasons for according to them maritime entitlements, while the need for a critical analysis of that award was also expressed. The view was expressed that artificial fortifications dedicated exclusively to preservation from sea-level rise did not render a natural island artificial. However, a point was raised on the need for clearer guidelines to distinguish between the construction of artificial islands for the purpose of preservation from the construction of artificial islands to create artificial entitlements. A view was expressed that coastal fortifications should not be abused to make extensive maritime entitlements. A question was posed as to whether the observations in the first issues paper were limited to sea-level rise or had a more general application. A question was also raised as to whether "rocks" that become submerged should continue to enjoy maritime entitlements. It was suggested that freezing the status of an island should not be a general rule, given that its inundation could be the result of reasons not related to sea-level rise. The Study Group considered that additional research into this area could be conducted to ascertain whether such distinction could be made scientifically and how significant a certain factor was to its study. The high cost of artificial preservation of baselines and coastal areas was also highlighted.

(d) Concluding remarks at the end of the first part of the session

283. Members made a number of suggestions with regard to the Study Group's future work and working methods.

284. Suggestions were made regarding the title of the topic[450] and the structure of the first issues paper. The Study Group considered that the issue regarding the title of the topic could be examined at a later stage. It also welcomed the suggestions on the structure of the first issues paper, as well as the ones on bibliography. The suggestion for a study of State legislation on baselines to be elaborated, with the support of the Secretariat, was also welcomed by the Study Group. It was also suggested that the first issues paper be included in volume II, Part One, of the *Yearbook of the International Law Commission*.

285. Recalling that the mandate of the Study Group was to undertake a mapping exercise of the legal implications of sea-level rise, which might require follow-up but would not lead to the development of any specific guidelines or articles, some members suggested that, to preserve its credibility, the Study Group – and the Commission – ought to be clear and

[449] *The South China Sea Arbitration between the Republic of the Philippines and the People's Republic of China, Award of 12 July 2016*, Arbitral Tribunal, Permanent Court of Arbitration, United Nations, *Reports of International Arbitral Awards*, vol. XXXIII, p. 166.

[450] These suggestions included a proposal to amend the title of the topic to read: "Sea-level rise and international law".

transparent from the beginning in distinguishing between *lex lata*, *lex ferenda* and policy options. It was also suggested that the Commission should be fully guided by its own prior work relevant to the topic, such as its conclusions on identification of customary international law and its conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties. The preliminary character of the first issues paper and the need to respect the mandate of the Study Group to perform "a mapping exercise of the legal questions raised by sea-level rise and its interrelated issues" were stressed; it was also emphasized that only at a later stage, after the Study Group had deepened its analysis, and taking into account the views of its members, could conclusions be drawn.

286. Conversely, the view was expressed that, given the importance of the subject, the topic should be considered by a special rapporteur, rather than by a study group, to ensure transparency and to allow the Commission to take a position in relation to draft texts, rather than undertaking thematic studies. In that regard, it was also suggested that co-special rapporteurs could be appointed with a view to concluding a set of draft articles that could be presented to States for the negotiation of a global framework convention on the legal consequences of sea-level rise, in accordance with article 23 of the Commission's statute.

287. The methodological approach of the Study Group was also deemed to have important consequences for the outcome of the topic, considering that such an approach might allow the Commission to be more creative with proposing solutions for States to deliberate on a topic that would become increasingly important for the peace, security and stability of the international community. The view was expressed that any conclusions reached by the Commission could provide States, especially those particularly affected by sea-level rise, with practical legal solutions that would preserve their rights and entitlements under the law of the sea, by explaining existing rules and proposing new ones where lacunae existed. It would then be for States and the international community as a whole to decide to adopt such rules, whether through practice, negotiations, international resolutions or agreements on relevant legal instruments.

288. Some members recommended a cautious approach to avoid rushing to early conclusions. Referring to the chapter on scientific findings, support was expressed for treating sea-level rise as a scientifically proven fact of which the Commission could take notice for the limited purpose of its specific work on the international legal implications of sea-level rise. In that regard, it was recalled that the mandate of the Study Group excluded causation, the premise of the work on the topic being that sea-level rise due to climate change was to be taken as a scientifically proven fact. At the same time, if needed, the Study Group could consider inviting scientific experts to future meetings of the Study Group.

(e) Outcome of the interactive discussion held during the second part of the session

289. During the first meeting of the Study Group during the second part of the session, held on 6 July 2021, the Co-Chairs responded to comments made by members of the Study Group during the first part, and introduced a draft interim report, an English version of which had been circulated to all members on 2 July 2021, followed by all other language versions on 5 July 2021.

290. During the interactive discussion that followed, members had a debate on the working methods of the Study Group. Some members expressed concern that the Co-Chairs' first issues paper (A/CN.4/740 and Corr.1 and Add.1) may have been interpreted as being of the Study Group as a whole. The time constraints under which the Study Group was operating, as well as the need for a collective and consultative process, were also underlined. Some members further suggested that, given the importance of the topic, it might be preferable for the Commission to consider following its regular procedure, appointing one or several special rapporteurs on the topic, so as to allow for more transparency while being in a position to take into account the position of States through a system of first and second readings of draft texts. Questions were also raised about the foreseen outcome of the work of the Study Group.

291. In that regard, the Co-Chairs expressed the view that they had proceeded in accordance with the methods of work that the Commission had agreed upon in 2019.[451] In their view, these methods of work had been deliberately tailored to be more formal than those followed by previous study groups, and appeared to be hybrid between the special rapporteur format and traditional study groups. They welcomed the contributions made by members and emphasized the need for a collective product. It was noted that the current year's debate consisted in a "mapping exercise" conducted on the basis of the first issues paper and the preliminary observations included therein, and that substantial further research was required for the Study Group to complete its task on the aspects of the law of the sea related to the topic. Members were accordingly invited by the Co-Chairs to take the lead on the various subjects that the Study Group would collectively investigate, some of which had already been suggested during the exchange of views held in the first part of the session.

292. The foreseen outcome of the Study Group's work, as outlined during the first part of the session, was also recalled.[452] It was also suggested that the Study Group should, in parallel, continue to pursue progress on aspects related to the law of the sea.

293. In concluding their exchange on the Study Group's working methods, members agreed that the interim report encapsulating the main points of the debate held during the session would, once finalized and agreed upon by the Study Group, be presented to the Commission by the Co-Chairs for the purpose of inclusion as a chapter of the annual report of the Commission.

294. The Study Group then elected to have a substantive discussion on the topic on the basis of questions prepared by the Co-Chairs in follow up to the debate held during the first part of the session.[453] As an outcome of this discussion, the Study Group identified the

[451] *Official Records of the General Assembly, Seventy-fourth Session, Supplement No. 10* (A/74/10), paras. 265–273. See also paragraphs 245 and 246 above.

[452] See also paragraph 0296 below.

[453] The guiding questions proposed by the Co-Chairs were as follows: (1) What other sources of law should the Study Group examine in relation to the topic? For example, it was suggested that, in addition to the United Nations Convention on the Law of the Sea, there are other "treaties to be considered, multilateral and bilateral, concerning a whole range of aspects of the law of the sea, involving different zones that could be affected by sea-level rise. These treaties need to be interpreted, including in the light of subsequent practice." Beyond the 1958 Geneva Conventions, such treaties need to be identified. It was also suggested that the Study Group look to other rules of general international law that can be relevant in the new context. Indeed, this would be an important issue to examine. From this perspective, the Co-Chairs would appreciate an indication on which such other rules could be. It was further suggested that the Study Group examine norms of international customary law not included in the United Nations Convention on the Law of the Sea, so it would be very useful to point out which such norms should be taken into account; (2) What specific aspects of the question of charts and navigation maps should be examined and how? (3) Is there a need for additional scientific input into the work of the Study Group? Which aspects and how to reconcile examining different causes of sea-level rise and effects with the limitation of the mandate that the Study Group cannot examine "causation"?; (4) Is there a need for more technical studies of the impacts of sea-level rise on baselines, outer limits of maritime zones measured therefrom, and offshore features? If so, how should this be done? Should the Study Group examine different scenarios from a purely technical perspective?; (5) Should the Study Group engage in an analysis of sea-level rise as suggested by a member who expressed an interest for a "discussion of the interests of those States that stand to gain from sea-level rise due to the loss by other States of their existing rights and the increase of the surface area of the high seas"?; (6) On the issue of legal stability and predictability, the question was raised as to whether it deserves more thorough discussion. The question is which aspects should this be studied and how?; (7) Several members invoked the principle of equity, an issue also raised by many States. Should equity be an important factor for the Study Group to take into account in its analysis of the consequences of sea-level rise and finding solutions? What is understood by "equity" by the Study Group? What other policy considerations could be considered in favour of the preservation of baselines over ambulatory or vice versa (points raised by two members)?; (8) It was suggested that there may be "a continuum of possibilities" between the options (ambulatory/permanency approaches) and all of them should be explored. The Co-Chairs would appreciate an indication on what such possibilities could be; (9) As suggested by a member, should the Study Group engage in examining ways in which "to distinguish the construction of

following issues as areas for further in-depth analysis on which it would focus on a priority basis in the near future. These studies would be undertaken on a voluntary basis by members of the Study Group:

(a) Sources of law: in addition to the United Nations Convention on the Law of the Sea[454] (in particular, the genesis and interpretation of its article 5), the 1958 Geneva Conventions[455] (and their *travaux préparatoires*), as well as customary international law of a universal and regional scope, the Study Group would examine other sources of law – relevant multilateral, regional and bilateral treaties or other instruments relating, for example, to fisheries management or the high seas that define maritime zones, or the 1959 Antarctic Treaty[456] and its 1991 Protocol on Environmental Protection,[457] the International Maritime Organization's treaties defining pollution or search and rescue zones, or the 2001 Convention on the Protection of the Underwater Cultural Heritage,[458] general principles of law, as well as the regulations of relevant international organizations such as the International Hydrographic Organization. The purpose of this examination would be to determine the *lex lata* in relation to baselines and maritime zones, without prejudice to the consideration of the *lex ferenda* or policy options. It would also aim at assessing whether these instruments permit or require (or not) the adjustment of baselines in certain circumstances, and whether a change of baselines would entail a change of maritime zones;

(b) Principles and rules of international law: the Study Group would examine various principles and rules of international law in more detail, such as the principle that the land dominates the sea, the principle of the immutability of borders, the principle of *uti possidetis juris*, the principle of *rebus sic stantibus*, or the principle of freedom of navigation, as well as the role of the principle of equity, the principle of good faith, historic rights and title, the obligation to settle disputes peacefully, the maintenance of international peace and security, the protection of the rights of coastal States and non-coastal States, and the principle of permanent sovereignty over natural resources;

(c) Practice and opinio juris: the Study Group would aim to extend its study of State practice and *opinio juris* to regions for which scarce, if any, information had been made available, including Asia, Europe and Latin America (one member of the Study Group already assumed the task to perform such analysis for this region) and continuing the work on Africa. In doing so, the Study Group would examine the interrelation between State

artificial islands for preservation from that to create artificial entitlement"?; (10) Several members indicated the need to study further article 62 of Vienna Convention on the Law of Treaties (*rebus sic stantibus*) and whether it would apply to maritime boundaries agreed to by treaties. In addition to the impacts of sea-level rise on valid maritime boundary agreements, another issue for the consideration of the Study Group could be the impact of sea-level rise in an ambulatory baseline scenario to maritime delimitation cases that have been adjudicated by the International Court of Justice, the International Tribunal for the Law of the Sea or arbitral tribunals. Would the principle of *res judicata* apply? What other principles might apply? Or would there be an obligation to re-open settled cases? What impact would this have on "stability, security and predictability"?; (11) How to approach the issue of the effects of sea-level rise on existing claims to the entitlement to maritime spaces in the case of future maritime delimitations (see paragraph 141 (f) of the first issues paper)?; (12) What would be the benefits of conducting a study on the law of river delimitations as proposed by a member?; (13) Should the Study Group develop a list of priority issues to be examined?; (14) Questions to the Co-Chair who reviewed the practice and laws of African States for further study; and (15) Study of practice of other regions (Asia, Europe, Latin America) needed. The Co-Chairs would appreciate members assuming such tasks (as already performed by two members).

454 United Nations, *Treaty Series*, vol. 1833, No. 31363, p. 3.

455 Convention on the Territorial Sea and the Contiguous Zone (Geneva, 29 April 1958), United Nations, *Treaty Series*, vol. 516, No. 7477, p. 205; Convention on the High Seas (Geneva, 29 April 1958), ibid., vol. 450, No. 6465, p. 11; Convention on the Continental Shelf (Geneva, 29 April 1958), ibid., vol. 499, No. 7302, p. 311; and Convention on Fishing and Conservation of the Living Resources of the High Seas (Geneva, 29 April 1958), ibid., vol. 559, No. 8164, p. 285.

456 The Antarctic Treaty (Washington D.C., 1 December 1959), United Nations, *Treaty Series*, vol. 402, No. 5778, p. 71.

457 Protocol on Environmental Protection to the Antarctic Treaty (Madrid, 4 October 1991), *ibid*., vol. 2941, p. 3.

458 Convention on the Protection of the Underwater Cultural Heritage (Paris, 12 November 2001), *ibid.*, vol. 2562, part I, No. 45694, p. 3.

practice and sources of law by assessing whether such practice is relevant to customary international law or whether it is pertinent to treaty interpretation. The Study Group would also examine the maritime zone notifications deposited with the Secretary-General of the United Nations and the national legislation accessible on the website of the Division of the Law of the Sea and Ocean Affairs of the Office of Legal Affairs to determine whether States do – or do not – update such notifications and laws;

(d) *Navigational charts*: Further to the study mentioned in paragraph 37 above, the Study Group would also consider suggestions that take into account the operational considerations and circumstances as well as practices of States as far as the updating of navigational charts.

295. Members of the Study Group also agreed that the Study Group might call upon scientific and technical experts to assist them in their task, on the understanding that they would do so in a selective, useful and limited manner.

(f) Future work of the Study Group

296. With regard to the future programme of work, the Study Group will address issues related to statehood and to the protection of persons affected by sea-level rise, under the co-chairpersonship of Ms. Patrícia Galvão Teles and Mr. Juan José Ruda Santolaria, who will prepare a second issues paper as a basis for the discussion in the Study Group at the seventy-third session. The Study Group would then seek to finalize a substantive report on the topic, in the first two years of the following quinquennium, by consolidating the results of the work undertaken during the seventy-second and seventy-third sessions of the Commission.

Chapter IX
Sea-level rise in relation to international law

A. Introduction

150. At its seventieth session (2018), the Commission decided to include the topic "Sea-level rise in relation to international law" in its long-term programme of work.[1205] The General Assembly, in its resolution 73/265 of 22 December 2018, noted the inclusion of the topic in the long-term programme of work of the Commission.

151. 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.[1206]

152. At its seventy-second session (2021), the Commission reconstituted the Study Group, and considered the first issues paper on the topic,[1207] which had been issued together with a preliminary bibliography.[1208] At its 3550th meeting, on 27th July 2021, the Commission took note of the joint oral report of the Co-Chairs of the Study Group.[1209]

B. Consideration of the topic at the present session

153. At the present session, the Commission reconstituted the Study Group on sea-level rise in relation to international law, chaired by the two Co-Chairs on issues related to statehood and to the protection of persons affected by sea-level rise, namely Ms. Galvão Teles and Mr. Ruda Santolaria.

154. In accordance with the agreed programme of work and methods of work, the Study Group had before it the second issues paper on the topic (A/CN.4/752), prepared by Ms. Galvão Teles and Mr. Ruda Santolaria and issued in April 2022, together with a selected bibliography (A/CN.4/752/Add.1), finalized in consultation with members of the Study Group and issued only in its original language in June 2022.

155. The Study Group held nine meetings, from 20 to 31 May and on 6, 7 and 21 July 2022.[1210]

156. At its 3612th meeting, on 5 August 2022, the Commission considered and adopted the report of the Study Group on its work at the present session, as reproduced below.

157. At the same meeting, the Commission decided to request the Secretariat to prepare a memorandum identifying elements in the Commission's previous work that could be relevant for its future work on the topic, in particular in relation to statehood and the protection of persons affected by sea-level rise, for its consideration at its seventy-fifth session.

[1205] *Official Records of the General Assembly, Seventy-third Session, Supplement No. 10* (A/73/10), para. 369.

[1206] *Official Records of the General Assembly, Seventy-fourth Session, Supplement No. 10* (A/74/10), paras. 265–273.

[1207] A/CN.4/740 and Corr.1.

[1208] A/CN.4/740/Add.1.

[1209] *Official Records of the General Assembly, Seventy-sixth Session, Supplement No. 10* (A/76/10), paras. 247–296.

[1210] For the membership of the Study Group, see chap. I.

1. Introduction of the second issues paper by the Co-Chairs

(a) Procedure followed by the Study Group

158. At the first meeting of the Study Group, held on 20 May 2022, the Co-Chair (Ms. Galvão Teles) indicated that the purpose of the six meetings scheduled in the first part of the session was to allow for an exchange of views on the second issues paper and any relevant matters that its members might wish to address on the topic, insofar as they related to the two subtopics under consideration, namely statehood and the protection of persons affected by sea-level rise. The Co-Chair also invited members to engage in a structured and interactive debate, drawing upon the contents of the second issues paper, and to provide input on a draft bibliography on the subtopics, to be issued as an addendum to the second issues paper. The outcome of the first part of the session would be an interim report of the Study Group, to be considered and complemented during the second part of the session so as to reflect a further interactive discussion on the future programme of work. It would then be agreed upon in the Study Group and subsequently presented by the Co-Chairs to the Commission, with a view to being included in the annual report of the Commission. That procedure, agreed upon by the Study Group, was based on the 2019 report of the Commission.[1211]

159. The Co-Chair also recalled that, as outlined in Part Four of the second issues paper, section II of which addressed the future programme of work of the Study Group, in the next quinquennium, the Study Group would revert to each of the subtopics – the law of the sea, statehood and the protection of persons affected by sea-level rise – and would then seek to prepare a substantive report on the topic as a whole by consolidating the results of the work undertaken.

(b) Presentation of the second issues paper

(i) Introduction, general comments and working methods

160. In a general introduction, the Co-Chairs (Ms. Galvão Teles and Mr. Ruda Santolaria) emphasized the preliminary nature of the second issues paper, underlining that it was intended to serve as a basis for the Study Group's discussion and could be complemented by contribution papers prepared by its members.

161. In addition to containing an outline of the purpose and structure of the issues paper (chapter I), the introduction addressed the inclusion of the topic in the Commission's programme of work and the extent to which it had been considered so far (chapter II). It also contained an overview of Member States' expression of support for or interest in the topic, or otherwise, during the debates in the Sixth Committee since 2018, and a summary of the outreach initiatives undertaken by the Co-Chairs (chapter III). Chapter IV of the introduction comprised an update on the scientific findings and prospects of sea-level rise relevant to the subtopics, which was orally complemented to take account of the fact that two new reports of the Intergovernmental Panel on Climate Change had been issued since the submission of the second issues paper, and to share the key findings set out in the report of the panel on the impacts, adaptation and vulnerability with respect to climate change.[1212] Chapter V of the introduction contained an outline of the relevant outcomes of the International Law Association's work. In that regard, the Co-Chairs noted that the Association had since decided to extend the mandate of the Committee on International Law and Sea-level rise until 2024.

[1211] *Official Records of the General Assembly, Seventy-fourth Session, Supplement No. 10* (A/74/10), paras. 270–271.

[1212] Intergovernmental Panel on Climate Change, *Climate Change 2022: Impacts, Adaptation and Vulnerability – Contribution of Working Group II to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* [H.-O. Pörtner *et al.* (eds.)] (Cambridge, Cambridge University Press); and Intergovernmental Panel on Climate Change, *Climate Change 2022: Mitigation of Climate Change – Contribution of Working Group III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* [P.R. Shukla *et al.* (eds.)] (Cambridge and New York, Cambridge University Press).

162. The purpose of Part One (entitled "General") was to recall the scope and outcome of the topic, taking into account the limits set forth in the syllabus prepared in 2018.[1213] In doing so, Part One contained, in chapter I, an examination of the issues to be considered by the Commission to the extent that they related to statehood, the protection of persons affected by sea-level rise, and the final outcome. Chapter II recalled that methodological and organizational matters had been addressed in the 2018 syllabus,[1214] in chapter X of the 2019 annual report of the Commission,[1215] and in chapter IX of its 2021 annual report.[1216] In that connection, the Co-Chairs emphasized that State practice was essential for the work of the Commission and encouraged States, international organizations and other relevant entities to continue engaging with the Study Group and the Commission in order to share their practices and experiences with regard to the topic.

(ii) Statehood and related observations and guiding questions

163. Part Two of the second issues paper, entitled "Reflections on statehood", was introduced by the Co-Chair of the Study Group (Mr. Ruda Santolaria) at the second meeting of the Study Group.

164. The Co-Chair recalled that sea-level rise is a global phenomenon, which is not uniform and poses serious threats to all States. For low-lying and small island developing States, the threat is existential in nature, and in the case of small island developing States, it concerns their very survival. He noted that, while there had been cases within the same State of evacuation of the population from one island to another,[1217] there was no record of situations where the territory of a State had been completely submerged or rendered uninhabitable. In light of the progressive character of the phenomenon, such a situation could not, however, be considered a distant theoretical concern. The Co-Chair also recalled that the preliminary reflections on statehood did not aim to prejudge or formulate conclusions on those sensitive matters, which deserved considerable caution. The paper aimed to explore certain past or present experiences or situations so as to establish a list of relevant international law issues to be analysed from the perspective of both *lex lata* and *lex ferenda*.

165. Turning to chapter II of Part Two of the issues paper, which focused on criteria for the creation of a State, the Co-Chair recalled that there was no generally accepted notion of a "State". He noted, however, that to be considered a "person" or subject of international law, a State had to meet four criteria in accordance with article 1 of the 1933 Convention on the Rights and Duties of States:[1218] (*a*) permanent population; (*b*) defined territory; (*c*) government; and (*d*) capacity to enter into relations with other States. The Co-Chair pointed out that the latter point also applied to other subjects of international law. A general overview of the criteria was provided in chapter II. As a matter of further reference, chapter II also explored the characteristics of a State contained in provisions of other illustrative texts: the 1936 resolution of the Institut de Droit International concerning the recognition of new States and new Governments;[1219] the 1949 draft Declaration on Rights and Duties of States;[1220] the 1956 draft articles on the law of treaties proposed by the Special Rapporteur;[1221] and the opinions of the Arbitration Commission of the 1991 International Conference on the Former

[1213] *Official Records of the General Assembly, Seventy-third Session, Supplement No. 10* (A/73/10), annex B, paras. 12–14.
[1214] *Ibid.*, para. 18.
[1215] A/74/10, para. 263–273.
[1216] A/76/10, para. 245–246.
[1217] For example, the people of the Carteret Islands, in Papua New Guinea, have been relocated owing to sea-level rise.
[1218] Convention on the Rights and Duties of States (Montevideo, 26 December 1933), League of Nations, *Treaty Series*, vol. CLXV, No. 3802, p. 19.
[1219] Institut de Droit International, "Resolutions concerning the recognition of new States and new Governments" (Brussels, April 1936), *The American Journal of International Law*, vol. 30, No. 4, Supplement: Official Documents (October 1936), pp. 185–187.
[1220] *Yearbook of the International Law Commission 1949*, p. 287.
[1221] *Yearbook of the International Law Commission, 1956*, vol. II, document A/CN.4/101, para. 10, at pp. 107–108.

Yugoslavia,[1222] in which the definition of the characteristics of a State was consistent with the requirements of the Convention on the Rights and Duties of States.

166. Chapter III contained some representative examples of actions taken by States and other subjects of international law, starting with the Holy See and the Sovereign Order of Malta. In that regard, it was noted that those entities, despite having been deprived of their territories at a certain point in history, maintained their legal personality and continued to exercise some of their rights under international law, in particular the right of legation and the treaty-making power (sections A and B). Chapter III (section C) also considered the example of Governments being forced into exile by foreign military occupation or other circumstances. In that connection, it was noted that, despite losing control over all or a large part of their territory, the affected States retained their status as such and their representative organs moved to territories under the jurisdiction of third States that hosted them, which was regarded as constituting evidence of a presumption of continuity of statehood. In a similar vein, the Co-Chair, drawing upon certain international instruments referred to in section D of chapter III, including the Convention on the Rights and Duties of States, noted that once a State was created as such under international law, it had an unalienable right to take measures to remain a State.

167. With respect to chapter IV, on concerns relating to the phenomenon of sea-level rise and measures taken in that regard, the following aspects were listed for consideration relevant to the issue of statehood:

(*a*) the possibility that the land area of the State could be completely covered by the sea or rendered uninhabitable, and that there would not be sufficient supply of drinking water for the population;

(*b*) the progressive displacement of persons to the territories of other States, which in turn raised questions related to nationality, diplomatic protection and refugee status;

(*c*) the legal status of the Government of a State affected by sea-level rise that had taken residence in the territory of another State;

(*d*) the preservation of the rights of States affected by the phenomenon of sea-level rise in respect of the maritime areas;

(*e*) the right to self-determination of the populations of affected States.

168. The Co-Chair further stressed the need to examine measures aimed, on the one hand, at mitigating the effects of sea-rise level – such as coastal reinforcement measures and the construction of artificial islands – and, on the other hand, possible alternatives for the future concerning statehood in the event of complete inundation of a State's territory. With respect to the former, the high cost of preservation measures and the need to assess their environmental impact were underlined, including through cooperation in favour of the most affected States. In connection with the latter, the urgent necessity to take into account the perspective of small island developing States was also emphasized.

169. Against the above background, chapter V presented several preliminary alternatives that were neither conclusive nor limitative. The first of the proposed alternatives was to assume a presumption of continuity of statehood. That proposal was in line with the preliminary approach taken by the International Law Association and with the views expressed by some States that the Convention on the Rights and Duties of States applied only to the determination of the birth of a State rather than to its continued existence. At the same time, it was noted that continuity of statehood in the absence of a territory could entail certain practical problems, such as statelessness of its population or difficulties in exercising rights over maritime zones. Another possible alternative that could be explored consisted in maintaining some form of international legal personality without a territory, similar to the examples of the Holy See and the Sovereign Order of Malta, in relation to which the Co-Chair outlined various modalities: (*a*) ceding or assignment of segments or portions of

[1222] Maurizio Ragazzi, "Conference on Yugoslavia Arbitration Commission: opinions on questions arising from the dissolution of Yugoslavia", *International Legal Materials*, vol. 31, No. 6 (November 1992), pp. 1488–1526, at p. 1495.

territory in other States, with or without transfer of sovereignty; (*b*) association with other State(s); (*c*) establishment of confederations or federations; (*d*) unification with another State, including the possibility of a merger; and (*e*) possible hybrid schemes combining elements of more than one modality, specific experiences of which may be illustrative or provide ideas for the formulation of alternatives or the design of such schemes.

170. At the third meeting of the Study Group, the Co-Chair introduced the guiding questions related to statehood, contained in paragraph 423 of the paper. He emphasized that these questions were meant to serve as a basis for future discussions within the Study Group.

(iii) Protection of persons affected by sea-level rise and related observations and guiding questions

171. At the fourth meeting of the Study Group, the Co-Chair (Ms. Galvão Teles) recalled some of the preliminary observations based on Parts Three and Four of the second issues paper, concerning the subtopic "Protection of persons affected by sea-level rise".

172. The Co-Chair noted that the existing international legal frameworks potentially applicable to the protection of persons affected by sea-level rise were fragmented and general in nature, suggesting that they could be further developed to address specific needs of affected persons. In particular, the existing framework could be further complemented to reflect the specificities of the long-term or permanent consequences of sea-level rise and to take account of the fact that the affected persons could remain *in situ*, be displaced within their own territory or migrate to another State in order to cope with or avoid the effects of sea-level rise. In that connection, the Commission's prior work, namely the 2016 draft articles on the protection of persons in the event of disasters,[1223] was regarded as a basis for that exercise.

173. The Co-Chair also noted that, while relevant State practice at the global level remained sparse, it was more developed among States already affected by sea-level rise. The Co-Chair observed that some of the practice identified was not specific to sea-level rise, but generally concerned the phenomena of disasters and climate change. Nonetheless, the practice revealed several principles that might prove useful for the Study Group's examination of the topic. It was also observed that international organizations and other entities with relevant mandates were taking a more proactive approach in order to promote practical tools to enable States to be better prepared to address issues related to human rights and human mobility in the face of climate displacement. The Co-Chairs' efforts to facilitate the exchange of information with States, international organizations and other stakeholders, including through expert meetings, were also underlined.

174. The Co-Chair recalled several relevant international instruments examined in Part Three of the second issues paper, including the Guiding Principles on Internal Displacement,[1224] the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention),[1225] the New York Declaration for Refugees and Migrants,[1226] the Global Compact for Safe, Orderly and Regular Migration,[1227] the Sendai Framework for Disaster Risk Reduction 2015–2030,[1228] the Nansen Initiative's Agenda for the Protection of Cross-Border Displaced Persons in the Context of Disasters and Climate Change,[1229] and the International Law Association's Sydney Declaration of Principles on the Protection of Persons Displaced in the Context of Sea-level

[1223] *Yearbook of the International Law Commission, 2016*, vol. II (Part Two), para. 48.
[1224] E/CN.4/1998/53/Add.2, annex.
[1225] 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.
[1226] General Assembly resolution 71/1 of 19 September 2016.
[1227] General Assembly resolution 73/195 of 19 December 2018, annex. See also A/CONF.231/7.
[1228] General Assembly resolution 69/283 of 3 June 2015, annex II.
[1229] Nansen Initiative, *Agenda for the Protection of Cross-Border Displaced Persons in the Context of Disasters and Climate Change*, vol. 1 (December 2015).

Rise.[1230] The importance of the recent Views adopted by the Human Rights Committee in *Teitiota v. New Zealand*,[1231] which concerned the applicability of the *non-refoulement* principle in the context of both climate change and sea-level rise, was noted. The Co-Chair further noted that, according to the Human Rights Committee in that case, the effects of climate change, namely sea-level rise, in receiving States could 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,[1232] thereby triggering the *non-refoulement* obligations of sending States.

175. Turning to Part Four of the second issues paper, the Co-Chair then referred to paragraph 435, which contained a list of guiding questions related to the protection of persons affected by sea-level rise. The questions were divided into three subsets, relating to: (*a*) the principles applicable to the protection of the human rights of the persons affected by sea-level rise; (*b*) the principles applicable to situations involving evacuation, relocation, displacement, or migration of persons, including vulnerable persons and groups, owing to the consequences of sea-level rise or as a measure of adaptation to sea-level rise; and (*c*) the applicability and scope of the principle of international cooperation to help States with regard to the protection of persons affected by sea-level rise. The Co-Chair emphasized that the guiding questions had been proposed in order to structure the future work of the Study Group on the topic, and that proposals or contributions from its members on any of the issues raised therein, and on aspects of State practice and the practice of relevant international organizations and other relevant entities with regard to the issues raised therein, would be welcomed.

2. Summary of the debate

(a) General comments

(i) Topic in general

176. Commenting on the topic in general terms, members of the Study Group reiterated the topic's relevance and the crucial importance of the Commission's discussion for States that are directly affected by sea-level rise, including for those whose survival might be threatened. Some members also expressed a sense of urgency given the issues at stake and the gravity of the situation, noting that sea-level rise had consequences that affected many branches of international law. It was also noted that the States that could be at risk of losing their statehood were small island developing States, which contributed the least to pollution emissions in the atmosphere yet were the most affected by climate change through sea-level rise.

177. It was also noted, however, that while the needs of small island developing States as specially affected States should be carefully taken into account, consistent with the position of the Commission in its conclusions on identification of customary international law,[1233] the Commission ought not to overlook the comments and needs of other States, given that the legal consequences of sea-level rise would affect not only small island developing States and coastal States, but all States. It was also noted that a middle path had to be found between the human and legal dimensions of the topic to make sure that the former was wedded with the latter. It was furthermore underlined that some aspects of the topic addressed difficult and sensitive matters in the nature of policy questions, in relation to which the Commission ought to be cautious, and that the Commission should focus on the legal aspects of the topic, in accordance with its mandate to progressively develop and codify international law.

[1230] Final report of the Committee on International Law and Sea-Level Rise, in International Law Association, *Report of the Seventy-eighth Conference, Held in Sydney, 19–24 August 2018*, vol. 78 (2019), pp. 897 *ff.*, and resolution 6/2018, annex, *ibid.*, p. 33.

[1231] CCPR/C/127/D/2728/2016.

[1232] International Covenant on Civil and Political Rights (New York, 16 December 1966), United Nations, *Treaty Series*, vol. 999, No. 14668, p. 171.

[1233] A/73/10, chap. V (paras. 53–66).

(ii) Second issues paper

178. Members of the Study Group largely expressed gratitude to the Co-Chairs (Ms. Galvão Teles and Mr. Ruda Santolaria) for a very well-documented and structured second issues paper, noting that it presented extensive relevant information in a systematized way, that it was of high quality and that it provided an excellent basis for the Study Group to deliberate on the two subtopics under consideration. It was also noted, however, that the relevance of some developments in the paper – such as comments on the issues of nationality and diplomatic protection with regard to statehood – was not obvious. It was also recalled that the content of the issues paper pertained to the Co-Chairs, not to the Commission as a whole.

179. Members further welcomed the Co-Chairs' outreach efforts on the topic, in terms of both gathering evidence of the practice of States, international organizations and other relevant entities and generating greater interest in and contributions on the topic in intergovernmental and academic fields.

(iii) Scope of the work of the Study Group and working methods

180. Regarding the scope of the work of the Study Group, differing views were expressed in relation to both the material scope and the temporal scope of the topic: while some members of the Study Group considered that they were too ambitious and ought to be narrowed, limitations placed upon the topic were viewed by others as preventing the Study Group from reaching conclusions on whether existing international law would be sufficient to address the challenges faced or whether new rules or principles were required to fill potential gaps.

181. The need to focus on the legal dimension of the topic and avoid speculative scenarios, while ascertaining the operational role of the Commission and distinguishing matters of policy from matters of international law, was also emphasized. In the latter regard, it was suggested that the role of the Commission on the topic should be limited to reviewing or outlining the relevant legal problems arising from situations of sea-level rise. It was also suggested, in contrast, that the Commission could examine policy-related issues and allow for the possibility of developing existing law or, at least, of making non-binding policy suggestions.

182. The need to identify the nexus between the subtopic on issues related to the law of the sea – which the Commission had considered during its seventy-second session – and the subtopics being examined at the current session was also underlined. In that regard, the interrelation between the impact of sea-level rise and the law of the sea was underlined, in particular the principle that "the land dominates the sea" and the principle of freedom of the seas.

183. With regard to working methods, it was noted that it would be useful to clarify how the product of the Study Group would reflect its members' contribution papers. It was further suggested that the Commission, in the next quinquennium, could consider turning the topic into a traditional topic, with a designated special rapporteur or rapporteurs and with public debates in a plenary format.

(iv) Scientific findings

184. With regard to scientific findings, while it was suggested that the Commission might need to appraise the scientific findings upon which it relied so as to be in a position to provide a uniform assessment of the risks, members largely recalled that the work of the Study Group was based on the common ground that sea-level rise was a fact, already proved by science, which was significantly affecting a number of States and was a global phenomenon. It was also noted that an excellent outline of the available scientific data was given in paragraphs 45 to 51 of the second issues paper, and that it was wise to lean – as did the first and second issues papers – on the work of highly regarded expert groups such as the Intergovernmental Panel on Climate Change.

185. On whether future meetings with scientists were needed, differing views were expressed. Members of the Study Group nonetheless welcomed the Co-Chairs' proposal to

organize focused meetings to inform and educate them about the aspects most relevant to their study of the legal questions.

(v) State practice

186. Members of the Study Group reiterated that State practice was essential to the work of the Study Group on the topic and that the limited State practice available restricted the mapping exercise with which it had been entrusted. It was also emphasized that, so far, no States were in the process of becoming completely submerged or otherwise uninhabitable.

187. In terms of scale and representativity, while it was noted that regional practice from small island States – specifically in the Pacific – was steadily emerging, a paucity of comments from Latin America and the Caribbean, Asia and Africa was observed, in conjunction with the need for the Commission to pursue governmental outreach initiatives and for members of the Study Group to prepare contribution papers on regional practice.

188. It was suggested that, in the particular circumstances of an extremely complex, existential and unavoidable phenomenon such as sea-level rise, where there was limited State practice since no State had yet been fully submerged, the Commission might instead have recourse to reasoning by analogy and interpretative norms, consistent with its mandate to progressively develop international law. In that sense, it was recalled that international legal practice included use of international law principles and constant interpretation of legal norms in light of events, in order to be able to address new challenges when appropriate. The need for the Commission to reflect on the basis of international law and to generate a dialogue on the possible options and alternatives, as the Co-Chairs had done to identify the most suitable of them, was also underlined.

(vi) Sources of law

189. With regard to sources of law, it was reiterated that the Commission should take account of treaties, custom and general principles of law that could be applicable – including, for example, the principle of equity, the principle of good faith and the principle of international cooperation – as relevant to the topic. The central role of the United Nations Convention on the Law of the Sea and the need to preserve its integrity was also emphasized.[1234]

190. It was suggested by some members of the Study Group that the principle of international cooperation seemed equally relevant to both subtopics under consideration. It was also observed that the principle could play an important role for States to provide for their own preservation, as suggested by the Co-Chairs in the second issues paper. Given the particularly high cost of preservation measures such as the installation or reinforcement of coastal barriers or defences and dykes, the importance of international cooperation through technology transfer and the exchange of best practices was thus underlined. International cooperation was deemed equally important in relation to the construction of artificial islands to house persons affected by the phenomenon of sea-level rise, given the cost of these initiatives and their potential environmental impact, so that other such durable and environmentally sustainable formulas could be found. The need to identify practical ways and means to achieve such international cooperation was underlined.

191. It was also observed that any reflection on statehood and sea-level rise should include the principle of common but differentiated responsibilities, insofar as the cost of addressing such a severe global environmental problem should be distributed among different States according to their historical responsibility and to their capabilities. To that end, the Study Group could build upon the already existing legal frameworks designed to address climate-related global challenges, including, *inter alia*, article 2 of the Vienna Convention for the Protection of the Ozone Layer,[1235] principle 7 of the Rio Declaration on Environment and

[1234] United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982), United Nations, *Treaty Series*, vol. 1833, No. 31363, p. 3.

[1235] Vienna Convention for the Protection of the Ozone Layer (Vienna, 22 March 1985), United Nations, *Treaty Series*, vol. 1513, No. 26164. p. 293.

Development,[1236] article 3 of the United Nations Framework Convention on Climate Change[1237] and the Kyoto Protocol thereto,[1238] article 20 of the Convention on Biological Diversity,[1239] and the Paris Agreement.[1240]

192. Differing views, encompassing support and scepticism, were also expressed in relation to the relevance to statehood of the principle that the land dominated the sea.

(b) Comments on statehood and related observations and guiding questions

(i) Criteria of the Convention on the Rights and Duties of States

193. During the exchanges on statehood, it was noted that statehood was a complex issue deserving of caution, and emphasized, as outlined in the second issues paper, that there was neither a generally accepted definition of a State, nor clearly defined criteria for the extinction of a State. It was noted that the Commission itself had faced difficulties in defining statehood in the context of its work on the 1949 draft Declaration on Rights and Duties of States. In that regard, it was observed that the term "State" had many meanings, that it had to be interpreted in the context of a particular treaty, and that there was controversial international case law on the matter. It was also noted that the issue of statehood was relevant only to those States whose territory could totally disappear or become unsuitable for sustaining human habitation or economic life, suggesting that the effect of sea-level rise could be limited to a very small number of States.

194. Diverse views were expressed regarding the relevance of the four criteria for the establishment of a State as set out in article 1 of the Convention on the Rights and Duties of States, namely that a State have a permanent population, a defined territory, a sovereign Government, and the capacity to enter into relations with other States and other subjects of international law.

195. In that connection, it was noted that each of the criteria was multifaceted, with many exceptions, possibilities and changing definitions. While these criteria were deemed to be a useful anchoring or starting point for the discussion on statehood and sea-level rise, it was noted that they were the product of a different historical context, at a time when the disappearance of a territory due to environmental changes was conceivable as a matter of fiction only. As such, they might unnecessarily limit the statehood options remaining for affected States. It was also observed that the criteria were not indefinite requirements, and that a State could not automatically disappear because it no longer met one of them, especially through the loss of a territory or a population due to inhabitability.

196. Regarding the criterion of territory, it was affirmed that a territory was a prerequisite for the establishment of a State, and that the existence of land territory had been a deeply rooted aspect of statehood. In contrast, it was noted that sovereignty referred to the whole territory under the State's control and not solely to the land territory. Thus, a territory that became fully submerged because of sea-level rise should not be considered a non-existent territory.

197. It was also underlined that the capacity to enter into relations with other States, the fourth criterion, was viewed in some legal traditions as a consequence stemming from statehood, meaning that there were in fact three real constituent elements of a State: a territory, a population and an effective Government.

198. It was further noted that, in their practice, States had developed modern criteria that supplemented those of the Convention on the Rights and Duties of States, hence the need for

[1236] A/CONF.151/26/Rev.1 (Vol. I).

[1237] United Nations Framework Convention on Climate Change (New York, 9 May 1992), United Nations, *Treaty Series*, vol. 1771, No. 30822, p. 107.

[1238] 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.

[1239] Convention on Biological Diversity (Rio de Janeiro, 5 June 1992), United Nations, *Treaty Series*, vol. 1760, No. 30619, p. 79.

[1240] Paris Agreement (Paris, 12 December 2015), United Nations, *Treaty Series*, No. 54113 (volume number has yet to be determined), available from https://treaties.un.org.

the Commission to be careful with its conclusions in that regard. A study on the practice of States regarding the interpretation of the criteria of the Convention on the Rights and Duties of States might therefore be helpful, including to take account of the decisions of the Security Council of the United Nations given their importance in certain cases of statehood. The point was also made that, according to State practice, failure to meet any of the criteria of the Convention on the Rights and Duties of States did not necessarily result in the termination of statehood.

(ii) Statehood and self-determination

199. In the course of the discussion, it was observed that, with a view to understanding which statehood options could be made available to States affected by sea-level rise, the interests and needs of the affected population should be an essential consideration. In that regard, the preservation of an affected population as a people for the purposes of exercising the right of self-determination should be one of the main pillars of the work of the Commission on the issue. At the same time, it was noted that the Commission should keep in mind the special historical and legal contexts of the right of self-determination and exercise caution in applying that principle in relation to sea-level rise.

(iii) Statehood and presumption of continuity

200. Turning to comments on the presumption of continuity of submerged or uninhabitable States and the maintenance of their international legal personality, as outlined in the second issues paper, various views were expressed by members of the Study Group.

201. It was indicated that the presumption of continuity of statehood was a relevant solution to address the consequences of sea-level rise, expressing support for the customary presumption to be considered by the Study Group as a starting point, given that, in particular, there was no clear criterion in customary international law for the cessation of a State. In that regard, it was noted that such an approach would also be in line with the preliminary conclusions reached by the International Law Association during its 2018 Sydney Conference. It was further asserted that the right to preservation was a right inherent in statehood.

202. According to another view that was presented, preliminary presumption of continuity of statehood was subject to further consideration by States, some of which had previously supported that option, disfavouring the extinction of States affected by sea-level rise. It was also suggested that it was not an issue on which the Commission could draw a specific conclusion, given that its role should be limited to outlining the relevant legal problems arising from the situation of sea-level rise, rather than taking further steps to provide specific solutions.

203. In that regard, it was recalled that, consistent with the 2018 syllabus, as referred to in paragraph 64 of the second issues paper, the Commission was, *inter alia*, to undertake an "analysis of the possible legal effects on the continuity or loss of statehood in cases where the territory of island States is completely covered by the sea or becomes uninhabitable".[1241] It was accordingly proposed that the Commission might consider: (*a*) legal issues arising from the continuity of statehood in the absence of territory, such as diplomatic protection for *de facto* stateless persons, which were partly discussed in the issues paper; and (*b*) legal issues arising from the discontinuity of statehood, namely extinction of statehood, which had not been considered so far.

204. It was also noted that the principle of continuity of statehood was temporary, aimed at allowing a State to be protected in the absence of a normal situation, as, for example, in the event of military occupation of a territory or internal violence, referred to in paragraphs 192 and 193 of the second issues paper. Further, it was observed that the inundation of a territory or complete absence thereof could not be compared to a change in a territory, and that the presumption of continuity could be envisaged only where a territory and population existed. In that regard, while it was recalled that a territory was an indispensable element of

[1241] A/73/10, annex B, para. 16.

a State, it was also stressed that, rather than depending upon its territory and population, the presumption of continuity of a State was attached to its legal personality.

205. The risks associated with the continuation of statehood in the absence of a territory, or where a disembodied State, without a territory, was subject to the sovereignty of another State, were also underlined. The capacity of such a State to uphold its international and domestic obligations, whether, for example, in relation to its maritime zones or in the field of human rights, migration and refugee law, was also questioned. The need for the Study Group to identify means and methods for preserving peoples' cultural and traditional identities, whether by statehood or otherwise, in low-lying coastal land as well as in fully submerged territories, was also stressed.

(iv) Other possible alternatives for the future concerning statehood

206. Against the background of the above exchange, the Study Group also examined the other possible alternatives for the future concerning statehood, as set out in chapter V of Part Two of the issues paper, such as the maintenance of international legal personality without a territory, and the use of various modalities, as listed in paragraph 169 above, to maintain statehood.

207. In doing so, the Study Group generally welcomed the in-depth analysis and the many illustrative examples explored by the Co-Chair, including those of the Holy See between 1870 and 1929, the Sovereign Order of Malta, and Governments in exile. While it was suggested that they might be helpful to the Study Group in further assessing the loss of statehood for submerged or uninhabitable States, they were deemed of historical interest rather than useful analogies in examining options aimed at maintaining the existence of States affected by sea-level rise. In that regard, it was notably emphasized that the context surrounding the examples provided by the Co-Chair, in which the entities in question appeared not to be truly regarded as a State, was fundamentally different to the context of a territory becoming unavailable, as in the case of sea-level rise.

208. Taking into account the various options examined in the second issues paper, it was suggested that a careful and prudent analysis of the possible alternatives be carried out, and that the creation of *sui generis* legal regimes, on the basis of either agreements between States or decisions by the international community, not be ruled out. In that regard, reference was made to certain cases in which various association agreements allowed the free movement of persons from small island States to a larger State, whereas in other cases no such agreement existed, with the example provided of a procedure in place for other small island States whereby only 75 persons selected by ballot were allowed to move to the larger State each year.[1242]

209. In contrast, the view was expressed that it was not the role of the Commission to recommend certain arrangements over others, a task that should be left to the political realm. Also noted was the potential imbalance in power between a disappearing State and the other (potentially receiving) State with which it would be negotiating a solution: in such a context, the maritime entitlements of the disappearing State could largely or entirely be transferred to the other (receiving) State as part of the arrangement.

(v) Statehood and reclamation efforts

210. Given the importance attached to the possession of a territory in practice, even in small amount, it was suggested that a potential solution could lie in preserving some part of a disappearing State, such as through reclamation efforts. Those efforts would take an already

[1242] See, for example, the Statement of Partnership between New Zealand and Tuvalu (2019–2023), available at https://www.mfat.govt.nz/assets/Countries-and-Regions/Pacific/Tuvalu/Statement-of-Partnership-NZ-Tuvalu-_2019-2023.pdf. See also New Zealand, Operational Manual, available at https://www.immigration.govt.nz/opsmanual/#46618.htm; and the New Zealand Government Immigration website at https://www.immigration.govt.nz/new-zealand-visas/apply-for-a-visa/about-visa/pacific-access-category-resident-visa; as well as R. Curtain and M. Dornan, "Climate change and migration in Kiribati, Tuvalu and Nauru", DevPolicyBlog, 15 February 2019, available at https://devpolicy.org/climate-change-migration-kiribati-tuvalu-nauru-20190215/.

existing feature, in its natural condition – such as an island – and expand the size of that feature so as to increase the land mass.

(vi) Statehood and compensation

211. It was suggested that, rather than analysing various concepts of statehood and trying to find precedents where there were none, it would be useful to give consideration to the classic issue of compensation for the damage caused, keeping in mind that considerations of continuity of sovereignty would not resolve the challenges faced by the most affected States, which had contributed the least to a phenomenon largely caused by uncontrolled human industry. It was alternatively suggested that addressing compensation as part of the topic could be counterproductive and that it was not expressly mentioned in the 2018 syllabus.

212. It was also noted that some States had expressed concerns about the subtopic of statehood and that it might be necessary to ascertain the extent to which global sea-level rise was attributable to changes in coastlines, given that other such human activity could explain the phenomenon.

(vii) Comments on guiding questions

213. Members of the Study Group made the following observations with respect to the guiding questions listed in paragraph 423 of the second issues paper:

(*a*) It was suggested that it should be possible for a State, in exceptional circumstances, to continue its existence despite no longer meeting some or all of the criteria set out in the Convention on the Rights and Duties of States. Yet, caution was called for, as practical situations would always be open to interpretation. At the same time, it was noted that the criteria of population and territory remained crucial, and that the prolonged or permanent loss of territory would inadvertently have an effect on statehood;

(*b*) It was noted that the cases of the Holy See and the Sovereign Order of Malta were not helpful to the examination of the subtopic, although it was also observed that while not directly related, they could be considered by analogy. Relatedly, cases of Governments in exile, which were by definition temporary and did not involve the disappearance of a territory, were not considered directly relevant. According to another view, some valuable conclusions could be drawn from cases of Governments being forced in exile for, at least, the immediate aftermath of the disappearance of a State's land territory due to sea-level rise or for when the land territory of a State became uninhabitable despite not being totally covered by the sea;

(*c*) Hesitation was expressed as to the existence and content of the right of a State to provide for its preservation, and it was proposed that the Study Group avoid addressing preservation measures from the rights and obligations perspective;

(*d*) and (*e*) It was observed that maintaining a presumption of continuity of statehood could result in complex practical difficulties. It was deemed uncertain whether the questions in subparagraphs (*d*) and (*e*) of paragraph 423 of the second issues paper were practical or necessary for the Study Group to explore. At the same time, it was proposed that the Study Group develop a set of preventive tools for States to use;

(*f*) It was noted that any practical modalities would depend on agreements between the States concerned. Some members expressed doubt as to the possibility of expanding the right of self-determination in that context;

(*g*) A view was expressed that there was no presumption of continuity of statehood. It was also noted that the Study Group should not determine the existence of such a presumption, but instead explore whether it was appropriate;

(*h*) It was noted that, assuming that a State could still maintain its jurisdiction over maritime zones despite losing its land territory, practical difficulties would arise, including in terms of the State fulfilling its obligations within those zones. Nonetheless, that situation was considered as a potential recourse for affected States. The need to differentiate between cases of complete and partial inundation, and situations where the land territory of a State became uninhabitable despite not being totally covered by the sea, was emphasized;

(*i*) According to one view, the question in subparagraph (*i*) of paragraph 423 of the second issues paper was not useful or relevant to the topic. It was also noted that suggesting specific modalities, such as the establishment of a self-governing area within the territory of a third State, was beyond the scope of the topic;

(*j*) It was observed that the choice of statehood options was a policy issue and would depend on agreements between the States concerned in each particular case.

(c) Comments on the protection of persons affected by sea-level rise and related guiding questions

(i) Existing legal frameworks

214. During discussions on the subtopic at the fourth and fifth meetings of the Study Group, it was noted that there was no legal framework that provided for a distinct legal status of persons affected by sea-level rise and that existing applicable frameworks were highly fragmented. Support was voiced for the proposal to identify and assess the effectiveness of the existing principles applicable to the protection of persons affected by sea-level rise. The need to consider different features of sea-level rise in the course of that exercise was emphasized. According to another view, it was questionable as to whether the fragmented nature of applicable rules caused any practical problems. It was therefore considered unnecessary to develop a highly specific legal framework for the protection of the narrow group of persons affected by sea-level rise.

215. While commenting on the question of the applicability of existing legal frameworks, some members noted that international refugee law, climate change law and international humanitarian law were not equipped to deal with the protection of persons affected by sea-level rise. In contrast, several relevant international legal instruments, such as the Kampala Convention, the New York Declaration for Refugees and Migrants and the Global Compact for Safe, Orderly and Regular Migration, were noted as examples of successful State cooperation. Members also recalled recent relevant case law of the United Nations human rights treaty bodies.[1243]

216. With respect to the question of available State practice, regret was expressed that only a few States had provided the Commission with relevant information on the topic. It was proposed that the request to States, international organizations and other relevant entities for information and practice be reiterated. Examples were provided of administrative policies adopted by States in response to cross-border displacement induced by sea-level rise. The practices of issuing humanitarian visas and of granting subsidiary protection to persons not qualifying as refugees were regarded as requiring further examination.

(ii) Applicability of human rights law

217. It was recognized that climate change and sea-level rise could adversely affect the enjoyment of human rights, and that there was a need to view all human rights – civil, political, economic, social and cultural – as interrelated, interdependent and indivisible. It was also noted that, while not directly addressing the issue of sea-level rise, certain regional instruments, such as the Cartagena Declaration on Refugees[1244] and the Brazil Declaration[1245] in Latin America or the Kampala Convention in Africa,[1246] did take into account climate change and disasters as cause for movement of persons who needed protection. It was further stressed that States must respect their human rights obligations while addressing the

[1243] For example, *Teitiota v. New Zealand* (CCPR/C/127/D/2728/2016) and *Bakatu-Bia v. Sweden* (CAT/C/46/D/379/2009).

[1244] Cartagena Declaration on Refugees, adopted at the Colloquium on the International Protection of Refugees in Central America, Mexico and Panama: Legal and Humanitarian Problems, held in Cartagena, Colombia, on 19–22 November 1984. Available at www.oas.org/dil/1984_Cartagena_Declaration_on_Refugees.pdf.

[1245] Brazil Declaration: "A Framework for Cooperation and Regional Solidarity to Strengthen the International Protection of Refugees, Displaced and Stateless Persons in Latin America and the Caribbean", 3 December 2014. Available at: https://www.unhcr.org/brazil-declaration.html.

[1246] See footnote 1225 above.

phenomenon of sea-level rise. Relatedly, it was recalled that the Human Rights Council had recently recognized the right to a clean, healthy and sustainable environment.[1247]

218. Some members of the Study Group questioned whether the international human rights law framework could be fully relevant to the protection of persons affected by sea-level rise. It was observed that while States had human rights obligations towards individuals, the sea-level rise phenomenon was not directly attributable to any particular State. Accordingly, it was unclear how human rights rules would operate within that context and, specifically, how and against whom claims related to sea-level rise could be brought. Those questions were considered even more pertinent in the case of a State whose territory was completely submerged or rendered uninhabitable. In response, it was also argued that human rights law was an important lens through which to view the sea-level rise phenomenon, and maintained that the human rights of individuals remained inalienable even if their State had ceased to exist owing to sea-level rise. It was considered, however, necessary to examine the extent to which human rights rules were applicable in that context. A proposal was made to assess how better to integrate human rights obligations into the climate change legal framework. An additional examination of the non-refoulement principle in the context of sea-level rise was suggested.

219. An argument was raised that it was difficult to examine the applicability of human rights law in the context of sea-level rise without addressing the issue of causation, because in order to determine how human rights law applied, it was necessary to identify which specific State or States were responsible in any given case for the protection of applicable human rights. It was noted in response that the Study Group had intentionally excluded causation from the scope of the topic,[1248] and that addressing it would not be helpful for the Study Group's work.

(iii) Comments on guiding questions

220. Members of the Study Group made the following observations with respect to the guiding questions listed in paragraph 435 of the second issues paper:

(*a*) It was suggested that the human rights mentioned therein be addressed by category, namely civil and political rights on the one hand, and economic, social and cultural rights on the other. Furthermore, it was noted that the principles of non-discrimination, equality and equal protection of the law should be included among those applicable to the protection of the human rights of persons affected by sea-level rise;

(*b*) A concern was raised that the measures referred to therein with regard to displacement and human mobility were too specific to be recommended as a general rule, since the choice in every particular case would depend to a great extent on domestic legal and administrative frameworks. It was also observed that a preferential regime for individuals displaced owing to sea-level rise could be seen as discriminatory towards people escaping other consequences of climate change. The importance of prevention and prohibition of arbitrary displacement in situations involving the evacuation, relocation, displacement or migration of persons owing to the consequences of sea-level rise was emphasized;

(*c*) The importance of the principle of international cooperation was stressed. According to another view, the principle was a political concept, and it was questionable as to whether any legal consequences could be derived from it. For guidance on the applicability and scope of the principle of international cooperation, it was therefore suggested that the Study Group refer to the Commission's draft articles on the protection of persons in the event of disasters and to principle 4 of the International Law Association's Sydney Declaration of Principles on the Protection of Persons Displaced in the Context of Sea-level Rise.[1249]

[1247] See Human Rights Council resolution 48/13 of 8 October 2021.

[1248] A/73/10, annex B, para. 14.

[1249] Final report of the Committee on International Law and Sea-Level Rise, in International Law Association, *Report of the Seventy-eighth Conference* (see footnote 1230 above), p. 904, and resolution 6/2018, annex, *ibid.*, p. 33.

(d) Future work of the Study Group

221. In connection with the comments made with respect to the Study Group's scope of the work and working methods (paras. 31–34 above), concern was expressed that the scope of the subtopics was too broad, and it was suggested that the number of questions under examination be reduced. A proposal was also made to focus predominantly on areas with sufficiently developed practice. Relatedly, it was suggested that the Study Group should leave issues related to statehood aside and focus its future work on issues related to the law of the sea and to the protection of persons affected by sea-level rise.

222. Regarding the subtopic of statehood, it was noted that further study was required of the question of extinction of statehood, as it had not been sufficiently explored in the second issues paper. Likewise, it was noted that the Study Group should further examine cases of partial land inundation, cases in which the land territory became uninhabitable despite not being totally covered by the sea, and coastal defence measures and the construction of artificial islands. With respect to the subtopic of the protection of persons affected by sea-level rise, it was proposed that matters of protection of persons in situ and in displacement be considered separately. Moreover, three broad subjects for further study were put forward: (*a*) human rights obligations; (*b*) issues specific to the movement of persons, including displacement; and (*c*) the obligation to cooperate.

223. It was noted that the Study Group's work needed to be based on the previous work of the Commission, in particular on the draft articles on the protection of persons in the event of disasters. At the same time, the need to examine specific aspects of sea-level rise, namely its irreversibility and long-term nature, was emphasized. It was also proposed that the Study Group consider establishing a dialogue with human rights expert bodies within the United Nations system on the subtopic of the protection of persons affected by sea-level rise. On that subtopic, it was further suggested to operate on the basis of a combined rights-based and needs-based approach.

224. With regard to the outcome of the Study Group's work, various proposals were made, including that a framework convention be drafted on issues related to sea-level rise, which could be used as a basis for further negotiations within the United Nations system, following the example of the Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa.[1250] Another proposal was to focus the work of the Study Group on more concrete, limited outcomes, such as a draft treaty on a new form of subsidiary protection for persons affected by sea-level rise, or a detailed analysis, for illustrative proposes, of certain specific human rights to determine how exactly they were affected and should be protected when affected by sea-level rise. Support was voiced for the development of guidelines for bilateral agreements between States and for the preparation of a list of legal questions to be addressed at the political level within the United Nations. It was also noted that the short-term outcome of the Study Group's work would be its final report, on all subtopics, yet the Commission's work could be continued beyond that outcome in a different format. In that regard, a proposal was made to include, in the final report of the Study Group, a draft resolution addressing all outstanding political issues, for the consideration of the General Assembly.

3. Concluding remarks by the Co-Chairs

(a) General concluding remarks

225. At the sixth meeting of the Study Group, the Co-Chairs (Ms. Galvão Teles and Mr. Ruda Santolaria) delivered concluding remarks in light of the comments that had been expressed by its members during the previous meetings.

226. The Co-Chairs expressed their gratitude to the members of the Study Group for their contributions and comments on the second issues paper. While the paper was considered a good basis for future discussions, some additional information was required on the practice

[1250] 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.

of States and international organizations, especially in Africa, Asia and Latin America and the Caribbean. The Co-Chairs indicated that, while scientific findings related to sea-level rise and climate change were not within the Study Group's scope of work, they would endeavour to organize informal meetings with scientists from the Intergovernmental Panel on Climate Change on specific issues of interest.

227. The Co-Chairs further observed that the Study Group's work would continue without prejudice to the outcome of its work, which, according to the syllabus, was a consolidated final report. Any proposals made by members of the Study Group with regard to the future format of its work and outcome would be examined in more detail at a later stage.

(b) Statehood

228. The Co-Chair (Mr. Ruda Santolaria) recalled that sea-level rise was a gradual phenomenon that could result in the partial or total loss of a State's territory. Although there had been no cases of complete inundation of a State's land, the small island developing States were likely to become uninhabitable in the future.

229. The Co-Chair noted that the lack of State practice had rendered it necessary to explore historical examples and relevant general principles of law. With regard to the latter, he recalled the principle of the sovereign equality of States, the principle of self-determination of peoples, the principle of international cooperation, and the principle of good faith. While it was acknowledged that the historical analogies of the Holy See and the Order of Malta were not directly related to sea-level rise, they could nonetheless be useful for further work on the topic with respect to the possibility of maintaining international legal personality despite the loss of territory. Likewise, some valuable conclusions could be drawn from cases of Governments being forced into exile for, at least, the immediate aftermath of the disappearance of a State's land territory due to sea-level rise or for when the land territory of a State became uninhabitable despite not being totally covered by the sea.

230. Turning to the criteria of statehood, the Co-Chair reiterated that, although there was no generally accepted notion of a "State", the criteria of the Convention on the Rights and Duties of States could constitute a starting point for the Study Group's work. He noted the position expressed by members of the Study Group that there was a difference between criteria for the creation of a State and those for its continued existence. Some reflections on the criteria of territory and permanent population were provided.

231. The Co-Chair noted that the presumption of continuity of a State was also a starting point for further work. At the same time, he emphasized the need to consider the practical implications of maintaining that presumption despite serious changes to a State's territory and its population. Relatedly, the right of a State to ensure its preservation required further reflection. The importance of preserving the right of self-determination of the affected populations was also highlighted.

(c) Protection of persons affected by sea-level rise

232. The Co-Chair (Ms. Galvão Teles) recalled that there was no specific legal framework that provided for a distinct legal status of persons affected by sea-level rise. Existing universal and regional legal frameworks, including human rights law, refugee and migration law, and disaster and climate change law, required additional study with a view to evaluating their applicability in the sea-level rise context. The Co-Chair noted the relevant emerging practice of States, international organizations and other relevant entities, both direct and indirect, and of the need to continue examining its development for the purpose of identifying principles applicable to the protection of persons affected by sea-level rise.

233. The Co-Chair observed that, in line with the proposals made by some members, the Study Group should refer in its work to previous outcomes of the Commission's work, in particular, but not limited to, the draft articles on the protection of persons in the event of disasters. The Co-Chair also recalled that members of the Study Group were welcome to provide individual written contributions on any of the guiding questions.

4. Issues for further work on the subtopics of statehood and the protection of persons affected by sea-level rise

234. Based on the discussions in the Study Group during the first part of the session, the Co-Chairs made the following proposals regarding the continuation of its work on the subtopics, without prejudice to the possibility of further examining other issues as appropriate.

(a) Statehood

235. The Co-Chair (Mr. Ruda Santolaria) proposed that the Study Group request the Secretariat to undertake a study of the relevant previous work of the Commission, with a view to assessing its relevance to the subtopic. He emphasized the need for collaboration with entities and institutions from different regions of the world in order to ensure diversity and representativeness, especially regarding the practice in regions for which less information was available, such as Latin America and the Caribbean, Asia and the Pacific and Africa. He proposed the following tasks to complement the second issues paper with respect to the subtopic of statehood, taking into account the exchange of opinions among members of the Study Group, in the context of the analysis of the sea-level rise in relation to statehood:

(*a*) an evaluation of the way in which the requirements for the configuration of a State as a person or subject of international law had been interpreted, taking the Convention on Rights and Duties of States as a starting point, and including references to the practice of the General Assembly and the Security Council of the United Nations; and an analysis of any differences between the criteria for the creation of a State and those for the continuity of its existence;

(*b*) an analysis of the territory, including the different spaces under the sovereignty of the State and the maritime zones under its jurisdiction, and the nature of the land surface that could become submerged as a consequence of sea-level rise;

(*c*) a presentation of the possible legal effects of the maintenance or the eventual loss of statehood, and of the eventual maintenance of some form of international legal personality, in the context of the different scenarios resulting from sea-level rise; and an analysis of the pertinence of the presumption of statehood in the case of States affected by sea-level rise, and of the ways in which self-determination could be exercised by the affected populations and whether certain principles of general international law could be applied in such cases. Given the progressive nature of sea-level rise, it would be important to distinguish between two situations and the potential effects thereof: one, closer in time, in which the land surface of a State was not completely covered by the sea, but could become uninhabitable; and the other, in which the land surface of a State could become completely covered by the sea. Without prejudice to the specificities of each subtopic in the analysis, the interplay between the different assumptions or scenarios in relation to statehood and their eventual implications for the protection of persons and their rights should be reinforced;

(*d*) a reflection on the right of a State affected by sea-level rise to seek its conservation, the modalities to be used for that purpose and the significance of international cooperation to that effect;

(*e*) a careful and prudent analysis of the various options set out in the second issues paper, taking into account the possibility of creating *sui generis* legal regimes or proposing practical alternatives based on agreements between States or instruments in relation to the phenomenon of sea-level rise that could be adopted within the framework of international organizations, especially in the context of the United Nations system.

(b) Protection of persons affected by sea-level rise

236. The Co-Chair (Ms. Galvão Teles) proposed that the Study Group request the Secretariat to undertake a study of the relevant previous work of the Commission, with a view to assessing its relevance to the subtopic. She encouraged members of the Study Group to prepare papers on relevant international and regional practice, and on the guiding questions contained in paragraph 435 of the second issues paper. She emphasized the need to establish and maintain contacts with relevant expert bodies and international organizations. Lastly, the Co-Chair listed the following points that she intended to further examine to complement the

second issues paper with respect to the subtopic of protection of persons affected by sea-level rise taking into account the exchange of views among the members of the Study Group:

(*a*) the protection of human dignity as an overarching principle in the protection of persons affected by sea-level rise;

(*b*) the combination of the needs-based and rights-based approaches as the basis for the legal analysis of the protection of persons affected by sea-level rise;

(*c*) implications on human rights – including with regard to civil, political, economic, social and cultural rights – in the context of the protection of persons affected by sea-level rise;

(*d*) identification of the scope of the obligations of human rights duty bearers in the context of sea-level rise;

(*e*) the protection of persons in vulnerable situations in the context of sea-level rise;

(*f*) the relevance of the principle of *non-refoulement* in the context of the protection of persons affected by sea-level rise;

(*g*) the implications of the Global Compact for Safe, Orderly and Regular Migration and other soft-law instruments in terms of the protection of persons affected by sea-level rise;

(*h*) the application of subsidiary and temporary protection to persons affected by sea-level rise;

(*i*) the relevance of humanitarian visas and similar administrative policies for the protection of persons affected by sea-level rise;

(*j*) tools for the avoidance of statelessness in the context of sea-level rise;

(*k*) the content of the principle of international cooperation, including institutional paths for inter-State, regional and international cooperation regarding the protection of persons affected by sea-level rise.

C. Future work of the Study Group

237. In the next quinquennium, the Study Group will revert to the subtopic of the law of the sea in 2023 and to the subtopics of statehood and the protection of persons affected by sea-level rise in 2024. In 2025, the Study Group will then seek to finalize a substantive report on the topic as a whole by consolidating the results of the work undertaken.

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Sea-level rise in relation to international law

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

Contents

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Introduction

I. Purpose and structure of the second issues paper

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[2] *Ibid.*, annex B.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[5] A/CN.4/740 and Corr.1.
[6] A/CN.4/740/Add.1.
[7] *Official Records of the General Assembly, Seventy-sixth Session, Supplement No. 10* (A/76/10), para. 250.
[8] See A/CN.4/SR.3550.
[9] A/76/10, para. 26.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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[19] Iceland (on behalf of the Nordic countries, namely Denmark, Finland, Iceland, Norway and Sweden) (A/C.6/76/SR.19, paras. 87–88).
[20] Singapore (A/C.6/76/SR.20, para. 22).
[21] Liechtenstein (A/C.6/76/SR.21, paras. 3–4).
[22] Cuba (A/C.6/76/SR.21, para. 32).
[23] Maldives (A/C.6/76/SR.21, para. 139).
[24] Thailand (A/C.6/76/SR.22, para. 4).
[25] Argentina, A/C.6/76/SR.22, para. 31.

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

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

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

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

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

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

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

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

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

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

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

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

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

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[68] Papua New Guinea (A/C.6/73/SR.23, para. 33; A/C.6/74/SR.30, para. 18; A/C.6/75/SR.13, para. 39; and A/C.6/76/SR.22, para. 38).
[69] Philippines (A/C.6/74/SR.31, para. 9, and A/C.6/76/SR.23, para. 17).
[70] Peru (A/C.6/74/SR.31, para. 5).
[71] Portugal (A/C.6/74/SR.29, para. 108, and A/C.6/76/SR.21, para. 10).
[72] Republic of Korea (A/C.6/75/SR.13, para. 67).
[73] Romania (A/C.6/74/SR.28, para. 15, and A/C.6/76/SR.21, para. 20).
[74] Samoa (on behalf of the Pacific small island developing States) (A/C.6/76/SR.19, para. 71).
[75] Sierra Leone (A/C.6/76/SR.20, para. 29).
[76] Slovenia (A/C.6/74/SR.29, para. 146, and A/C.6/76/SR.21, para. 97).
[77] Solomon Islands (A/C.6/76/SR.22, para. 79).
[78] South Africa (A/C.6/73/SR.23, para. 15, and A/C.6/76/SR.20, para. 77).
[79] Thailand (A/C.6/73/SR.22, para. 18; A/C.6/74/SR.29, para. 99; and A/C.6/76/SR.22, para. 3).
[80] Tonga (A/C.6/73/SR.22, para. 63, and A/C.6/76/SR.22, para. 120).
[81] Tuvalu (A/C.6/76/SR.23, para. 5).
[82] United Kingdom (A/C.6/76/SR.21, para. 146).
[83] Viet Nam (*ibid.*, para. 85).
[84] Holy See (Observer) (A/C.6/76/SR.23, para. 28–29).
[85] Belarus (A/C.6/74/SR.28, para. 22, and A/C.6/76/SR.20, para. 63).
[86] Iran (Islamic Republic of) (A/C.6/76/SR.20, para. 38).
[87] Russian Federation (A/C.6/76/SR.22, para. 95).
[88] United States (A/C.6/73/SR.29, para. 27, and A/C.6/74/SR.30, para. 126).
[89] Czechia (https://www.un.org/en/ga/sixth/74/pdfs/statements/ilc/czech_republic_2.pdf; A/C.6/74/SR.28, para. 66).
[90] Germany (A/C.6/76/SR.21, para. 81).
[91] The following events, *inter alia*, were organized or attended by the Co-Chairs of the Study Group in 2020 and 2021: interactive dialogues with the Sixth Committee (28 October 2020 and 27 October 2021); side event organized by Fiji, Jamaica, Mauritius and Singapore during International Law Week 2020 (28 October 2020); panels during the annual meetings of the American Society of International Law on sea-level rise and the law of the sea (2020) and the protection of people in the context of climate change and disasters (2021); series of workshops organized by the Liechtenstein Institute on Self-Determination, at Princeton University, on sea-level rise and self-determination (2020 and 2021); webinar as part of a series on the theme "Rising sea levels: promoting climate justice through international law" on the role of the Commission, organized by the British Institute of International and Comparative Law (3 March 2021); virtual interactive discussion with the Alliance of Small Island States on the protection of persons affected by sea-level rise (22 April 2021); panel organized by the Asian Society of International Law on the theme "Rising sea levels and international law: Asia and beyond" (26 May 2021); briefing to European Union Working Party on Public International Law (3 June 2021); twenty-first meeting of the United Nations Open-ended Informal Consultative Process on Oceans and the Law

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

V. Consideration of the topic by the International Law Association

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

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

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

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

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

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

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

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

(c) the duty to take positive action;

(d) the duty to cooperate;

(e) evacuation of affected persons;

(f) planned relocations of affected persons;

(g) migration of affected persons;

(h) internal displacement of affected persons;

(i) cross-border displacement of affected persons.

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

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

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

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

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

[110] *Ibid.*, pp. 25–26.

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

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

Part One: General

I. Scope and outcome of the topic

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

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

A. Issues to be considered by the Commission

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

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

[111] Resolution 6/2018, in International Law Association, *Report of the Seventy-eighth Conference* (see footnote 108 above), p. 33.
[112] A/73/10, annex B, para. 12.
[113] *Ibid.*, para. 13.
[114] *Ibid.*, para. 14.
[115] *Ibid*.
[116] *Ibid*.
[117] *Ibid*.
[118] A/CN.4/740, Corr.1 and Add.1.
[119] A/76/10.

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

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

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

B. Final outcome

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

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

[120] A/C.6/76/SR.17 to A/C.6/76/SR.24. The full texts of the statements are available from the Sixth Committee's web page, at https://www.un.org/en/ga/sixth/.
[121] A/73/10, annex B, para. 16.
[122] *Ibid.*, para. 17.
[123] *Ibid.*, para. 18.

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

II. Methodological approach

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

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

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

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

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

Part Two

Reflections on statehood

I. Introduction

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

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

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

II. Criteria for the creation of a State

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

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

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

[130] Viet Nam (A/C.6/73/SR.30, para. 48).
[131] Submission of FAO.
[132] Samoa (A/C.6/73/SR.23, para. 65) and Seychelles (A/C.6/73/SR.24, para. 11).
[133] General Assembly resolution 72/217 of 20 December 2017, eleventh preambular para.
[134] Jane McAdam *et al.*, *International Law and Sea-Level Rise: Forced Migration and Human Rights* (Lysaker, Fridtjof Nansen Institute, 2016), pp. 7–9; Mariano J. Aznar Gómez, "El Estado sin territorio: La desaparición del territorio debido al cambio climático", *Revista Electrónica de Estudios Internacionales*, No. 26 (2013), pp. 6–7; and Susin Park, "El cambio climático y el riesgo de apatridia: La situación de los Estados insulares bajos" (Geneva, Office of the United Nations High Commissioner for Refugees (UNHCR), 2011), p. 11.

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

1. Permanent population

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2. Defined territory

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

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

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

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

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

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

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

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

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

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

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

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

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

3. Government

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

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

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

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

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

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

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

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

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

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

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

[157] *Ibid.*, pp. 55–58.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

A. Holy See[165]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

B. Sovereign Order of Malta[180]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

C. Governments in exile

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

D. Some relevant issues in certain international instruments

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[211] Marshall Islands (on behalf of members of the Pacific Islands Forum) (A/C.6/73/SR.20, para. 41).
[212] Fiji (https://www.un.org/en/ga/sixth/73/pdfs/statements/ilc/fiji_1.pdf; A/C.6/73/SR.23, para. 63).
[213] Papua New Guinea (A/C.6/73/SR.23, para. 36).
[214] *Ibid.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

V. Possible alternatives for the future concerning statehood

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

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

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

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

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

179. On the same day, Maldives said that:

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

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

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

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

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

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

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

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

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

A. Presumption as to the continuity of the State concerned

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

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

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

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

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

186. Tonga said:

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

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

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

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

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

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

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

187. Tuvalu made the following important point:

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

188. Cuba maintained a cautious position, saying that:

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

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

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

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

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

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

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

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

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

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

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

194. With regard to small island developing States whose territory could be covered by the sea or become uninhabitable owing to exceptional circumstances outside their will or control, a strong presumption in favour of continuing statehood should be considered. Such States have the right to provide for their preservation, and international cooperation will be of particular importance in that regard.

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

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

B. Maintenance of international legal personality without a territory

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

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

C. Use of some of the following modalities:

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

With transfer of sovereignty

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

Without transfer of sovereignty

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

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

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

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

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

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

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

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

2. Association with other State(s)

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

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

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

3. Establishment of confederations or federations

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

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

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

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

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

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

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

208. A detail that could be taken into account when considering the advisability of forming a federation or joining an existing one is that, in some federal States, the individual units of the federation are recognized as having the capacity to carry out certain actions of an international character, as described below.

Germany

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

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

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

Switzerland

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

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

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

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

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

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

Belgium

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

Canada

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

Former Soviet Union

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

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

216. In case of a merger, the island State affected by sea-level rise would be absorbed by another State. The population of the island State would be incorporated into the population of the other State and take on the nationality of that State. However, a degree of autonomy for the former nationals of the affected island State could be agreed upon beforehand, in order to preserve their cultural and group identity.

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

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

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

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

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

Joint sovereignty model

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

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

Bosnia and Herzegovina

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

Faroe Islands

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

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

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

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

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

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

Special Administrative Regions of Hong Kong and Macao (China)

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

Scenarios relating to citizenship

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

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

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

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

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

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

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

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

Scenarios relating to the right of peoples to self-determination

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

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

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

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

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

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

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

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

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

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

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

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

I. Introductory considerations

A. A significant threat

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[294] Draft articles on the protection of persons in the event of disasters, and commentary thereto, *Yearbook of the International Law Commission, 2016*, vol. II (Part Two), paras. 48–49.

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

A. International human rights law

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

B. International humanitarian law

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

C. International law concerning refugees and internally displaced persons

1. International law concerning refugees

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

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

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

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

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

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

[322] *Ibid.*, pp. 18–20.

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

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

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

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

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

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

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

267. The 1951 Convention defines a refugee as any person who, "owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it".[331]

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

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

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

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

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

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

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

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

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

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

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

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

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

2. International law concerning internally displaced persons

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[352] United Nations, 2021.

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

D. International law concerning migrants

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

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

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

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

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

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

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

[353] On IOM, see also paras. 399–401 below.
[354] Oli Brown, "Migration and climate change", IOM Migration Research Series, No. 31 (Geneva, IOM, 2008), p. 15.
[355] United Nations, *Treaty Series*, vol. 2220, No. 39481, p. 3.
[356] Art. 2 (1).
[357] General Assembly resolution 71/1.
[358] General Assembly resolution 73/195 of 19 December 2018. See also A/CONF.231/7.
[359] General Assembly resolution 73/195, annex, para. 18 (i).

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

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

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

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

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

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

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

E. International law concerning disasters

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2. Sendai Framework for Disaster Risk Reduction 2015–2030

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[387] *Ibid*., p. 20.
[388] *Ibid.*, p. 30.
[389] *Ibid*., p. 31.
[390] Nansen Initiative, *Agenda for the Protection of Cross-Border Displaced Persons* (see footnote 368 above).
[391] *Ibid*., para. 16.
[392] *Ibid*., para. 18.
[393] See *ibid*., paras. 30–34.
[394] *Ibid*., paras. 87–93.

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

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

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

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

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

F. International law concerning climate change

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[409] Nansen Initiative, *Agenda for the Protection of Cross-Border Displaced Persons* (see footnote 368 above), para. 22.

[410] Platform on Disaster Displacement, "Update on 2017 progress", July 2018, p. 1. Available at https://agendaforhumanity.org/sites/default/files/resources/2018/Jul/2018%20Initiatives%20Updates_PDD_final_20%20June_1.pdf (accessed 20 February 2022).

[411] Advisory Group on Climate Change and Human Mobility (2015), "Human mobility in the context of climate change: elements for the UNFCCC Paris Agreement", March 2015, p. 2, available at https://www.unhcr.org/5550ab359.pdf (accessed 20 February 2022); and IOM, "Glossary on Migration", International Migration Law, No. 34 (Geneva, 2018). See also strategic workstream (d) of the five-year rolling workplan of the Executive Committee of the Warsaw International Mechanism for Loss and Damage: "Enhanced cooperation and facilitation in relation to human mobility, including migration, displacement and planned relocation" (FCCC/SB/2017/1/Add.1, annex).

[412] IOM, "Glossary on migration" (see footnote 411 above).

[413] For a literature review, see Serdeczny, *What Does It Mean to "Address Displacement" under the UNFCCC?* (see footnote 398 above), pp. 13–18.

[414] See, for instance, United Nations Development Programme, *Human Development Report 2009: Overcoming Barriers – Human Mobility and Development* (Basingstoke and New York, Palgrave Macmillan, 2009).

[415] For instance, UNU and the Nansen Initiative, in collaboration with IOM, UNHCR and a number of other organizations, have advocated the integration of human mobility issues into national adaptation plans. See Koko Warner *et al.*, "Integrating human mobility issues within national adaptation plans", UNU Institute for Environment and Human Security Publication Series, Policy Brief No. 9 (Bonn, UNU Institute for Environment and Human Security, 2014).

a specific legal content.[416] It is therefore not a legal concept or framework for analysis, but it is worth referencing since it has been used frequently in the context of the protection of persons affected by climate change and its adverse effects, including sea-level rise.

III. Mapping State practice and the practice of relevant international organizations and bodies regarding the protection of persons affected by sea-level rise

317. The States most affected by the impact of sea-level rise first attempted to bring the issue to the attention of the international community some 30 years ago, through the Malé Declaration on Global Warming and Sea-Level Rise of 1989.[417]

318. Because sea-level rise – although already happening, as proven by scientific data – is still a relatively new phenomenon and, as mentioned above, its acceleration will have different impacts through time and space, many States seem only now to be beginning to consider the measures required to protect persons affected by it. Furthermore, some of the emerging practice that may be identified is not necessarily specific to sea-level rise, since it may cover the wider phenomena of disasters and climate change.

319. While a preliminary assessment of State practice shows that it is still scarce at the global level, it is increasingly more developed in the States and regions that are the most exposed to sea-level rise and thus that are already feeling its effects on their territory, such as Pacific small island States and States with low-lying coastal areas.

320. Certain third States that might be exposed to an indirect impact, from cross-border displacement of persons affected by the adverse effects of climate change, including sea-level rise, are also commencing to take legal or policy measures to prepare for such a possibility.

321. International organizations and other bodies with relevant mandates in the field of human rights, displacement, migration, labour, refugees, statelessness, climate change and financing have been taking a more proactive approach in order to promote tools that would allow States to be better prepared with regard to issues related to human rights and human mobility in the face of climate displacement, including as a result of sea-level rise.

322. In spite of the general support for the inclusion of the subtopic of the protection of persons affected by sea-level rise in the current work of the Commission, and following the Commission's requests in chapter III of its annual reports of 2019[418] and 2021[419] for information from States, international organizations and other relevant bodies, only a few replies have been received so far.[420] More time appears to

[416] Certain domestic laws and policies do adopt the term, however. See, for instance, Fiji, "Planned relocation guidelines: a framework to undertake climate change related relocation", available at https://cop23.com.fj/wp-content/uploads/2018/12/CC-PRG-BOOKLET-22-1.pdf (accessed 20 February 2022).

[417] A/C.2/44/7, annex.

[418] A/74/10, paras. 31–33.

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

[420] Submissions have been received from Belgium (23 December 2021), Fiji (on behalf of the members of the Pacific Islands Forum, namely Australia, Fiji, Kiribati, Marshall Islands, Micronesia (Federated States of), Nauru, New Zealand, Palau, Papua New Guinea, Samoa, Solomon Islands, Tonga, Tuvalu and Vanuatu) (31 December 2021), Liechtenstein (12 October 2021), Morocco (22 December 2021), the Russian Federation (17 December 2020) and Tuvalu (on

be needed for States, international organizations and other relevant bodies to provide the Commission with the necessary supporting material to complete its task. Further information would therefore be welcomed, and could be the subject of a more detailed study in the future.

323. A very preliminary, merely illustrative and non-exhaustive mapping exercise of the practice of States, international organizations and other relevant bodies is presented in the following sections, therefore, based on the replies received and on further research on the basis of publicly available information, for the purposes of highlighting examples of relevant practice, including of practice not specific to sea-level rise that arises in the context of the protection of persons in the context of disasters and climate change.

324. It is hoped that, at a later stage, based on further submissions received from States, international organizations and other relevant bodies, and possibly on a memorandum by the Secretariat and/or contribution papers by members of the Study Group, a more detailed analysis of the emerging practice with regard to the protection of persons affected by sea-level rise may be carried out.

325. The following sections therefore contain some examples of practice by directly and indirectly affected States and by international organizations and other relevant bodies, in order to highlight emerging practice relevant for the purposes of the protection of persons affected by sea-level rise.

A. State practice regarding the protection of persons affected by sea-level rise

326. The present section contains examples from small island States directly affected by sea-level rise, from States with low-lying coastal areas and from third States that might be indirectly affected by the movement of persons affected by sea-level rise.

1. Practice of small island States

327. The submission of Fiji on behalf of the Pacific Islands Forum,[421] an international organization comprising 18 States and territories,[422] contains information provided by individual Forum members and relevant regional organizations. While not exhaustive, the submission serves to "demonstrate examples of national and regional practice across the region". The information provided is representative of national practice and positions of individual Forum members, and therefore do not reflect a collective position of the Forum unless stated otherwise.

328. According to the submission, the members of the Forum have been at the "forefront of tackling issues such as the protection of persons affected by sea-level rise through climate change and disaster resilience efforts". States such as Kiribati, the Marshall Islands and Tuvalu "are taking urgent actions to protect their people who live the reality of climate change on a daily basis."

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behalf of the members of the Pacific Islands Forum) (30 December 2019), and from ECLAC (3 January 2022), FAO (30 December 2021), IMO (11 October 2021), UNEP (6 December 2021) and the United Nations Framework Convention on Climate Change (30 December 2021). The submissions are available at https://legal.un.org/ilc/guide/8_9.shtml#govcoms.

[421] The submission of Fiji (on behalf of the members of the Pacific Islands Forum) is accompanied by supplementary reference documents, also available at https://legal.un.org/ilc/guide/8_9.shtml#govcoms.

[422] Australia, Cook Islands, Fiji, French Polynesia, Kiribati, Marshall Islands, Micronesia (Federated States of), Nauru, New Caledonia, New Zealand, Niue, Palau, Papua New Guinea, Samoa, Solomon Islands, Tonga, Tuvalu and Vanuatu.

329. Most recently, the leaders of Forum members have prepared and endorsed various declarations regarding climate change and the impact of sea-level rise, such as the Boe Declaration on Regional Security (2018) and the Kainaki II Declaration for Urgent Climate Action Now (2019).[423] In 2021, leaders endorsed the Declaration on Preserving Maritime Zones in the Face of Climate Change-related Sea-Level Rise, recognizing "the threats of climate change and sea-level rise as the defining issue that imperils the livelihoods and well-being of our peoples and undermines the full realization of a peaceful, secure and sustainable future for our region".

330. The subtopic of the protection of persons affected by sea-level rise is a "complex [issue] of vital importance to [Forum] [m]embers and the entire global community, and … more time is needed to work through [it]". For Forum members, due consideration of the subtopic "should be guided and informed by applicable principles and norms of international law and relevant international frameworks and standards to address the need for an effective response to the urgent threats posed by sea-level rise".

331. There follows a short summary of the submission of Fiji to the Commission on behalf of the members of the Pacific Islands Forum, concerning regional and national legislation, policies and strategies relating to the protection of persons affected by sea-level rise:

(a) for the Federated States of Micronesia, helping its population to remain in their island homes is a major priority. Its goal is to "prevent environmental migration through adaption strategies", for which coordination is needed between national, state and local actors and across multiple sectors. The Constitution of enshrines the right of citizens to migrate within the borders of the State, a right that is particularly critical in the face of displacement induced by climate change, including sea-level rise and inundation of atolls and low-lying atolls;

(b) Fiji has put in place various policies and frameworks to address the adverse effects of climate change, including sea-level rise, in relation to the possible displacement of people and communities. The National Climate Change Policy 2018–2030, encapsulated in the Climate Change Act (2021), includes strategies to reduce the climate change-related impact on human well-being and national sovereignty through robust regional and international policy. For Fiji, human mobility is a priority issue for human security and for national security. It prioritizes the need for legal frameworks, policies and strategies for managing climate and disaster-induced displacement in order to protect human rights and reduce long-term risks, through planned relocation, relevant resourcing and national policies and strategies as a form of adaptation. On cross-border migration issues, the Global Compact for Migration is considered a useful guide. Fiji has also developed guidelines on displacement in the

[423] See also, for example: Pacific Islands Forum, "Our Sea of Islands, Our Livelihoods, Our Oceania": Framework for a Pacific Oceanscape – A Catalyst for Implementation of Ocean Policy, November 2010, available at https://library.sprep.org/sites/default/files/684.pdf; Palau Declaration on "The Ocean: Life and Future – Charting a Course to Sustainability", adopted by the Pacific Islands Forum Leaders at their forty-fifth meeting, in July 2014, available at https://www.forumsec.org/wp-content/uploads/2017/11/2014-Forum-Communique_-Koror_-Palau_-29-31-July.pdf; Taputapuātea Declaration on Climate Change, adopted by the Polynesian Leaders Group on 16 July 2015, available at https://www.samoagovt.ws/wp-content/uploads/2015/07/The-Polynesian-P.A.C.T.pdf; Delap Commitment on Securing Our Common Wealth of Oceans – "Reshaping the Future to Take Control of the Fisheries", adopted by the representatives of eight Pacific island States on 2 March 2018, available at https://www.pnatuna.com/sites/default/files/Delap%20Commitment_2nd%20PNA%20Leaders%20Summit.pdf; and communiqué of the fiftieth Pacific Islands Forum Leaders meeting, held in Funafuti, Tuvalu, 13–16 August 2019, available at https://www.forumsec.org/2019/08/19/fiftieth-pacific-islands-forum-tuvalu-13-16-august-2019/.

context of climate change and disasters, and a national adaption plan to address climate change in relation to sea-level rise and the relocation of affected communities. Reinforcing the preservation and practicality of traditional knowledge and expression of culture is pivotal. For Fiji, relocation is probably the most drastic of the possible steps to be taken, as people rarely want to move from the places in which they have grown up and that provide them with sustenance. However, if the risks are too great and will affect not just the livelihoods but the very existence of communities, relocation is a sensible option. In total, four local communities have been relocated in Fiji, and another 80 communities have been earmarked for relocation due to sea-level rise and other adverse effects of climate change. In the case of displacement and relocation within a State, the human rights of the persons affected must be protected and their security guaranteed as they move into new communities where social issues and potential conflicts over limited resources can arise. Fiji launched the first ever national planned relocation guidelines in 2018, at the twenty-fourth session of the Conference of the Parties to the United Nations Framework Convention on Climate Change. The guidelines provide a blueprint for a human rights-based approach in relation to relocation processes, particularly with regard to vulnerable groups;

(c) in Palau, the action plan of the national climate change policy focuses, *inter alia*, on strengthening resilience within vulnerable communities through innovative financing for relocation and climate-proofing, and on establishing relocation, displacement and emergency support programmes for vulnerable members of society. Climate change-related sea-level rise has necessitated urgent action to protect access to health-care services, and there are plans to relocate a national hospital;

(d) in Papua New Guinea, the people of the Carteret Islands, in the Autonomous Region of Bougainville, have been relocated owing to sea-level rise;

(e) in the Marshall islands, the National Strategic Plan 2020–2030 sets out the following key principles that underpin the State's approach to climate change adaptation: the right to remain, the resilience imperative, integrated adaptation, the "knowledge first" principle, adaptative capacity-strengthening, consensus and inclusion, and technology and tradition;

(f) in Samoa, the 2017 "State of Human Rights Report" focused on the impact of climate change on the full enjoyment of human rights, including the impact of sea-level rise. It highlighted the impact of climate change in human rights terms, and considered how the Government could embrace a human rights-based approach to climate change policies;

(g) in Tuvalu, the national climate change policy (2012–2021) lists as a strategy the development of a climate change migration and resettlement plan for each island in case the impact of climate change impacts lead to the worst-case scenario.

332. In the debate in the Sixth Committee in 2021, Tuvalu further stated that "[w]hile several international legal instruments, literature and human rights case law addressed the situation and status of refugees and stateless persons, international law did not explicitly apply to the situation of persons displaced by sea-level rise. The human rights of such persons must be protected."[424]

333. During the same debate, Solomon Islands added that "[i]t was also important for States to consider disaster risk reduction principles when adopting measures in the context of sea-level rise, such as measures to help populations remain *in situ* or to evacuate and relocate populations. In that connection, [the] delegation encouraged

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

the Study Group to consider the numerous international frameworks that incorporated those principles in its work."[425]

2. Practice of States with low-lying coastal areas

334. In their submissions to the Commission, Belgium and Morocco describe, *inter alia*, measures taken for the protection of their coastal areas.

335. In other publicly available information, cited here for illustrative purposes, there are accounts of measures regarding flooding adaptation and the restriction of coastal development in States with low-lying coastal areas such as the Netherlands,[426] Indonesia, Thailand,[427] the United States,[428] the United Kingdom,[429] South Africa[430] and France.[431] Singapore has put in place land reclamation strategies and installed hard walls or stone embankments, and has developed a national plan for combating sea-level rise.[432]

336. The case of Bangladesh provides an example of a rights-based approach to internal displacement in the context of disasters and climate change. In Bangladesh, sea-level rise caused by climate change is anticipated to subsume up to 13 per cent of the coastal land by 2080. A national strategy on the management of internal displacement in the context of disasters and climate change was adopted in December 2020.[433] In this strategy, it is recognized that the key driver of displacement in coastal regions was increasing tidal-water height, leading to tidal flooding. The national strategy proposes a rights-based approach with three prongs: (a) prevention and preparation (risk reduction); (b) protection during displacement; and (c) durable solutions.

3. Practice of third States

337. In its submission to the Commission, the Russian Federation stated the following:

> The interests of the Russian Federation in connection with climate change are not limited to its territory, and are global in nature. This is driven both by the global character of climate change and by the need to take into account in international relations the diversity of climate impacts and the implications of

[425] Solomon Islands (A/C.6/76/SR.22, para. 80).

[426] Louise Miner and Jeremy Wilks, "Rising sea levels: how the Netherlands found ways of working with the environment", Euronews, 25 February 2020; and C40 Cities Climate Leadership Group, "C40 Good Practice Guides: Rotterdam – climate change adaptation strategy", February 2016.

[427] Robert Muggah, "The world's coastal cities are going under: here's how some are fighting back", World Economic Forum, 16 January 2019.

[428] C40 Cities Climate Leadership Group, "Sea-level rise and coastal flooding: a summary of *The Future We Don't Want* research on the impact of climate change on sea levels". Available at https://www.c40.org/other/the-future-we-don-t-want-staying-afloat-the-urban-response-to-sea-level-rise (accessed 20 February 2022).

[429] Organisation for Economic Co-operation and Development (OECD), *Responding to Rising Seas: OECD Country Approaches to Tackling Climate Risks* (Paris, OECD Publishing, 2019).

[430] Sally Brown, "African countries aren't doing enough to prepare for rising sea levels", The Conversation, 16 September 2018.

[431] OECD, *Responding to Rising Seas* (see footnote 429 above).

[432] Audrey Tan, "Singapore to boost climate change defences", The Straits Times, 8 January 2018, available at https://www.straitstimes.com/singapore/environment/spore-to-boost-climate-change-defences (accessed 20 February 2022); and Singapore, National Climate Change Secretariat, "Impact of climate change and adaptation measures", available at https://www.nccs.gov.sg/faqs/impact-of-climate-change-and-adaptation-measures/ (accessed 20 February 2022).

[433] See http://www.rmmru.org/newsite/wp-content/uploads/2020/02/NSMDCIID.pdf (accessed 20 February 2022).

> climate change in different regions of the Earth. When establishing climate policies, account must be taken not only of the direct, but also of the indirect and long-range, impacts of climate change on the natural environment, the economy, the population and its various social groups. Indirect impacts of climate change include their impact on migration patterns as a result of the global redistribution of natural resources, including food and water, and the reduction in the relative comfort of human habitation in some regions of the Russian Federation and beyond.[434]

338. The Russian Federation further stated that the 1951 Convention's definition of a refugee "does not so far allow for the recognition of persons affected by sea-level rise as refugees", and that "assistance …, in the form of temporary asylum on humanitarian grounds, may be provided on the territory of Russia, but only if it is established that there is a real threat to the lives of such persons due to a natural emergency. We were unsuccessful in finding evidence of practice of the Russian Federation that would make it possible to establish whether sea-level rise and its consequences would be regarded as such an emergency".[435]

339. In its submission to the Commission, Liechtenstein affirmed that it "sees a fundamental role for the right of self-determination in addressing the issues raised by sea-level rise for the protection of persons affected by sea-level rise and for statehood". It recalled that common article 1 of the International Covenant on Economic, Social and Cultural Rights and International Covenant on Civil and Political Rights provides for the right of all peoples to self-determination, and that, by virtue of that right, they freely determine their political status and freely pursue their economic, social and cultural development.[436]

340. The submission of Fiji, on behalf of Pacific Islands Forum, contains information on measures taken by third States with regard to small island developing States that may be relevant for the protection of persons affected by sea-level rise.

341. According to that submission, the Marshall Islands, Micronesia (Federated States of) and Palau are party to Compacts of Free Association with the United States.[437] The compacts make it easier for citizens of the three States parties to enter and establish non-immigrant residence in the United States by, *inter alia*, waiving visa and labour certification requirements. The compacts do not confer the right to establish the residence necessary for naturalization or the right to petition for benefits for non-citizen relatives, though they do not preclude citizens of the States parties from pursuing those rights under the United States Immigration and Nationality Act.

342. Because of the compacts, emigration to the United States from their States parties is continuing. The Federated States of Micronesia reports that this movement is primarily for "education, employment and health reasons" rather than climate displacement, but that this "will likely change in the near future to becoming driven primarily by climate displacement, especially from atolls and low-lying islands in the three States [parties to the compacts] (indeed, there is already evidence that this is happening for citizens of [the Marshall Islands] at an accelerated rate)".

343. The compacts allow citizens of the Marshall Islands, Micronesia (Federated States of) and Palau to become and remain non-immigrant, non-citizen residents in the United States indefinitely, without the need for a visa or any other similar immigration documents: only a passport issued by the relevant State party is required for entry. This status allows them to retain their original citizenship while remaining

[434] Submission of the Russian Federation.
[435] *Ibid.*
[436] Submission of Liechtenstein.
[437] See https://www.doi.gov/oia/compacts-of-free-association.

in the United States indefinitely. It also allows them, *inter alia*, to pursue gainful employment, seek educational opportunities and use health and medical services while in the United States.

344. According to publicly available information, third States that might be exposed to an indirect impact, from displacement and migration of persons affected by sea-level rise, have begun to take legal or policy measures to prepare for such a possibility. Such measures concern, for instance, the adoption of procedures for temporary protection status and humanitarian visas, and the inclusion in national legislation on immigration and asylum of categories of environmental migrants or similar.

345. In the United States, the White House published a report in October 2021 on the impact of climate change on migration.[438] While it is recognized in the report that domestic climate change-related displacement is a current and future security risk in the United States, the focus of the report is on international climate change-related migration. It notes that United States policy can aid in supporting human security by building on existing foreign assistance towards reconsidering and developing legal mechanisms to support those who migrate. After an analysis of existing legal instruments at the international, regional and domestic levels, the report concludes that expanding access to protection will be vital, including through national measures such as the granting of "temporary protected status" in the United States.

346. Countries such as New Zealand have discussed the creation of a humanitarian visa category to help relocate people from the Pacific countries displaced by the effects of climate change, including for persons displaced by rising sea levels.[439]

347. In Sweden, the Aliens Act (2005)[440] applies to "refugees and persons otherwise in need of protection". The latter category comprises aliens who, under circumstances falling outside the scope of either asylum or subsidiary protection, are outside their country of origin because they: (a) need protection because of external or internal armed conflict or, because of other severe conflicts in their country of origin, feel a well-founded fear of being subjected to serious abuse, or (b) are unable to return to their country of origin because of an environmental disaster. Such persons in need of protection and their family members are entitled to a residence permit.[441]

B. Practice of relevant international organizations and bodies regarding the protection of persons affected by sea-level rise

348. Certain international organizations and other bodies have developed a relevant body of practice relating to the protection of persons affected by disasters and climate change, including sea-level rise, especially in the past decade or so. The present section adds further examples to those already mentioned above, in particular in section II of the present Part.

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[438] Available at https://reliefweb.int/sites/reliefweb.int/files/resources/Report-on-the-Impact-of-Climate-Change-on-Migration.pdf.

[439] Lin Taylor, "New Zealand considers visa for climate 'refugees' from Pacific islands", Reuters, 17 November 2017. Resident visas had already been granted on a humanitarian basis owing to the effects of climate change in the country of origin: see Immigration and Protection Tribunal, *AD (Tuvalu)*, Case No. [2014] NZIPT 501370-371, Decision, 4 June 2014, available at https://www.refworld.org/cases,NZ_IPT,585152d14.html (accessed 20 February 2022).

[440] See https://www.government.se/contentassets/784b3d7be3a54a0185f284bbb2683055/aliens-act-2005_716.pdf (accessed 20 February 2022).

[441] See Jane McAdam, *Climate Change Displacement and International Law: Complementary Protection Standards* (Geneva, UNHCR, 2011).

349. Submissions to the Commission referring to such practice have been received so far from the United Nations Environment Programme (UNEP) and the Food and Agriculture Organization of the United Nations (FAO).

350. Further preliminary research, based on publicly available documents, is then presented to illustrate potentially relevant practice from United Nations organs and bodies, Office of the United Nations High Commissioner for Human Rights (OHCHR), UNHCR, IOM, the International Labour Organization (ILO), the Task Force on Displacement, the Platform on Disaster Displacement, the International Federation of Red Cross and Red Crescent Societies, the World Bank and the Organisation for Economic Co-operation and Development (OECD). According to this preliminary research, these organizations and bodies have been integrating into their respective policies the issue of climate change, including sea-level rise, and its impact on the protection of persons.

1. United Nations Environment Programme

351. UNEP, in its submission, provides relevant examples of regional and national legislation, policies and strategies regarding the protection of persons affected by sea-level rise. It includes examples of Pacific regional instruments and national legislation, policies and strategies from several States in the Caribbean and in the Pacific and Indian Oceans. According to UNEP, the objective of many of these instruments is to strengthen resilience for people and communities in the face of sea-level rise, prevent displacement if possible and, in some instruments, set out a rights-based framework that seeks to respect, protect and ensure the rights of displaced persons in different stages of displacement and during the search for durable solutions.

2. Food and Agriculture Organization of the United Nations

352. FAO, in its submission, refers to its 2017 strategy on climate change, in which it recognizes that biophysical changes, including sea-level rise, have an impact on the socioeconomic status of the fishery and aquaculture sector in many parts of the world. It also has an impact on levels of poverty and food insecurity in areas dependent on fish and fishery products, as well as on the governance and management of the sector and on societies. These changes are having profound impacts on fishery- and aquaculture-reliant communities and the ecosystems on which they depend, especially in tropical regions, including persons affected by sea-level rise.

353. FAO recalls that it is mandated to assist Member Nations in addressing the biophysical impacts of climate change, including sea-level rise, through technical assistance projects and programmes, including through regional and national legislation, policies and strategies for ensuring food security and nutrition for affected persons, in particular the marginalized and vulnerable members of the community.

3. United Nations

354. This section briefly presents practice arising from treaties deposited with the Secretary-General or registered with the Secretariat, and resolutions and decisions of the General Assembly and some of its bodies – such as the United Nations Open-ended Informal Consultative Process on Oceans and the Law of the Sea – the Security Council, the Human Rights Council and its special procedures, and the human rights treaty bodies.

Treaties deposited or registered with the United Nations

355. No treaties relating specifically to the protection of persons in the event of sea-level rise were found among treaties deposited or registered with the United Nations.

Nonetheless, there are agreements that anticipate the relocation of persons in the context of emergencies.[442] Such agreements envisage the relocation of persons, including as refugees, albeit, again, not in the specific context of the consequences of sea-level rise.

356. There are also several agreements dealing with specific repatriation arrangements, again not specifically related to persons affected by sea-level rise, but which could nonetheless be deemed relevant as analogous practice.[443]

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[442] See, for example, the Agreement between Mexico and United States of America on cooperation in cases of natural disasters (Mexico City, 15 January 1980; United Nations, *Treaty Series*, vol. 1241, No. 20171, p. 207, at p. 211), which envisages the establishment of a United States–Mexico consultative committee on natural disasters, whose mandate (art. II) would include the exchange of information on techniques for evacuation and relocation of persons under emergency conditions (although not specifically or expressly related to sea-level rise). Another example, this time a treaty action, is that of the notification by Brazil under article 1 (B) (2) of the Convention relating to the Status of Refugees, which reads as follows (United Nations, *Treaty Series*, vol. 1558, No. 2545, p. 370): "... by Decree 98.602, of 19 December 1989, the President of the Republic annulled the geographic restriction clause in Section B.1 (a) of article 1 of the Convention on the Status of Refugees concluded in Geneva on 20 June 1951. As Your Excellence is aware, that clause rendered the Convention inapplicable in Brazil to refugees of non-European origin, who currently make up almost the total number applying for refuge. While the clause was in effect, non-European refugees were accepted in Brazil on an in-transit basis, although, in practice, they were allowed to work and remain on national territory until their relocation to another country, and were even allowed to settle permanently in Brazil provided petitions for them to do so had been filed by the United Nations High Commissioner for Refugees. The annulment of the geographic restriction clause renders possible, as of now, the official acknowledgment of these refugees by the Brazilian Government and makes the application of this international instrument in Brazil fully in conformity with Article 48, subsection X, of the new Constitution, which establishes the concession of political asylum as one of the principles of Brazil's foreign policy."

[443] See, for example: Tripartite Agreement for the voluntary repatriation of the Surinamese refugees, between France, Suriname and UNHCR (Paramaribo, 25 August 1998), United Nations, *Treaty Series*, vol. 1512, No. 26128, p. 69; Agreement concerning migration and settlement, between Japan and Brazil (Rio de Janeiro, 14 November 1960), *ibid*., vol. 518, No. 7491, p. 61; Convention (with Final Protocol) concerning the reciprocal grant of assistance to distressed persons, between Sweden, Denmark, Finland, Iceland and Norway (Stockholm, 9 January 1951), *ibid*., vol. 197, No. 2647, p. 377; and Fourth Convention between the European Economic Community and the African, Caribbean and Pacific States (with protocols, final act, exchange of letters, minutes of signature, declaration of signature dated 19 December 1990 and memorandum of rectification dated 22 November 1990) (Lomé, 15 December 1989), *ibid*., vol. 1924, No. 32847, p. 3. In particular, under article 255 (1) and (2) of the latter Convention: "1. Assistance may be granted to [African, Caribbean and Pacific] States taking in refugees or returnees to meet acute needs not covered by emergency assistance, to implement in the longer term projects and action programmes aimed at self-sufficiency and the integration or reintegration of such people. 2. Similar assistance, as set out in paragraph 1, may be envisaged to help with the voluntary integration or reintegration of persons who have had to leave their homes as a result of conflicts or natural disasters. In implementing this provision account shall be taken of all the factors leading to the displacement in question including the wishes of the population concerned and the responsibilities of the government in meeting the needs of its own people." Under article 257 of the same Convention: "Post-emergency action, aimed at physical and social rehabilitation consequent on the results of natural disasters or extraordinary circumstances having comparable effects, may be undertaken with Community assistance under this Convention. The post-emergency needs may be covered by other resources, in particular the counterpart funds generated by Community instruments, the special appropriation for refugees, returnees, and displaced persons, the national or regional indicative programmes or a combination of these different elements." Under annex LII of the same Convention, entitled "Joint declaration on article 255": "The Contracting Parties agree that, in the implementation of Article 255, particular attention should be given to the following: (i) projects that assist the voluntary repatriation and reintegration of refugees; (ii) the cultural identity both of refugees in host countries and displaced persons within their own countries; (iii) the needs of women, children, the aged or the

General Assembly

357. The General Assembly, in a number of its resolutions, has referred to the fact that sea-level rise is a result of climate change or link the phenomenon to the various threats that it poses to, for example, small island developing States and biodiversity.

358. In resolution 44/206 of 22 December 1989,[444] on the possible adverse effects of sea-level rise on islands and coastal areas, particularly low-lying coastal areas, the General Assembly urged the international community to provide effective and timely support to countries affected by sea-level rise, particularly developing countries, in their efforts to develop strategies to protect themselves and their vulnerable natural marine ecosystems from the particular threats of sea-level rise caused by climate change.

359. In General Assembly resolution 70/1 of 25 September 2015,[445] by which the Assembly adopted the 2030 Agenda for Sustainable Development, it was stressed that increases in global temperature, sea-level rise, ocean acidification and other climate change impacts were seriously affecting coastal areas and low-lying coastal countries, including many least developed countries and small island developing States.

360. A further relevant example is resolution 66/288 of 27 July 2012,[446] in which the General Assembly endorsed the outcome document of the United Nations Conference on Sustainable Development, entitled "The future we want". In the outcome document, the Conference "note[s] that sea-level rise and coastal erosion are serious threats for many coastal regions and islands, particularly in developing countries" and "call[s] upon the international community to enhance its efforts to address these challenges". The Conference further notes that "[s]ea-level rise and other adverse impacts of climate change continue to pose a significant risk to small island developing States and their efforts to achieve sustainable development and, for many, represent the gravest of threats to their survival and viability, including for some through the loss of territory", and "call[s] for continued and enhanced efforts to assist small island developing States".

361. A resolution that directly connects sea-level rise to migration is resolution 73/195 of 19 December 2018,[447] in which the General Assembly endorsed the Global Compact for Safe, Orderly and Regular Migration. Under the Global Compact, States would "[d]evelop adaptation and resilience strategies to sudden-onset and slow-onset natural disasters, the adverse effects of climate change, and environmental degradation, such as desertification, land degradation, drought and sea-level rise, taking into account the potential implications for migration, while recognizing that adaptation in the country of origin is a priority". States would further "[c]ooperate to identify, develop and strengthen solutions for migrants compelled to leave their countries of origin owing to slow-onset natural disasters, the adverse effects of climate change, and environmental degradation, such as desertification, land degradation, drought and sea-level rise, including by devising planned relocation and visa options, in cases where adaptation in or return to their country of origin is not possible".

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handicapped among refugees or displaced persons; (iv) creating a greater awareness of the role that assistance under Article 255 can play in meeting the longer-term developmental needs of refugees, returnees and displaced persons and of the population of the host regions; (v) closer coordination between the ACP States, the Commission and other agencies in the implementation of these projects."

[444] General Assembly resolution 44/206, para. 2.

[445] General Assembly resolution 70/1, para. 14.

[446] General Assembly resolution 66/288, annex, paras. 165, 178 and 179.

[447] General Assembly resolution 73/195, annex, paras. 18 (i) and 21 (h).

362. It is also worth noting – although it has not yet, at the time of writing, been debated or adopted – that Tuvalu proposed a draft resolution to the General Assembly in July 2019 under the agenda item on sustainable development in relation to the protection of the global climate for present and future generations of humankind. The draft resolution included a proposal to develop a "legally binding instrument to create appropriate protection for persons displaced by the impacts of climate change".

United Nations Open-ended Informal Consultative Process on Oceans and the Law of the Sea

363. "Sea-level rise and its impacts" was the theme of the twenty-first meeting of the United Nations Open-ended Informal Consultative Process on Oceans and the Law of the Sea, which was held from 14 to 18 June 2021. The report on the work of the Informal Consultative Process at its twenty-first meeting includes the Co-Chairs summary of discussions on sea-level rise and its impacts.[448]

364. The General Assembly, in its resolution of 9 December 2021,[449] on oceans and the law of the sea, provided a brief overview of the meeting and the discussions, noting that they, *inter alia*:

> … focused on the characterization and extent of sea level rise, including regional variability, and its environmental, social and economic impacts, highlighted the urgency of sea level rise and the impacts of the increasing frequency of extreme weather events for small island developing States and coastal States including low-lying coastal areas, discussed the various mitigation and adaptation responses, urging that measures be taken urgently and stressing possible challenges such as their cost, data gaps and challenges for modelling and monitoring sea level rise, stressed the importance of the science-policy interface and cooperation at all levels and with all stakeholders, the relevance of traditional and local knowledge, of the ocean-climate nexus and of the legal dimension, while noting that delegations looked forward to engaging in, and do not want to prejudge, the work of appropriate forums on legal matters related to sea level rise, and the need for international cooperation and coordination, capacity-building, national planning processes, and financing.

Security Council

365. The Security Council has discussed whether climate change and its consequences can be considered a threat to international peace and security on several occasions and in different formats.[450] Since 2007, the Security Council has held open debates and Arria-formula meetings on the issue of climate change, international peace and security.[451] At the most recent open debate, held on 13 December 2021, the Council failed to adopt a draft resolution in which it would have expressed "deep concerns that the impacts [of climate change], including the loss of territory caused by the rise of the sea level, may have implications for international peace and security".[452]

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[448] A/76/171.

[449] General Assembly resolution 76/72, para. 211.

[450] See, for example, S/PV.8451 (25 January 2019).

[451] For the open debates, see S/PV.5663 (17 April 2007), S/PV.6587 and S/PV.6587 (Resumption 1) (20 July 2011), S/PV.7499 (30 July 2015), S/PV.8307 (11 July 2018), S/PV/8451 (25 January 2019), S/PV/8864 (23 September 2021) and S/PV/8926 (13 December 2021). Arria-formula meetings were held on 15 February 2013, 20 June 2015, 10 April 2017, 15 December 2017, 22 April 2020 and 18 October 2021. See https://www.securitycouncilreport.org/un-security-council-working-methods/arria-formula-meetings.php?msclkid=276251c2afb911ecbb0098022f272058.

[452] S/2021/990.

366. At the Arria-formula meeting in October 2021, on sea-level rise and implications for international peace and security,[453] the concept note circulated by Viet Nam contained five questions to guide the discussions, [454] including the following:

(a) how can a better understanding be gained of the interlinkages between instability, conflict and climate risks, including climate change-related sea-level rise?

(b) what are the best policy and practical measures to effectively approach the multifaceted risks of climate change, and in particular sea-level rise, including through conflict prevention and peacebuilding?

(c) how can the United Nations system and other international and regional organizations be better empowered to address the challenges of climate change and sea-level rise, including through adaptation and mitigation measures and support for small island developing States?

(d) how can the Security Council better employ its existing tools and mechanisms in addressing climate-related security risks, in particular the risks from sea-level rise?

(e) how can developing States affected by climate change and small island developing States gain better access the support that they need to mitigate these threats?

367. Previously, in April 2017, the Security Council had discussed the theme "Security implications of climate change: sea-level rise" during an Arria-formula meeting organized by the then-Council member Ukraine in cooperation with non-Council member Germany. During the open debate held in July 2015 on peace and security challenges facing small island developing States, the Secretary-General noted that "[r]ising sea levels, dying coral reefs and the increasing frequency and severity of natural disasters exacerbate the conditions leading to community displacement and migration".[455] In a statement by the President of the Security Council in July 2011, the President expressed the Council's "concern that possible security implications of loss of territory of some States caused by sea-level rise may arise, in particular in small low-lying island States".[456]

Human rights bodies

368. There has been a marked increase since 2010 in references to topics concerning human rights and climate change, including sea-level rise, within United Nations human rights bodies.[457] Whether in States' submissions or in reports or other

[453] See https://media.un.org/en/asset/k1i/k1im1x4i6t.

[454] Available at https://s3-eu-west-1.amazonaws.com/upload.teamup.com/908040/IHrZ4x3Q2a7eWfWfWUq5_Concept-20Note-20--20Arria-20on-20Sea-20level-20rise-final.pdf.

[455] S/PV.7499.

[456] S/PRST/2011/15.

[457] Although it is not a document of a human rights body, it may be worth noting that *International Migration and Human Rights: Challenges and Opportunities on the Threshold of the 60th Anniversary of the Universal Declaration of Human Rights* (Global Migration Group, 2008), which includes a foreword from the Secretary-General, the following definition of an environmental migrant is provided, distinguishing between "environmentally motivated migrants" and "environmental forced migrants" (p. 9; citing IOM, "Expert seminar: migration and the environment", International Dialogue on Migration, No. 10 (Geneva, 2008), pp. 22–23): "An environmental migrant is characterized as a person who, for compelling reasons of sudden or progressive change in the environment that adversely affects his/her life or living conditions, is forced to leave his/her habitual home and cross a national border, or chooses to do so, either

documents issued by human rights bodies, including reports of special rapporteurs or independent experts, the aim of these references is to underline a range of potential consequences of sea-level rise, such as the potential risk of the flooding of low-lying lands due to sea-level rise,[458] the threat posed to local communities,[459] the challenges regarding access to water and sanitation and the need to make the human right to water a tangible reality,[460] the increased incidence of disease,[461] and the fear of forced relocation among affected populations and the need for the legal order to include guarantees that they would be properly consulted.[462]

369. A number of Human Rights Council documents describe sea-level rise as a factual cause of migration or internal displacement. This connection has been referred to the context of the universal periodic review and other review mechanisms, both in documents prepared by the States under review and in Council documents.[463] The Special Rapporteur in the field of cultural rights, Karima Bennoune, highlighted the connection in her report on a visit to Tuvalu, and refers to a 2001 agreement between Tuvalu and New Zealand establishing an annual emigration quota of Tuvaluans wishing to leave their country because of sea-level rise.[464]

370. More specifically, some Human Rights Council documents spell out that rising sea-levels caused by global warming threaten the very existence of small island States, which has "implications for the right to self-determination, as well as for the full range of rights for which individuals depend on the State for their protection".[465] In addition, during a visit to Maldives in 2011 to examine the situation of persons internally displaced as a result of the 2004 tsunami and to study issues related to risks of potential internal displacement in the future, including owing to the effects of climate change, the Special Rapporteur on the human rights of internally displaced persons, Chaloka Beyani, found that "climate change and other factors specific to the low-lying island environment of Maldives were already affecting the livelihoods and rights of residents of many islands, including the rights to housing, safe water and health". The Special Rapporteur further noted that "other factors, such as more frequent storms and flooding, coastal erosion, salination, overcrowding and the existential threat posed by rising sea levels, point to increased risks of potential internal displacement in the future".[466]

371. Commenting in the context of the universal periodic review of Solomon Islands on the status of persons displaced owing to climate factors, UNHCR noted that while such persons "were not 'refugees' under the 1951 Convention, there were nonetheless clear links between environmental degradation or climate change, and social tensions

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temporarily or permanently. Environmental migrants may be distinguished between two categories: [(a)] [e]nvironmentally motivated migrants are defined as those persons who 'pre-empt the worst by leaving before environmental degradation results in [the] devastation of their livelihoods and communities. These individuals may leave a deteriorating environment that could be rehabilitated with proper policy and effort.' Their movement may be temporary or permanent; [(b)] [e]nvironmental forced migrants are defined as those persons who 'are avoiding the worst. These individuals have to leave due to a loss of livelihood, and their displacement is mainly permanent. Examples include displacement or migration due to sea-level rise or loss of topsoil.'".

458 For example, CRC/C/ATG/2-4, para. 138.

459 For example, A/HRC/WG.6/22/MHL/3, para. 22.

460 For example, A/HRC/24/44/Add.2, summary.

461 For example, A/HRC/24/44/Add.1, para. 48, and A/HRC/22/43, para. 20.

462 For example, CCPR/C/SR.2902, para. 21.

463 For examples emanating from States, see A/HRC/WG.6/24/PLW/1, CEDAW/C/MHL/1-3 and A/HRC/WG.6/35/KIR/1. For examples emanating from OHCHR, see A/HRC/WG.6/24/SLB/3, A/HRC/WG.6/35/KIR/2 and A/HRC/WG.6/38/SLB/3.

464 A/HRC/46/34/Add.1, para. 8.

465 For example, A/HRC/22/43, para. 20.

466 A/HRC/19/54, para. 12.

and conflict. Experience in other Pacific island countries has demonstrated that displacement can lead to competition with a host community and lead to conflict, often over land or the use of limited resources (e.g. potable water). In the worst-case scenario, involving complete submersion under rising sea levels, widespread 'external displacement' and a *de facto* or *de jure* loss of the sovereign State itself may result." UNHCR went on to recognize that "climate change posed a unique set of challenges for many Pacific island countries, including Solomon Islands, as it resulted in … rising sea levels, salinization, the incidence of storms of increasing frequency and severity, and increasing climate variability", and noted that "[t]he populations of a number of small islands in Solomon Islands were facing imminent relocation".[467]

Human rights treaty bodies' joint statements, general recommendations, decisions and general comments

372. Human rights treaty bodies have also referred to the connection between climate change and human rights, namely between sea-level rise and migration. One example is the joint statement on human rights and climate change by the Committee on the Elimination of Discrimination against Women, the Committee on Economic, Social and Cultural Rights, the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, the Committee on the Rights of the Child and the Committee on the Rights of Persons with Disabilities, issued on 14 May 2020. In that statement, the treaty bodies highlight sea-level rise as a cause of forced migration, and assert that "States must therefore address the effects of climate change, environmental degradation and natural disasters as drivers of migration and ensure that such factors do not hinder the enjoyment of the human rights of migrants and their families. In addition, States should offer migrant workers displaced across international borders in the context of climate change or disasters and who cannot return to their countries complementary protection mechanisms and temporary protection or stay arrangements".[468]

373. The Committee on the Elimination of Discrimination against Women addressed sea-level rise in its general recommendation No. 37 (2018) on the gender-related dimensions of disaster risk reduction in the context of climate change. It emphasized that, "[i]n their reports submitted to the Committee pursuant to article 18 [of the Convention on the Elimination of All Forms of Discrimination against Women], States parties should address general obligations to ensure substantive equality between women and men in all areas of life, as well as the specific guarantees in relation to those rights under the Convention that may be particularly affected by climate change and disasters, including extreme weather events such as floods and hurricanes, as well as slow-onset phenomena, such as the melting of polar ice caps and glaciers, drought and sea-level rise".[469]

374. Two important communications have been submitted to the Human Rights Committee for the purposes of assessing the principles applicable to the protection of persons affected by sea-level rise.

375. In the first case, the author, Ioane Teitiota, alleged that, by removing him to Kiribati, New Zealand had violated his right to life under article 6 of the International Covenant on Civil and Political Rights.[470] This case was the Committee's first ruling on a communication by an individual seeking asylum from the effects of climate change, in particular the effects of sea-level rise.

[467] A/HRC/WG.6/11/SLB/2, paras. 56 and 59.
[468] HRI/2019/1, paras 15–16.
[469] CEDAW/C/GC/37, para. 10.
[470] *Teitiota v. New Zealand* (CCPR/C/127/D/2728/2016), para. 3.

376. In the communication, Mr. Teitiota claimed, *inter alia*, that "the effects of climate change and sea-level rise forced him to migrate from the island of Tarawa in Kiribati to New Zealand. The situation in Tarawa has become increasingly unstable and precarious due to sea-level rise caused by global warming".[471] He argued that the severe impacts of climate change in Kiribati triggered the *non-refoulement* obligations of New Zealand not to send him back to Kiribati.

377. In its Views, adopted on 24 October 2019, the Committee assessed whether there was clear arbitrariness, error or injustice in the evaluation by the authorities of New Zealand of Mr. Teitiota's claim that when he was removed to the Kiribati he faced a real risk of a threat to his right to life under article 6 of the Covenant. The Committee noted that the facts before it did not permit it to conclude that Mr. Teitiota's removal violated his right to life under article 6 of the Covenant, or thus that the *non-refoulement* obligations of New Zealand were triggered in this particular case.

378. The Committee nonetheless recalled that "environmental degradation can compromise effective enjoyment of the right to life". It also stated that the "obligation not to extradite, deport or otherwise transfer, pursuant to article 6 of the Covenant, may be broader than the scope of the principle of *non-refoulement* under international refugee law, since it may also require the protection of aliens not entitled to refugee status". However, it was of the opinion that Mr. Teitiota had not substantiated the claim that he faced upon deportation "a real risk of irreparable harm to his right to life", that was specific to him, rather than a general risk faced by all individuals in Kiribati.

379. The Committee accepted Mr. Teitiota's claim that sea-level rise was "likely to render Kiribati uninhabitable". However, it noted that the "time frame of 10 to 15 years, as suggested by the author, could allow for intervening acts by Kiribati, with the assistance of the international community, to take affirmative measures to protect and, where necessary, relocate its population". While the Committee recognized the burdensome living conditions in Kiribati for the general population, it concluded that the information provided to it had not indicated that upon his return to Kiribati, Mr. Teitiota was at serious risk of living in poverty, being deprived of adequate food or being subjected to a situation of extreme precariousness that would affect his right to a decent life.

380. Significantly, the Committee expressed the view that "without robust national and international efforts, the effects of climate change in receiving States may expose individuals to a violation of their rights under articles 6 or 7 of the Covenant, thereby triggering the *non-refoulement* obligations of sending States. Furthermore, given that the risk of an entire country becoming submerged under water is such an extreme risk, the conditions of life in such a country may become incompatible with the right to life with dignity before the risk is realized".[472]

381. In his dissenting opinion, Committee member Duncan Laki Muhumuza found that it would be "counter-intuitive to the protection of life to wait for deaths to be very frequent and considerable in number in order to consider the threshold of risk as met". As he put it, "the action taken by New Zealand is … like forcing a drowning person back into a sinking vessel, with the 'justification' that after all, there are other passengers on board".[473]

382. In her dissenting opinion, Committee member Vasilka Sancin argued that the notion of "potable water" should not be equated with "safe drinking water". She stated it fell to New Zealand, not to Mr. Teitiota, "to demonstrate that [he] and his family

[471] *Ibid*., para. 2.1.
[472] *Ibid*., para. 9.11.
[473] *Ibid*., annex I, paras. 5 and 6.

would in fact enjoy access to safe drinking (or even potable) water in Kiribati, to comply with its positive duty to protect life from risks arising from known natural hazards".[474]

383. The second communication was initiated on 13 May 2019 by eight Torres Strait Islanders, who alleged that Australia is violating their rights under articles 2 (respect for Covenant rights), 6 (right to life), 17 (right to be free from arbitrary interference with privacy, family and home), 24 (rights of the child) and 27 (right of minorities to enjoyment of their own culture) of the Covenant as a result of the insufficient targets and plans set by Australia concerning greenhouse gas mitigation, and its failure to fund adequate measures for coastal defence and resilience on the islands, such as sea walls.[475] In particular, the authors requested that Australia commit to the provision of at least $20 million for emergency measures such as sea walls, as requested by local authorities; to sustained investment in long-term adaptation measures to ensure that the islands can continue to be inhabited; to a reduction in its emissions by at least 65 per cent below 2005 levels by 2030 and to net zero emissions by 2050; and to a phasing-out of thermal coal, both for domestic electricity generation and for export markets.

384. This case constitutes the first communication to the Committee by inhabitants of low-lying islands, where communities are highly vulnerable to the effects of climate change, including sea-level rise, against a national Government for inaction on climate change. The Committee has yet to render its decision.

385. In its general comment No. 36 (2018) on the right to life, under article 6 of the Covenant, the Committee specifically stated the following:

> Environmental degradation, climate change and unsustainable development constitute some of the most pressing and serious threats to the ability of present and future generations to enjoy the right to life. The obligations of States parties under international environmental law should thus inform the contents of article 6 of the Covenant, and the obligation of States parties to respect and ensure the right to life should also inform their relevant obligations under international environmental law. Implementation of the obligation to respect and ensure the right to life, and in particular life with dignity, depends, *inter alia*, on measures taken by States parties to preserve the environment and protect it against harm, pollution and climate change caused by public and private actors. States parties should therefore ensure sustainable use of natural resources, develop and implement substantive environmental standards, conduct environmental impact assessments and consult with relevant States about activities likely to have a significant impact on the environment, provide notification to other States concerned about natural disasters and emergencies and cooperate with them, provide appropriate access to information on environmental hazards and pay due regard to the precautionary approach.[476]

386. On 22 September 2021, the Committee on the Rights of the Child adopted decisions on the impact of climate change on children's rights. Sixteen children had submitted five identical communications against Argentina, Brazil, France, Germany and Turkey, alleging that those States had violated their rights under articles 6 (right to life), 24 (right to the enjoyment of the highest attainable standard of health) and 30 (rights of children belonging to minorities and indigenous children), read in conjunction with article 3 (the principle of the best interests of the child) of the

[474] *Ibid.*, annex II, paras. 3 and 5.
[475] Communication No. 3624/2019, currently pending before the Human Rights Committee.
[476] Human Rights Committee, general comment No. 36 (2018), para. 62.

Convention on the Rights of the Child by failing to prevent and mitigate the consequences of climate change.[477]

387. In particular, the authors claimed that rising sea levels were transforming children's relationships with the land, and the Committee noted the authors' claims that, "due to the rising sea level, the Marshall Islands and Palau are at risk of becoming uninhabitable within decades".

388. The Committee found the communications inadmissible for failure to exhaust domestic remedies. It noted that domestic remedies were available to the authors, and recalled that they must make use of all judicial or administrative avenues that could offer them a reasonable prospect of redress.

389. Nevertheless, in its decisions concerning these communications, the Committee clarified the scope of extraterritorial jurisdiction in relation to environmental protection. It found that the appropriate test for jurisdiction in the present case was that adopted by the Inter-American Court of Human Rights in its Advisory Opinion on the environment and human rights.[478] which implied that when transboundary harm occurred, children were under the jurisdiction of the State on whose territory the emissions originated if there was a causal link between the acts or omissions of the State in question and the negative impact on the rights of children located outside its territory, when the State of origin exercised effective control over the sources of the emissions in question. As a result, the Committee found that the State parties had effective control over the sources of carbon emissions that contributed to causing reasonably foreseeable harm to children outside their territory.

390. It is also important to note that, in June 2021, the Committee on the Rights of the Child decided to draft a general comment on children's rights and the environment, with a special focus on climate change. The draft general comment is being prepared through consultations and workshops with the global community, including specific consultations with children and young people. It is expected to be adopted in March 2023.

4. Office of the United Nations High Commissioner for Human Rights

391. The United Nations High Commissioner for Human Rights and her Office have, in response to requests by the Human Rights Council and on their own initiative, contributed to the analysis of the implications for human rights of climate change, including sea-level rise.

392. OHCHR has developed the following key messages on human rights, climate change and migration:[479] (a) ensure the dignity, safety and human rights of migrants in the context of climate change; (b) reduce the risk of forced migration through climate change mitigation; (c) reduce climate change risks through adaptation; (d) protect the human rights of people who are in particularly vulnerable situations; (e) ensure liberty and freedom of movement for all persons; (f) ensure durable legal status for all those forced to move and safeguards in the context of returns; (g) ensure meaningful and informed participation; (h) guarantee human rights in relocation; (i)

[477] *Sacchi et al. v. Argentina* (CRC/C/88/D/104/2019), *Sacchi et al. v. Brazil* (CRC/C/88/D/105/2019), *Sacchi et al. v. France* (CRC/C/88/D/106/2019), *Sacchi et al. v. Germany* (CRC/C/88/D/107/2019) and *Sacchi et al. v. Turkey* (CRC/C/88/D/108/2019).

[478] Inter-American Court of Human Rights, Advisory Opinion OC-23/17, on "The environment and human rights" (requested by Colombia), 15 November 2017.

[479] OHCHR, "OHCHR's key messages on human rights, climate change and migration", available at https://www.ohchr.org/Documents/Issues/ClimateChange/Key_Messages_HR_CC_Migration.pdf (accessed 20 February 2022).

ensure access to justice for those affected by climate change; and (j) cooperate internationally in order to protect the rights of migrants.

393. In 2018, the High Commissioner produced a report entitled "Addressing human rights protection gaps in the context of migration and displacement of persons across international borders resulting from the adverse effects of climate change and supporting the adaptation and mitigation plans of developing countries to bridge the protection gaps".[480]

394. Also in 2018, OHCHR presented a conference room paper to the Human Rights Council on a study undertaken on behalf of OHCHR, in collaboration with the Platform on Disaster Displacement, on the slow-onset effects of climate change and human rights protection for cross-border migrants.[481]

5. Office of the United Nations High Commissioner for Refugees[482]

395. UNHCR seeks to contribute substantively to understanding on legal and normative issues around displacement in the context of disasters and climate change. In this context, and in the exercise of its supervisory role for international refugee instruments, UNHCR has recalled that refugee law, as well as broader human rights principles, will be relevant in certain circumstances, but that this does not involve the creation of a new legal category, or the expansion of the refugee definition, given that most people who move in the context of climate change or disasters are not likely to fall within the definition of a refugee.

396. UNHCR has been working on legal guidance in relation to claims for asylum in the context of the adverse effects of climate change. In this regard, people fleeing in the adverse effects of climate change and disasters may, in certain circumstances, have valid claims for refugee status under the 1951 Convention, or under the wider refugee definition in the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa or the 1984 Cartagena Declaration on Refugees, but only insofar as the criteria for recognition as a refugee under those definitions are fulfilled. Complementary forms of protection under international human rights law in some contexts, as well as the potential for the use of temporary protection and stay arrangements, may also be of relevance.

397. Building on a study that it had published in 2018,[483] UNHCR issued a document in 2020 entitled "Legal considerations regarding claims for international protection made in the context of the adverse effects of climate change and disasters", to guide interpretation and steer international discussion on such claims.[484] The term "climate refugee" is not used by UNHCR in this document, preferring instead "persons displaced in the context of disasters and climate change".

398. UNHCR has also begun to examine the question of the potential implications of sea-level rise for the risks of statelessness, since it has mandate responsibilities in this

[480] A/HRC/38/21.

[481] A/HRC/37/CRP.4, available at https://www.ohchr.org/en/migration/reports.

[482] See the pages on the UNHCR website dedicated to climate change and disaster displacement (https://www.unhcr.org/climate-change-and-disasters.html); and UNHCR, "Key concepts on climate change and disaster displacement", June 2017. See also "Displaced on the front lines of the climate emergency", a new data visualization launched by UNHCR in 2021, that shows how a warming world is compounding risks for people already living with conflict and instability, driving further displacement, and often decreasing possibilities for return.

[483] Sanjula Weerasinghe, *In Harm's Way: International Protection in the Context of Nexus Dynamics between Conflict or Violence and Disaster or Climate Change* (Geneva, UNHCR, 2018).

[484] Available at https://www.refworld.org/docid/5f75f2734.html. Also published in *International Journal of Refugee Law*, vol. 33, No. 1 (2021), pp. 151–65.

area under the 1954 and 1961 Statelessness Conventions.[485] In this regard, it has recently published a fact sheet on the links between the impacts of climate change and statelessness.[486] According to this fact sheet, millions of stateless people face considerable vulnerabilities in the context of climate change, including exclusion from disaster relief, health care and adaptation solutions. The risks of statelessness can increase when people move, including during displacement situations in the context of climate change and disasters. For UNHCR, the greatest risks of statelessness owing to climate change relate not to the disappearance of States as such, but rather to the significant number of people being displaced in the context of climate change and disasters all over the world. Specific efforts are therefore needed to reduce statelessness risks for displaced people and to include stateless persons in climate action to strengthen their protection and resilience.

6. International Organization for Migration[487]

399. IOM has played an important role in the development of the notion of environmental migrants and environmental migration. The vision of IOM is to support States and migrants in addressing the complex challenges posed by environmental degradation and climate change in terms of human mobility and in delivering enhanced benefits to migrants and vulnerable communities.

400. IOM has produced, for instance, the *Atlas of Environmental Migration*,[488] the annual *World Migration Report*,[489] and the *Institutional Strategy on Migration, Environment and Climate Change 2021–2030*.[490]

401. IOM has consistently recognized sea-level rise as one of the greatest climate change threats that are likely to affect populations and cause migration in the future and has called for a rights-based approach to migration in the context of environmental degradation, climate change and migration.

7. International Labour Organization

402. ILO is another international organization that has included in its policy analysis and action the issue of climate change, including sea-level rise, as an additional driver of migration, both internal and across borders.[491] In the case of slow-onset events, climate variables interact with other key drivers, including lack of decent work and employment opportunities, weak governance and intercommunity violence. The sectors that employ the majority of workers are also some of the most vulnerable to climate change. When livelihoods are compromised and if survival is at stake, people migrate in search for better opportunities. This is an increasing trend, particularly among young persons.

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[485] 1954 Convention relating to the Status of Stateless Persons and 1961 Convention on the Reduction of Statelessness.

[486] UNHCR, “Statelessness and Climate Change”, October 2021. Available at https://www.unhcr.org/618524da4.pdf (accessed 20 February 2022).

[487] See the IOM Environmental Migration Portal (https://environmentalmigration.iom.int/), which is a rich repository for information from both IOM and other sources.

[488] Dina Ionesco, Daria Mokhnacheva and François Gemenne, *Atlas of Environmental Migration* (Abingdon and New York, Routledge, 2016).

[489] Available at https://worldmigrationreport.iom.int.

[490] IOM, *Institutional Strategy on Migration, Environment and Climate Change 2021–2030: For a Comprehensive, Evidence- and Rights-Based Approach to Migration in the Context of Environmental Degradation, Climate Change and Disasters, for the Benefit of Migrants and Societies* (Geneva, 2021).

[491] See John Campbell and Olivia Warrick, *Climate Change and Migration Issues in the Pacific* (Suva, United Nations, 2014).

403. The experience of ILO has shown that labour migration, when governed in accordance with international labour standards, can play an important role in the development of both countries of origin and countries of destination. Labour migration can be used to boost resilience in communities through the generation of remittances, the transfer of knowledge and skills and the development of networks that can lead to entrepreneurship and new markets. If migrants crossing borders owing to climate-related factors can do so through safe and regular channels and can access formal employment opportunities, they are more likely to contribute positively to their home country's development.

404. ILO participates in the Task Force on Displacement under the Warsaw International Mechanism for Loss and Damage associated with Climate Change Impacts. In addition, ILO is contributing to the Platform on Disaster Displacement through the implementation of regional and integrated projects and plans of action.

8. Task Force on Displacement[492]

405. The Conference of the Parties to the United Nations Framework Convention on Climate Change, at its twenty-first session, in Paris, established the Task Force on Displacement to develop recommendations for integrated approaches to avert, minimize and address displacement related to the adverse impacts of climate change. The Executive Committee of the Warsaw International Mechanism for Loss and Damage associated with Climate Change Impacts was entrusted by the Conference of the Parties with operationalizing the Task Force. The Task Force also includes representatives from, *inter alia*, UNHCR, IOM, the United Nations Development Programme, the International Federation of Red Cross and Red Crescent Societies, ILO and the Platform on Disaster Displacement, among others.

406. The Task Force presented a set of recommendations on integrated approaches in 2018.[493] These recommendations provide for a range of actions and policy instruments that aim to strengthen policies, institutional frameworks, tools and guidelines, and the preparedness and capacities of national and local governments to address climate-related drivers and the impact of displacement. The recommendations also recognize and stress the importance of enhancing knowledge, data collection, monitoring of risks, and coordination and policy coherence.

9. Platform on Disaster Displacement

407. The Platform on Disaster Displacement is a State-led initiative that was launched at the World Humanitarian Summit in 2016 as a follow-up to the Nansen Initiative, to work towards better protection for people displaced across borders in the context of disasters and climate change.

408. The Platform on Disaster Displacement continues the work of the Nansen Initiative by bringing together a group of States committed to supporting the implementation of the Protection Agenda. The Protection Agenda offers States a toolbox to better prevent and prepare for displacement before a disaster strikes. When displacement cannot be avoided, it helps States improve their responses to situations when people are forced to find refuge, either within their own country or across an international border. Rather than calling for a new binding international convention on cross-border disaster displacement, the Protection Agenda supports the integration of effective practices by States and subregional actors into their own normative frameworks, in accordance with their specific context.

[492] For further information, see https://unfccc.int/process/bodies/constituted-bodies/WIMExCom/TFD#eq-5.

[493] Available at https://unfccc.int/sites/default/files/resource/2018_TFD_report_17_Sep.pdf.

10. International Federation of Red Cross and Red Crescent Societies

409. The International Federation of Red Cross and Red Crescent Societies has increasingly devoted its attention to disasters and climate change and their impact on affected populations. A resolution entitled "Disaster laws and policies that leave no one behind" was adopted in December 2019 at the thirty-third International Conference of the Red Cross and Red Crescent.[494]

410. The *World Disasters Report 2020: Come Heat or High Water*[495] discusses how disaster risk management should become climate smart, including in the face of sea-level rise: "In a world already replete with people highly exposed to natural hazards, we must, at the least, ensure the resilience of our critical infrastructure against reasonably predictable weather extremes and rising sea levels. In light of these growing risks, we need also to develop a much more thorough and nuanced understanding of existing vulnerabilities and capacities – and not just in a national aggregate, but at community level."

411. In a 2021 report entitled *Displacement in a Changing Climate*,[496] a collection of case studies is presented on how national Red Cross and Red Crescent societies around the world are protecting and assisting communities in the context of climate-related displacement, including sea-level rise. More ambitious climate action and investment in local communities and local organizations is called for to address this urgent humanitarian challenge. According to the report, millions of people around the world are displaced and moving in the context of disasters and the adverse effects of climate change, which is only set to worsen as climate change increases the intensity and frequency of sudden- and slow-onset hazards. It refers to a collective duty to address the humanitarian impacts of climate-related displacement, without waiting until communities are displaced: "we can and must take action now to protect them".

412. In a 2021 report entitled Turning the Tide: Adapting to Climate Change in Coastal Communities,[497] the devastating impact of climate change on coastal communities across the globe is highlighted. People living in the world's coastal regions face multiple and compounding risks from climate change. Sea levels are rising, coastal floods are becoming more severe, storms and cyclones are intensifying, and storm surge is reaching higher levels, further inland. In addition to extreme weather events, large areas are becoming uninhabitable, and millions of people have been or may be forced to leave their homes. The report includes first-hand accounts by resilient people living in coastal areas in Bangladesh, Mexico and Somalia. Whether as a result of extreme heat, sea-level rise, droughts or storms, the climate crisis is already pushing those communities towards the very limits of their future survival.

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[494] Resolution 7, in ICRC and International Federation of Red Cross and Red Crescent Societies, *33rd International Conference of the Red Cross and Red Crescent, Including the Summary Report of the 2019 Council of Delegates* (Geneva, 2019), p. 125.

[495] International Federation of Red Cross and Red Crescent Societies, *World Disasters Report 2020* (see footnote 287 above).

[496] International Federation of Red Cross and Red Crescent Societies, *Displacement in a Changing Climate: Localized Humanitarian Action at the Forefront of the Climate Crisis* (Geneva, 2021).

[497] Bangladesh Red Crescent Society, Cruz Roja Mexicana, International Federation of Red Cross and Red Crescent Societies, Norwegian Red Cross, Red Cross Red Crescent Climate Centre and Somalia Red Crescent Society, *Turning the Tide: Adapting to Climate Change in Coastal Communities* (Oslo, Norwegian Red Cross, 2021).

11. World Bank

413. In June 2021, the World Bank published a report entitled *Legal Dimensions of Sea Level Rise: Pacific Perspectives*.[498] The focus of the report is on key policy questions pertaining to the law of the sea, but it also covers issues related to the protection of persons affected by sea-level rise and how the international community could assist affected communities.

414. In the area of development and internal climate migration, the World Bank published its first *Groundswell* report in 2018),[499] focusing on sub-Saharan Africa, South Asia and Latin America, and the second *Groundswell* report in 2021,[500] focusing on East Asia and the Pacific, North Africa, and Eastern Europe and Central Asia. In these reports, future scenarios were explored and patterns identified of potential hotspots for both in- and outmigration, which constitute key steps towards a better understanding of the nexus of climate, migration and development.

415. The World Bank also published two *Groundswell Africa* reports, focusing on internal climate migration in Africa and using the *Groundswell* methodology.[501] The impact of sea-level rise and related projections are covered in these reports, but their scope is broader than sea-level rise. The *Groundswell Africa* reports also contain a dedicated legal and policy chapter.

12. Organisation for Economic Co-operation and Development

416. In 2019, OECD published a report on the risks of sea-level rise and how their members were adapting. This report, entitled *Responding to Rising Seas: OECD Country Approaches to Tackling Coastal Risks*,[502] includes an analysis of potential strategies and their benefits and limitations. Such strategies include the construction and maintenance of hard defences, beach nourishment and dune restoration, "living" shorelines, amendment of building codes, prevention of new development through zoning, and relocation.

Part Four: Preliminary observations, guiding questions for the Study Group and future programme of work

I. Preliminary observations and guiding questions for the Study Group

A. Statehood

417. The present paper constitutes an initial and preliminary approach to the question of statehood, where we sought to introduce the main aspects of the issue and to present some points for discussion and an exchange of views. Although the starting point of the paper is that sea-level rise is a global phenomenon and has global effects, it is

[498] David Freestone and Duygu Çiçek, *Legal Dimensions of Sea Level Rise: Pacific Perspectives* (Washington, D.C., World Bank Group, 2021).

[499] Kanta Kumari Rigaud *et al.*, *Groundswell: Preparing for Internal Climate Migration* (Washington, D.C., World Bank Group, 2018).

[500] Viviane Clement *et al.*, *Groundswell Part II: Acting on Internal Climate Migration* (Washington, D.C., World Bank Group, 2021).

[501] Kanta Kumari Rigaud *et al.*, *Groundswell Africa: Internal Climate Migration in the Lake Victoria Basin Countries* (Washington, D.C., World Bank Group, 2021); and Kanta Kumari Rigaud *et al.*, *Groundswell Africa: Internal Climate Migration in West African Countries* (Washington, D.C., World Bank Group, 2021).

[502] (See footnote 429 above).

very important to note that the phenomenon poses a very serious threat to the existence of some small island developing States, whose land territory may be completely covered by the sea or become uninhabitable.

418. In this paper, we set out the requirements for the creation of a State as a subject of international law, on the basis of the 1933 Convention on the Rights and Duties of States, and a brief description of the criteria in that regard contained in the Convention. We also considered the 1936 Institut de Droit International resolution concerning the recognition of new States and new Governments, the International Law Commission's 1949 draft Declaration on the Rights and Duties of States, the draft articles on the law of treaties presented to the International Law Commission in 1956 by Special Rapporteur Sir Gerald Fitzmaurice; and the opinions of the Arbitration Commission of the International Conference on the Former Yugoslavia (Badinter Commission) of 1991. We provided representative examples of actions taken by States and other subjects of international law, including the cases of the Holy See, the Sovereign Order of Malta and Governments in exile, and drew attention to elements of certain international instruments that demonstrate the right of the State to ensure its own preservation, in accordance with international law and without prejudice to the rights of other members of the international community.

419. The following issues should also be considered in relation to the phenomenon of sea-level rise from the perspective of statehood: (a) the entire land territory of a State may be covered by the sea or become uninhabitable, possibly resulting in insufficient supply of drinking water for the population; (b) there may be a displacement of persons to other States, raising a number of concerns relating to the rights and legal status of nationals of particularly affected States, including questions concerning the prevention of situations of *de facto* statelessness through the maintenance of original nationality or citizenship, the acquisition of another nationality or the implementation of a dual nationality or common citizenship system; the ways in which diplomatic protection and assistance and consular protection and assistance could be provided; and the possibility of treating these displaced persons as refugees; (c) the legal status of the Government of a State needing to take up residency in the territory of another State; (d) the preservation by States affected by sea-level rise of their rights with respect to the maritime areas under their jurisdiction and the resources therein, also taking into account the need to maintain maritime boundaries established pursuant to agreements or judicial or arbitral decisions; and (e) the right to self-determination of the people of the States affected by sea-level rise, which encompasses the right to preserve identities of various kinds.

420. We noted that measures adopted by States include the construction and reinforcement of coastal defences and polders, as well as the construction of artificial islands to accommodate persons affected by sea-level rise, and drew attention to the high costs of such measures and the need to evaluate their potential environmental impact.

421. Lastly, we emphasized that, although there have not yet been any cases of the land territory of a State being completely covered by the sea or becoming uninhabitable, States that have the potential to be the most affected by sea-level rise have a legitimate interest in seeing the question of statehood in such situations addressed and the possible approaches analysed. This paper is not intended to be exhaustive or definitive; the intention is rather to explore possible alternatives, with a view to contributing to the consideration of the issue by the States Members of the United Nations, whether that be within the United Nations, in the context of other entities or groupings or at the level of civil society. Such alternatives include a strong presumption of continuity of States; the maintenance of international legal personality without a territory, as in the cases of the Holy See from 1870 to 1929 and the Sovereign Order of Malta today; and the use of modalities such as the ceding of a

portion of territory by another State, with or without transfer of sovereignty, association with other State(s), the establishment of or incorporation into confederations or federations, unification with another State, including the possibility of a merger, and the possible development of hybrid schemes, for which we provided some examples and ideas that may be useful at some point.

422. This is a very sensitive issue that should be addressed with caution, but its consideration should not be avoided or further postponed, especially considering the concerns and worries expressed by the States directly concerned. At this time, the aim is to set out various options that could be considered individually, or, depending on the circumstances, elements of different options could be combined.

423. The following questions are proposed with a view to fostering a fruitful discussion within the Commission's Study Group:

(a) Could we consider the criteria set out in the Convention on the Rights and Duties of States as the determinants of the existence of a State as a subject of international law, but agree that, in exceptional circumstances, a State does not cease to exist despite not meeting any of those criteria?

(b) How can the cases of the Holy See, the Sovereign Order of Malta and Governments in exile be of use in addressing the topic?

(c) How can a State exercise the right to provide for its preservation?

(d) How can situations of *de facto* statelessness be avoided?

(e) How can adequate diplomatic protection and consular assistance be provided to nationals of a small island developing State affected by the phenomenon of sea-level rise who are located in third States?

(f) How could the Government of a small island developing State that has to be hosted in a third State because its territory has been completely covered by the sea or become uninhabitable best perform its functions?

(g) Is it appropriate to maintain a strong presumption in favour of the continuity of the statehood of States whose land territory is completely covered by the sea or becomes uninhabitable?

(h) How could a State whose land territory is completely covered by the sea or becomes uninhabitable exercise its rights with respect to the maritime areas under its jurisdiction and the resources therein?

(i) What would be the best ways to preserve and ensure the exercise of the right to self-determination of the people of States whose land territory is totally covered by the sea or becomes uninhabitable?

(j) What statehood options could be considered for States whose land territory is completely covered by the sea or becomes uninhabitable?

424. As indicated by the Republic of Korea in its statement in the Sixth Committee of the General Assembly delivered in October 2018,[503] this issue should be dealt with comprehensively, that is, taking into account elements of both *lex lata* and *lex ferenda*. Furthermore, as highlighted by both the Republic of Korea[504] and the Holy See,[505] at that same session, sea-level rise is an intergenerational issue and, therefore, the approaches adopted should ensure respect for the rights and the needs of future generations.

[503] Republic of Korea (A/C.6/73/SR.23, para. 71).
[504] *Ibid*.
[505] Holy See (Observer) (A/C.6/73/SR.24, para. 49).

B. Protection of persons affected by sea-level rise

425. Sea-level rise is among the several adverse effects of climate change. According to scientific evidence, this phenomenon, which is already taking place, is likely to accelerate in the future, resulting in the increased inundation of low-lying coastal areas and of islands, making these zones less and less habitable. Low-elevation coastal zones in different regions will be at risk from a variety of threats related to the rising sea levels, including soil salinization, degradation of marine ecosystems, more frequent flooding and extreme weather events such as cyclones.

426. Particularly vulnerable areas include small island developing States in the Pacific and Indian Oceans, West Africa and the Caribbean and highly populated urban centres in megadeltas and low-lying coastal areas. In these areas, sea-level rise is having and will continue to have an impact on the lives and livelihoods of the inhabitants, and may lead to their displacement.

427. Displacement and migration may be triggered by the slow-onset consequences of sea-level rise, such as coastal erosion, by sudden-onset disasters or by a combination of both. Sea-level rise may exacerbate storm surges, leading to saltwater intrusion into surface water and corruption of the freshwater lens, thus diminishing habitable conditions of a territory even before its possible submersion or disappearance. Displacement within one's own country and cross-border displacement to third countries in the context of climate change and disasters, including sea-level rise, is a multicausal phenomenon, involving interaction with other, economic, social and political, factors. Unlike some other disasters or adverse effects of climate change, however, sea-level rise has the potential to create long-term or permanent movement of persons within a country or to another country.

428. At the same time, for those who wish to remain *in situ* and who may be able to do so because of mitigation and adaptation measures, questions may arise as to how to ensure that their human rights are respected, in terms, *inter alia*, of human dignity, non-discrimination, access to information and public participation and regarding possible processes of planned relocation.

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

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

431. Consequently, given the complexity of the issues at hand and taking account of the mapping exercise of the applicable legal frameworks and emerging practice, presented in the present paper, it can be concluded that the principles applicable to the protection of persons affected by sea-level rise could be further identified and developed by the Study Group and the Commission.

432. This identification and development exercise could build on the draft articles on the protection of persons in the event of disasters,[506] which provide a general framework for disaster response and the protection of persons, namely with regard to human dignity (draft article 4), human rights (draft article 5), the duty to cooperate (draft article 7) and the role of the affected State (draft article 10). This framework could be further developed to reflect the specificities of the long-term or permanent consequences of sea-level rise and to take account of the fact that affected persons may remain *in situ*, be displaced within their own country or migrate to another State in order to cope with or avoid the effects of sea-level rise.

433. As discussed in Part Three, section II, of the present paper, in addition to instruments of international and regional human rights law,[507] other existing instruments that could usefully be taken into consideration in this respect include the Guiding Principles on Internal Displacement (1998),[508] the Kampala Convention (23 October 2009), the New York Declaration for Refugees and Migrants (2016),[509] the Global Compact for Safe, Orderly and Regular Migration (2018),[510] the Sendai Framework for Disaster Risk Reduction 2015–2030 (2015)[511] and the Nansen Initiative's Agenda for the Protection of Cross-Border Displaced Persons in the Context of Disasters and Climate Change (2015).[512] Guidance could also be drawn from the International Law Association's Sydney Declaration of Principles on the Protection of Persons Displaced in the Context of Sea-level Rise.[513]

434. This exercise should also incorporate the relevant emerging practice of States and relevant international organizations and bodies, mapped in a preliminary and illustrative form in Part Three, section III, of the present issues paper. Special attention should be paid to recent decisions, such as that by the Human Rights Committee in *Teitiota v. New Zealand*,[514] according to which the effects of climate change, namely sea-level rise, in receiving States may expose individuals to a violation of their rights under articles 6 (right to life) or 7 (prohibition of torture and cruel, inhuman or degrading treatment or punishment) of the International Covenant on Civil and Political Rights, thereby triggering the *non-refoulement* obligations of sending States, and that given that the risk of an entire country becoming submerged under water is such an extreme risk, the conditions of life in such a country may become incompatible with the right to life with dignity before the risk is realized.

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[506] *Yearbook of the International Law Commission, 2016*, vol. II (Part Two), para. 48.

[507] Universal Declaration of Human Rights; International Covenant on Civil and Political Rights; International Covenant on Economic, Social and Cultural Rights; American Convention on Human Rights: "Pact of San José, Costa Rica"; African Charter on Human and Peoples' Rights; and European Convention on Human Rights.

[508] E/CN.4/1998/53/Add.2, annex.

[509] General Assembly resolution 71/1.

[510] General Assembly resolution 73/195, annex.

[511] General Assembly resolution 69/283, annex II.

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

[513] Resolution 6/2018, annex, in International Law Association, *Report of the Seventy-eighth Conference* (see footnote 108 above), p. 34.

[514] CCPR/C/127/D/2728/2016.

435. Taking the 2018 syllabus into account,[515] and starting from the recognition that territorial States have the primary duty and responsibility to provide protection and assistance to persons within their jurisdiction,[516] the following issues may be studied further and in more detail in order to identify and develop principles regarding the protection of persons affected by sea-level rise:

(a) what principles are applicable or should be applicable to the protection of the human rights of persons affected by sea-level rise? In particular, what are or should be:

(i) the substantive obligations of States to respect human rights with regard to the right to life, the prohibition of cruel, inhuman or degrading treatment, the right to adequate housing, the right to food, the right to water, the right to take part in cultural life and respect for cultural identity, the right to a nationality and the prevention of statelessness, the rights of children, the right to self-determination and the rights of indigenous peoples;

(ii) the procedural obligations regarding public participation, access to information and access to justice;

(iii) the *non-refoulement* obligations for third States;

(iv) the obligations regarding the protection of vulnerable persons and groups (including women, children and indigenous peoples);

(v) the obligations regarding the prevention of risks affecting persons?

(b) what principles are applicable or should be applicable to situations involving the evacuation, relocation, displacement or migration of persons, including vulnerable persons and groups, owing to the consequences of sea-level rise or as a measure of adaptation to sea-level rise? In particular, with regard to displacement and human mobility, what are or should be the obligations of States to protect and assist persons affected by sea-level rise, adopting both a rights-based and a needs-based approach, in the following areas:

(i) prevention of displacement;

(ii) assistance to remain *in situ*;

(iii) establishment of principles for planned relocation;

(iv) protection of persons in case of internal displacement and promotion of durable solutions;

(v) protection options in case of cross-border displacement (such as humanitarian visas or temporary protection schemes);

(vi) arrangements for regular migration (both temporary and long-term);

(vii) the granting of refugee status or complementary protection if existing criteria are met?

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[515] A/73/10, annex B, para. 17.

[516] See, for instance, Guiding Principles on Internal Displacement, principle 3; General Assembly resolution 71/127 of 8 December 2016, on strengthening of the coordination of emergency humanitarian assistance of the United Nations, twenty-second preambular para.; draft article 10 of the draft articles on the protection of persons in the event of disasters, *Yearbook of the International Law Commission, 2016*, vol. II (Part Two), para. 48; and Assembly resolution 45/100 of 14 December 1990 on humanitarian assistance to victims of natural disasters and similar emergency situation, third preambular para.; and Assembly resolution 46/182 19 December 1991 on strengthening of the coordination of humanitarian emergency assistance of the United Nations, annex, para. 4.

(c) what is or should be the applicability and scope of the principle of international cooperation by other States, in the region and beyond, and by international organizations, to help States with regard to the protection of persons affected by sea-level rise?[517]

436. With regard to subparagraph (c) above, the importance of international cooperation for the protection of persons was highlighted not only in the Commission's draft articles on the protection of persons in the event of disasters,[518] but generally also in many statements by Member States while addressing the topic of sea-level rise in the debates in the Sixth Committee, namely, in 2021: Colombia,[519] Cuba,[520] Germany,[521] Italy,[522] Maldives,[523] Mexico,[524] New Zealand,[525] Solomon Islands,[526] Turkey[527] and Viet Nam.[528] For instance, according to Solomon Islands: "With regard to the protection of persons affected by sea-level rise, the foundational principles of international cooperation must apply, to help States cope with the adverse effects of sea-level rise on their populations. The duty to cooperate with respect to the effects of sea-level rise should be informed by specialized legal regimes connected to sea-level rise … The principle of cooperation had been interpreted in

[517] Article 1 (3) of the Charter of the United Nations lists the following as one of the four purposes of the United Nations: "To achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion". Under Article 56 of the Charter, "[a]ll Members pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55." See also, for instance, International Covenant on Economic, Social and Cultural Rights, arts. 2 (1), 11, 15 and 22–23; Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, General Assembly resolution 2625 (XXV), annex, para. 1; Rio Declaration on Environment and Development, principles 5, 7, 13, 24 and 27; United Nations Framework Convention on Climate Change, arts. 4 (1) (c)–(e), (g), (h), (i), 5(c), 6(b); articles on prevention of transboundary harm from hazardous activities (2001) (General Assembly resolution 62/68 of 6 December 2007, annex), arts. 4, 14 and 16; Declaration of the United Nations Conference on the Human Environment (Stockholm, 16 June 1972), *Report of the United Nations Conference on the Human Environment, Stockholm, 5–16 June 1972* (United Nations publication, Sales No. E.73.II.A.14 (A/CONF.48/14/Rev.1 and Corr.1, part I, chap. 1), principles 22 and 24. See also Committee on Economic, Social and Cultural Rights, general comment No. 2 (1990), *Official Records of the Economic and Social Council, 1990, Supplement No. 3* (E/1990/23-E/C.12/1990/3 and Corr.1 and Corr.2), annex III; general comment No. 3 (1990), *ibid., 1991, Supplement No. 3* (E/1991/23-E/C.12/1990/8 and Corr.1), annex III; general comment No. 7 (1997), *ibid., 1998, Supplement No. 2* (E/1998/22-E/C.12/1997/10 and Corr.1), annex IV; general comment No. 14 (2000), *ibid., 2001, Supplement No. 2* (E/2001/22-E/C.12/2000/21), annex IV; and general comment No. 15 (2002). Under the Convention on the Rights of Persons with Disabilities (New York, 13 December 2006; United Nations, *Treaty Series*, vol. 2515, No. 44910, p. 3), the principle of cooperation applies "in situations of risk, including situations of armed conflict, humanitarian emergencies and the occurrence of natural disasters" (art. 11). In the context of natural disasters specifically, see: General Assembly resolution 46/182, annex, para. 5; draft Article 5 of the draft articles on the protection of persons in the event of disasters, *Yearbook of the International Law Commission, 2016*, vol. II (Part Two), para. 48; and Guiding Principles on Internal Displacement, principle 3.

[518] *Yearbook of the International Law Commission, 2016*, vol. II (Part Two), para. 48).

[519] Colombia (A/C.6/76/SR.23, para. 24).

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

[521] Germany (*ibid.*, para. 79).

[522] Italy (A/C.6/76/SR.20, para. 87).

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

[524] Mexico (*ibid.*, para. 48).

[525] New Zealand (*ibid.*, para. 104).

[526] Solomon Islands (A/C.6/76/SR.22, paras. 79–80).

[527] Turkey (A/C.6/76/SR.20, para. 81).

[528] Viet Nam (A/C.6/76/SR.21, para. 83).

the context of human rights, the environment and other areas of international law as an obligation of States to exchange information and provide financial and technical assistance to States that required additional support."[529] In that regard, it is also worth recalling the Malé Declaration on Global Warming and Sea-Level Rise, adopted at the Small States Conference on Sea-Level Rise in 1989, in which the participants declared their "intent to work, collaborate and seek international cooperation to protect the low-lying small coastal and island States from the dangers posed by climate change, global warming and sea-level rise."[530]

437. The Co-Chairs would appreciate guidance and comments from the members of the Study Group regarding the guiding questions proposed in paragraphs 423 and 435 above. Contribution papers from members of the Study Group on any of the issues raised in the guiding questions would be welcomed, and on aspects of State practice and the practice of relevant international organizations and bodies.

II. Future programme of work

438. In the next quinquennium, the Study Group will revert to each of the subtopics – the law of the sea, statehood and the protection of persons affected by sea-level rise – and will then seek to prepare a substantive report on the topic as a whole by consolidating the results of the work undertaken.

[529] Solomon Islands (A/C.6/76/SR.22, paras. 79–80).
[530] A/C.2/44/7, annex.

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Sea-level rise in relation to international law

Additional paper to the first issues paper (2020), by Bogdan Aurescu and Nilüfer Oral,* Co-Chairs of the Study Group on sea-level rise in relation to international law

Contents

* The Co-Chair wishes to thank Zhifeng Jiang for his research assistance, and Beril Söğüt.

I. Introduction

A. 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.[1] 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.[2]

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,[3] prepared by Mr. Aurescu and Ms. Oral. The paper was issued together with a preliminary bibliography.[4] 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.[5]

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,[6] prepared by Ms. Galvão Teles and Mr. Ruda Santolaria. The paper was issued together with a selected bibliography.[7] 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.[8]

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[1] *Official Records of the General Assembly, Seventy-third Session, Supplement No. 10* (A/73/10), para. 369.
[2] *Official Records of the General Assembly, Seventy-fourth Session, Supplement No. 10* (A/74/10), paras. 265–273.
[3] A/CN.4/740 and Corr.1.
[4] A/CN.4/740/Add.1.
[5] *Official Records of the General Assembly, Seventy-sixth Session, Supplement No. 10* (A/76/10), paras. 247–296.
[6] A/CN.4/752.
[7] A/CN.4/752/Add.1.
[8] *Official Records of the General Assembly, Seventy-seventh Session, Supplement No. 10* (A/77/10), paras. 153–237.

B. Purpose and structure of the additional paper to the first issues paper (2020)

5. The purpose of the present paper is to supplement and develop the content of the first issues paper (2020), on the basis of a number of suggestions by members of the Study Group that were proposed during the debate on that paper, which took place during the seventy-second session (2021). These suggestions were presented in the 2021 annual report of the Commission and referred to a wide range of issues.[9]

6. 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 Member States in their submissions to the Commission and in their statements presented in the Sixth Committee of the General Assembly after the first issues paper was issued and following the debate on it in the Commission in 2021.

7. From this perspective, the present paper focuses on the following areas and is structured accordingly: the meaning of "legal stability" in connection with the present topic, including the issue of ambulatory versus fixed baselines; the potential situation whereby, as a result of sea-level rise and a landward shift of the coastline, overlapping areas of the exclusive economic zones of opposite coastal States, delimited by bilateral agreement, no longer overlap; the issue of the consequences of the situation whereby an agreed land boundary terminus ends up being located out at sea because of sea-level rise; the relevance of other international treaties and legal instruments than the United Nations Convention on the Law of the Sea;[10] the relevance for the topic of various principles; the issue of navigational charts in connection with the topic; and the possible loss or gain of benefits by third States in the case of fixed baselines..

8. 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.

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

9. Owing to the outbreak of the coronavirus disease (COVID-19) pandemic in 2020, and the ensuing postponement of the seventy-second session of the Commission, Member States had the opportunity to comment upon the first issues paper during the sessions of the Sixth Committee in both 2020 and 2021.[11] Some Member States also made reference in their statements in 2022 to the law of the sea aspects related to sea-level rise included in the first issues paper and in chapter IX of the 2021 annual report of the Commission.

[9] See *ibid.*, chap. IX.

[10] United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982), United Nations, *Treaty Series*, vol. 1833, No. 31363, p. 3.

[11] The plenary debate in the Sixth Committee as pertains to the subtopic is reflected in the summary records contained in the documents cited in the footnotes, which contain a summarized form of the statements made by delegations. The full texts 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/.

10. The growing interest in and support for the topic as described in the first issues paper with respect to 2017, 2018 and 2019,[12] was confirmed as a trend during the debates in the Sixth Committee in 2020, 2021 and 2022.

11. In 2020, because of the pandemic and the consequent special circumstances in which the debate in the Sixth Committee took place, only 25 Member States presented statements on the Commission's work,[13] of which 15 referred to the topic: 11 of them expressed appreciation for the first issues paper,[14] and the remaining 4 made reference to the topic or to the first issues paper.[15]

12. In 2021, 67 delegations delivered 69 statements in the Sixth Committee that referred to the topic.[16] These statements not only refer to the first issues paper, but also react to the substantive debates in the Study Group and the Commission that took place during its seventy-second session (2021).

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[12] A/CN.4/740 and Corr.1, paras. 8–9 and 19.

[13] A/76/10, para. 255.

[14] Belize, on behalf of the Alliance of Small Island States (A/C.6/75/SR.13, paras. 24–28); Fiji, on behalf of the Pacific small island developing States (*ibid.*, paras. 50–51); Maldives (*ibid.*, paras. 55–58); Micronesia (Federated States of) (*ibid.*, paras. 52–55); New Zealand (*ibid.*, paras. 43–46); Papua New Guinea (*ibid.*, paras. 37–39); Portugal (*ibid.*, para. 65); Solomon Islands (*ibid.*, paras. 72– 74); Tonga (*ibid.*, para. 59); Türkiye (*ibid.*, paras. 60–61); and Tuvalu, on behalf of the Pacific Islands Forum (*ibid.*, paras. 21–23).

[15] India (*ibid.*, paras. 69–60); Republic of Korea (*ibid.*, paras. 66–68); Sierra Leone (*ibid.*, paras. 34–36); and United States of America (*ibid.*, paras. 30–32).

[16] Croatia (A/C.6/76/SR.17, para. 64); Samoa, on behalf of the Pacific small island developing States (A/C.6/76/SR.19, paras. 68–71); European Union (in its capacity as observer; also on behalf of the candidate countries Albania, Montenegro, North Macedonia and Serbia; the stabilization and association process country Bosnia and Herzegovina; and, in addition, Georgia, the Republic of Moldova and Ukraine) (*ibid.*, paras. 72–73); Fiji, on behalf of the Pacific Islands Forum (*ibid.*, paras. 74–76); Antigua and Barbuda, on behalf of the Alliance of Small Island States (*ibid.*, paras. 77–82); Iceland, on behalf of the Nordic countries (Denmark, Finland, Iceland, Norway and Sweden) (*ibid.*, paras. 87–91); Singapore (A/C.6/76/SR.20, paras. 22–24); Sierra Leone (*ibid.*, paras. 27–29); Islamic Republic of Iran (*ibid.*, paras. 38–39); France (*ibid.*, paras. 45–47); Egypt (*ibid.*, paras. 58–59); Belarus (*ibid.*, paras. 63–65); El Salvador (*ibid.*, para. 70); Kingdom of the Netherlands (*ibid.*, para. 76); South Africa (ibid., paras. 77–78); Türkiye (*ibid.*, paras. 81–83); Italy (*ibid.*, paras. 87–88); China (*ibid.*, paras. 92–95); United States (*ibid.*, para. 96); Israel (*ibid.*, paras. 98–99); Liechtenstein (A/C.6/76/SR.21, paras. 2–4); Portugal (*ibid.*, paras. 8–10); Romania (*ibid.*, paras. 20–23); Brazil (*ibid.*, para. 26); Cuba (*ibid.*, paras. 31–33); Slovakia (*ibid.*, para. 38); Japan (*ibid.*, paras. 41–42); Mexico (*ibid.*, paras. 48–50); Chile (*ibid.*, paras. 51–58); Hungary (*ibid.*, paras. 67–68); Germany (*ibid.*, paras. 78–82); Viet Nam (*ibid.*, paras. 83–85); Czech Republic (ibid., para. 92); Slovenia (*ibid.*, paras. 96–97); New Zealand (*ibid.*, paras. 102–107); Sri Lanka (*ibid.*, paras. 111–112); Estonia (*ibid.*, paras. 118–122); Ireland (*ibid.*, paras. 131–135); Maldives (*ibid.*, paras. 137–141); United Kingdom of Great Britain and Northern Ireland (*ibid.*, para. 146); Federated States of Micronesia (*ibid.*, paras. 147–150); Malaysia (*ibid.*, paras. 153–154); Thailand (A/C.6/76/SR.22, paras. 3–5); Côte d'Ivoire (*ibid.*, paras. 6–7); Cameroon (*ibid.*, para. 26); Argentina (*ibid.*, paras. 31–34); Papua New Guinea (*ibid.*, paras. 35–38); Austria (*ibid.*, paras. 53–55); Republic of Korea (*ibid.*, para. 60); Australia (*ibid.*, paras. 62–63); Poland (*ibid.*, paras. 70–71); Latvia (*ibid.*, paras. 74–75); Solomon Islands (*ibid.*, paras. 76–81); Indonesia (*ibid.*, paras. 83–84); Russian Federation (*ibid.*, paras. 91–95); Algeria (*ibid.*, paras. 99–100); Cyprus (*ibid.*, paras. 101–106); Spain (*ibid.*, para. 115); Tonga (*ibid.*, paras. 117–120); Greece (*ibid.*, paras. 129–131); Lebanon (*ibid.*, paras. 133–134); Tuvalu (A/C.6/76/SR.23, paras. 2–5); India (*ibid.*, paras. 9–10); Costa Rica (*ibid.*, paras. 11–15); Philippines (*ibid.*, paras. 17–21); Colombia (*ibid.*, paras. 23–25); Holy See (Observer) (*ibid.*, paras. 28–29); and Jordan (A/C.6/76/SR.24, paras. 126–127). The topic was referred to in two statements by Japan (A/C.6/76/SR.17, para. 74; and A/C.6/76/SR.21, paras. 41–42) and by Sri Lanka (A/C.6/76/SR.18, para. 8; and A/C.6/76/SR.21, paras. 111–112). Of all the delegations that presented statements, only one (Austria) expressed doubts as to "the usefulness of discussing topics closely resembling those that have already been dealt with" by either the International Law Association or the Institute of International Law.

13. The following were the main issues highlighted in these statements:

(a) the meaning of legal stability, security, certainty and predictability;[17]

(b) support for the preliminary observation contained in the first issues paper that the United Nations Convention on the Law of the Sea does not exclude an approach based on the preservation of baselines and outer limits of maritime zones in the face of climate change-related sea-level rise once information about such maritime zones has been established and deposited with the Secretary-General,[18] or support for the solution of fixed baselines and/or outer limits of maritime zones;[19]

(c) support for the Declaration on Preserving Maritime Zones in the Face of Climate Change-related Sea-Level Rise, issued by the Pacific Islands Forum Leaders in August 2021, and references to regional State practice among the Pacific small island developing States or the Alliance of Small Island States;[20]

(d) support for the Declaration of the Heads of State and Government of the Alliance of Small Island States issued in September 2021;[21]

[17] The following States referred explicitly in their statements to legal stability, although implicit references were made in many other statements: Fiji, on behalf of the Pacific Islands Forum; Antigua and Barbuda, on behalf of the Alliance of Small Island States; Sierra Leone; France; Kingdom of the Netherlands (which "is guided by the notions of legal certainty, stability and security, while remaining firmly grounded in the primacy of the [United Nations Convention on the Law of the Sea]"); Italy; Romania; Brazil; Chile ("'legal stability' meant the need to preserve the baselines and outer limits of maritime zones"); Viet Nam; Slovenia; New Zealand; Estonia; Maldives; Malaysia; Federated States of Micronesia ("legal stability, security, certainty, and predictability … mean[s] the need to maintain maritime zones without reduction, as well as the rights and entitlements that flow from them, regardless of climate change-related sea-level rise"); Papua New Guinea ("legal stability … means the need to preserve the baselines and outer limits of maritime zones"); Indonesia; Solomon Islands ("Solomon Islands holds the view that maritime boundaries and archipelagic baselines are fixed. Once national maritime zones are determined in accordance with [the United Nations Convention on the Law of the Sea] and deposited with the Secretary-General, our interpretation of international law is that they are not subject to change, despite sea-level rise. The foundational principles of certainty, predictability and stability in international law demand this result"); Cyprus; Spain; Greece; Tuvalu; Costa Rica; and Philippines.

[18] A/CN.4/740 and Corr.1, para. 104.

[19] Samoa, on behalf of the Pacific small island developing States; Fiji, on behalf of the Pacific Islands Forum; Antigua and Barbuda, on behalf of the Alliance of Small Island States; Egypt; Cuba; Chile; Estonia; Maldives; Malaysia; Federated States of Micronesia; Argentina; Papua New Guinea; Australia ("[i]t is important that we protect our maritime zones, established in accordance with [the United Nations Convention on the Law of the Sea], in the face of sea-level rise"); Solomon Islands; Algeria; Cyprus; Tonga; Greece; Tuvalu; and Philippines (which "would caution against inference in favour of ambulatory baselines, absent a showing of State practice and *opinio juris* on the matter").

[20] Samoa, on behalf of the Pacific small island developing States; Fiji, on behalf of the Pacific Islands Forum; Antigua and Barbuda, on behalf of the Alliance of Small Island States; Japan; New Zealand; Federated States of Micronesia; Papua New Guinea; Australia ("[w]hile preserving maritime zones to the greatest extent possible, the Declaration upholds the integrity of [the United Nations Convention on the Law of the Sea] and is supported by the legal principles underpinning it, including legal stability, security, certainty and predictability"); Latvia; Spain ("Spain understands and positively values the statement made by the Pacific Islands Forum"); Tonga; and Tuvalu.

[21] Fiji, on behalf of the Pacific Islands Forum; Antigua and Barbuda, on behalf of the Alliance of Small Island States; and New Zealand.

(e) the need to interpret the United Nations Convention on the Law of the Sea in the light of changing circumstances and/or taking into account the interests of States affected by sea-level rise;[22]

(f) the need to maintain the integrity of the Convention and/or the balance of rights and obligations under the Convention;[23]

(g) the need to take into account of equity,[24] the principle of *uti possidetis*,[25] the principle of good faith,[26] the principle that "the land dominates the sea", the principle of freedom of the seas, obligations for the peaceful settlement of disputes, protection of the rights of coastal and non-coastal States, and the principle of permanent sovereignty over natural resources;[27]

(h) the preservation of maritime boundary delimitation treaties and the decisions of international courts or tribunals;[28]

(i) the need to study navigational charts;[29]

(j) the issue of ambulatory versus fixed baselines;[30] and

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[22] Iceland, on behalf of the Nordic countries (Denmark, Finland, Iceland, Norway and Sweden); Chile; Germany ("Germany commits to support the process and work together with others to preserve their maritime zones and the rights and entitlements that flow from them in a manner consistent with [the United Nations Convention on the Law of the Sea], including through a contemporary reading and interpretation of its intents and purposes, rather than through the development of new customary rules"); Sri Lanka ("[p]erhaps it was time for the Commission to examine whether or not [the United Nations Convention on the Law of the Sea] could be modified by mutual consent or based on the subsequent practice of all States parties"); Estonia; Papua New Guinea; Russian Federation ("[a] practical solution was needed that was aligned with the United Nations Convention on the Law of the Sea, on the one hand, and reflected the concerns of States affected by sea-level rise, on the other"); Solomon Islands; Spain ("[i]t was imperative for the Commission to continue working on the topic in a manner that ensured respect for and integrity of the United Nations Convention on the Law of the Sea, and also allowed for the identification of special formulas that reflected the extraordinary circumstances that various States, especially small island developing States, endured as a consequence of sea-level rise due to climate change"); Tonga (the United Nations Convention on the Law of the Sea "must be interpreted and applied in a way that respects the rights and sovereignty of vulnerable small island States"); and Greece ("[w]ith respect to the topic of sea-level rise, the [United Nations Convention on the Law of the Sea] provides the answers to the questions raised, within their proper context").

[23] European Union (in its capacity as observer; also on behalf of the candidate countries Albania, Montenegro, North Macedonia and Serbia; the stabilization and association process country Bosnia and Herzegovina; and, in addition, Georgia, the Republic of Moldova and Ukraine); Fiji, on behalf of the Pacific Islands Forum; Iceland, on behalf of the Nordic countries (Denmark, Finland, Iceland, Norway and Sweden) (which also referred to predictability and stability in connection with the integrity of the Convention); Singapore; Italy; China; United States (which emphasized "the universal and unified character of the [United Nations] Convention on the Law of the Sea"); Romania; Cuba; Japan; Chile; Germany; Viet Nam; Czech Republic (which also referred to legal stability, certainty and predictability in connection with the integrity of the Convention); Malaysia; Australia (for which the Convention "reflects our commitment to an international rules-based order, as the basis for international stability and prosperity"); Russian Federation; Cyprus; Spain; Greece; Costa Rica; Philippines; and Jordan.

[24] Singapore; Islamic Republic of Iran; Federated States of Micronesia; and Philippines ("[e]cological equity as a principle is key: no State should suffer disproportionately from effects of climate change affecting all").

[25] Egypt, El Salvador and Philippines.

[26] El Salvador and Federated States of Micronesia.

[27] Belarus and Federated States of Micronesia.

[28] Singapore; Italy ("the principle of fundamental change of circumstances [applies] neither to existing delimitation agreements nor to decisions rendered in arbitral or judicial decisions"); Chile; Estonia; Malaysia; Argentina; Poland; Indonesia; Algeria; Cyprus; Greece; and Philippines.

[29] South Africa.

[30] United States, Israel, Romania, Sri Lanka and Ireland.

(k) the importance of distinguishing between *lex lata*, *lex ferenda* and policy options in the future work on this topic.[31]

14. In 2022, 67 delegations delivered 68 statements by in the Sixth Committee that referred to the topic.[32] The majority of these statements referred to the second issues paper, dedicated to the subtopics of statehood and the protection of persons affected by sea-level rise, and to the debates that took place in the Study Group and the Commission at its seventy-third session (2022). However, 17 statements also referred to issues relating to the law of the sea in connection with sea-level rise,[33] mainly the following: support for the solution of fixed baselines;[34] support for legal stability;[35]

[31] South Africa, Germany, Ireland, Austria and Poland.

[32] Croatia; France; European Union (in its capacity as observer; also on behalf of the candidate countries Albania, Montenegro, North Macedonia and Serbia; the stabilization and association process country Bosnia and Herzegovina; and, in addition, Georgia, the Republic of Moldova and Ukraine); Bahamas, on behalf of the Caribbean Community; Iceland, on behalf of the Nordic countries (Denmark, Finland, Iceland, Norway and Sweden); Singapore; Poland; Slovenia; China; India; Italy; El Salvador; Belarus; Hungary; United States; Romania; Malaysia; Austria; Mexico; Sierra Leone; Germany; Islamic Republic of Iran; Brazil; Colombia; Slovakia; Estonia; Armenia; Australia; Cuba; Portugal; Philippines; Ireland; Kingdom of the Netherlands; Antigua and Barbuda, on behalf of the Alliance of Small Island States; Israel; Samoa, on behalf of the Pacific small island developing States; Cameroon; Bangladesh; Maldives; Viet Nam; South Africa; United Kingdom; Russian Federation; Chile; Thailand; Egypt; Spain; Federated States of Micronesia; Czech Republic; Cyprus; Japan; Algeria; Indonesia; United Republic of Tanzania; Papua New Guinea; Jamaica; Liechtenstein; Côte d'Ivoire; Peru; Nicaragua; Türkiye; Republic of Korea; New Zealand; Argentina; Bulgaria; Holy See (Observer); and State of Palestine (Observer). El Salvador referred to the topic in two statements before the Sixth Committee (see https://www.un.org/en/ga/sixth/77/summaries.shtml, 21st and 26th plenary meetings).

[33] Croatia; European Union (in its capacity as observer; also on behalf of the candidate countries Albania, Montenegro, North Macedonia and Serbia; the stabilization and association process country Bosnia and Herzegovina; and, in addition, Georgia, the Republic of Moldova and Ukraine); India; United States; Romania; Germany; Cuba; Antigua and Barbuda, on behalf of the Alliance of Small Island States; Samoa, on behalf of the Pacific small island developing States; Thailand; Federated States of Micronesia; Cyprus; Indonesia; Papua New Guinea; Türkiye; New Zealand; and Bulgaria.

[34] Croatia ("Croatia holds the view that baselines are fixed and, once determined, national maritime zones are not subject to change, despite sea-level rise"); European Union (in its capacity as observer; also on behalf of the candidate countries Albania, Montenegro, North Macedonia and Serbia; the stabilization and association process country Bosnia and Herzegovina; and, in addition, Georgia, the Republic of Moldova and Ukraine) (which noted that "there is no express obligation on States under the United Nations Convention on the Law of the Sea to periodically review and update all the charts and coordinates [that] they have drawn (or agreed) and duly published in accordance with the relevant provisions of the Convention"); United States (which had "announced a new policy on sea-level rise and maritime zones. Under this policy, which recognizes that new trends are developing in the practices and views of States on the need for stable maritime zones in the face of sea-level rise, the United States will work with other countries toward the goal of lawfully establishing and maintaining baselines and maritime zone limits and will not challenge such baselines and maritime zone limits that are not subsequently updated despite sea-level rise caused by climate change"); Romania (which noted that "preserving the baselines and outer limits of maritime zones is crucial to legal stability"); Cuba; Antigua and Barbuda, on behalf of the Alliance of Small Island States; Samoa, on behalf of the Pacific small island developing States; Cyprus; Papua New Guinea; New Zealand; and Bulgaria.

[35] European Union (in its capacity as observer; also on behalf of the candidate countries Albania, Montenegro, North Macedonia and Serbia; the stabilization and association process country Bosnia and Herzegovina; and, in addition, Georgia, the Republic of Moldova and Ukraine) ("there are major legal and policy reasons to recognize the stability provided for by the maritime delimitations established either by treaty or by adjudication"); United States (see footnote 34 above); Romania (see footnote 34 above); Germany (which noted that, "[i]n our view, a contemporary reading of [the rules under the United Nations Convention on the Law of the Sea regarding the stability of baselines] gives the coastal State the right to update its baselines when the sea level rises or falls or the coastline moves, but it does not require the coastal State to do so"); Antigua and Barbuda, on the behalf of Alliance of Small Island States; Samoa, on behalf of the Pacific small island developing States; Thailand; Indonesia; and Bulgaria.

the principle that "the land dominates the sea";[36] the need to maintain the integrity of the United Nations Convention on the Law of the Sea;[37] the need to respect rights of third States;[38] the preservation of maritime boundary delimitation treaties and the decisions of international courts or tribunals;[39] the issue of customary international law in relation to the topic;[40] and the need to interpret the Convention in the light of changing circumstances and/or taking into account the interests of States affected by sea-level rise.[41]

15. 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.

II. Issue of "legal stability" in relation to sea-level rise, with a focus on baselines and maritime zones

16. At the seventy-second session of the Commission (2021), the debate in the Study Group and in the Commission on the first issues paper focused, *inter alia*, on the important issue of legal stability. Some members of the Study Group agreed on the need for stability, security, certainty and predictability, and the need to preserve the balance of rights and obligations between coastal States and other States, yet did not agree on whether the first issues paper's preliminary observations reflected those needs. Further, some members took the view that the statements by States in favour of stability, certainty and predictability could be open to different interpretations, and called into question the first issues paper's repeated reliance on "concerns expressed by Member States". It was noted that the terms "stability", "certainty" and "predictability" were referred to in the jurisprudence in relation to land boundary delimitation and not maritime delimitation, where the considerations were different. At the same time, it was noted that the statements delivered in the Sixth Committee by the delegations of States affected by sea-level rise seemed to indicate that, by "legal stability", they meant the need to preserve the baselines and outer limits of maritime zones. The Study Group welcomed the suggestion that the meaning of "legal stability" in connection with the present topic needed further clarification, including by addressing specific questions to the Member States.[42]

17. Another important part of the debate on legal stability focused on the relevance of the preliminary observation from the first issues paper regarding the possible use

[36] Croatia; and European Union (in its capacity as observer; also on behalf of the candidate countries Albania, Montenegro, North Macedonia and Serbia; the stabilization and association process country Bosnia and Herzegovina; and, in addition, Georgia, the Republic of Moldova and Ukraine).

[37] Croatia; European Union (in its capacity as observer; also on behalf of the candidate countries Albania, Montenegro, North Macedonia and Serbia; the stabilization and association process country Bosnia and Herzegovina; and, in addition, Georgia, the Republic of Moldova and Ukraine); and Romania.

[38] European Union (in its capacity as observer; also on behalf of the candidate countries Albania, Montenegro, North Macedonia and Serbia; the stabilization and association process country Bosnia and Herzegovina; and, in addition, Georgia, the Republic of Moldova and Ukraine).

[39] European Union (in its capacity as observer; also on behalf of the candidate countries Albania, Montenegro, North Macedonia and Serbia; the stabilization and association process country Bosnia and Herzegovina; and, in addition, Georgia, the Republic of Moldova and Ukraine); Thailand; and Cyprus.

[40] European Union (in its capacity as observer; also on behalf of the candidate countries Albania, Montenegro, North Macedonia and Serbia; the stabilization and association process country Bosnia and Herzegovina; and, in addition, Georgia, the Republic of Moldova and Ukraine); Federated States of Micronesia; and Papua New Guinea.

[41] Samoa, on behalf of the Pacific small island developing States; Federated States of Micronesia; Papua New Guinea; and New Zealand.

[42] A/76/10, para. 266.

of fixed baselines and outer limits of the maritime zones measured from the baselines as a response to the concerns of the States affected by sea-level rise. A substantive discussion regarding the interpretation of the provisions of the United Nations Convention on the Law of the Sea pertaining to the ambulatory or fixed character of baselines took place in the Study Group.[43]

18. Beyond the doctrinal perspective on the issue of legal stability, it is highly relevant to take into account the views expressed by Member States in their submissions to the Commission and in their statements delivered in the Sixth Committee after the first issues paper was released in 2020, and, especially, in reaction to the debate in the Study Group and in the Commission in 2021. Indeed, this methodological approach is confirmed by the references in the 2021 annual report of the Commission to the need to address specific questions to the Member States in further clarifying the meaning of "legal stability", and to the agreement among members of the Study Group on the importance of and need for assessing State practice on questions relating to the freezing of baselines.[44]

19. As evidenced below, the Member States, in their submissions and statements, attached concrete meaning to "legal stability", connected to the importance of fixing the baselines from which the maritime zones are measured and the outer limits of these zones, thus preserving their entitlements to these zones. The issue of legal stability in connection with delimitation agreements is not covered in the present chapter, but will be examined later, in chapters III and IV, in the context of analysis of the principles of *uti possidetis juris* and *rebus sic stantibus*. Member States were clear and unequivocal as to their support for the observations in paragraph 141 of the first issues paper in this respect, especially subparagraph (c).[45]

A. Views of Member States related to legal stability and the preservation of baselines and maritime zones

1. Submissions of Member States to the Commission

20. Antigua and Barbuda, in its submission to the Commission, in 2021,[46] makes a direct and concrete reference to the meaning that it attaches to legal stability, which is connected with the solution of fixed baselines: "The baselines may remain fixed despite sea-level rise to abide with the principles of certainty and stability … Antigua and Barbuda shares the concerns expressed in the [first issues paper] that ambulatory baselines 'affect legal stability, security, certainty and predictability'".[47] It states the following:

> Antigua and Barbuda's legal opinion, which is backed by its State practice …, is that maritime baselines established in accordance with [the United Nations Convention on the Law of the Sea] may remain fixed despite sea-level rise and, additionally, States have no obligation to revise maritime baselines because of sea-level rise. … [B]aselines may remain fixed despite sea-level rise to abide

[43] *Ibid.*, paras. 270–275.
[44] *Ibid.*, paras. 266 and 270.
[45] A/CN.4/740 and Corr.1, para. 141, especially 141 (c): "Sea-level rise cannot be invoked in accordance with article 62, paragraph 2, of the 1969 Vienna Convention on the Law of Treaties, as a fundamental change of circumstances for terminating or withdrawing from a treaty which established a maritime boundary, since maritime boundaries enjoy the same regime of stability as any other boundaries."
[46] Submission of Antigua and Barbuda. Available from https://legal.un.org/ilc/guide/8_9.shtml#govcoms.
[47] *Ibid.*, para. 17; and A/CN.4/740 and Corr.1, para. 77.

> with the principles of certainty and stability. Furthermore, ambulatory baselines are inequitable and unfair.[48]

Antigua and Barbuda again makes the direct connection between legal stability and fixed baselines: "Fixed baselines respect international law while ambulatory baselines may lead to the violation of international law principles … Interpreting baselines as fixed would be more consistent with the principles of certainty and stability of international law."[49] It goes further with this reasoning by arguing that the United Nations Convention on the Law of the Sea should be interpreted in the light of the current challenges prompted by sea-level rise. In this respect, it invokes article 7, paragraph 2, of the Convention, on deltas:

> [U]nder this provision, States can keep their baseline when the low-water line regresses but can still move them forward in the event the low-water line were to expand … [S]ea-level rise triggers article 7, [paragraph 2,] of [the Convention] and allows for the drawing of straight baselines "along the furthest seaward extent of the low-water line" that "shall remain effective until changed by the coastal State" "notwithstanding subsequent regression of the low-water line". Indeed, the "other natural conditions" and "regression of the low-water line" included in the article can reasonably be read to include sea-level rise. Thus, even with sea-level rise, which causes a coastline to be highly unstable, and notwithstanding subsequent regression of the low-water line, baselines can remain fixed.[50]

Antigua and Barbuda concludes by referring to its State practice: "Antigua and Bermuda deposited its maritime charts with the United Nations … In accordance with the practice of fixed maritime entitlements, Antigua and Barbuda has never updated its deposited charts as sea levels have risen. This practice is consistent with [paragraph 104 (f) of the first issues paper], that found that States do not have to update their baseline and can preserve their entitlements."[51] Moreover, its Maritime Areas Act 1982 "provides for no mandatory update of those charts or lists".[52]

21. Colombia, in its submission to the Commission, in 2022, does not refer directly to legal stability, but refers extensively to the issue of baselines. It recalls the Declaration on Preserving Maritime Zones in the Face of Climate Change-related Sea-Level Rise, issued by the Pacific Islands Forum Leaders in August 2021, "in which the member countries of the Forum state that … they do not intend to review the baselines or limits of their maritime zones as notified [at the relevant time] to the Secretary-General". While Colombia has not yet formally decided on a specific position regarding that intention, it notes the following:

> [It] will continue to review the issue, in particular because, owing to its geographical location and the configuration of its coastline and island territories, it is among the States that will be the worst affected by climate change and rising sea levels. … [B]aselines, although they are of a variable nature insofar as they change in accordance with changes in the coastline and variations in the low-water line, have to be set out on maps, and there is no express obligation to modify or update them. … [T]here would be no legal impediment to updating or revising registered and publicized maps or coordinates, but nor is there a positive obligation to do so.[53]

[48] Submission of Antigua and Barbuda (see footnote 46 above), paras. 10 and 13.
[49] *Ibid.*, at para. 12, and para. 20.
[50] *Ibid.*, paras. 19 and 22–23.
[51] *Ibid.*, para. 45.
[52] *Ibid.*, para. 44.
[53] Submission of Colombia, pp. 2–3. Available from https://legal.un.org/ilc/guide/8_9.shtml#govcoms.

22. New Zealand, in its submission to the Commission, in 2022, refers to its State practice: "New Zealand has not updated [its] maritime zone submission since it was submitted [on 8 March 2006]. In the event that New Zealand experiences coastal regression as a result of climate change-related sea-level rise, New Zealand does not intend to update its notification of 8 March 2006."[54] This practice is presented as fully in accordance with Declaration on Preserving Maritime Zones in the Face of Climate Change-related Sea-Level Rise, issued by the Pacific Islands Forum Leaders on 6 August 2021:

> The Declaration … makes clear our intention to maintain our zones, without reduction. The Declaration records the position of Members of the [Pacific Islands Forum] that maintaining maritime zones established in accordance with [the United Nations Convention on the Law of the Sea], and rights and entitlements that flow from them, notwithstanding climate change-related sea-level rise, is supported by both the Convention and the legal principles underpinning it.[55]

23. New Zealand also informs the Committee about the practice of the Cook Islands:

> The Cook Islands is a self-governing territory in free association with New Zealand, and a party to [the United Nations Convention on the Law of the Sea] in its own right. New Zealand notes that when the Cook Islands deposited its list of geographic coordinates to the Secretary-General on 12 August 2021 in accordance with [the Convention], it further transmitted … the following observation of relevance to this topic: 'The Cook Islands states its understanding that it is not obliged to keep under review the maritime zones reflected in the present official deposit of lists of geographical coordinates of points and accompanying illustrative maps, delineated in accordance with [the Convention, and that the Cook Islands intends to maintain these maritime zones in line with that understanding, notwithstanding climate change-induced sea-level rise.'[56]

24. The Pacific Islands Forum, in its submission to the Commission, in 2021, refers, *inter alia*, to the practice of Fiji: "Fiji's Climate Change Act 2021 is a most recent State practice that recognizes by law the permanence of Fiji's maritime boundaries and maritime zones notwithstanding the effects of climate change and sea-level rise, aligned to the [Pacific Islands Forum] position in the 2021 [Forum] Declaration."[57]

25. The Philippines, in its submission to the Commission, in 2022, notes the following regarding the stability of baselines in case of sea-level rise:

> We are … of the view that any adjustment of the baselines should result in expansion rather than diminution of our maritime zones. Erosion of coastlines and inundation of features as a result of sea-level rise, for example, should not affect the baselines that the State has established. … Further, in accordance with article 7 (2) of [the United Nations Convention on the Law of the Sea], there is no need to change the baselines if it would result in a reduction of maritime zone areas as a result of the regression of the coastline.[58]

26. Japan, in its submission to the Commission, in 2022, noted that the Leaders Declaration adopted at the Ninth Pacific Islands Leaders Meeting, on 2 July 2021,

[54] Submission of New Zealand, p. 1. Available from https://legal.un.org/ilc/guide/8_9.shtml#govcoms.
[55] *Ibid*.
[56] *Ibid.*, p. 2.
[57] Submission of the Pacific Islands Forum in 2021, para. 44. Available from https://legal.un.org/ilc/guide/8_9.shtml#govcoms.
[58] Submission of the Philippines. Available from https://legal.un.org/ilc/guide/8_9.shtml#govcoms.

referred to the "importance of protecting maritime zones established in accordance with" the United Nations Convention on the Law of the Sea.[59]

27. France, in its submission to the Commission, in 2022, is in favour of interpreting the United Nations Convention on the Law of the Sea in order to find solutions for the impact of sea-level rise, even if it does not explicitly mention "legal stability":

> France considers that the Convention's framework and ambitions help us to understand this relatively new legal issue, without requiring a new multilateral framework. In this regard, it is … important to note that the Convention provisions grant coastal States room for manoeuvre when it comes to taking the initiative to modify or maintain declared data regarding baselines and limits of their maritime zones. The Convention leaves it to coastal States to decide whether to make modifications to this data, which means that so long as a coastal State does not decide to make such modifications, the initially declared data remain in force.[60]

France goes on to note that "some of the Convention's provisions could be applied to sea-level rise", with direct reference to article 7, paragraph 2, regarding deltas, which, according to France, can be interpreted "as being applicable to situations resulting from sea-level rise, independently [of] the presence of a delta". It takes that reasoning further, noting that article 7, paragraph 4, of the Convention could similarly "be applied in the context of sea-level rise, because it enables a coastal State to establish straight baselines from low-tide elevations".[61]

28. Germany, in its submission to the Commission, in 2022, goes in the same direction and is clear:

> [O]n the issue of the preservation of baselines and maritime zones … Germany commits to … work together with others to preserve their maritime zones and the rights and entitlements that flow from them in a manner consistent with the [United Nations Convention on the Law of the Sea], including through a contemporary reading and interpretation of its intents and purposes, rather than through the development of new customary rules.[62]

Germany is explicitly in favour of interpreting the Convention in order to find solutions for the impact of sea-level rise:

> Through such contemporary reading and interpretation, Germany finds that [the Convention] allows for freezing of [baselines and outer limits of maritime zones] once duly established, published and deposited … in accordance with the Convention.
>
> [The Convention] does not contain any explicit obligations to update [either] normal baselines that have been marked … [or] straight baselines that have been marked, published and deposited …, as well as no further obligation to update a State's relevant charts and lists of geographical coordinates with regard to the [exclusive economic zone] … and the continental shelf ….

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[59] Submission of Japan. Available from https://legal.un.org/ilc/guide/8_9.shtml#govcoms. See also para. 12 of the Leaders Declaration, available from https://www.mofa.go.jp/files/100207980.pdf.

[60] Submission of France, pp. 1–2. Available from https://legal.un.org/ilc/guide/8_9.shtml#govcoms. France also notes that the Convention "does not provide for an obligation, for coastal States, to re-evaluate and update their baselines", that "States may update their baselines and their national maritime zone notifications, but they are not obliged to do so", and that the Convention "does not provide for an obligation to update the charts and lists of geographical coordinates, once published pursuant to its provisions" (*ibid.*, pp. 3–4).

[61] *Ibid*., p. 2.

[62] Submission of Germany, p. 1. Available from https://legal.un.org/ilc/guide/8_9.shtml#govcoms.

> However, Germany concludes [that] the concept of fictitious baselines [is] already immanent within [the Convention], in particular when a coastline is highly unstable due to the presence of "a delta and other natural conditions" [in accordance with article 7, paragraph 2, of the Convention].
>
> Since this provision has been translated as "delta or other natural conditions" in several translations by [European Union member States], Germany suggests to examine if a contemporary understanding of the provision could broaden the scope of the exception pursuant to [article 7, paragraph 2, of the Convention] and provide further legal certainty with regard to States freezing their baselines and outer limits of maritime zones.[63]

Germany continues to present this interpretation in the following terms:

> Germany … considers that once the baselines and lines of delimitation mentioned in [article 16 of the Convention] have been drawn in accordance with the Convention and their charts and lists of geographical coordinates duly published and deposited with the [Secretary-General], these baselines and lines of delimitation, as well as the charts and geographical coordinates, remain stable until the coastal State decides to update them again.
>
> Germany also considers that once a coastal State has duly published the outer limit lines and the lines of delimitation of its [exclusive economic zone] and continental shelf in accordance with the Convention and duly published and deposited their relevant charts and lists of geographical coordinates with the [Secretary-General], … the Convention does not impose a further duty on the coastal State to keep these under review and/or update them regularly (but the coastal State remains entitled to do so).[64]

29. Ireland, in its submission to the Commission, in 2022, informs the Committee of the following:

> Ireland notes that its practice in this field to date has not been formulated expressly in contemplation of sea-level rise. In Ireland normal baselines are ambulatory and are determined by the low-water line along the coast as marked on the officially recognized large-scale charts. These charts are revised from time to time and accordingly the normal baselines may change over time depending on natural processes.

At the same time, Ireland "notes that in contrast to straight baselines, coastal States are not required by [the United Nations Convention on the Law of the Sea] to deposit details of normal baselines with the Secretary-General".[65]

30. The Kingdom of the Netherlands, in its submission to the Commission in 2022, provides interesting information regarding its efforts to ensure the stability of its coastline:

> In respect of the European part of the [Kingdom of the] Netherlands a so-called "basic coastline" has been established (for policy purposes). … An important tool to maintain and preserve the coastline is the "basic coastline", which is defined as an imaginary, indicative line along our coast, in between the low-water line along the coast at the bottom and the dune foot … at the top. … The basic coastline ("approach") is evaluated every six years in terms of location and efficiency. It is also periodically reviewed whether the effects of the rising sea level should be taken into account. … In respect of the European part of the

[63] *Ibid.*, p. 2.
[64] *Ibid.*, p. 3.
[65] Submission of Ireland. Available from https://legal.un.org/ilc/guide/8_9.shtml#govcoms.

> [Kingdom of the] Netherlands, the current adaptation measures executed by the Dutch authorities in order to preserve the coastline take the form of sand nourishment …. The basic coastline remains basically the same.[66]

31. Poland, in its submission to the Commission, in 2022, notes that it "does not consider modifying of maritime boundary treaties due to sea-level rise for now".[67]

32. The United Kingdom of Great Britain and Northern Ireland, in its submission to the Commission, in 2022, refers to the frequency of updating of national legislation regarding baselines, and of national maritime zone notifications deposited with the Secretary-General: "There has been no change to this legislation, including to the specified coordinates, since it was originally made [in 2014]".[68]

2. Statements by Member States in the Sixth Committee of the General Assembly

33. The statements presented from 2020 to 2022 on behalf of the Pacific Islands Forum and by the member States of the Forum are clear as to the meaning attached to legal stability.

34. For instance, Tuvalu, in its statement on behalf of the Pacific Islands Forum in 2020, refers directly to legal stability:

> As mentioned by the [first issues paper] and highlighted by many Member States, there is an overarching concern for preserving legal stability, security, certainty and predictability at the very centre of this topic. This would also be in line with the general purpose of the [United Nations Convention on the Law of the Sea], as reflected in its preamble. … The practice of our region, as well as the practice of other regions, demonstrates the interest of many Member States in preserving the legal stability and security of their baselines and of outer limits of maritime zones measured from the baselines. … In this context, we note with appreciation the preliminary conclusions set out in [paragraph] 104 of the first issues paper and particularly draw attention to the points in [subparagraphs] (e) and (f) that the Convention does not exclude an approach based on the preservation of baselines and outer limits once notifications have been deposited.[69]

35. Fiji, in its statement on behalf of the Pacific Islands Forum in 2021, explicitly clarifies the meaning of legal stability:

> In the interest of absolute clarity, particularly in light of the discussion in the Commission this year on this point, we stress that when we refer to the need for legal stability, security, certainty and predictability in relation to the subtopic of the law of the sea, we mean that this is achieved through the preservation of maritime zones and the rights and entitlements that flow from them despite climate change-related sea-level rise.[70]

It also specifies the following:

> The Pacific Islands Forum's approach to this issue … preserves maritime zones in the face of climate change-related sea-level rise. … We also recognize that

[66] Submission of the Kingdom of the Netherlands, pp. 2–3. Available from https://legal.un.org/ilc/guide/8_9.shtml#govcoms.
[67] Submission of Poland, p. 2. Available from https://legal.un.org/ilc/guide/8_9.shtml#govcoms.
[68] Submission of the United Kingdom, para. 6. Available from https://legal.un.org/ilc/guide/8_9.shtml#govcoms.
[69] Statement of Tuvalu, on behalf of the Pacific Islands Forum, in 2020. Available from https://www.un.org/en/ga/sixth/75/summaries.shtml#13mtg.
[70] Statement of Fiji, on behalf of the Pacific Islands Forum, in 2021, para. 12. Available from https://www.un.org/en/ga/sixth/76/summaries.shtml#19mtg.

> other countries, including small island developing States and low-lying States outside of our Pacific region, similarly require stability, security, certainty and predictability of their maritime zones.[71]

36. In the same statement, Fiji refers to the Declaration on Preserving Maritime Zones in the Face of Climate Change-related Sea-Level Rise, issued by the Pacific Islands Forum Leaders on 6 August 2021, as "a formal statement of Forum Members' view on how the [United Nations Convention on the Law of the Sea] rules on maritime zones apply in the situation of climate change-related sea-level rise" and "a good-faith interpretation of [the Convention] and a description of the current and intended future practice of our members in [the] light of this interpretation".[72]

37. Similar references to the importance of the Declaration in connection with legal stability can be found in many statements by Forum member States in 2021 and 2022. For example, Papua New Guinea, in its statement in 2021, noted the following:

> Through this Declaration, Pacific Island Forum Members intend to promote stability, security, certainty and predictability of maritime zones by clarifying our good-faith interpretation of [the Convention] as it applies to the relationship between climate change-related sea-level rise and maritime zones.
>
> The Declaration proclaims that the Pacific Islands Forum Members' maritime zones, as established and notified to the Secretary-General of the United Nations in accordance with [the Convention], and the rights and entitlements that flow from them, shall continue to apply, without reduction, notwithstanding any physical changes connected to climate change-related sea-level rise.
>
> … [T]his proclamation, and the current and intended future State practice in our region, is supported by [the Convention] and its underpinning legal principles, including those of stability, security, certainty and predictability. Furthermore, preserving maritime zones in the manner set out in the Declaration contributes to a just international response to climate change-related sea-level rise.[73]

Papua New Guinea also notes in its statement in 2022 that this approach of the Declaration "is in accord with the observations in paragraphs 104 (e) and 104 (f) of the first issues paper. We are pleased at the positive responses to the [Forum] Declaration that have been expressed to us by many members of the international community across different regions".[74] Similarly, New Zealand, in its statement in 2021, notes that the Declaration "promotes the principles of legal stability and certainty over maritime zones",[75] and, in its statement in 2022, refers again to "the approach set out" in the Declaration.[76] Similar references are made by Samoa, in its statement on behalf of the Pacific small island developing States in 2021;[77] by the Federated States of Micronesia in its statement in 2021;[78] and by Australia in its

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[71] Statement of Fiji, on behalf of the Pacific Islands Forum, in 2021 (see footnote 70 above), paras. 8 and 11.

[72] *Ibid.*, paras. 10 and 13.

[73] Statement of Papua New Guinea in 2021, p. 3. Available from https://www.un.org/en/ga/sixth/76/summaries.shtml#22mtg.

[74] Statement of Papua New Guinea in 2022, p. 2. Available from https://www.un.org/en/ga/sixth/77/summaries.shtml (29th plenary meeting).

[75] Statement of New Zealand in 2021, p. 4. Available from https://www.un.org/en/ga/sixth/76/summaries.shtml#21mtg.

[76] Statement of New Zealand in 2022, p. 2. Available from https://www.un.org/en/ga/sixth/77/summaries.shtml (29th plenary meeting).

[77] Statement of Samoa, on behalf of the Pacific small island developing States, in 2021. Available from https://www.un.org/en/ga/sixth/76/summaries.shtml#19mtg.

[78] Statement of the Federated States of Micronesia in 2021. Available from https://www.un.org/en/ga/sixth/76/summaries.shtml#21mtg.

statement in 2021 ("While preserving maritime zones to the greatest extent possible, the Declaration … is supported by the legal principles underpinning it, including legal stability, security, certainty and predictability").[79]

38. In its statement on behalf of the Pacific small island developing States in 2020, Fiji refers to efforts to ensure that "maritime zones could not be challenged or reduced as a result of sea-level rise and climate change", and calls on other member States to "recognize the need [to retain] maritime zones and the entitlements that flow from such maritime zones once delineated in accordance with [the United Nations Convention on the Law of the Sea]".[80] Samoa, in its statement on behalf of the Pacific small island developing States in 2021, goes into further detail on the need to maintain the stability of maritime zones and of the entitlements and rights of coastal States affected by sea-level rise:

> Currently, the mean low-water lines along coasts around the world as marked on large-scale charts officially recognized by the relevant coastal States are used as normal baselines for measuring maritime zones under [the Convention]. These physical points will likely change in the future due to climate change-related sea-level rise, but [the Convention does not explicitly state what this means for maritime zones and the rights and entitlements that flow from them. It is important that [the Convention] is applied in such a way that respects the rights and obligations in the Convention, including the rights and entitlements of island States flowing from their maritime zones. We note with appreciation the preliminary observations set out in [paragraph 104 of the first issues paper] and particularly draw attention to the points in [subparagraphs] (e) and (f) that [the Convention] does not exclude an approach based on the preservation of baselines and outer limits of maritime zones in the face of climate change-related sea-level rise once information about such maritime zones has been established and deposited with the … Secretary-General.
>
> … Many [Pacific small island developing States] have built on regional State practice by adopting domestic legislation purporting to maintain their maritime limits for perpetuity, including the description of maritime boundary lines by reference to geographic coordinates and defining the outer limits of our continental shelves beyond 200 nautical miles and reference to neutral decision-making processes under [the Convention]. … This practice grounds the observations of the Co-Chairs that, in order to preserve maritime zones and the rights and entitlements that flow from them, States parties [to the Convention] are not obligated to update their maritime zone coordinates or charts once deposited with the … Secretary-General.[81]

In its statement on behalf of the Pacific small island developing States in 2022, Samoa notes that "[Pacific Islands] Forum Leaders consider that maritime zones, once established and notified to the Secretary-General … in accordance with [the Convention], and the rights and entitlements that flow from them, shall continue to apply, without reduction, notwithstanding any physical changes connected to climate change-related sea-level rise".[82]

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[79] Statement of Australia in 2021, p. 2. Available from https://www.un.org/en/ga/sixth/76/summaries.shtml#22mtg.

[80] Statement of Fiji, on behalf of the Pacific small island developing States, in 2020, p. 2. Available from https://www.un.org/en/ga/sixth/75/summaries.shtml#13mtg.

[81] Statement of Samoa, on behalf of the Pacific small island developing States, in 2021 (see footnote 77 above).

[82] Statement of Samoa, on behalf of the Pacific small island developing States, in 2022, p. 2. Available from https://www.un.org/en/ga/sixth/77/summaries.shtml (28th plenary meeting).

39. Papua New Guinea, a Pacific Islands Forum member, refers to legal stability in its statement in 2020:

> For Papua New Guinea, as an archipelagic States, the need to preserve the legal stability, security, certainty and predictability of our maritime zones is of very high priority, including as regards our archipelagic waters. We therefore welcome and agree with the emphasis in the [Study Group Co-Chairs'] first issues paper on the need to preserve legal stability, security, certainty and predictability.[83]

In its statement in 2021, it is even more direct as to the meaning of legal stability:

> [W]e recognize the need for legal stability, security, certainty and predictability, to maintain peace and security and orderly relations between States, and to avoid conflict …. By "legal stability", we mean the need to preserve the baselines and outer limits of maritime zones. … [T]here are no provisions in [the Convention] that require States to keep under review and update their baselines and outer limits of maritime zones, once the relevant information has been deposited with the Secretary-General of the United Nations in accordance with [the Convention].[84]

It makes similar references in its statement in 2022.[85]

40. In its statement in 2020, the Federated States of Micronesia, another Pacific Islands Forum member, refers explicitly to legal stability:

> We agree with the [first issues paper]'s observations that the 1982 United Nations Convention on the Law of the Sea … does not contemplate the phenomenon of sea-level rise, does not prohibit States parties from preserving for perpetuity their maritime zones and the entitlements that flow from them once those zones are delineated in accordance with the Convention, and should be interpreted and applied in a manner that fosters legal stability, security, certainty and predictability.[86]

It continues by providing information about its State practice in this regard:

> [E]arlier this year, [the Federated States of] Micronesia officially deposited its lists of geographical coordinates of points and accompanying illustrative maps of our maritime zones with the Secretary-General …. In that process, [the Federated States of] Micronesia formally included with its deposit a set of written observations which, among other things, underscored that [the Federated States of] Micronesia is a specially-affected State with respect to sea-level rise and climate change; stated [the Federated States of] Micronesia's understanding that it is not obliged to keep under review the maritime zones reflected in its official deposit of lists of geographical coordinates of points and accompanying illustrative maps, as delineated in accordance with the Convention; and announced that [the Federated States of] Micronesia intends to maintain these maritime zones in line with that understanding, notwithstanding climate change-induced sea-level rise. These observations have been included in the formal maritime zone notification circulated earlier this year by the Secretary-General as depositary of the Convention.[87]

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[83] Statement of Papua New Guinea in 2020, p. 3. Available from https://www.un.org/en/ga/sixth/75/summaries.shtml#13mtg.

[84] Statement of Papua New Guinea in 2021 (see footnote 73 above), pp. 2–3.

[85] Statement of Papua New Guinea in 2022 (see footnote 74 above).

[86] Statement of the Federated States of Micronesia in 2020, p. 1. Available from https://www.un.org/en/ga/sixth/75/summaries.shtml#13mtg

[87] *Ibid.*, p. 2.

It is even more explicit in its statement in 2021:

> [The Federated States of] Micronesia stresses that when we speak of the importance of legal stability, security, certainty and predictability in connection with the law of the sea elements of the sea-level rise topic, we mean the need to maintain maritime zones without reduction, as well as the rights and entitlements that flow from them, regardless of climate change-related sea-level rise. … [T]he rights and entitlements that flow from maritime zones that are originally established by a coastal State must never be reduced solely on the basis of climate change-related sea-level rise. … [T]he preservation of maritime zones and the rights and entitlements that flow from them is the most suitable and equitable approach in order to achieve that goal.[88]

41. In its statement in 2020, Tonga, also a Pacific Islands Forum member, takes the same line:

> Tonga maintains that the baselines which determine our territorial boundaries, once established under the United Nations Convention on the Law of the Sea, should remain unchanged despite the effects of sea-level rise and any climate change modification that might ensue. Our sovereignty must not be compromised to that effect.[89]

It is more explicit in its statement in 2021:

> The catastrophic impacts of rising sea levels cannot be emphasized enough.
>
> This unprecedented reality was not contemplated 40 years ago when the legal regime for ocean governance under the 1982 United Nations Convention on the Law of the Sea … was being negotiated. The current deliberations of the Commission are key to filling this gap and strengthening the [Convention] framework to address the modern realities of sea-level rise.
>
> It is for the aforementioned [reasons] that our Pacific Islands Forum leaders are committed to ensuring [that] maritime zones of Pacific Member States are delineated in accordance with [the Convention] which should not be challenged or reduced due to climate change-induced sea-level rise. We maintain the importance of preserving baselines and outer limits of maritime zones measured therefrom and their entitlements, despite climate change-induced sea-level rise. [The Convention must be interpreted and applied in a way that respects the rights and sovereignty of vulnerable small island States. …
>
> We welcome the Commission's … preliminary conclusion in [paragraph 104 of the first issues paper] that preserving maritime zones once notifications have been deposited can be consistent with the Convention.[90]

42. In its statement in 2020, Solomon Islands, another Pacific Islands Forum member, also refers to fixed baselines in the context of stability:

> [The United Nations Convention on the Law of the Sea] does not adequately consider rapidly rising sea levels. This ambiguity was underscored in the Study Group's issues paper. …
>
> My delegation would like to reaffirm its opinion that maritime boundaries and archipelagic baselines are fixed. Once national maritime zones are determined in accordance with [the Convention] and deposited with the Secretary-General,

[88] Statement of the Federated States of Micronesia in 2021 (see footnote 78 above).
[89] Statement of Tonga in 2020. Available from https://www.un.org/en/ga/sixth/75/summaries.shtml#13mtg.
[90] Statement of Tonga in 2021, pp. 1–2. Available from https://www.un.org/en/ga/sixth/76/summaries.shtml#22mtg.

> our interpretation of international law is that they are not subject to change, despite sea-level rise. Fixed baselines contribute to the certainty, predictability, and stability of maritime boundaries in international law. Fixed baselines ensure fair and equitable results, by preserving existing maritime entitlements which [small island developing States] and so many other States rely on.
>
> This stability is of great importance to Solomon Islands …. Consistent with international law and regional practice, Solomon Islands has deposited geographic coordinates for nearly all of its maritime zones with [the Division for Ocean Affairs and the Law of the Sea]. These zones are fixed and are not to be altered, despite sea-level rise.[91]

Solomon Islands repeats the same position in its statement in 2021:

> Once national maritime zones are determined in accordance with [the Convention] and deposited with the Secretary-General, our interpretation of international law is that they are not subject to change, despite sea-level rise. The foundational principles of certainty, predictability and stability in international law demand this result.[92]

43. In its statement in 2021, Tuvalu, another Pacific Islands Forum member, also refers explicitly to legal stability: "As mentioned in the [first issues paper] and highlighted by many Member States, there is an overarching concern for *preserving legal stability, security, certainty and predictability* at the very centre of this topic. This would also be in line with the general purpose of [the United Nations Convention on the Law of the Sea], as reflected in its preamble."[93]

44. In its statement in 2021, Australia, also a Pacific Islands Forum member, refers to the issue of stability in the following terms:

> It is important that we protect our maritime zones, established in accordance with [the United Nations Convention on the Law of the Sea], in the face of sea-level rise.
>
> … [T]he Declaration [on Preserving Maritime Zones in the Face of Climate Change-related Sea-Level Rise] adopted by Pacific Islands Forum Leaders on 6 August 2021 … is supported by the legal principles underpinning it, including legal stability, security, certainty and predictability.
>
> Australia is committed to working together with all States to preserve maritime zones and the rights and entitlements that flow from them … in a manner that is consistent with international law, particularly [the Convention].[94]

45. In its statement in 2020, New Zealand, another Pacific Islands Forum member, directly refers to legal stability: "New Zealand agrees that the principle of stability and certainty underlies [the United Nations Convention on the Law of the Sea], along with justice and equity, good faith, reciprocity and the duty of States to cooperate. … [T]hese principles are all relevant to the issue of sea-level rise and international law."[95] It goes further in its statement in 2021:

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[91] Statement of Solomon Islands in 2020, pp. 2–3. Available from https://www.un.org/en/ga/sixth/75/summaries.shtml#13mtg.

[92] Statement of Solomon Islands in 2021, p. 1. Available at https://www.un.org/en/ga/sixth/76/summaries.shtml#22mtg.

[93] Statement of Tuvalu in 2021, p. 2. Available at https://www.un.org/en/ga/sixth/76/summaries.shtml#23mtg.

[94] Statement of Australia in 2021 (see footnote 79 above), p. 2.

[95] Statement of New Zealand in 2020, p. 3. Available from https://www.un.org/en/ga/sixth/75/summaries.shtml#13mtg.

> We recall that [the Convention] was adopted as an integral package containing a delicate balance of rights and obligations, which are integral to many States' development pathways. It is in the interests of the international community to preserve this balance and to ensure [that] there is certainty, security, stability and predictability over maritime zones. New Zealand is committed to working constructively with other States to this end.[96]

It also refers to the "urgency" of the "securing maritime zones for future generations", to the Pacific Islands Forum Declaration on Preserving Maritime Zones in the Face of Climate Change-related Sea-Level Rise, issued by the Pacific Islands Forum Leaders on 6 August 2021, and to the Declaration of the Heads of State and Government of the Alliance of Small Island States, issued in September 2021.[97]

46. Belize, in its statement on behalf of the Alliance of Small Island States in 2020, points in the same direction:

> [W]e agree with the observation of the first issues paper that nothing prevents Member States from depositing geographic coordinates or large-scale charts concerning the baselines and outer limits of maritime zones measured from baselines, in accordance with [the United Nations Convention on the Law of the Sea], and then not updating those coordinates or charts, in order to preserve their entitlements. … [A]s indicated in the first issues paper, an approach responding adequately to the need to preserve legal stability, security, certainty and predictability is one based on the preservation of baselines and outer limits of maritime zones measured therefrom and their entitlements.
>
> … [T]here is a body of State practice under development regarding the preservation of maritime zones and the entitlements that flow from them. Many small island and low-lying States have taken political and legislative measures to preserve their baselines and the existing extent of their maritime zones, through domestic legislation, maritime boundary agreements, and deposit of charts or coordinates and declarations attached thereto.
>
> … This State practice grounds the observations of the Co-Chairs that, in order to preserve maritime zones and the entitlements that flow from them, State Parties are not obligated to update their coordinates or charts once deposited.
>
> … Nevertheless, the absence of a general customary rule does not have an effect on the interpretation of the Convention, based on subsequent practice of its States parties.[98]

Antigua and Barbuda, in its statement on behalf of the Alliance of Small Island States, in 2021, reinforces the meaning attached to legal stability as expressed in 2020: "For small island developing States, legal stability, security, certainty and predictability in relation to our maritime zones are of paramount importance. As we stated last year, this is achieved through the preservation of baselines and outer limits of maritime zones measured therefrom and their entitlements".[99] Referring to the Declaration of the Heads of State and Government of the Alliance of Small Island States, it noted the following:

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[96] Statement of New Zealand in 2021 (see footnote 75 above), pp. 4–5. Available from https://www.un.org/en/ga/sixth/76/summaries.shtml#21mtg.

[97] *Ibid.*, p. 4..

[98] Statement of Belize, on behalf of the Alliance of Small Island States, in 2020, pp. 2–3. Available from https://www.un.org/en/ga/sixth/75/summaries.shtml#13mtg.

[99] Statement of Antigua and Barbuda, on behalf of the Alliance of Small Island States, in 2021, p. 2. Available from https://www.un.org/en/ga/sixth/76/summaries.shtml#19mtg.

> "This statement reflects [the Alliance's] interpretation of a lack of an obligation under [the Convention] to review or update baselines and outer limits once deposited with the Secretary-General, and of the practice of many [small island developing States] on this issue. This echoes the statement by the Heads of State and Government of the Pacific Islands Forum in August, and the preliminary observations in the first issues paper.[100]

Antigua and Barbuda goes on to reiterate the observations made by Belize on behalf of the Alliance, in 2020, regarding the development of State practice regarding the preservation of baselines and the existing extent of their maritime zones.[101] In its statement on behalf of the Alliance of Small Island States in 2022, Antigua and Barbuda refers again to the Declaration of the Heads of State and Government of the Alliance of Small Island States of September 2021:

> In that negotiated declaration, our [Alliance] Leaders affirmed that there is no obligation under [the Convention] to keep baselines and outer limits of maritime zones under review [or] to update charts or lists of geographical coordinates once deposited with the Secretary-General …, and that such maritime zones and the rights and entitlements that flow from them shall continue to apply without reduction, notwithstanding any physical changes connected to climate change-related sea-level rise. We are heartened to see that other States, including some of the largest coastal States, have adopted a similar understanding of international law, recognizing the need to ensure legal stability, security, certainty and predictability.[102]

47. Asian States include similar references to legal stability in their statements.

48. For instance, Maldives, in its statement in 2020, refers to the interpretation of the United Nations Convention on the Law of the Sea in the context of legal stability:

> [O]ur interpretation of [the Convention] is that once a State deposits the appropriate charts and/or geographic coordinates with the Secretary-General, these entitlements are fixed and will not be altered by any subsequent physical changes to a State's geography as a result of sea-level rise. Baselines and maritime entitlements remain consistent. Stability, certainty, equity and fairness all require it.
>
> … States are not prohibited under [the Convention] from maintaining previously established baselines, and other limits of maritime zones measured from those baselines, in order to preserve their maritime entitlements.
>
> … Maldives also agrees with the observation of the first issues paper that there is … State practice [of] freezing baselines and outer limits of maritime zones and increasing *opinio juris* on these maritime entitlements.[103]

Maldives repeats this reasoning in its statement in 2021:

> [W]e do not interpret [the Convention] to require regular updates to those submissions. Once a State has deposited the relevant charts and maritime zones, baselines and maritime entitlements are fixed and cannot be altered by any subsequent physical changes to a State's physical geography as a consequence of sea-level rise. This interpretation is necessary to support the goals of stability,

[100] *Ibid.*, p. 2.
[101] *Ibid.*, pp. 2–3.
[102] Statement of Antigua and Barbuda, on behalf of the Alliance of Small Island States, in 2022, para. 4. Available from https://www.un.org/en/ga/sixth/77/summaries.shtml (28th plenary meeting).
[103] Statement of Maldives in 2020, pp. 4–6. Available at https://www.un.org/en/ga/sixth/75/summaries.shtml#13mtg.

> security, certainty and predictability as outlined in the first issues paper and discussed in the report [of the Commission on its seventy-second session].[104]

49. Viet Nam, in its statement in 2021, refers explicitly to the issue of legal stability, and implicitly to the way in which to interpret the United Nations Convention on the Law of the Sea in order to ensure such stability: "The approach to address the implications of sea-level rise should ensure the stability and security in international relations, including the legal stability, security, certainty and predictability, without involving the question of amending and/or supplementing [the Convention]."[105]

50. Sri Lanka, in its statement in 2021, refers to the way the United Nations Convention on the Law of the Sea can be interpreted to respond to the effects of sea-level rise:

> A fixed baseline approach to the establishment of the outer limits of maritime zones meant that the maritime boundaries of States were permanent and their baselines would remain unchanged even if coastal areas were inundated as a result of sea-level rise. The United Nations Convention on the Law of the Sea did not exclude the possibility of resorting to either ambulatory or fixed baselines. Perhaps it was time for the Commission to examine whether or not the Convention could be modified by mutual consent or based on the subsequent practice of all States parties.[106]

51. Malaysia, in its statement in 2021, is also clear: "Malaysia shares the view [of] the majority of States that maritime baselines, limits and boundaries should be fixed in perpetuity regardless of sea-level rise".[107] Similarly, Thailand, in its statement in 2021, notes the following: "Thailand believes that in order to maintain peace, stability and friendly relations among States, their rights in relation to maritime zones and boundaries as guaranteed by [the United Nations Convention on the Law of the Sea] must be protected."[108] Thailand repeats this assertion in its statement in 2022.[109]

52. Indonesia, in its statement in 2021, also refers to legal stability:

> [W]e concur that the principles of certainty, security and predictability and the preservation of the balance of rights and obligations should be maintained.
>
> … [C]harts or lists of geographical coordinates of baselines that have been deposited with the Secretary-General pursuant to articles 16 (2) and 47 (9) of [the United Nations Convention on the Law of the Sea] shall continue to be relevant.
>
> We believe that … maintaining existing maritime baselines and limits corresponding to the principles of certainty, security and predictability … also reflects the interests of many States in connection with the effects of sea-level rise.[110]

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[104] Statement of Maldives in 2021, p. 3. Available at https://www.un.org/en/ga/sixth/76/summaries.shtml#21mtg.

[105] Statement of Viet Nam in 2021. Available at https://www.un.org/en/ga/sixth/76/summaries.shtml#21mtg.

[106] Statement of Sri Lanka in 2021. See A/C.6/76/SR.21, para. 111.

[107] Statement of Malaysia in 2021, p. 3. Available at https://www.un.org/en/ga/sixth/76/summaries.shtml#21mtg.

[108] Statement of Thailand in 2021, para. 5. Available from https://www.un.org/en/ga/sixth/76/summaries.shtml#22mtg.

[109] Statement of Thailand in 2022, para. 7. Available from https://www.un.org/en/ga/sixth/77/summaries.shtml (28th plenary meeting).

[110] Statement of Indonesia in 2021, p. 2. Available from https://www.un.org/en/ga/sixth/76/summaries.shtml#22mtg.

In its statement in 2022, Indonesia refers, *inter alia*, to "the need for stability and security in the law of the sea".[111]

53. The Philippines, in its statement in 2021, notes the following:

> The Philippines would caution against inference in favour of ambulatory baselines, absent a showing of State practice and *opinio juris* on the matter. … [P]roceeding on the basis of legal stability, security, certainty and predictability in international law is a welcome approach. … [T]he principle of immutability of borders …, in accordance with the principle of *uti possidetis juris*, has value in this regard. An analogous principle could be considered in favour of permanent baselines.[112]

54. Jordan, in its statement in 2021, considers that "any outcome … should take into account legal certainty, equity and stability, and balance the legitimate interests of all relevant States and the international community as a whole".[113]

55. African States also include references to legal stability in their statements.

56. Sierra Leone, in its statement in 2021, includes the following reference to legal stability: "We ... note with interest that the Study Group welcomed the suggestion that the meaning of 'legal stability' … seems to suggest 'the need to preserve the baselines and outer limits of maritime zones', in the views expressed by Member States".[114] Egypt, in its statement in 2021, asserted that "maritime limits should be fixed rather than ambulatory".[115] Algeria, in its statement in 2021, "welcomed the fact that the Study Group on the topic had examined the practice of African States regarding maritime delimitation and confirmed that the principles of international law supported fixed baselines".[116]

57. Latin American States also include references to legal stability in their statements.

58. For instance, Cuba, in its statement in 2021, notes the following:

> Cuba is aware that the United Nations Convention on the Law of the Sea does not offer answers to the questions raised by the topic, because of the moment in history when it was adopted. Nevertheless, it is essential to ensure unconditional compliance with the provisions of the Convention concerning maritime limits and boundaries, even when the latter undergo physical changes owing to sea-level rise.[117]

In its statement in 2022, Cuba repeats these assertions and adds that, if baselines or maritime boundaries were subject to change due to sea-level rise, "[t]his would imply

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[111] Statement of Indonesia in 2022, para. 17. Available from https://www.un.org/en/ga/sixth/77/summaries.shtml (29th plenary meeting).

[112] Statement of the Philippines in 2021, pp. 2–3. Available from https://www.un.org/en/ga/sixth/76/summaries.shtml#23mtg.

[113] Statement of Jordan in 2021, p. 6. Available from https://www.un.org/en/ga/sixth/76/summaries.shtml#24mtg.

[114] Statement of Sierra Leone in 2021, para. 13. Available from https://www.un.org/en/ga/sixth/76/summaries.shtml#20mtg.

[115] Statement of Egypt in 2021. Available from https://www.un.org/en/ga/sixth/76/summaries.shtml#20mtg (Arabic only). See also A/C.6/76/SR.20, para. 58.

[116] Statement of Algeria in 2021. Available from https://www.un.org/en/ga/sixth/76/summaries.shtml#22mtg (Arabic only). See also A/C.6/76/SR.22, para. 99.

[117] Statement of Cuba in 2021, p. 4. Available from https://www.un.org/en/ga/sixth/76/summaries.shtml#21mtg (Spanish only). See also A/C.6/76/SR.21, para. 31.

an additional expense that would be very difficult for small island States to assume, in addition to the legal insecurity generated owing to the loss of natural resources necessary for the economy of these States".[118]

59. Chile, in its statement in 2021, explicitly refers to the meaning of legal stability:

> Chile agrees that the principles of stability, security, certainty and predictability must be applied in the analysis of the issues contained in the mandate [of the Study Group], it being understood that, as expressed by the delegations of States affected by sea-level rise, "legal stability" means the need to preserve the baselines and outer limits of maritime zones.
>
> … The concept of ambulatory baselines, if established, would be of particular concern, and the immediate effect would be a loss of sovereignty and jurisdictional rights for coastal and island States and a corresponding reduction in their maritime zones.
>
> … [I]f the baselines and the outer limits of maritime zones of a coastal or archipelagic State have been duly determined in accordance with the United Nations Convention on the Law of the Sea, there should be no requirement that those baselines and outer limits be recalculated in the event of sea-level changes that affect the geographical reality of the coastline.[119]

60. Argentina, in its statement in 2021, is similarly direct:

> … [W]ith respect to the effects of sea-level rise on the boundaries of maritime spaces, in terms of legal certainty it seems appropriate to consider that, if the baselines and the outer limits of maritime spaces of a coastal or archipelagic State have been duly determined in accordance with the requirements of the United Nations Convention on the Law of the Sea, which also reflects customary international law, there should be no requirement to readjust these baselines and limits in the event of sea-level changes that affect the geographical reality of the coastline.[120]

61. Costa Rica, in its statement in 2021, notes the following:

> Costa Rica would like to highlight … the need to apply the principles of stability, security, certainty and predictability in order to preserve the balance of rights and obligations between coastal States and other States.
>
> … Costa Rica welcomes the consideration [by the Study Group] of the judgment of the [International Court of Justice] that served to establish the maritime boundaries between Costa Rica and Nicaragua, using a moving delimitation line in a segment that connects the coast with the fixed point of the start of the maritime boundary. As this case shows, in some situations where the coastal geomorphology is variable, a solution such as the one determined by the Court in that specific case is an ideal alternative for providing security and stability to the parties despite frequent variations in the land boundary terminus.[121]

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[118] Statement of Cuba in 2022, p. 4. Available from https://www.un.org/en/ga/sixth/77/summaries.shtml (27th plenary meeting; Spanish only).

[119] Statement of Chile in 2021, pp. 5–6. Available from https://www.un.org/en/ga/sixth/76/summaries.shtml#21mtg (Spanish only). See also A/C.6/76/SR.21, paras. 55–56.

[120] Statement of Argentina in 2021, p. 3. Available from https://www.un.org/en/ga/sixth/76/summaries.shtml#22mtg (Spanish only). See also A/C.6/76/SR.22, para. 32.

[121] Statement of Costa Rica in 2021, pp. 2–3. Available from https://www.un.org/en/ga/sixth/76/summaries.shtml#23mtg (Spanish only).See also A/C.6/76/SR.23, paras. 13–14.

62. European Member States also include references to legal stability in their statements.

63. For instance, Iceland, in its statement on behalf of the Nordic countries (Denmark, Finland, Iceland, Norway and Sweden) in 2021, refers to stability, but in more general terms:

> [The United Nations Convention on the Law of the Sea] provides predictability and stability, and its universal and unified character should be safeguarded and strengthened. Like any other legal instrument, the Convention should be interpreted in [the] light of changing circumstances. That said, it seems premature at this juncture for the Nordic countries to pronounce on the precise legal implications of sea-level rise in the context of [the Convention].[122]

64. The Kingdom of the Netherlands, in its statement in 2021, also refers to legal stability:

> The [Kingdom of the] Netherlands is guided by the notions of legal certainty, stability and security while remaining firmly grounded in the primacy of the [United Nations Convention on the Law of the Sea]. … [S]ome potential solutions deserve more consideration. In particular, we would like to note that the option of merely securing the outer limits of established maritime zones to prevent States from losing maritime zones has not received much attention in the [first issues paper].[123]

65. Italy, in its statement in 2021, directly refers to legal stability:

> Italy would like to stress the importance of stability, security and legal certainty with regard to baselines and maritime delimitation. … It is also important to underline that any principle of permanency of baselines, which have been established and deposited in accordance with international law, must refer solely to sea-level rise induced by climate change and not to other circumstances, including land accretion.[124]

66. Romania, in its statement in 2021, notes that "[t]he increasing challenges that sea-level rise pose are beyond doubt, including from the perspective of ensuring security and stability around the world". It refers to the debate in the Study Group regarding ambulatory versus fixed baselines: "our legislation could be interpreted as favouring an ambulatory system of baselines, though a connection with the specific case of sea-level rise is difficult to make, given the particular character of the Black Sea as a semi-enclosed sea and less exposed to this phenomenon".[125] It is more explicit in its statement in 2022, stressing "that preserving the baselines and outer limits of maritime zones is crucial to legal stability".[126]

67. Germany, in its statement in 2022, refers to its 2022 submission,[127] in which "we explain how we interpret the [rules under United Nations Convention on the Law of the Sea] regarding the stability of baselines. In our view, a contemporary reading of these [Convention] rules gives the coastal State the right to update its baselines when

[122] Statement of Iceland, on behalf of the Nordic countries (Denmark, Finland, Iceland, Norway and Sweden), in 2021, p. 5. Available from https://www.un.org/en/ga/sixth/76/summaries.shtml#19mtg.

[123] Statement of the Kingdom of the Netherlands in 2021, pp. 5–6. Available from https://www.un.org/en/ga/sixth/76/summaries.shtml#20mtg.

[124] Statement of Italy in 2021, p. 4. Available from https://www.un.org/en/ga/sixth/76/summaries.shtml#20mtg.

[125] Statement of Romania in 2021, pp. 4–5. Available from https://www.un.org/en/ga/sixth/76/summaries.shtml#21mtg.

[126] Statement of Romania in 2022, p. 3. Available from https://www.un.org/en/ga/sixth/77/summaries.shtml (27th plenary meeting).

[127] See footnote 62 above.

the sea level rises or falls or the coastline moves but it does not require the coastal State to do so".[128]

68. The Czech Republic, in its statement in 2021, refers to legal stability in more general terms: "In order to contribute to legal stability, certainty and predictability in dealing with these challenges, it is of paramount importance that the work of the Commission and its Study Group on this topic proceed in strict adherence to the existing legal regime of the law of the sea, in particular the 1982 [United Nations] Convention on the Law of the Sea".[129] Slovenia also refers to the issue in its statement in 2021: "The immense challenge of sea-level rise, relating to possible effects of sea-level rise on baselines [and] maritime zones …, as well as on the exercise of sovereign rights and jurisdiction, underline the demand for a multifaceted, in-depth approach and new solutions where legal certainty and predictability should remain one of the primary considerations."[130]

69. Estonia, in its statement in 2021, includes clear references to legal stability in connection with the solution of fixed baselines and outer limits, which can be based on interpretation of the United Nations Convention on the Law of the Sea:

> [W]e welcome the conclusion in the first issues paper that the aim of the Study Group should be to find solutions to the challenges connected to sea-level rise in the [Convention]. The need to preserve legal stability, security, certainty and predictability in international relations has to be kept in mind. We are satisfied that the Study Group has found possibilities to interpret the [Convention] in [a] way that it corresponds to the need for the stability in inter-State relations.
>
> We support the idea to stop updating notifications, in accordance with the [Convention], regarding the baselines and outer limits of maritime zones measured from the baselines and, after the negative effects of sea-level rise occur, in order to preserve … States' entitlements.[131]

70. The Russian Federation, in its statement in 2021, notes that "one of the key issues in this respect is the question of baselines … [I]t is important to find a practical solution that is aligned with [the United Nations Convention on the Law of the Sea], on one hand, and reflects the concerns of States affected by sea-level rise, on the other".[132]

71. Cyprus, in its statement in 2021, notes the following:

> [A]ffected coastal States should be entitled to designate permanent baselines pursuant to article 16 of [the United Nations Convention on the Law of the Sea], which would withstand any subsequent regression of the low-water line. This view is in conformity with [the Convention] and aims at safeguarding coastal States' legal entitlements in [the] light of the ongoing, worrisome developments generated by climate change.

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[128] Statement of Germany in 2022, p. 4. Available from https://www.un.org/en/ga/sixth/77/summaries.shtml (27th plenary meeting).

[129] Statement of the Czech Republic in 2021, pp. 3–4. Available from https://www.un.org/en/ga/sixth/76/summaries.shtml#21mtg.

[130] Statement of Slovenia in 2021, p. 4. Available from https://www.un.org/en/ga/sixth/76/summaries.shtml#21mtg.

[131] Statement of Estonia in 2021, p. 4. Available from https://www.un.org/en/ga/sixth/76/summaries.shtml#21mtg.

[132] Statement of the Russian Federation in 2021. Available from https://www.un.org/en/ga/sixth/76/summaries.shtml#22mtg (Russian only). See also A/C.6/76/SR.22, para. 93.

> Moreover, baselines must be permanent and not ambulatory so as to achieve greater predictability ….
>
> … [I]t is evident that the obligation under article 16 of [the Convention] for the coastal State to show the baselines for measuring the breadth of the territorial sea, or the limits "derived therefrom", on charts or a list of geographical coordinates of points is meant to establish legal security. No indication is provided for that these charts are to be periodically revised.[133]

Cyprus uses similar wording in its statement in 2022.[134]

72. According to Greece, in its statement in 2021:

> [P]redictability, stability and certainty, which are inherent to the [United Nations Convention on the Law of the Sea] and guide its application, require the preservation of baselines and of the outer limits of maritime zones, as well as of maritime entitlements deriving therefrom, in accordance with the [Convention]. … As rightly observed, the Convention imposes no obligation of reviewing or recalculating baselines or the outer limits of maritime zones established in accordance with its provisions."[135]

73. Croatia, in its statement in 2022, clearly states that it "holds the view that baselines are fixed and once determined national maritime zones are not subject to change, despite sea-level rise".[136]

74. Bulgaria, in its statement in 2022, also refers to legal stability in connection with the stability of baselines:

> [The United Nations Convention on the Law of the Sea] does not contain a legal obligation for States parties to regularly review and update their baselines and the borders of their maritime zones, established in accordance with the applicable rules of [the Convention]. Conclusions that suggest that a periodic review should be carried out by States could potentially have a negative impact on … relations between coastal States and may affect … stability in different regions of the world.[137]

75. The European Union, in its statement in 2022, notes, *inter alia*, that "there is no express obligation on States under the United Nations Convention on the Law of the Sea to periodically review and update all the charts and coordinates [that] they have drawn (or agreed) and duly published in accordance with the relevant provisions of the Convention".[138]

76. Furthermore, the United States of America, in its statement in 2022, notes the following:

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[133] Statement of Cyprus in 2021, pp. 2–3. Available from https://www.un.org/en/ga/sixth/76/summaries.shtml#22mtg.

[134] Statement of Cyprus in 2022, pp. 1–3. Available from https://www.un.org/en/ga/sixth/77/summaries.shtml (28th plenary meeting).

[135] Statement of Greece in 2021, pp. 4–5. Available from https://www.un.org/en/ga/sixth/76/ilc.shtml (statement II).

[136] Statement of Croatia in 2022, p. 3. Available from https://www.un.org/en/ga/sixth/77/summaries.shtml (25th plenary meeting).

[137] Statement of Bulgaria in 2022, p. 3. Available from https://www.un.org/en/ga/sixth/77/summaries.shtml (29th plenary meeting).

[138] Statement of the European Union (in its capacity as observer; also on behalf of the candidate countries Albania, Montenegro, North Macedonia and Serbia; the stabilization and association process country Bosnia and Herzegovina; and, in addition, Georgia, the Republic of Moldova and Ukraine) in 2022, para. 8. Available from https://www.un.org/en/ga/sixth/77/summaries.shtml (26th plenary meeting).

> [T]he United States … has announced a new policy on sea-level rise and maritime zones. Under this policy, which recognizes that new trends are developing in the practices and views of States on the need for stable maritime zones in the face of sea-level rise, the United States will work with other countries toward the goal of lawfully establishing and maintaining baselines and maritime zone limits and will not challenge such baselines and maritime zone limits that are not subsequently updated despite sea-level rise caused by climate change.[139]

3. Collective declarations by regional bodies

77. After the issuance of the first issues paper in 2020 and the debate on it in the Commission in 2021, the most notable collective action by States was the Declaration on Preserving Maritime Zones in the Face of Climate Change-related Sea-Level Rise, issued by the 18 Pacific Islands Forum Leaders on 6 August 2021.[140] The Declaration contains important references to legal stability in relation to the United Nations Convention on the Law of the Sea and sea-level rise. For example, the preamble includes the following text:

> *Recalling* … that the Convention was adopted as an integral package containing a delicate balance of rights and obligations, and was prompted by the desire to settle, in a spirit of mutual understanding and cooperation, all issues relating to the law of the sea, and establishes, with due regard for the sovereignty of all States, an enduring legal order for the seas and oceans,
>
> *Recognizing* the principles of legal stability, security, certainty and predictability that underpin the Convention and the relevance of these principles to the interpretation and application of the Convention in the context of sea-level rise and climate change,
>
> …
>
> *Acknowledging* that the relationship between climate change-related sea-level rise and maritime zones was not contemplated by the drafters of the Convention at the time of its negotiation, and that the Convention was premised on the basis that, in the determination of maritime zones, coastlines and maritime features were generally considered to be stable.

78. In the operative part of the Declaration, the Pacific Islands Forum Leaders:

> *Affirm* that the Convention imposes no affirmative obligation to keep baselines and outer limits of maritime zones under review nor to update charts or lists of

[139] Statement of the United States in 2022, p. 2. Available from https://www.un.org/en/ga/sixth/77/summaries.shtml (27th plenary meeting). See also United States, White House, "Roadmap for a 21st-century US-Pacific island partnership", fact sheet, 29 September 2022: "Sea-level rise: The United States is adopting a new policy on sea-level rise and maritime zones. This policy recognizes that new trends are developing in the practices and views of States on the need for stable maritime zones in the face of sea-level rise, is mindful of the Pacific Island Forum's Declaration Preserving Maritime Zones in the Face of Climate Change-related Sea-Level Rise, commits to working with Pacific island States and other countries toward the goal of lawfully establishing and maintaining baselines and maritime zone limits, and encourages other countries to do the same."

[140] See https://www.forumsec.org/2021/08/11/declaration-on-preserving-maritime-zones-in-the-face-of-climate-change-related-sea-level-rise/. The Pacific Islands Forum is a regional organization comprising 18 members: Australia, Cook Islands, Fiji, French Polynesia, Kiribati, Marshall Islands, Micronesia (Federated States of), Nauru, New Caledonia, New Zealand, Niue, Palau, Papua New Guinea, Samoa, Solomon Islands, Tonga, Tuvalu and Vanuatu.

geographical coordinates once deposited with the Secretary-General of the United Nations,

Record the position of Members of the Pacific Islands Forum that maintaining maritime zones established in accordance with the Convention, and rights and entitlements that flow from them, notwithstanding climate change-related sea-level rise, is supported by both the Convention and the legal principles underpinning it,

Declare that once having, in accordance with the Convention, established and notified our maritime zones to the Secretary-General of the United Nations, we intend to maintain these zones without reduction, notwithstanding climate change-related sea-level rise,

Further declare that we do not intend to review and update the baselines and outer limits of our maritime zones as a consequence of climate change-related sea-level rise, and

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

79. That Declaration was preceded, *inter alia*, by the Leaders Declaration adopted at the Ninth Pacific Islands Leaders Meeting, on 2 July 2021. In paragraph 12 of this Declaration, the Pacific Islands Leaders "jointly noted the importance of protecting maritime zones established in accordance with [the United Nations Convention on the Law of the Sea], and concurred to further discuss the issue of preserving maritime zones, properly delineated in accordance with [the Convention, in the face of climate change-related sea-level rise including at the multilateral level".[141]

80. Following the adoption of the Declaration by the Pacific Islands Forum Leaders, the Declaration of the Heads of State and Government of the Alliance of Small Island States was adopted, on 22 September 2021.[142] In paragraph 41 of the Declaration, the leaders of the Alliance of Small Island States:

Affirm that there is no obligation under the United Nations Convention on the Law of the Sea to keep baselines and outer limits of maritime zones under review nor to update charts or lists of geographical coordinates once deposited with the Secretary-General of the United Nations, and that such maritime zones and the rights and entitlements that flow from them shall continue to apply without reduction, notwithstanding any physical changes connected to climate change-related sea-level rise.

According to Antigua and Barbuda, in its statement on behalf of the Alliance of Small Island States in 2021:

[141] See footnote 59 above.

[142] See https://www.aosis.org/launch-of-the-alliance-of-small-island-states-leaders-declaration/. The Alliance of Small Island States is a regional organization comprising 39 members, from the Caribbean, the Pacific, Africa, the Indian Ocean and South-East Asia: Antigua and Barbuda, Bahamas, Barbados, Belize, Cabo Verde, Comoros, Cook Islands, Cuba, Dominica, Dominican Republic, Fiji, Grenada, Guinea-Bissau, Guyana, Haiti, Jamaica, Kiribati, Maldives, Marshall Islands, Mauritius, Micronesia (Federated States of), Nauru, Niue, Palau, Papua New Guinea, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Samoa, Sao Tome and Principe, Seychelles, Singapore, Solomon Islands, Suriname, Timor-Leste, Tonga, Trinidad and Tobago, Tuvalu and Vanuatu.

> [The Declaration] reflects [the Alliance's] interpretation of a lack of an obligation under [the Convention] to review or update baselines and outer limits once deposited with the Secretary-General, and of the practice of many [small island developing States] on this issue. This echoes the statement by the Heads of State and Government of the Pacific Islands Forum in August, and the preliminary observations in the first issues paper .[143]

81. The Declaration by the Pacific Islands Forum Leaders was endorsed by further two organizations: the Climate Vulnerable Forum[144] and the Organization of African, Caribbean and Pacific States.[145] The Dhaka-Glasgow Declaration of the Climate Vulnerable Forum, of 2 November 2021, provides the following: "We, Heads of State and Government, and high representatives, of the Climate Vulnerable Forum … call on all States to support the principles outlined in the Pacific Islands Forum [Leaders'] 2021 Declaration on Preserving Maritime Zones in the Face of Climate Change-related Sea-Level Rise".[146] The Declaration of the Seventh Meeting of the Organization of African, Caribbean and Pacific States Ministers in Charge of Fisheries and Aquaculture, of 8 April 2022, provides the following: "We, the Ministers in charge of fisheries and aquaculture from the Member States of the Organization … [*s*]*upport* the 2021 Pacific Islands Forum [Leaders'] Declaration on Preserving Maritime Zones in the Face of Climate Change-related Sea-Level Rise".[147]

B. Preliminary observations

82. In the light of the above comprehensive presentation of Member States' submissions to the Commission, statements presented in the Sixth Committee and collective positions as expressed in various international and regional declarations, a number of preliminary observations can be made.

83. First, it is clear that, in these many submissions and statements, references to the issue of legal stability, whether explicit or implicit – including to the solution of fixed baselines and/or outer limits of maritime zones measured from them, as examined in the first issues paper – are the most numerous. The next most numerous are references to the need to interpret the United Nations Convention on the Law of the Sea in such a manner as to respond to the effects of sea-level rise, mostly in the sense that the Convention does not forbid the freezing of baselines.[148] It is obvious that Member States consider these issues to be the most relevant to the aspects of the

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[143] See footnote 99 above.

[144] Comprising 58 members: 27 members from Africa and the Middle East, 20 members from Asia and the Pacific and 11 members from Latin America and the Caribbean. For further information, see https://thecvf.org/members/.

[145] Comprising 79 members from Africa, the Caribbean and the Pacific. For further information, see https://www.oacps.org/.

[146] See https://thecvf.org/our-voice/statements/dhaka-glasgow-declaration-of-the-cvf/.

[147] See https://www.oacps.org/wp-content/uploads/2022/05/Declaration_-7thMMFA_EN.pdf, p. 8.

[148] As evidenced above, out of 69 statements delivered by 67 delegations in 2021 in the Sixth Committee that referred to the topic, 25 referred to legal stability, 20 to the solution of fixed baselines, 11 to the Declaration on Preserving Maritime Zones in the Face of Climate Change-related Sea-Level Rise (which touches upon the previous topics), and 11 to the need to interpret the United Nations Convention on the Law of the Sea to favour fixed baselines. In 2022, out of the 17 statements referring to the aspects of the law of the sea related to sea-level rise, 11 referred to the solution of fixed baselines and 9 referred to legal stability. The vast majority of submissions also included such references.

law of the sea related to sea-level rise. This interesting evolution of the focus of Member States on these aspects has also been noted by legal scholars.[149]

84. Second, the significance that Member States attach to legal stability – and certainty, security and predictability – is concrete and pragmatic. With the exception of a limited number of Member States, which refer in their statements to legal stability as more general notion connected to the overall regime embodied in the United Nations Convention on the Law of the Sea,[150] the rest of the Member States that refer to this issue in their submissions, statements and collective declarations made following the issuance of the first issues paper consider legal stability as dedicated to, and inherently linked to, the preservation of maritime zones as they were before the effects of the sea-level rise, and the decision of the Member States affected by sea-level rise not to update their notifications of coordinates and charts, thus fixing their baselines even if the physical coast moves landward because of sea-level rise. No States, even those that have national legislation providing for ambulatory baselines, have contested the option of fixed baselines.

85. Third, it is interesting to note the progressive and remarkable extension of awareness among States from various regions of the world of the need to find solutions in the context of the law of the sea to the negative impact of sea-level rise on coasts and maritime zones, especially the view of legal stability in connection with the preservation of baselines and the outer limits of maritime zones measured from those baselines. The Pacific States have consolidated their approach and State practice, as evidenced by their submissions to the Commission, their statements in the Sixth Committee and the adoption by the Pacific Islands Forum Leaders of the Declaration on Preserving Maritime Zones in the Face of Climate Change-related Sea-Level Rise in August 2021. The approach of these States was cross-regionally confirmed by the views of the members of the Alliance of Small Island States, as expressed in their submissions and statements, but also in the Declaration of the Heads of State and Government of the Alliance of Small Island States, adopted in September 2021. This is because the Alliance's 39 members include not only those from the Pacific (14 out of the 18 members of Pacific Islands Forum), but also those from other regions: Africa (3), Indian Ocean (4), Caribbean (16) and South-East Asia (1). Together, the Pacific Islands Forum and the Alliance of Small Island States represent 43 members, of which 41 are parties to the United Nations Convention on the Law of the Sea, comprising approximately 25 per cent of all parties to the Convention.[151] Furthermore, it is important to note the positions expressed by States from other regions in favour of the preservation of baselines and the outer limits of maritime zones measured from those baselines and the solution of fixed baselines. These positions have been expressed with various nuances, both explicitly and implicitly – stressing the absence of an obligation set forth by the United Nations Convention on the Law of the Sea to update the baselines – by States from Asia (Indonesia, Japan, Malaysia and Philippines), Latin America (Argentina, Chile, Colombia and Costa Rica), Africa (Algeria, Egypt and Sierra Leone), Europe

[149] See, for instance, Davor Vidas and David Freestone, "Legal certainty and stability in the face of sea level rise: trends in the development of State practice and international law scholarship on maritime limits and Boundaries", in *International Journal of Marine and Coastal Law*, vol. 37, 2022, pp. 673–725; and Frances Anggadi, "What States say and do about legal stability and maritime zones, and why it matters", in *International and Comparative Law Quarterly*, vol. 71, No. 4 (October 2022), pp. 767–798.

[150] Iceland, on behalf of the Nordic countries (Denmark, Finland, Iceland, Norway and Sweden), in 2021 (see footnote 122 above); Kingdom of the Netherlands, in 2021 (see footnote 123 above); Czech Republic, in 2021 (see footnote 129 above); and Jordan, in 2021 (see footnote 113 above).

[151] See Vidas and Freestone, "Legal certainty and stability in the face of sea level rise" (see footnote 149 above), pp. 714–715.

(Bulgaria, Croatia, Cyprus, France, Germany, Greece, Ireland, Netherlands (Kingdom of the) and Romania) and North America (United States).

86. An explicit connection has been drawn by several States from various regions of the world between the meaning of legal stability and the solution of preserving maritime zones and fixing the baselines and the outer limits of maritime zones: Fiji, in its statement, on behalf of Pacific Islands Forum, to the Sixth Committee, in 2021;[152] Papua New Guinea (Pacific), in its statement in 2020;[153] Federated States of Micronesia (Pacific), in its statement in 2020;[154] Antigua and Barbuda (Caribbean), in its submission, in 2021;[155] Romania (Europe), in its statement in 2021;[156] Chile (Latin America), in its statement in 2021;[157] and Argentina (Latin America), in its statement in 2021.[158]

87. This was the approach taken in the first issues paper. The observations made in paragraph 104, subparagraphs (d),[159] (e)[160] and (f)[161], of that paper were confirmed by the positions of Member States, as discussed above.

88. At the same time, the fact that sea-level rise and its effects were not perceived as an issue that needed to be addressed in the United Nations Convention on the Law of the Sea at the time of its negotiation[162] is also reflected in the statements of Member States,[163] as is the need to interpret the Convention in such a manner as to respond to the effects of sea-level rise, mostly in the sense that the Convention does not the

[152] See footnote 70 above.
[153] See footnote 83 above.
[154] See footnote 86 above.
[155] See footnote 46 above.
[156] See footnote 125 above.
[157] See footnote 119 above.
[158] See footnote 120 above.
[159] A/CN.4/740 and Corr.1, para. 104 (d): “The ambulatory theory/method regarding baselines and the limits of maritime zones measured from them does not respond to the concerns expressed by Member States that are prompted by the effects of sea-level rise, especially as regards the rights of the coastal State in the various maritime zones, and the consequent need to preserve legal stability, security, certainty and predictability”.
[160] *Ibid*., para. 104 (e): “An approach responding adequately to these concerns is one based on the preservation of baselines and outer limits of the maritime zones measured therefrom, as well as of the entitlements of the coastal State; the [United Nations Convention on the Law of the Sea] does not prohibit *expressis verbis* such preservation …. In any case, the obligation provided by article 16 [of the Convention] to give due publicity to and deposit copies of charts and lists of coordinates about baselines only refers to straight baselines (which are less affected by sea-level rise) and not to normal baselines. Even in the case of straight baselines, the Convention does not indicate an obligation to draw and notify new baselines when coastal conditions change (or, as a consequence, new outer limits of maritime zones measured from the baselines)”.
[161] *Ibid*., para. 104 (f): “Consequently, nothing prevents Member States from depositing notifications, in accordance with the Convention, regarding the baselines and outer limits of maritime zones measured from the baselines and, after the negative effects of sea-level rise occur, to stop updating these notifications in order to preserve their entitlements”.
[162] As concluded in the first issues paper (A/CN.4/740 and Corr.1, para. 104 (a)).
[163] For instance, Tonga in 2021 (see footnote 90 above); Samoa, on behalf of the Pacific small island developing States, in 2021 (see footnote 77 above); Antigua and Barbuda, on behalf of the Alliance of Small Island States, in 2021 (see footnote 99 above); China in 2021 (available from https://www.un.org/en/ga/sixth/76/summaries.shtml#20mtg. Chinese only. See also A/C.6/76/SR.20, para. 93); Cuba in 2021 (see footnote 117 above); Solomon Islands in 2021 (see footnote 92 above); India in 2021 (available from https://www.un.org/en/ga/sixth/76/summaries.shtml#23mtg) and 2022 (available from https://www.un.org/en/ga/sixth/77/summaries.shtml, 26th plenary meeting); Indonesia in 2022 (see footnote 111 above); and Federated States of Micronesia in 2020 (see footnote 86 above). The preamble of the Declaration on Preserving Maritime Zones in the Face of Climate Change-related Sea-Level Rise, issued by the Pacific Islands Forum Leaders on 6 August 2021, includes a similar reference.

forbid freezing the baselines. The first issues paper addressed the question as to whether the provisions of the Convention could be interpreted and applied so as to address the effects of sea-level rise on the baselines, outer limits of maritime zones and entitlements in these zones.[164] That analysis, which led to the above-mentioned observations in paragraph 104, subparagraphs (d), (e) and (f), of the first issues paper, was largely validated by the views of the Member States on the interpretation of the Convention, as shown in the following paragraphs.

89. Although a large part of the doctrine has interpreted the United Nations Convention on the Law of the Sea to the effect that the outer limits of the territorial sea, contiguous zone and exclusive economic zone are ambulatory [165] – an interpretation that was also mentioned during the debate in the Study Group in 2021 [166] – the views of many States favour a rather different, more pragmatic approach, in an attempt to respond to the concerns prompted by the negative effects of sea-level rise.

90. France, in its submission to the Commission, in 2022, [167] points out the following:

> [The provisions of the United Nations Convention on the Law of the Sea] grant coastal States room for manoeuvre when it comes to taking the initiative to modify, or maintain declared data regarding baselines and limits of their

[164] A/CN.4/740 and Corr.1, paras. 78–80:

> 78. … Nevertheless, it is quite important to underline that the Convention does not indicate *expressis verbis* that new baselines must be drawn, recognized (in accordance with article 5) or notified (in accordance with article 16) by the coastal State when coastal conditions change; the same observation is valid also with regard to the new outer limits of maritime zones (which move when baselines move). Also, it should be noted that the obligation under article 16 for the coastal State to show the baselines for measuring the breadth of the territorial sea or the limits "derived therefrom" on charts (or a list of geographical coordinates of points, specifying the geodetic datum), and to "give due publicity to such charts or lists of geographical coordinates" and to deposit copies of them with the Secretary-General of the United Nations, applies only in the case of straight baselines (art. 7), mouths of rivers (art. 9) and bays (art. 10). So, normal baselines are exempted from this obligation.
>
> 79. The interpretation of the Convention to the effect that baselines (and, consequently, the outer limits of maritime zones) have, generally, an ambulatory character does not respond to the concerns of the Member States prompted by the effects of sea-level rise and the consequent need to preserve the legal stability, security, certainty and predictability. The only express exception in the Convention to this ambulatory character – other than the permanency of the continental shelf following the deposit with the Secretary-General of the United Nations of charts and relevant information, including geodetic data, describing its outer limits – is article 7, paragraph 2: "[w]here because of the presence of a delta and other natural conditions the coastline is highly unstable, the appropriate points may be selected along the furthest seaward extent of the low-water line and, notwithstanding subsequent regression of the low-water line, the straight baselines shall remain effective until changed by the coastal State in accordance with this Convention." Although there were notable attempts by scholars to argue in favour of the use of this provision to respond to sea-level rise concerns in general, the overall view is that this text is only applicable to situations where deltas are involved.
>
> 80. Another possible option suggested by scholars for using the existing provisions of the Convention to address the effects of sea-level rise on the baselines is the interpretation of the rules of article 7 referring to straight baselines. … In addition, the argument is made that it is possible to use to this purpose article 7, paragraph 4, … and article 7, paragraph 5 …. But the same authors concede that such solutions based on using the provisions of the Convention on straight baselines are not efficient when the sea-level rise is significant.

[165] *Ibid.*, para. 78.

[166] A/76/10, paras. 270–277.

[167] See footnote 60 above.

> maritime zones. The Convention leaves it to coastal States to decide whether to make modifications to this data, which means that so long as a coastal State does not decide to make such modifications, the initially declared data remains in force.
>
> That is the case for normal baselines, under article 5 of the Convention, but also for straight baselines, under article 16. Likewise, regarding maritime areas, when reading articles 75 and 84 of the Convention, regarding the exclusive economic zone and the continental shelf respectively we can make the same observation.

At the same time, France advocates an interpretation of article 7, paragraph 2, as being "applicable to situations resulting from sea-level rise, independently [of] the presence of a delta", thus proposing an even more ambitious approach than the first issues paper.

91. Germany, in its submission, in 2022,[168] goes in the same direction:

> Germany commits … to work together with others to preserve their maritime zones and the rights and entitlements that flow from them in a manner consistent with the [United Nations Convention on the Law of the Sea], including through a contemporary reading and interpretation of its intents and purposes…
>
> Through such contemporary reading and interpretation, Germany finds that [the Convention] allows for freezing of [baselines and outer limits of maritime zones] once duly established, published and deposited … in accordance with the Convention.
>
> [The Convention] does not contain any explicit obligations to update [either] normal baselines that have been marked (article 5 [of the Convention]) [or] straight baselines that have been marked, published and deposited (article 16 …), as well as no further obligation to update a State's relevant charts and lists of geographical coordinates with regard to the [exclusive economic zone] (article 75 …) and the continental shelf (article 84 …).
>
> However, Germany concludes [that] the concept of fictitious baselines [is] already immanent within [the Convention], in particular when a coastline is highly unstable due to the presence of "a delta and other natural conditions" [in accordance with article 7, paragraph 2, of the Convention].
>
> Since this provision has been translated as "delta or other natural conditions" in several translations by [European Union member States], Germany suggests to examine if a contemporary understanding of the provision could broaden the scope of the exception pursuant to [article 7, paragraph 2, of the Convention] and provide further legal certainty with regard to States freezing their baselines and outer limits of maritime zones.
>
> Germany commits to close multilateral coordination and cooperation at many levels in order to arrive at such a contemporary interpretation, possibly by working towards a "common understanding of the correct interpretation of the relevant [Convention] provisions", which could possibly be expressed and endorsed by the States parties to [the Convention] in a [resolution of the Meeting of States Parties] or by [United Nations] Member States in [a General Assembly] resolution. We also support further discussions in the Sixth Committee of the [General Assembly] with this aim.

[168] See footnote 62 above.

92. States take a similar line in their statements in the Sixth Committee. See, for example, the statements of the following:

(a) Tuvalu, on behalf of the Pacific Islands Forum, in 2020;[169]

(b) Fiji, on behalf of the Pacific Islands Forum, in 2021, referring to the Declaration on Preserving Maritime Zones in the Face of Climate Change-related Sea-Level Rise, issued by the Pacific Islands Forum Leaders in August 2021, as "a good-faith interpretation" of the United Nations Convention on the Law of the Sea.[170] Similar statements on the Pacific Islands Forum Declaration have been made by the following: Papua New Guinea, in 2021 and 2022, referring to the Declaration as "a formal statement of Forum members' view on how [the Convention] rules on maritime zones apply in the situation of climate change-related sea-level rise";[171] New Zealand, in 2021 and 2022;[172] and Samoa, on behalf of Pacific small island developing States, in 2022, noting the following:

> As the Declaration makes clear, this approach is supported by [the Convention] and its underlying principles. … [T]he Declaration does not formally represent an extra-legal circumvention of [the Convention] or the establishment of new international law. Because it is grounded on an interpretation of the existing law of the sea as reflected in [the Convention], States from outside the Pacific Islands Forum membership are welcome to endorse and apply the approach of the Declaration, including those that are not States parties to [the Convention];[173]

(c) Belize, on behalf of the Alliance of Small Island States, in 2020, recalling that "the Vienna Convention on the Law of Treaties states that subsequent practice [in] applying the treaty, which evinces parties' agreement on the treaty interpretation, shall be taken into account. This is particularly useful where the treaty is silent on an issue, as the Convention is with the requirement to update coordinates or charts";[174]

(d) Antigua and Barbuda, on behalf of the Alliance of Small Island States, in 2021, referring to the Alliance's "interpretation of a lack of an obligation under [the Convention] to review or update baselines and outer limits once deposited with the Secretary-General";[175]

(e) Samoa, on behalf of Pacific small island developing States, in 2021, noting that "[i]t is important that [the Convention] is applied in such a way that respects the rights and obligations in the Convention, including the rights and entitlements of island States flowing from their maritime zones";[176]

(f) Maldives, in 2021, noting that "we do not interpret [the Convention] to require regular updates to those submissions. … This interpretation is necessary to support the goals of stability, security, certainty and predictability";[177]

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[169] See footnote 69 above.
[170] See footnote 70 above.
[171] See footnotes 73 and 74 above.
[172] See footnotes 75 and 76 above.
[173] See footnote 82 above.
[174] See footnote 98 above. Vienna Convention on the Law of Treaties (Vienna, 23 May 1969), United Nations, *Treaty Series*, vol. 1155, No. 18232, p. 443 (see article 31, paragraph 3 (*b*)).
[175] See footnote 99 above.
[176] See footnote 77 above.
[177] See footnote 104 above.

(g) Federated States of Micronesia, in 2020, affirming that "the Convention … should be interpreted and applied in a manner that fosters legal stability, security, certainty and predictability";[178]

(h) Tonga, in 2021, noting that the Convention "must be interpreted and applied in a way that respects the rights and sovereignty of vulnerable small island States";[179]

(i) Iceland, on behalf of the Nordic countries (Denmark, Finland, Iceland, Norway and Sweden), in 2021, noting that "the Convention should be interpreted in [the] light of changing circumstances";[180]

(j) Germany, in 2021, adopting the same approach as in its submission to the Commission, in 2022;[181]

(k) Chile, in 2021, asserting that "the best approach for interpreting [the Convention] is to give priority to the principles of international stability and the peaceful coexistence of States";[182]

(l) Sri Lanka, in 2021, noting that "[p]erhaps it was time for the Commission to examine whether or not the Convention could be modified by mutual consent or based on the subsequent practice of all States parties";[183]

(m) Estonia, in 2021, noting that "[w]e are satisfied that the Study Group has found possibilities to interpret the [Convention] in [a] way that it corresponds to the need for the stability in inter-State relations";[184]

(n) Russian Federation, in 2021, stating that "it is important to find a practical solution that is aligned with [the Convention], on one hand, and reflects the concerns of States affected by sea-level rise, on the other";[185]

(o) Solomon Islands, in 2021;[186]

(p) Spain, in 2021, noting that "it is essential to continue the work of the Commission on this topic in a way that guarantees respect for and [the] integrity of [the Convention] … and that, at the same time, allows us to identify special formulas that take into consideration the extraordinary circumstances that several States, especially … small island developing States, are suffering as a result of the process of sea-level rise caused by climate change";[187] and

(q) Greece in 2021, asserting that, "[w]ith respect to the topic of sea-level rise, the [Convention] provides the answers to the questions raised, within their proper context".[188]

93. It is noteworthy that there was no objection from any State, in their submissions to the Commission or statements in the Sixth Committee, to the above-mentioned interpretation of the United Nations Convention on the Law of the Sea.

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[178] See footnote 86 above.
[179] See footnote 90 above.
[180] See footnote 122 above.
[181] Statement of Germany in 2021. Available from https://www.un.org/en/ga/sixth/76/summaries.shtml#21mtg. See also footnote 62 above.
[182] See footnote 119 above.
[183] See footnote 106 above.
[184] See footnote 131 above.
[185] See footnote 132 above.
[186] See footnote 92 above.
[187] Statement of Spain in 2021. Available from https://www.un.org/en/ga/sixth/76/summaries.shtml#22mtg.
[188] See footnote 135 above.

94. This pragmatic interpretation by States, which supports the approach proposed in the first issues paper,[189] in some cases goes even further than the first issues paper by suggesting that article 7, paragraph 2, of the United Nations Convention on the Law of the Sea is applicable to situations resulting from sea-level rise, independently of the presence of a delta. Such an approach is welcome.

95. At the same time, the views of States, as expressed in their submissions and statements following the issuance of the first issues paper, include only very few references to the issue of the formation of customary law on the freezing of baselines and outer limits of maritime zones. That issue was analysed in the first issues paper, with the observation that "it is early to draw, at this stage, a definitive conclusion on the emergence of a particular or regional customary rule (or even of a general customary rule) of international law regarding the preservation of baselines and of outer limits of maritime zones measured from the baselines"; although, at the time of drafting of the first issues paper, the Co-Chairs were able to identify elements of regional State practice, the existence of the *opinio juris* was not yet evident.[190]

96. Indeed, in their submissions and statements over the period 2020–2022, States focus rather on interpretation of the United Nations Convention on the Law of the Sea and on presentation of State practice. Views referring to the issue of the formation of customary law are limited and quite cautious. For instance, Germany, in its submission, in 2022, notes that it "commits to … work together with others to preserve their maritime zones and the rights and entitlements that flow from them in a manner consistent with the Convention, including through a contemporary reading and interpretation of its intents and purposes, rather than through the development of new customary rules".[191] The European Union, in its statement in 2022, notes the following:

> [T]he European Union and its Member States would suggest caution regarding the consideration of regional State practices together with the respective *opinio juris* in this context, because universally applicable provisions and principles such as the [Convention] need to be applied in a uniform way in all regions of the world …. [C]ertain possible emerging regional State practices regarding sea-level rise should not lead to the recognition of a regional customary law of the sea rule, and the European Union and its Member States would encourage the Study Group to build on the State practice and consider the *opinio juris* accepted by all the regions of the world before inferring the existence (or not) of an established State practice or *opinio juris*.[192]

The Federated States of Micronesia, in its statement in 2022, notes the following:

> [The Federated States of Micronesia] stresses that the Declaration [by the Pacific Islands Forum Leaders in 2021] announces the Pacific Islands Forum membership's understanding and application of existing international law of the sea. … [T]he Declaration is not formally meant to establish or announce new regional customary international law. … For [the Federated States of] Micronesia, even if we assume that the Declaration represents the formation or announcement of new regional customary international law, the views of States from outside the Pacific Islands Forum region have no bearing on whether such new law can be developed for the region. As the Commission itself has pointed out in its draft conclusions on the identification of customary international law, such regional customary international law applies only to those States that

[189] A/CN.4/740 and Corr.1, para. 104 (f).
[190] *Ibid.*, para. 104 (i).
[191] See footnote 62 above.
[192] See footnote 138 above.

accept it and would not be opposable to States outside the region that do not accept or apply such regional customary international law.[193]

Similarly Papua New Guinea, in its statement in 2022, notes that the Declaration "is not a formal statement on regional customary law and should not be misunderstood or misconstrued as such".[194] Antigua and Barbuda, in its statement on behalf of the Alliance of Small Island States in 2021, notes that, "while we recognize that there may not yet be sufficient State practice and *opinio juris* to make a conclusion that there is a general customary rule concerning preservation of maritime zones, we think that the trend is in that direction".[195] China, in its statement in 2021, is more cautious: "Many countries believe that consistent State practice on sea-level rise has not been formed and that overemphasizing regional practice may exacerbate the fragmentation of legal rules."[196] Similar caution is expressed by Israel in its statement in 2021: "Israel believes that given the limited State practice in this field – as acknowledged by the Study Group itself – it is doubtful whether any conclusion regarding evidence of existing binding rules of international law on the subject of sea-level rise could be drawn at this juncture."[197] The Russian Federation, in its statement in 2021, expresses the following view: "At this stage, there is no applicable rule of customary international law, because of both the lack of recognition of the relevant practice as legal obligation (*opinio juris*) and the insufficiency of the practice itself."[198] Sri Lanka, in its statement in 2021, expresses the view that "the Commission might be able to develop the rules of customary international law in such a way as to lead to the modification of the Convention with respect to the preferred approach for the delimitation of maritime boundaries".[199] The Co-Chairs wish to restate their commitment to fully observing the mandate established when the topic was introduced on the agenda of the Commission: work on the present topic will not lead to proposals for modification of the Convention.

97. State practice regarding the preservation of maritime zones and/or the fixing of baselines has become increasingly evident over the period 2020–2022 in the submissions to the Commission and statements to the Sixth Committee of States from various regions of the world. See, for example, the following: Federated States of Micronesia, in its statement in 2020;[200] Belize, in its statement on behalf of the Alliance of Small Island States in 2020;[201] Antigua and Barbuda, in its statement on behalf of the Alliance of Small Island States in2021;[202] Fiji, in the submission of the Pacific Islands Forum in 2021;[203] New Zealand, in its submission in 2022 (in which it also refers to the practice of the Cook Islands);[204] the United Kingdom, in its submission in 2022;[205] and the Kingdom of the Netherlands, in its submission in 2022 (in which it refers to the establishment of a "basic coastline", which is preserved through sand nourishment).[206] The Co-Chairs wish to thank Commission member

[193] Statement of the Federated States of Micronesia in 2022, p. 3. Available from https://www.un.org/en/ga/sixth/77/summaries.shtml (28th plenary meeting).
[194] See footnote 74 above.
[195] See footnote 99 above.
[196] See footnote 163 above.
[197] Statement of Israel in 2021, pp. 2–3. Available from https://www.un.org/en/ga/sixth/76/summaries.shtml#20mtg.
[198] See footnote 132 above.
[199] A/C.6/76/SR.21, para. 112 (see footnote 106 above).
[200] See footnote 86 above.
[201] See footnote 98 above.
[202] See footnote 99 above.
[203] See footnote 57 above.
[204] See footnote 54 above.
[205] See footnote 68 above.
[206] See footnote 66 above.

Mr. Bimal N. Patel for providing a paper on State practice in India, which was very informative.

98. In conclusion, the following observations of a preliminary nature can be made:

(a) legal stability (and security, certainty and predictability) is viewed among Member States as having a very concrete meaning, and has been linked to the preservation of maritime zones through the fixing of baselines (and outer limits of maritime zones measured from those baselines): in other words, States affected by sea-level rise are not required to update their notifications of coordinates and charts, resulting in their baselines being fixed even if the physical coast moves landward because of sea-level rise. No States – not even those with national legislation providing for ambulatory baselines – have expressed positions contesting the option of fixed baselines;

(b) Member States point to the fact that when the United Nations Convention on the Law of the Sea was being negotiated, sea-level rise and its effects were not perceived as an issue that needed to be addressed by the Convention, and to the need to interpret the Convention in order to respond to the effects of sea-level rise. Most States take the view that this interpretation should be in the sense that the Convention does not forbid the freezing of baselines. This approach is a pragmatic one, which proposes a reading or interpretation of the Convention that allows for the freezing of baselines once duly established, published and deposited. According to this interpretation, the Convention contains no explicit obligation to update either normal baselines or straight baselines that have been published and deposited, and no further obligation to update a State's relevant charts and lists of geographical coordinates with regard to the exclusive economic zone and the continental shelf. This interpretation of the Convention goes even further than the one proposed in the first issues paper, since article 7, paragraph 2, of the Convention is considered to be applicable to situations resulting from sea-level rise, independently of the presence of a delta. There were no objections from any States, in their submissions to the Commission or in their statements to the Sixth Committee, to this interpretation of the Convention;

(c) the observations in paragraph 104 of the first issues paper were largely upheld by Member States, with the nuances presented above.

III. Immutability and intangibility of boundaries

A. Boundaries and the principle of immutability

99. Oppenheim defined State boundaries as "the imaginary lines on the surface of the earth which separate the territory of one [S]tate from that of another, or from unappropriated territory, or from the open sea".[207] In the *Frontier Dispute (Benin/Niger)* case, the International Court of Justice stated that "a boundary represents the line of separation between areas of State sovereignty, not only on the earth's surface but also in the subsoil and in the superjacent column of air".[208] According to the International Court of Justice in *Territorial Dispute (Libyan Arab Jamahiriya/Chad)*, "[t]o 'define' a territory is to define its frontiers".[209] Nesi writes that "[i]n contemporary international relations, the term 'boundary' means a line that

[207] Robert Jennings and Arthur Watts, eds., *Oppenheim's International Law*,, 9th ed., vol. 1, *Peace* (Harlow, Longman, 1992), para. 226, at p. 661.

[208] *Frontier Dispute (Benin/Niger), Judgment, I.C.J. Reports 2005*, p. 90, at p. 142, para. 124.

[209] *Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment, I.C.J. Reports 1994*, p. 6, at p. 26, para. 52.

determines the extension of a [S]tate's territorial sovereignty. A general definition of the notion, which is applicable to both land and maritime delimitations, would refer to boundaries as the 'extreme limits of spatial validity of the legal norms of a State'".[210] Nesi further observes that "[b]oundaries are fundamental in international law because they define the limits of national jurisdiction and the important legal consequences deriving from this fact", [211] and that the "principle of the intangibility of boundaries refers to the obligation that all [S]tates have to respect existing delimitations in any circumstances, without implying their immutability".[212]

100. The principle of the stability and finality of boundaries is well established in international law.[213] As underscored by International Court of Justice in the *Temple of Preah Vihear (Cambodia* v. *Thailand)* case, "[i]n general, when two countries establish a frontier between them, one of the primary objects is to achieve stability and finality. This is impossible if the line so established can, at any moment, and on the basis of a continuously available process, be called in question … Such a frontier, so far from being stable, would be completely precarious". [214] Likewise, in the *Territorial Dispute (Libyan Arab Jamahiriya/Chad)* case, the Court underscored the principle of the stability of boundaries, stating that "[o]nce agreed, the boundary stands, for any other approach would vitiate the fundamental principle of the stability of boundaries, the importance of which has been repeatedly emphasized by the Court".[215] The Court reaffirmed this principle in the *Territorial and Maritime Dispute (Nicaragua* v. *Colombia*) case.[216]

B. *Uti possidetis juris* and the intangibility of boundaries

101. The principle of the intangibility of frontiers,[217] deriving from the principle of *uti possidetis juris*, is considered by many to be a well-established principle.[218] Its origins can be traced back to Roman law, but later it was adopted and developed within the context of establishing boundaries during the decolonization period in

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[210] Giuseppe Nesi, "Boundaries", in *Research Handbook on Territorial Disputes in International Law*, Marcelo G. Kohen and Mamadou Hébié, eds. (Cheltenham, United Kingdom, and Northampton, Massachusetts, Edward Elgar, 2018), pp. 193–233, at p. 197.

[211] *Ibid*., p. 201. See also Malcolm N. Shaw, "The heritage of States: the principle of *uti possidetis juris* today", *British Year Book of International Law*, vol. 67 *(1996)*, pp. 75–154, at p. 77.

[212] Nesi, "Boundaries" (see footnote 210 above), p. 229.

[213] See *Ibid*., p. 227.

[214] *Case concerning the Temple of Preah Vihear (Cambodia v. Thailand), Merits, Judgment of 15 June 1962: I.C.J. Reports 1962,* p. 6, at p. 34.

[215] *Territorial Dispute (Libyan Arab Jamahiriya/Chad)* (see footnote 209 above), p. 37, para. 72; and Nesi, "Boundaries" (see footnote 210 above), p. 229.

[216] *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2007*, p. 832, at p. 861, para. 89.

[217] Dirdeiry M. Ahmed, *Boundaries and Secession in Africa and International Law: Challenging* Uti Possidetis (Cambridge, United Kingdom, Cambridge University Press, 2015), pp. 47–74.

[218] *Frontier Dispute (Burkina Faso/Republic of Mali), Judgment, I.C.J. Reports 1986*, p. 554, at p. 565, para. 20; *Frontier Dispute (Burkina Faso/Niger), Judgment, I.C.J. Reports 2013*, p. 44, at. p. 73, para. 63. See *also* A/76/10, para. 261. Ahmed takes the position that, based on the "clean slate" principle, there is no general rule of international law for newly independent States "to respect pre-existing international frontiers in the event of a State succession". Ahmed, *Boundaries and Secession* (see footnote 217 above), p. 52. It should be noted that there is a robust scholarly debate on whether *uti possidetis* is a rule of customary international law and whether it has actually served to preserve stability and avoid conflict. Suzanne Lalonde, *Determining Boundaries in a Conflicted World: The Role of* Uti Possidetis (Montreal and Kingston, McGill-Queen's University Press, 2002); Mohammad Shahabuddin, "Postcolonial boundaries, international law, and the making of the Rohingya crisis in Myanmar", *Asian Journal of International Law*, vol. 9, No. 2 (July 2019), pp. 334–358; and Ahmed, *Boundaries and Secession* (see footnote 217 above).

Latin America in the nineteenth century and in Africa in the twentieth century. Former colonial administrative boundaries or divisions were turned into international frontiers or boundaries.[219] The three core purposes of the *uti possidetis* principle are to prevent the situation of *res nullius*,[220] to prevent conflict[221] and to preserve stability.[222]

102. In addition to the decolonization process, the *uti possidetis* principle was applied by the Commission of Rapporteurs in the case of the Åland Islands, between Finland and Sweden, and adopted by the League of Nations Council in recommending that the islands be awarded to Finland.[223] In the context of State succession, following the dissolution of the former Socialist Federal Republic of Yugoslavia, the Badinter Arbitration Committee, in its third opinion, recognized *uti possidetis* – respect for frontiers existing at the moment of independence – as a general principle applicable beyond the decolonization context, where internal borders of federated states serve as international borders.[224] While much of the scholarship and focus on *uti possidetis* has been on Latin America and Africa, recent scholarship has criticized the absence of discussion of *uti possidetis* in relation to postcolonial South Asia.[225]

103. The principle of *uti possidetis* has been invoked in arbitration cases[226] and before the International Court of Justice.[227] No doubt the most influential case is the decision by the Chamber of the International Court of Justice in the *Frontier Dispute (Burkina Faso/Republic of Mali)* case, in which the parties had agreed that the settlement of the dispute must be "based in particular on respect for the principle of the intangibility of frontiers inherited from colonization".[228] The Court went on to declare that the principle of *uti possidetis* was not limited to the process of decolonization, but was a general principle that "has kept its place among the most

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[219] *Frontier Dispute (Benin/Niger)* (see footnote 208 above), p. 120, paras. 45–46. See also Giuseppe Nesi, "Uti possidetis doctrine", in Rüdiger Wulfrum, ed., *Max Planck Encyclopedia of Public International Law* (Oxford, Oxford University Press, 2018).

[220] *Affaire des frontières Colombo-vénézuéliennes (Colombie contre Vénézuela)*, Award of 24 March *1922*, *Reports of International Arbitral Awards, vol. I, pp.* 223–298, at p. 228 (cited in *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening), Judgment, I.C.J. Reports 1992*, p. 351, at pp. 387, para. 42).

[221] See also the separate opinion of Judge *ad hoc* G. Abi-Saab in *Frontier Dispute (Burkina Faso/Republic of Mali)* (see footnote 218 above), in which he describes the dual purpose of the principle of *uti possidetis*; and the separate opinion of Judge Yusuf in *Frontier Dispute (Burkina Faso/Niger)* (see footnote 218 above).

[222] *Frontier Dispute (Burkina Faso/Republic of Mali)* (see footnote 218), p. 565, para. 20.

[223] *Aaland Islands Question*, report of the Commission of Rapporteurs, League of Nations Council Doc B.7 21/68/106, 16 April 1921.

[224] Alain Pellet, "The opinions of the Badinter Arbitration Committee: a second breath for the self-determination of peoples", *European Journal of International Law*, vol. 3, No. 1 (1992), pp. 178–185, at p. 180; Shahabuddin, "Postcolonial boundaries" (see footnote 218 above); and Peter Radan, *The Break-Up of Yugoslavia and International Law* (London and New York, Routledge, 2002) (in which the author is critical of the reliance by the Badinter Commission's on the application of the principle of *uti possidetis* in *Frontier Dispute (Burkina Faso v. Mali)*).

[225] Vanshaj Ravi Jain, "Broken boundaries: border and identity formation in postcolonial Punjab", *Asian Journal of International Law*, vol. 10, No. 2 (July 2020), pp. 261–292; Radan, *The Break-Up of Yugoslavia and International Law* (see footnote 224 above), pp. 118–134; and Shaw, "The heritage of States" (see footnote 211 above), p. 105.

[226] See *Affaire des frontières Colombo-vénézuéliennes (Colombie contre Vénézuela)*, Award of 24 March 1922 (see footnote 220 above).

[227] *Frontier Dispute (Burkina Faso/Republic of Mali)* (see footnote 218 above); *Kasikili/Sedudu Island (Botswana/Namibia), Judgment, I.C.J. Reports 1999)*, p. 1045; *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria: Equatorial Guinea intervening), Judgment, I.C.J. Reports 2002*, p. 303; *Frontier Dispute (Benin/Niger)* (see footnote 208 above); and *Frontier Dispute (Burkina Faso/Niger)* (see footnote 218 above).

[228] *Frontier Dispute* (*Burkina Faso/Republic of Mali)* (see footnote 218 above), p. 564, para. 19.

important legal principles" regarding territorial title and boundary delimitation at the moment of decolonization.[229]

104. The Chamber also stressed that "[t]he essence of the principle lies in its primary aim of securing respect for the territorial boundaries at the moment when independence is achieved".[230] The notion of the freezing of the boundaries is vividly depicted when the Chamber explains that "the principle of *uti possidetis* … applies to the new State (as a State) not with retroactive effect, but immediately and from that moment onwards. It applies to the State *as it is*, i.e., to the 'photograph' of the territorial situation then existing. The principle of *uti possidetis* freezes the territorial title; it stops the clock, but does not put back the hands".[231] Stressing the interests of "stability", the Chamber resolved the apparent contradiction of *uti possidetis* with the right of peoples in African States to self-determination by citing the "essential requirement of stability in order to survive, to develop and gradually to consolidate their independence in all fields".[232]

105. The principle of respect for existing boundaries is reflected in a resolution of the Organization of African Unity (OAU) adopted in 1964.[233] In that resolution, member States reaffirm their strict respect for the principles laid down in article 3 (3) of the OAU Charter,[234] and "pledge themselves to respect the frontiers existing on their achievement of national independence". This text has been interpreted as a recognition of the principle of *uti possidetis juris*.[235] In the *Tunisia/Libyan Arab Jamahiriya* case, the International Court of Justice noted that the fact that the land boundary between the Libyan Arab Jamahiriya and Tunisia dated from 1910 and had survived two world wars exemplified the principle of respect for boundaries declared in the 1964 OAU resolution.[236]

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[229] *Ibid*., p. 567, para. 26 (cited in *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras), Judgment, I.C.J. Reports 2007*, p. 659, at p. 706, para. 151).

[230] *Frontier Dispute* (*Burkina Faso/Republic of Mali)* (see footnote 218 above), p. 566, para. 23. See also Shaw, "The heritage of States" (see footnote 211 above), p. 128.

[231] *Frontier Dispute* (*Burkina Faso/Republic of Mali)* (see footnote 218 above), p. 568, para. 30.

[232] *Ibid.*, p. 567, para. 25.

[233] Resolution AHG/Res. 16(I), adopted by the First Ordinary Session of the Assembly of Heads of State and Government of OAU, held in Cairo from 17 to 21 July 1964, entitled "Border disputes among African States", which includes the following in the preamble: "*Considering further* that the borders of African States, on the day of their independence, constitute a tangible reality".

[234] Charter of the Organizations of African Unity (Addis Ababa, 25 May 1963), United Nations, *Treaty Series*, vol. 479, No. 6947, p. 39. Under article 3 (3), the member States solemnly affirm and declare their adherence to the principles of "respect for the sovereignty and territorial integrity of each State and for its inalienable right to independent existence".

[235] *Frontier Dispute (Burkina Faso/Republic of Mali)* (see footnote 218 above), p. 565–566, paras. 22–23. However, see the separate opinion of Judge Yusuf in *Frontier Dispute (Burkina Faso/Niger)* (see footnote 218 above), in which he details the differences between the principle of *uti possidetis juris* and the African principle of respect for boundaries as found in the OAU resolution. See also Suzanne Lalonde, "The role of the *uti possidetis* principle in the resolution of maritime boundary disputes", in *Sovereignty, Statehood and State Responsibility: Essays in Honour of James Crawford*, Christine Chinkin and Freya Baetens, eds. (Cambridge, United Kingdom, Cambridge University Press, 2002), pp. 248–272, at p. 256; and Pierre-Emmanuel Dupont, "Practice and prospects of boundary delimitation in Africa: the ICJ judgment in the *Burkina Faso/Niger Frontier Dispute* case", *Law and Practice of International Courts and Tribunals*, vol. 13, No. 1 (April 2014), pp. 103–116.

[236] *Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Judgment, I.C.J. Reports 1982*, p. 18, at p. 65–66, para. 83–84. See also Shaw, "The heritage of States" (see footnote 211 above), p. 114; and Dupont, "Practice and prospects of boundary delimitation in Africa" (see footnote 235 above).

C. Application of the principle of *uti possidetis* to maritime boundaries

106. Distinctions have been made between land and maritime boundaries, in particular as to their respective foundation or creation.[237] Nesi observes that a general definition of the notion of a boundary, "which is applicable to both land and maritime delimitations, would refer to boundaries as the 'extreme limits of spatial validity of the legal norms of a State'".[238] In the *Frontier Dispute (Burkina Faso/Republic of Mali)* case, the Chamber of the International Court of Justice stated that "the effect of any judicial decision rendered either in a dispute as to attribution of territory or in a delimitation dispute, is necessarily to establish a frontier"; the same reasoning would seem to apply to maritime delimitation, where the objective is to establish a frontier or boundary.[239]

107. The principle of *uti possidetis*, however, has had limited application in relation to maritime boundaries.[240] The issue was raised in the *Case concerning the delimitation of maritime boundary between Guinea-Bissau and Senegal*.[241] While both parties recognized the principle of *uti possidetis* in general, their views diverged on its application to maritime boundaries. Guinea-Bissau argued against the application of *uti possidetis* to maritime boundaries, as this was an area of recent development, whereas Senegal was of the view that it did apply.[242] The question was not directly addressed by the Tribunal's determination that the convention in question did not create a maritime boundary.[243] However, as highlighted by Shaw, "[t]he Tribunal also emphasized that the Arbitration Agreement signed between Guinea-Bissau and Guinea in 1983 in order to settle that particular dispute incorporated an express reference to the 1964 OAU resolution accepting colonial boundaries. Since that dispute was a maritime dispute, the Tribunal concluded that both parties had

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[237] Lalonde, "The role of the *uti possidetis* principle", in Chinkin Baetens, eds., *Sovereignty, Statehood and State Responsibility* (see footnote 235 above); Nesi, "Boundaries" (see footnote 210 above), p. 196; Marcelo Kohen, "Conclusions", in *Droit des frontières internationales – The Law of International Boundaries*, Société française pour le droit international (Paris, Editions A. Pedone, 2016), pp. 311–319, at pp. 317–318; and Alberto Alvarez-Jimenez, "Boundary agreements in the International Court of Justice's case law, 2000–2010", *European Journal of International Law*, vol. 23, No. 2 (2012), pp. 495–515.

[238] Nesi, "Boundaries" (see footnote 210 above), p. 197.

[239] *Frontier Dispute (Burkina Faso/Republic of Mali)* (see footnote 218 above), p. 563, para. 17. However, Snjólaug Árnadóttir expresses the view that there is "an inherent difference between boundaries delimiting land territory and those delimiting maritime zones". Snjólaug Árnadóttir, "Termination of maritime boundaries due to a fundamental change of circumstances" *Utrecht Journal of International and European Law*, vol. 32, No. 83 (September 2016), pp. 94–111, at pp. 104–105. See also Lucius Caflisch, "The delimitation of marine spaces between States with opposite or adjacent coasts", in *A Handbook on the New Law of the Sea*, René-Jean Dupuy and Daniel Vignes, eds. (Dordrecht, Boston and Lancaster, Martinus Nijhoff, 1991), pp. 425–499, at. p. 426.

[240] *Dispute between Argentina and Chile concerning the Beagle Channel,* Decision of 18 February 1977, *Reports of International Arbitral Awards,* vol. XXI, pp. 53–264 (the Tribunal rejected Argentina's invocation of the principle of *uti possidetis* on the grounds that the principle had been replaced by the Boundary Treaty of 1881); *Case concerning the delimitation of maritime boundary between Guinea-Bissau and Senegal*, Decision of 31 July 1989, *Reports of International Arbitral Awards,* vol. XX, pp. 119–213; *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Honduras)* (see footnote 229 above); and *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria: Equatorial Guinea intervening)* (see footnote 227 above).

[241] *Case concerning the delimitation of maritime boundary between Guinea-Bissau and Senegal* (see footnote 240 above), pp. 144–145, para. 64.

[242] Guinea-Bissau further challenged the automatic rule of State succession, arguing instead for the principle of *tabula rasa*.

[243] *Case concerning the delimitation of maritime boundary between Guinea-Bissau and Senegal* (see footnote 240 above), p. 148, para. 75.

accepted that the principle of respect for colonial boundaries applied also to maritime boundaries".[244]

108. In the same case, Judge Bedjaoui penned his well-known dissent,[245] which included his response to the view of Senegal that maritime boundaries did not constitute frontiers. He made clear his view that maritime boundaries were real boundaries:

> *Sur ce point, j'estime que les délimitations maritimes donnent lieu à l'existence de "frontières" véritables. L'étendue des compétences de l'Etat est sans doute différente pour les limites maritimes par rapport aux frontières terrestres. Mais cette différence est de degré non de nature, même si certaines limites maritimes ne "produisent" pas une exclusivité et une plénitude de compétence étatique*.[246]

109. In *Land and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)*, because of the colonial history of the Gulf of Fonseca, the Chamber examined the legal situation of the waters of the Gulf in 1821 at the time of succession from Spain. However, it found that no evidence had been presented by the parties of the application of the principle of *uti possidetis* by analogy with the case of the land.[247] The only part where the Chamber found an implicit application of *uti possidetis* to the Gulf waters was in relation to the part of the Gulf between Honduras and Nicaragua that had been delimited in 1900. The Chamber was of the view that the Mixed Commission responsible for that delimitation "simply took it as axiomatic that 'there belonged to each State that part of the Gulf or Bay of Fonseca adjacent to its coasts' … A joint succession of the three States to the maritime area seems in these circumstances to be the logical outcome of the principle of *uti possidetis juris* itself".[248] According to Shaw, "[i]n other words, the doctrine applied to what were in effect maritime boundaries, but in the special circumstances of that bay did so not in the form of a division of waters but rather by way of joint sovereignty over them by the three coastal States".[249]

110. In the *Nicaragua* v. *Honduras* case, Honduras had argued that the principle of *uti possidetis juris* applied to both land and maritime areas in the case.[250] The International Court of Justice found that Honduras had failed to make a persuasive case overall for the application of the *uti possidetis* principle.[251] Nonetheless, the Court did not preclude its application in maritime delimitation, stating that "the *uti possidetis juris* principle might in certain circumstances, such as in connection with historic bays and territorial seas, play a role in a maritime delimitation".[252] The Court further observed that "Nicaragua and Honduras as new independent States were entitled by virtue of the *uti possidetis juris* principle to such mainland and insular

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[244] Shaw, "The heritage of States" (see footnote 211 above), p. 127.

[245] *Case concerning the delimitation of maritime boundary between Guinea-Bissau and Senegal* (see footnote 240 above), dissenting opinion of Judge Bedjaoui, p. 154.

[246] *Ibid*., pp. 162–163, para. 22.

[247] *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)* (see footnote 220 above), p. 589, para. 386.

[248] *Ibid*., pp. 601–602, para. 405.

[249] Shaw, "The heritage of States" (see footnote 211 above), p. 128.

[250] *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea* (*Nicaragua* v. *Honduras)* (see footnote 229 above). In the *Cameroon* v. *Nigeria* land and maritime delimitation case, Cameroon had also argued for the application of *uti possidetis*. The Court did not address the arguments advanced by Cameroon in finding that the Anglo-German Agreement of 11 March 1913 was applicable. *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)* (see footnote 227 above), p. 412, para. 217.

[251] *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Honduras)* (see footnote 229 above), p. 728, para. 232.

[252] *Ibid*., p. 728, para. 232.

territories and territorial seas which constituted their provinces at independence".[253] However, there was no evidence the Spanish Crown had divided its maritime jurisdiction between the colonial provinces of Nicaragua and Honduras even within the limits of the territorial sea.[254] The Court did not address the claim by Honduras in relation to the continental shelf.

D. Preliminary observations

111. In conclusion, the following observations of a preliminary nature can be made:

(a) the function of boundaries is to demarcate the extent of the State's sovereignty and jurisdiction, which extends beyond its land territory and includes the maritime space. The principle of stability of and respect for existing boundaries – that is, their immutability – is a rule of customary international law. The same principle of stability of and respect for existing boundaries would apply to maritime boundaries, which share the same function of demarcating the extent of the sovereignty and the sovereign rights of a State. Concerns regarding preservation of the stability of boundaries would equally apply to maritime boundaries, which, if questioned, could create conflictual situations among States over maritime territory that had been settled by treaty or otherwise;

(b) the principle of the intangibility of boundaries, as developed under the principle of *uti possidetis*, is considered a general principle of law beyond application to the traditional decolonization process and is a rule of customary international law. For the purposes of the present paper, it is relevant, first, because its overriding purpose is to preserve stability and avoid conflict should boundaries be questioned. Second, *uti possidetis* provides an example under international law of the "freezing" of pre-existing boundaries in the interests of preserving stability and preventing conflict. The same approach could be applied to baselines or the outer limits of maritime zones, also in the interests of preserving stability and preventing conflict;

(c) in relation to sea-level rise and maritime boundaries, the main preliminary observation is not so much the application of *uti possidetis* to existing maritime boundaries because of the impact of sea-level rise impact, but rather the importance accorded to ensuring continuity of pre-existing boundaries in the interests of stability and preventing conflict.

IV. Fundamental change of circumstances (*rebus sic stantibus*)

A. Submissions of Member States to the Commission and statements by Member States in the Sixth Committee of the General Assembly

112. The issue whether sea-level rise represents a fundamental change of circumstances, in the context of article 62, paragraph 2 (a), of the 1969 Vienna Convention on the Law of Treaties, that might be invoked as a ground to terminate maritime boundary agreements was examined in the first issues paper.[255] While some members of the Study Group noted that maritime treaties and adjudicated boundaries should be final, other members commented that additional study was necessary. A summary of the general exchange of views of the Study Group on this issue is to be found in the annual report of the Commission.[256] In the first issues paper, reference

[253] *Ibid*., p. 729, para. 234.
[254] *Ibid*.
[255] A/CN.4/740 and Corr.1, paras. 114–140.
[256] A/76/10, para. 281.

is made to the numerous statements made by Member States in the Sixth Committee, and their submissions to the Commission, in which they assert that sea-level rise should not affect maritime boundaries fixed by treaty or that there is a need to maintain the stability of existing maritime boundary agreements.[257]

113. Austria, in its statement in 2021, notes that it "would welcome further study in regard to the applicability of article 62 [of the Vienna Convention on the Law of Treaties] to the phenomenon of sea-level rise".[258] Israel notes that it "continues to study and consider this important discussion on the interministerial level, as it is of great relevance to the entire topic of sea-level rise, and we look forward to weighing in on this debate at a future date".[259] A number of States also have expressed the view that a fundamental change of circumstances would not apply to treaties establishing maritime boundaries: Antigua and Barbuda,[260] Columbia,[261] Cyprus,[262] France,[263] Greece,[264] Ireland,[265] Maldives,[266] Philippines,[267] Poland,[268] Singapore,[269] Thailand[270] and United States.[271]

114. To date, no State has expressed the view that the rule of fundamental change of circumstances, as codified in article 62, paragraph 1, of the Vienna Convention on the Law of Treaties, would apply to maritime boundaries as a result of sea-level rise. It should be noted also, that, in general, there are very few examples of State practice whereby article 62 has been invoked to unilaterally terminate a treaty,[272] and virtually

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[257] Submission of Maldives, p. 9 (available from https://legal.un.org/ilc/guide/8_9.shtml#govcoms; see A/CN.4/740 and Corr.1, para. 122); submission of the Pacific Islands Forum in 2019, p. 3 (available from https://legal.un.org/ilc/guide/8_9.shtml#govcoms; see A/CN.4/740 and Corr.1, para. 123); submission of the United States in 2020, p. 1 (available from https://legal.un.org/ilc/guide/8_9.shtml#govcoms; see A/CN.4/740 and Corr.1, para. 125); statements of Greece in 2018 and 2019 (A/C.6/73/SR.21, para. 68, and A/C.6/74/SR.28, paras. 56–57; see A/CN.4/740 and Corr.1, para. 128); statement of New Zealand (A/C.6/73/SR.22, para. 5; see A/CN.4/740 and Corr.1, para. 130); and statement of Israel (A/C.6/74/SR.24, para. 27; see A/CN.4/740 and Corr.1, para. 131).

[258] Statement of Austria in 2021. Available from https://www.un.org/en/ga/sixth/76/summaries.shtml#22mtg.

[259] Statement of Israel in 2021 (see footnote 197 above).

[260] Submission of Antigua and Barbuda (see footnote 46 above).

[261] Submission of Columbia (see footnote 53 above).

[262] Submission of Cyprus (see footnote 133 above).

[263] Submission of France (see footnote 60 above).

[264] Statement of Greece in 2021 (see footnote 135 above).

[265] Submission of Ireland (see footnote 65 above).

[266] Submission of Maldives (see footnote 257 above).

[267] Statement of the Philippines in 2021 (see footnote 112 above).

[268] Submission of Poland (see footnote 67 above), in which it states that it "does not consider modifying of maritime boundary treaties due to sea-level rise for now".

[269] Statement of Singapore in 2021. Available from https://www.un.org/en/ga/sixth/76/summaries.shtml#20mtg. In that statement, Singapore expresses the view that, "in general, maritime boundary delimitation treaties and the decisions of international courts or tribunals should not be easily reopened", while acknowledging that "each treaty needs to be interpreted in accordance with its terms in their context and in the light of its object and purpose and surrounding circumstances".

[270] Statement of Thailand in 2021 (see footnote 108 above).

[271] Submission of the United States in 2022. Available from https://legal.un.org/ilc/guide/8_9.shtml#govcoms.

[272] Examples of States invoking the rule of *rebus sic stantibus* to terminate or withdraw from treaties that predate the Vienna Convention on the Law of Treaties are examined in Snjólaug Árnadóttir, *Climate Change and Maritime Boundaries: Legal Consequences of Sea Level Rise* (Cambridge, United Kingdom, Cambridge University Press, 2021), pp 171–172.

none where international courts or tribunals have applied it.[273] Indeed, the situation does not seem to have changed much since Lauterpacht wrote that the "practice of States shows few examples of actual recourse to the doctrine *rebus sic stantibus*, and probably no examples of its recognition by States against whose treaty rights it has been invoked".[274]

B. Development of the rule of fundamental change of circumstances

115. Fundamental change of circumstances (*rebus sic stantibus*) is a general rule of international law that has been codified in article 62 of the Vienna Convention on the Law of Treaties. Article 62, paragraph 1, provides the following:

> A fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of a treaty, and which was not foreseen by the parties, may not be invoked as a ground for terminating or withdrawing from the treaty unless:
>
> (*a*) The existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and
>
> (*b*) The effect of the change is radically to transform the extent of obligations still to be performed under the treaty.

116. The threshold is high, as States may invoke a fundamental change of circumstance only if the circumstances that existed at the time that the treaty was made formed an "essential" basis of the consent of the parties and the change in circumstances has the effect of "radically" transforming the obligations to be performed by the parties. However, even should there be a fundamental change of circumstances in accordance with article 62, paragraph 1, under paragraph 2, that change may not be invoked by a party "as a ground for terminating or withdrawing from a treaty … if the treaty establishes a boundary".

117. During its eighteenth session, the Commission adopted draft article 59 on fundamental change of circumstances.[275] The adopted draft article included paragraph 2 (a), excluding the invocation of fundamental change of circumstances as a ground for terminating or withdrawing from a treaty establishing a boundary. The draft articles were later adopted, in 1969, as the Vienna Convention on the Law of Treaties.

118. As reflected in the commentaries, the Commission agreed to exclude treaties establishing a boundary in order to prevent situations of conflict, "because otherwise the rule [of fundamental change of circumstances], instead of being an instrument of

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[273] See Julia Lisztwan, "Stability of maritime boundary agreements", *Yale Journal of International Law*, vol. 37, No. 1 (Winter 2012), pp. 153–200, at pp. 181 and 185; *Fisheries Jurisdiction (United Kingdom v. Iceland), Jurisdiction of the Court, Judgment, I.C.J. Reports 1973*, p. 3; and *Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, p. 7. However, the European Court of Justice did find that the political and economic changes in former Yugoslav republics created a fundamental change in circumstances. European Court of Justice, *A. Racke GmbH & Co.* v. *Hauptzollamt Mainz*, Case No. C-162/96, Judgment, 16 June 1998, para. 55.

[274] Hersch Lauterpacht, *The Function of Law in the International Community* (Oxford, Clarendon, 1933) p. 270. Lauterpacht also discusses the case of *Bremen (Free Hansa City of) v. Prussia*, German *Staatsgerichtshof*, 29 June 1925, in which the court recognized the principle of *rebus sic stantibus* but did not deem it applicable to the case. *Ibid.*, pp. 277–279; and *Annual Digest of Public International Law Cases*, vol. 3 (Cambridge, United Kingdom, Cambridge University Press, 1929), pp. 352–354.

[275] "*Yearbook … 1966*, vol. II, document A/6309/Rev.1, Part II, p. 177, para. 38, at p. 184.

peaceful change, might become a source of dangerous frictions",[276] and to safeguard the stability of boundaries in order to promote peace and security in the international community.[277]

119. Moreover, the same concerns were expressed by States during the negotiations of the Vienna Convention on the Law of Treaties. For example, specifically on the exclusion of boundary treaties, Poland stated the following:

> "[T]he Polish delegation considered that the present formulation of article 59 reconciled two conflicting elements, the dynamics of international life and the stability that was essential in every legal order. While it might be argued that stability was not an end in itself, it was nevertheless the most important factor in the case of treaties establishing boundaries. The problem of boundaries was closely connected with the most fundamental rights of States. It was for that reason that the Polish delegation maintained that no treaty establishing a boundary could be open to unilateral action on the ground of a fundamental change of circumstances.[278]

120. It can be concluded that the fundamental interest of ensuring stability of boundaries with a view to preserving peaceful relations was an object and purpose of article 62, paragraph 2, of the Vienna Convention on the Law of Treaties. The same interest would apply to ensuring the stability of maritime boundaries and preserving peaceful relations among States. There are still many disputed maritime boundaries, and the prospect of adding new ones from boundaries that were settled would seem to undermine the interest of ensuring stability under the Convention.

C. Case law and application of the rule of fundamental change of circumstances to maritime boundaries

121. Past cases have also demonstrated that courts and tribunals are reluctant to apply fundamental change of circumstances to terminate a treaty. For example, the International Court of Justice did not accept a claim by Iceland of fundamental change of circumstances based on changes in fishing techniques and law as grounds to terminate the compromissory clause between it and the United Kingdom.[279] Likewise, the Court did not accept the argument by Hungary for the application of article 62 of the Vienna Convention on the Law of Treaties as grounds for termination of its treaty with Czechoslovakia. The Court underscored the concerns of stability under the Convention, observing that "[t]he negative and conditional wording of [a]rticle 62 of

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[276] *Ibid.*, p. 259, paragraph (11) of the commentary to draft article 59. See also submission of Maldives (see footnote 257 above).

[277] Árnadóttir, "Termination of maritime boundaries" (see footnote 239 above), pp. 101–102. In support of excluding boundaries, the Commission referred to Permanent Court of International Justice, *Case of the Free Zones of Upper Savoy and the District of , Order*, 19 August 1929, *P.C.I.J. Series A*, No. 22 (Árnadóttir, *ibid.*, pp. 103–104). See also submission of Maldives (see footnote 257 above), pp. 20–21, citing *Yearbook … 1966*, vol. II, document A/6309/Rev.1, Part II, p. 259, paragraph (11) of the commentary to draft article 59.

[278] *Official Records of the United Nations Conference on the Law of Treaties, Second Session, 9 April–22 May 1969, Summary Records of the Plenary Meetings and of the Meetings of the Committee of the Whole* (A/CONF.39/11/Add.1), 22nd plenary meeting, p. 117, para. 14. States also expressed concern that the exclusion of treaties establishing boundaries would constitute endorsement of a number of colonial and unequal treaties concluded in the past, and runs counter to the right of self-determination. See, for example, the statement of Afghanistan, *ibid.*, p. 118, para. 19.

[279] Iceland did not appear in the jurisdictional proceedings. Iceland had raised the principle of fundamental change of circumstance in a letter dated 29 May 1972 from the Minister for Foreign Affaires of Iceland to the Registrar of the Court. *Fisheries Jurisdiction (United Kingdom* v. *Iceland), Jurisdiction of the Court* (see footnote 273 above).

the Vienna Convention on the Law of Treaties is a clear indication moreover that the stability of treaty relations requires that the plea of fundamental change of circumstances be applied only in exceptional cases".[280]

122. The question as to whether article 62, paragraph 2, applies to maritime boundaries, was examined in two cases, already addressed in the first issues paper: the 1978 judgment of the International Court of Justice in the *Aegean Sea Continental Shelf (Greece v. Turkey)* case,[281] and the *Bay of Bengal Maritime Boundary Arbitration (Bangladesh v. India)*.[282] Most recently, in *Maritime Delimitation in the Indian Ocean (Somalia* v. *Kenya)*, the Court observed "that boundaries between States, including maritime boundaries, are aimed at providing permanency and stability".[283] Moreover, the dominant view of writers does not support the application of fundamental change of circumstances (*rebus sic stantibus*) to maritime boundary treaties.[284] Thus, in reality the issue is more theoretical than likely to occur.

123. It is evident the objective and purpose article 62, paragraph 2 (a), is to prevent conflict and preserve the stability of boundaries. To recognize sea-level rise as a fundamental change of circumstance within the meaning of article 62 would produce the contrary outcome. By allowing States to unilaterally terminate or withdraw from existing treaties for maritime boundaries would instigate new disputes where they had been resolved peaceably by agreement of the parties. Given the widespread impact of sea-level rise, this would also threaten the stability of international relations in many parts of the world.

124. Moreover, given the very high threshold for invoking article 62, the question can also be raised as to whether sea-level rise would fulfil these cumulative conditions to allow a party to unliterally terminate an otherwise valid boundary agreement. Article 62 requires that "the facts, knowledge, or legal regime, the change of which is invoked as grounds for termination, existed at the time the treaty was concluded; the parties did not foresee a change in those circumstances".[285] As one author remarks, "the [S]tate would need to demonstrate both that the coastal geography at the time the agreement was concluded was a basis for its consent and that the [S]tate could not reasonably have anticipated changes in that coastal geography".[286]

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[280] *Gabčíkovo-Nagymaros Project (Hungary* v. *Slovakia)* (see footnote 273 above), p. 65, para. 104.

[281] *Aegean Sea Continental Shelf, Judgment, I.C.J. Reports 1978*, p. 3, at pp. 35–36, para. 85. See also A/CN.4/740 and Corr.1, para. 118.

[282] *Bay of Bengal Maritime Boundary Arbitration (Bangladesh v. India)*, Case No. 2010-16, Permanent Court of Arbitration, Award, 7 July 2014, p. 63, paras. 216–217. Available from www.pca-cpa.org/en/cases/18. See also A/CN.4/740 and Corr.1, para. 120.

[283] *Maritime Delimitation in the Indian Ocean (Somalia v. Kenya), Judgment, I.C.J. Reports 2021*, p. 206, at p. 263, para. 158.

[284] Lisztwan, "Stability of maritime boundary agreements" (see footnote 273 above), pp. 184–199. The author refers to the statement of the United States delegation at the negotiations of the then draft article 59 on the fundamental change of circumstances, in which it quoted Oppenheim's definition of boundaries, noting that, "[b]y inference, the United States delegation also viewed boundaries as encompassing land and maritime delimitations". *Ibid*., p. 188. See also Kate Purcell, *Geographical Change and the Law of the Sea* (Oxford, Oxford University Press, 2019), pp. 253–254; and Jenny Grote Stoutenburg, "Implementing a new regime of stable maritime zones to ensure the (economic) survival of small island States threatened by sea-level rise", *International Journal of Marine and Coastal Law*, vol 26, No. 2 (January 2011), pp. 263–311, at p. 280. However, Árnadóttir is of the view that maritime boundaries are not excluded from article 62, paragraph 2. Árnadóttir, *Climate Change and Maritime Boundaries* (see footnote 272 above), pp. 209–219.

[285] Lisztwan, "Stability of maritime boundary agreements" (see footnote 273 above), citing Oliver J. Lissitzyn, "Treaties and changed circumstances (*rebus sic stantibus*)", American Journal of International Law, vol. 61, No. 4 (October 1967), pp. 895–922, at p. 912, para. 5 ("A change in circumstances may be invoked even if it was not 'unforeseen' in the absolute sense").

[286] Lisztwan, "Stability of maritime boundary agreements" (see footnote 273 above), p. 184.

D. Preliminary observations

125. In conclusion, the following observations of a preliminary nature can be made:

(a) many States in the Sixth Committee have expressed the clear position that sea-level rise should affect neither maritime boundaries fixed by treaty nor the need to maintain the stability of existing maritime boundary agreements. This view was reiterated by several States in their submissions to the Commission. To date, no State has expressed the view that the principle of fundamental change of circumstances, as codified in article 62, paragraph 1, of the Vienna Convention on the Law of Treaties, would apply to maritime boundaries as a result of sea-level rise;

(b) the history of article 62, paragraph 2 (a), of the Vienna Convention on the Law of Treaties, under which treaties establishing boundaries are excluded from application of the principle of fundamental change of circumstances to terminate or suspend a treaty, shows that its objective and purpose was the maintenance of the stability of boundaries in the interests of peaceful relations. The same objective, of maintaining stability in the interests of peaceful relations and avoiding conflict, would clearly apply to maritime boundaries. The possibility of a State unilaterally invoking sea-level rise as a fundamental change of circumstances to terminate an existing treaty would create a risk of conflict and disturbance of international relations. The widespread impact of sea-level rise could create many new disputes among States over settled maritime boundaries. Such a scenario would not be in the interests of preserving stability and peaceful relations;

(c) in practice, there are few examples of treaties being terminated or suspended as a result of a fundamental change of circumstances, whether before or after the adoption of the Vienna Convention on the Law of Treaties. Likewise, the International Court of Justice has not applied the principle when requested by States, on the basis of concerns of ensuring stability under the Convention. There is no clear evidence that maritime boundaries were intended to be excluded from article 62, paragraph 2 (a). On the contrary, in three cases that have raised this issue, the Court has consistently concluded that article 62, paragraph 2 (a), does apply to maritime boundaries, in the interests of the stability of boundaries;

(d) the objective of preserving the stability of boundaries and peaceful relations under article 62 would equally apply to maritime boundaries, as underlined by the Court and arbitral tribunal in three cases addressing this issue.

V. Effects of the potential situation whereby overlapping areas of the exclusive economic zones of opposite coastal States, delimited by bilateral agreement, no longer overlap, and the issue of objective regimes;[287] effects of the situation whereby an agreed land boundary terminus ends up being located out at sea; judgment of the International Court of Justice in the *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica* v. *Nicaragua)* case

126. According to the 2021 annual report of the Commission:

> Some members suggested that the Study Group take into account the possible situation where, as a result of sea-level rise and a landward shift of the coastline,

[287] The Co-Chairs wishes to thank Professor Ion Galea, Faculty of Law, University of Bucharest, for his contribution to this part of the present chapter.

> the bilaterally-agreed delimitation of overlapping areas of exclusive economic zones of opposite coastal States no longer overlapped, as such a situation would result in States being trapped in an unreasonable legal fiction. Support was expressed for the examination of this hypothesis, including from the angle of concepts from the law of treaties, like obsolescence or the supervening impossibility of performance of a treaty.[288]
>
> …
>
> It was noted that the matter [as to whether maritime agreements establishing boundaries and fixing limits were binding upon all States] needed to be further examined, including from the perspective of objective regimes in international law. It was also suggested that the Study Group examine the issue of the consequences for a maritime boundary if an agreed land boundary terminus ended up being located out at sea because of sea-level rise.[289]

Furthermore, "it was also deemed important to consider the judgment rendered by the International Court of Justice in the *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica* v. *Nicaragua)* case in which the Court used a moving delimitation line for maritime delimitation".[290]

127. These issues were not covered by Member States in their submissions to the Commission or statements to the Sixth Committee over the period 2020–2022.

128. According to the doctrine, "[w]hen the coastal State has a maritime delimitation agreement with an opposite or adjacent State, … [i]f the total area exceeds 400 nautical miles after the coast retreats, a new area of high seas is created".[291]

129. The scenario under consideration presupposes that the delimitation was effected through a treaty between States with opposite coasts (hereinafter referred to as the "delimitation treaty"). In any case, the considerations below may apply only to the notion of the exclusive economic zone. In the case of the continental shelf, nothing prevents States from extending their continental shelf to limits beyond 200 nautical miles, in accordance with article 76 of the United Nations Convention on the Law of the Sea and the procedure for which it provides; at the same time, the maximum limit of 350 nautical miles must not be exceeded.

130. A first question to be answered is whether the delimitation treaty can be affected by the "supervening impossibility of performance", under article 61 of the Vienna Convention on the Law of Treaties. According to that article, "[a] party may invoke the impossibility of performing a treaty as a ground for terminating or withdrawing from it if the impossibility results from the permanent disappearance or destruction of an object indispensable for the execution of the treaty". This article reflects customary international law.[292]

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[288] A/76/10, para. 277.

[289] *Ibid.*, para. 281.

[290] *Ibid.*, para. 272. *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica* v. *Nicaragua)* and *Land Boundary in the Northern Part of Isla Portillos (Costa Rica* v. *Nicaragua), Judgment, I.C.J. Reports 2018*, p. 139.

[291] Sarra Sefrioui, "Adapting to sea-level rise: a law of the sea perspective", in *The Future of the Law of the Sea*, Gemma Andreone, ed.) (Cham, Springer International, 2017), pp. 3–22, at p. 10), citing Lisztwan, "Stability of maritime boundary agreements" (see footnote 273 above), p. 176.

[292] *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* (see footnote 273 above), p. 38, para. 46. See also *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 16,; and *Fisheries Jurisdiction (United Kingdom* v. *Iceland), Jurisdiction of the Court* (see footnote 273 above), p. 18, para. 36.

131. The Commission, in its commentary to the draft articles on the law of treaties, explained the following: “State practice furnishes few examples of the termination of a treaty on this ground. But the type of cases envisaged by the article is the submergence of an island, the drying up of a river or the destruction of a dam or hydro-electric installation indispensable for the execution of a treaty.”[293] The Special Rapporteur on the topic, Sir Humphrey Waldock, also provided similar examples, including the destruction of a railway by an earthquake, and the destruction of a plant, installations, a canal or a lighthouse.[294]

132. According to the doctrine, only a “material” impossibility (not a “legal” impossibility) triggers the application of article 61.[295] Nevertheless, the International Court of Justice left the issue open in the *Gabčíkovo-Nagymaros Project* case. Hungary contended that the essential object of a 1997 treaty establishing a hydropower plant on the River Danube was “an economic joint investment which was consistent with environmental protection and which was operated by the two contracting parties jointly” and that it had permanently disappeared. The Court held that “[i]t is not necessary for the Court to determine whether the term ‘object’ in [a]rticle 61 can also be understood to embrace a legal régime as in any event, even if that were the case, it would have to conclude that in this instance that régime had not definitively ceased to exist”.[296]

133. Thus, if, in the case of a delimitation treaty, the overlapping entitlements over maritime areas were to be interpreted as a physical object (the “contact” between the entitlements of the two States), it may be argued that the parties could invoke article 61 if their entitlements in the respective areas disappear because of sea-level rise (a situation which is comparable to the submergence of an island). If the delimitation treaty is interpreted as establishing a legal regime, then it may be argued that article 61 does not apply, since this article is applicable only when “a physical object” indispensable for the execution of the treaty disappears. However, as noted by the International Court of Justice (see previous paragraph), even if so, the legal regime provided by that treaty continues to exist, since a maritime delimitation is a legal act.

134. In any case, both the Commission and the Special Rapporteur emphasize that the application of article 61 is not “automatic”: the parties have a “right to invoke” the supervening impossibility of performance as a ground for terminating the treaty,[297] which means that following that invocation the parties still have to agree on the termination of the treaty.

135. A second question to be answered is whether a treaty can be affected by the “desuetude” or “obsolescence”. The exclusion of desuetude and obsolescence as grounds for terminating treaties in the Vienna Convention on the Law of Treaties was intentional on the part of the Commission: “while ‘desuetude’ or ‘obsolescence’ may be a factual cause of the termination of a treaty, the legal basis of such termination,

[293] *Yearbook … 1966*, vol. II, document A/6309/Rev.1, p. 256, paragraph (2) of the commentary to draft article 58.

[294] *Yearbook … 1963*, vol. II, documents A/CN.4/156 and Add.1–3, p. 79, paragraph (5) of the commentary to draft article 21.

[295] Mark E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Leiden and Boston, Martinus Nijhoff, 2009), p. 755, para. 4.

[296] *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* (see footnote 273 above), pp. 63–64, para. 103.

[297] *Yearbook … 1966*, vol. II, document A/6309/Rev.1, p. 256, paragraph (5) of the commentary to draft article 58; and *Yearbook … 1963*, vol. II, documents A/CN.4/156 and Add.1–3, p. 78, paragraph (2) of the commentary to draft article 21.

when it occurs, is the consent of the parties to abandon the treaty, which is to be implied from their conduct in relation to the treaty".[298]

136. Desuetude is understood by the Special Rapporteur, Sir Gerald Fitzmaurice, to be "failure by both or all the parties over a long period to apply or invoke a treaty, or other conduct evidencing a lack of interest in it", which "may amount to tacit agreement to by the parties to disregard the treaty, or to treat it as terminated".[299] Obsolescence refers to the "impossibility of applying a treaty due to the disappearance of a legal situation which constituted one of its essential conditions".[300] Thus, obsolescence deals with the legal impossibility of applying a treaty. Examples offered in the doctrine include the references to "enemy state" in the Charter of the United Nations.[301] In practice, Austria, in 1990, notified the other States parties to the State Treaty of 15 May 1955 (France, Union of Soviet Socialist Republics, United Kingdom and United States) that military and aviation clauses in the treaty had became obsolete, and the other parties replied by consenting to this notification.[302] Thus, it may also be argued that the partial termination of the treaty took place by the consent of the parties.

137. It therefore appears that obsolescence could occur in the case of a delimitation treaty, as a "legal impossibility" to perform, if the following conditions were met: (a) a change in the legal framework that rendered the treaty inapplicable (this would imply that the rights and entitlements of States over the maritime areas that overlapped would disappear); and (b) the parties agreed on such inapplicability (or at least one party invoked obsolescence and the others did not object). However, this would require the entire United Nations Convention on the Law of the Sea to become obsolete, which seems highly improbable. The change of baselines of some States, or even many, does not render that entire Convention obsolete.

138. A third question to be answered is whether the delimitation treaty can affect the rights of third States. It could be argued that a delimitation treaty represents an "objective regime", a "territorial treaty", which is opposable to third States and has *erga omnes* effects.

139. The Vienna Convention on the Law of Treaties does not deal with treaties establishing objective regimes. However, in 1960, the Special Rapporteur Sir Gerald Fitzmaurice, recognized the following:

> [T]he instruments governing the use of such international rivers as the Rhine, Danube, and Oder, and such seaways as the Suez and Panama Canals, the sounds and belts, and the Dardanelles and Bosphorus, to take some of the more prominent cases, have all come to be accepted or regarded as effective *erga omnes*, and this of course is still more so as regards the question whether they confer universally available rights of passage.[303]

140. At the same time, the Special Rapporteur argued that, in the case of objective regimes, all States have a duty to recognize and respect situations of law or of fact

[298] *Yearbook … 1966*, vol. II, document A/6309/Rev.1, p. 237; and Marcelo G. Kohen, "Desuetude and obsolescence of treaties", in *The Law of Treaties Beyond the Vienna Convention*, Enzo Cannizzaro, ed. (Oxford, Oxford University Press, 2011), pp. 350–359, at p. 351.

[299] *Yearbook … 1957*, vol. II, document A/CN.4/107, p. 28, paragraph 3 of draft article 15.

[300] Kohen, "Desuetude and obsolescence of treaties" (see footnote 298 above), p. 358.

[301] *Ibid.*

[302] State Treaty for the Re-establishment of an Independent and Democratic Austria (Vienna, 15 May 1955), *Federal Gazette*, vol. 39 (1955), No. 152, p. 725 (English text at p. 762).

[303] *Yearbook … 1960*, document A/CN.4/130, p. 92, para. 52.

established under lawful and valid international treaties embodying "international regimes or settlements".[304]

141. The question of "territorial" treaties appeared before the Commission on the occasion of the works related to the succession of States in respect of treaties. In its commentary to the draft articles on succession of states in respect of treaties, the Commission noted the following: "Both in the writings of jurists and in State practice frequent reference is made to certain categories of treaties, variously described as of a 'territorial', 'dispositive', 'real' or 'localized' character, as binding upon the territory affected notwithstanding any succession of States."[305] The Commission included in this category treaties establishing a boundary – which include delimitation treaties[306] – as well as "other territorial treaties", in what would become articles 11 and 12 of the 1978 Vienna Convention on the Succession of States in respect of Treaties.[307] The International Court of Justice confirmed the customary character of article 12 in the *GabčíkovoNagymaros Project* case.[308]

142. The interpretation of the word "boundary" to cover maritime boundaries was reinforced in the *Aegean Sea Continental Shelf* case.[309] In this case, the International Court of Justice interpreted the term "territorial status" to cover also the issues of delimitation of the continental shelf.[310] It can be noted, in this context, that States parties to the United Nations Convention on the Law of the Sea are obliged to give "due publicity" to charts or lists of geographical coordinates of the outer limit lines of the exclusive economic zone (art. 75, para. 2) and of the outer limit lines of the continental shelf and the lines of delimitation (art. 84, para. 2), and to deposit a copy of each such chart or list with the Secretary-General of the United Nations.

143. The hypothesis whereby an agreed land boundary terminus ends up being located out at sea has been flagged by the doctrine. For instance, Samuel Pyeatt Menefee refers to the situation whereby "land boundaries between two [S]tates … become flooded by rising sea levels. Do these remain the same, although submerged, or would the onslaught of the oceans trigger the necessity for a new boundary agreement?"[311] Referring to article 15 of the United Nations Convention on the Law of the Sea,[312] he goes on:

> The initial wording suggests problems in retaining an old land boundary if the [S]tates involved are not equally affected by the rise in sea level. At the same

[304] *Ibid.*, p. 97, paras. 68–70.

[305] *Yearbook … 1974*, vol I (Part One), document A/9610/Rev.1, p. 174, para. 85, at p. 196, paragraph (1) of the commentary to draft article 12.

[306] *Idem*, p. 199, paragraph (10) of the commentary to draft article 12.

[307] Vienna Convention on Succession of States in Respect of Treaties (Vienna, 23 August 1978), United Nations, *Treaty Series*, vol. 1946, No. 33356, p. 3.

[308] *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* (see footnote 273 above), p. 72, para. 123.

[309] *Aegean Sea Continental Shelf* (see footnote 281 above), pp 35–36. para. 85: "Whether it is a land frontier or a boundary line in the continental shelf that is in question, the process is essentially the same, and inevitably involves the same element of stability and permanence, and is subject to the rule excluding boundary agreements from fundamental change of circumstances."

[310] *Ibid.*, p. 32, para. 77.

[311] Samuel Pyeatt Menefee, "'Half seas over': the impact of sea-level rise on international law and policy", *UCLA Journal of Environmental Law and Policy*, vol. 9, No. 2 (1991), pp. 175–218, at p. 210.

[312] Article 15, on "Delimitation of the territorial sea between States with opposite or adjacent coasts", reads as follows: "Where the coasts of two States are opposite or adjacent to each other, neither of the two States is entitled, failing agreement between them to the contrary, to extend its territorial sea beyond the median line every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial seas of each of the two States is measured. The above provision does not apply, however, where it is necessary by reason of historic title or other special circumstances to delimit the territorial seas of the two States in a way which is at variance therewith."

> time, one could expect an argument based on 'historical title or other special circumstances' by any [S]tate gaining advantage by retaining the old land boundaries. A similar argument is that the doctrine of changed circumstances is not usually held to apply in boundary matters and the former (dry land) territorial agreement would therefore apply, constituting an "agreement between them to the contrary".[313]

144. Indeed, boundary treaties are explicitly excluded under article 62, paragraph 2, of the Vienna Convention on the Law of Treaties from termination as a result of a change of circumstances: "[a] fundamental change of circumstances may not be invoked as a ground for terminating or withdrawing from a treaty ... if the treaty establishes a boundary". The fact of an agreed land boundary terminus ending up being located out at sea or even of a segment of an agreed land boundary being inundated does not affect the validity of the treaty establishing that land boundary. A different approach would affect the legal stability of the boundary and of its regime.

145. In the *Nicaragua* v. *Honduras* case, Nicaragua, noting the highly unstable nature of the mouth of the River Coco at the Nicaragua-Honduras land boundary terminus, asserted that fixing base points on either bank of the river and using them to construct a provisional equidistance line would be "unduly problematic".[314] As noted by Sefrioui:

> In this case, if the [d]elta shifted landward, it would actually lead to the baseline more closely following the overall shape of the coastline. The [International Court of Justice] held that '[g]iven the close proximity of these base points to each other, any variation or error in situating them would become disproportionately magnified in the resulting equidistance line'.[315] The land boundary along the Rio Coco ends in a prominent delta – Cape Gracias a Dios – created by sediment transported down the river. The parties to the case agreed that the sediment transported by the River Coco has 'caused its delta, as well as the coastline to the north and south of the Cape, to exhibit a very active morpho-dynamism'.[316] The Court has underlined that 'continued accretion at the Cape might render any equidistance line so constructed today arbitrary and unreasonable in the near future'.[317] Therefore, the Court could not determine any base point for the construction of the equidistance line and concluded that 'where … any base points that could be determined by the Court are inherently unstable, the bisector method may be seen as an approximation of the equidistance method'.[318]

In this way, the Court found a practicable legal solution to overcome the instability of the baseline and of the base points.

146. In the *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica* v. *Nicaragua)* case,[319] the International Court of Justice used a moving delimitation line for maritime delimitation, thus making a further step after the

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[313] Menefee, "'Half seas over'" (see footnote 311 above), p. 210.

[314] *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Honduras)* (see footnote 229 above), p. 741, para. 273. See also Sefrioui, "Adapting to sea level rise" (see footnote 291 above), p. 17.

[315] *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Honduras)* (see footnote 229 above), p. 742, para. 277.

[316] *Ibid*.

[317] *Ibid*.

[318] *Ibid*., p. 746, para. 287. Sefrioui, "Adapting to sea level rise" (see footnote 291 above), pp. 10–11.

[319] *Maritime Delimitation in the Caribbean Sea and in the Pacific Ocean (Costa Rica* v. *Nicaragua)* and *Land Boundary in the Northern Part of Isla Portillos (Costa Rica* v. *Nicaragua)* (see footnote 290 above).

solution found in the above-mentioned *Nicaragua v. Honduras* case. In its statement before the Sixth Committee in 2021, Costa Rica refers to this judgment:

> Costa Rica would like to highlight the need to apply the principles of stability, security, certainty and predictability …. Costa Rica welcomes the consideration [by the Study Group] of the judgment of the Court that served to establish the maritime boundaries between Costa Rica and Nicaragua, using a moving delimitation line in a segment that connects the coast with the fixed point of the start of the maritime boundary. As this case shows, in some situations where the coastal geomorphology is variable, a solution such as the one determined by the Court in that specific case is an ideal alternative for providing security and stability to the parties despite frequent variations in the land boundary terminus.[320]

Indeed, according to the Court in its judgment:

> The Court observes that, "since the starting-point of the land boundary is currently located at the end of the sandspit bordering the San Juan River where the river reaches the Caribbean Sea …, the same point would normally be the starting-point of the maritime delimitation. However, the great instability of the coastline in the area of the mouth of the San Juan River, as indicated by the Court-appointed experts, prevents the identification on the sandspit of a fixed point that would be suitable as the starting-point of the maritime delimitation. It is preferable to select a fixed point at sea and connect it to the starting-point on the coast by a mobile line. Taking into account the fact that the prevailing phenomenon characterizing the coastline at the mouth of the San Juan River is recession through erosion from the sea, the Court deems it appropriate to place a fixed point at sea at a distance of 2 nautical miles from the coast on the median line.[321]

This is a concrete solution found by the Court to overcome the "great instability of the coastline", characterized by "recession through erosion from the sea", and thus the instability of the baseline and of the base points.

147. In conclusion, the following observations of a preliminary nature can be made:

(a) in the potential situation whereby the overlapping areas of the exclusive economic zone of opposite coastal States, delimited by bilateral agreement, no longer overlap, the "supervening impossibility of performance", under article 61 of the Vienna Convention on the Law of Treaties, can be invoked only if the contact between the overlapping entitlements of the two States is interpreted to be the physical object that disappeared. At the same time, the legal regime can continue, since the delimitation is a legal act and, at any rate, the application of article 61 is not automatic. As shown above, neither can desuetude or obsolescence be invoked to terminate the treaty. At the same time, it could be argued that a delimitation treaty represents an "objective regime", a "territorial treaty", which is opposable to third States.

(b) the fact of an agreed land boundary terminus ending up being located out at sea or even of a segment of an agreed land boundary being inundated does not affect the validity of the treaty establishing that land boundary. A different approach would affect the legal stability of the boundary and of its regime.

[320] Statement of Costa Rica in 2021 (see footnote 121 above).

[321] *Maritime Delimitation in the Caribbean Sea and in the Pacific Ocean (Costa Rica* v. *Nicaragua)* and *Land Boundary in the Northern Part of Isla Portillos (Costa Rica* v. *Nicaragua)* (see footnote 290 above), p. 173, para. 86.

(c) the International Court of Justice, in its recent jurisprudence (*Nicaragua* v. *Honduras* and *Costa Rica* v. *Nicaragua*), has found concrete and practicable legal solutions to overcome the instability of the baseline and of the base points: using a fixed point at sea for the start of the maritime boundary might be interpreted as similar to fixing the baseline for the purposes of ensuring the stability of the maritime zones measured from it.

VI. Principle that "the land dominates the sea"

A. Development of the principle that "the land dominates the sea"

148. The well-known principle of international law that "the land dominates the sea" is a judicial creation famously articulated by the International Court of Justice in its 1969 *North Sea Continental Shelf* case.[322] The Court applied this principle to the continental shelf on the grounds that "the land is the legal source of the power which a State may exercise over territorial extensions to seaward", especially in the case of stretches of submerged land.[323] It indicated that the starting point for determining any maritime entitlement is the coast.[324] The principle that "the land dominates the sea" has since been applied in a number of cases concerning the delimitation of the continental shelf,[325] the exclusive economic zone and islands.[326] The concept dates back to the 1909 arbitration in the *Grisbådarna case*, in which the arbitral tribunal referred to the fundamental principles of the law of nations, "*tant ancien que moderne*" ("both ancient and modern"), according to which "*le territoire maritime est une dépendance nécessaire d'un territoire terrestre"* ("maritime territory is an essential appurtenance of land territory").[327] The concept was later highlighted in the *Fisheries Case (United Kingdom* v. *Norway)*, in which the Court took into consideration "the close dependence of the territorial sea upon the land domain. It is the land which confers upon the coastal State a right to the waters off its coasts".[328] Notably, the principle that "the land dominates the sea", despite its wide acceptance and application by the Court and tribunals, has not been codified. There is no mention

[322] *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 3.

[323] *Ibid*., p. 51, para. 96.

[324] *Ibid*. See also *Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Merits, Judgment, I.C.J. Reports 2001*, p. 40, at p. 97, para. 185.

[325] *Delimitation of the Maritime Boundary in the Gulf of Maine Area, Judgment, I.C.J. Reports 1984*, p. 246, at p. 312, para. 157; *Aegean Sea Continental Shelf* (see footnote 281 above), p. 36, para. 86; *Maritime Delimitation and Territorial Questions between Qatar and Bahrain* (see footnote 324 above), p. 97, para. 185; *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Honduras)* (see footnote 229 above), pp. 696 and 699, paras. 113 and 126; *Maritime Delimitation in the Black Sea (Romania* v. *Ukraine), I.C.J. Reports 2009*, p. 61, at p. 89, para. 77; *Bay of Bengal Maritime Boundary Arbitration (Bangladesh v. India)* (see footnote 282 above), p. 172, para. 279; *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* (see footnote 236 above), p. 61, para. 73; and *Delimitation of the maritime boundary in the Bay of Bengal (Bangladesh/Myanmar), Judgment, ITLOS Reports 2012*, p. 4, at. p. 56, para. 185.

[326] *Maritime Delimitation and Territorial Questions between Qatar and Bahrain* (see footnote 324 above), p. 97, para. 185.

[327] *Affaire des Grisbådarna (Norvège, Suède)*, Award of 23 October 1909, *Reports of International Arbitral Awards, vol.* XI, pp. 155–162, at. p. 159. See also Bing Bing Jia, "The principle of the domination of the land over the sea: a historical perspective on the adaptability of the law of the sea to new challenges", *German Yearbook of International Law*, vol. 57, 2014, pp. 63–94, at p. 69.

[328] *Fisheries Case, Judgment of December 18th 1951: I.C.J. Reports 1951*, p. 116, at p. 133.

of the principle in the four 1958 Geneva Conventions[329] or in the 1982 the United Nations Convention on the Law of the Sea.

149. While the land is the source of maritime entitlements, the International Court of Justice has clarified that it is not the land mass itself that is the basis of entitlement to continental shelf rights: "The juridical link between the State's territorial sovereignty and its rights to certain adjacent maritime expanses is established by means of its coast. The concept of adjacency measured by distance is based entirely on that of the coastline, and not on that of the landmass."[330] The Court reiterated this concept in the *Qatar and Bahrain* case, recalling that "[i]n previous cases the Court has made clear that maritime rights derive from the coastal State's sovereignty over the land, a principle which can be summarized as 'the land dominates the sea'".[331] In 2009, in the *Maritime Delimitation in the Black Sea* case, the Court stated the following: "The title of a State to the continental shelf and to the exclusive economic zone is based on the principle that the land dominates the sea through the projection of the coasts or the coastal fronts."[332]

B. Principle of natural prolongation

150. Notably, in relation to the continental shelf, the doctrine of "natural prolongation" also emerged parallel to the principle that "the land dominates the sea", as articulated by the International Court of Justice in the *North Sea Continental Shelf* cases: "the rights of the coastal State in respect of the area of continental shelf that constitutes a natural prolongation of its land territory into and under the sea exist *ipso facto* and *ab initio*, by virtue of its sovereignty over the land, and as an extension of it in an exercise of sovereign rights for the purpose of exploring the seabed and exploiting its natural resources".[333]

151. In contrast to the principle that "the land dominates the sea", the principle of natural prolongation was codified, in article 76, paragraph 1, of the United Nations Convention on the Law of the Sea. However, the application of the principle of natural prolongation in the delimitation of the respective claims of coastal States over the continental shelf by courts and tribunals diminished, despite its broad acceptance by States, in favour of the distance criterion. In the *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* case, both parties had asserted that the principle of natural prolongation should be applied in the delimitation of their respective continental shelves. As the International Court of Justice observed, "for both [p]arties it is the concept of the natural prolongation of the land into and under the sea which is

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[329] Convention on the High Seas (Geneva, 29 April 1958), United Nations, *Treaty Series*, vol. 450, No. 6465, p. 11; Convention on the Continental Shelf (Geneva, 29 April 1958), *ibid.*, vol. 499, No. 7302, p. 311; Convention on the Territorial Sea and the Contiguous Zone (Geneva, 29 April 1958), *ibid.*, vol. 516, No. 7477, p. 205; and Convention on Fishing and Conservation of the Living Resources of the High Seas (Geneva, 29 April 1958), *ibid.*, vol. 559, No. 8164, p. 285.

[330] *Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, I.C.J. Reports 1985*, p. 13, at p. 41, para. 49.

[331] *Maritime Delimitation and Territorial Questions between Qatar and Bahrain* (see footnote 324 above), p. 97, para. 185. See also *Aegean Sea Continental Shelf* (see footnote 281 above), p. 36, para. 86.

[332] *Maritime Delimitation in the Black Sea (Romania* v. *Ukraine)* (see footnote 325 above), p. 89, para. 77.

[333] *North Sea Continental Shelf* (see footnote 322 above), p. 22, para. 19. See also *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* (see footnote 236 above). Both parties invoked the concept in the following terms (*ibid.*, pp. 29–30): "The concept of the continental shelf as the natural prolongation of the land territory into and under the sea is fundamental to the juridical concept of the continental shelf and a State is entitled *ipso facto* and *ab initio* to the continental shelf which is the natural prolongation of its land territory into and under the sea."

commanding. Where they differ in this respect is … as to the meaning of the expression 'natural prolongation'".[334] The United Nations Convention on the Law of the Sea had not yet been adopted at the time of the judgment and neither State was party to the 1958 Convention on the Continental Shelf, meaning that the Court was to apply the rules and principles of international law. The Court decided not to apply the well-accepted principle of natural prolongation, as both the Libyan Arab Jamahiriya and Tunisia derived continental shelf title from a natural prolongation common to both territories, despite the parties presenting geological information otherwise. Instead, the Court found that "the ascertainment of the extent of the areas of shelf appertaining to each State must be governed by criteria of international law other than those taken from physical features".[335] While it had recognized in 1969 that natural prolongation was a concept of customary international law,[336] the Court relied on equitable principles: "the two considerations – the satisfying of equitable principles and the identification of the natural prolongation – are not to be placed on a plane of equality".[337] The Court essentially shifted the approach from one relying on geomorphology to ultimately apply the distance criterion under articles 76 and 83 of the then draft United Nations Convention on the Law of the Sea as "new accepted trends".[338]

152. In the *Libyan Arab Jamahiriya/Malta* case, the International Court of Justice, referring to the above-mentioned decision in the *Tunisia/Libyan Arab Jamahiriya* case, abandoned the application of the principle of natural prolongation in favour of the distance criterion, taking into account as a relevant circumstance the close link between rights of the coastal State over the continental shelf and the exclusive economic zone.[339] Some years later, the International Tribunal for the Law of the Sea rejected the argument of Bangladesh to apply natural prolongation as the primary criterion in establishing entitlement to the continental shelf beyond 200 nautical miles: "The Tribunal finds it difficult to accept that natural prolongation … constitutes a separate and independent criterion a coastal State must satisfy in order to be entitled to a continental shelf beyond 200 [nautical miles]."[340] Bing Bing Jia observed that "[t]he current regime of the continental shelf seemingly operates independently of the principle [that 'the land dominates sea']", the practice in that area having "[rid] itself of the element of natural prolongation".[341]

153. These are examples where the International Court of Justice has not applied well-established and recognized principles that had broad acceptance by States or were codified, such as the principle of natural prolongation, for reasons of pragmatism and equity. A similar approach could be considered in regard to the application of the principle that "the land dominates the sea" in relation to sea-level rise and solutions such as the preservation of baselines or outer limits. The principle that "the land

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[334] *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* (see footnote 236 above), p. 44, para. 38.

[335] *Ibid.*, p. 58, para. 67.

[336] *Ibid.*, p. 46, para. 43.

[337] *Ibid*., p. 47, para. 44.

[338] *Ibid.*, pp. 48–49, paras. 47–48.

[339] *Continental Shelf (Libyan Arab Jamahiriya/Malta*) (see footnote 330 above), p. 33, para. 33, and pp. 46–47, paras. 61–62. See also *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Judgment, I.C.J. Reports 2012*, p. 624; and *Delimitation of the maritime boundary in the Bay of Bengal (Bangladesh/Myanmar)* (see footnote 325 above), p. 114, para. 437. In the subsequent case against India, before the Permanent Court of Arbitration, Bangladesh withdrew its argument for the application of natural prolongation as a criterion for the continental shelf beyond 200 nautical miles. *Bay of Bengal Maritime Boundary Arbitration (Bangladesh v. India)* (see footnote 282 above), p. 131, para. 439.

[340] *Delimitation of the maritime boundary in the Bay of Bengal (Bangladesh/Myanmar)* (see footnote 325 above), p. 113, para. 435.

[341] Bing Bing Jia, "The principle of the domination of the land over the sea" (see footnote 327 above), p. 76.

dominates the sea" is a purely judicial creation and has not been codified. Soons has dismissed the views of authors who see that principle as a possible barrier to the preservation of existing maritime zones, stating that he does not find such arguments convincing:

> I think these authors confuse the meaning of a legal maxim with the underlying legal rules themselves. They seem to argue: you cannot change the law, because it is the law. "The land dominates the sea" is a maxim, it is a summary of what some positive legal rules (on baselines and perhaps on the extent of maritime zones) currently provide. But circumstances can change, and so will the law; law is inherently adapting to the requirements of developments in society. So, if the rules on baselines change, perhaps the maxim will in the future be worded differently, but I am not even sure that is really needed.[342]

Likewise, Nguyen, while recognizing the role of the principle that "the land dominates the sea" as the basis for maritime entitlements, is of the view that it "does not go against the maintenance of maritime baseline and limits".[343]

C. Exception of "permanency" and the continental shelf

154. The finality and permanency of the limits of the continental shelf under article 76, paragraphs 8 and 9, of the United Nations Convention on the Law of the Sea is an example of where the principle that "the land dominates the sea" does not apply. It demonstrates a flexible application of the principle that "the land dominates the sea". The continental shelf is measured from the baselines from which the breadth of the territorial sea is measured, as is case for the other maritime zones. If the baseline moves landward, the boundaries of the continental shelf should therefore be affected. However, if the required conditions are met, as provided for under article 76, a landward shift of the baseline would have no impact on the boundaries of the continental shelf, which remain fixed or permanent. This shows that the principle that "the land dominates the sea" is not absolute and, under certain circumstances, is not always applied. Indeed, an underlying presumption of permanency of maritime zones in general can be inferred from the observation by the International Court of Justice in the *Jan Mayen* case that "the attribution of maritime areas to the territory of a State, which, by its nature, is destined to be permanent, is a legal process based solely on the possession by the territory concerned of a coastline".[344]

D. Preliminary observations

155. In conclusion, the following observations of a preliminary nature can be made:

(a) the principle that "the land dominates the sea" is a judicial construction that was developed in relation to the continental shelf and the extension of the sovereign rights coastal State. As stated by the International Court of Justice, "the land is the legal source of the power which a State may exercise over territorial extensions to seaward".[345] It is a rule of customary international law, and has been codified in neither the 1958 Geneva Conventions nor the United Nations Convention

[342] Alfred Soons, "Remarks by Alfred Soons" (in Patrícia Galvão Teles, Nilüfer Oral *et al.*, remarks on "Addressing the law of the sea challenges of sea-level rise"), *American Society of International Law Proceedings*, vol. 114 (2020), pp. 389–392, at p. 392.

[343] Nguyen Hong Thao, "Sea-level rise and the law of the sea in the Western Pacific region", 13 *Journal of East Asia and International Law*, vol. 13, No. 1 (May 2020), pp. 121–142, at p. 139.

[344] *Maritime Delimitation in the Area between Greenland and Jan Mayen, Judgment, I.C.J. Reports 1993*, p. 38, at p. 74, para. 80.

[345] *North Sea Continental Shelf* (see footnote 322 above), p. 51, para. 96.

on the Law of the Sea. Maritime entitlements do not derive from the land mass *per se*, but from the sovereignty exercised by the State over the coastline. The determination of the extent of maritime boundaries is not a mathematical equation based on the size of the land territory. The Court has stated that the application of equitable principles is paramount, and has discarded the use of natural prolongation for this reason. The preservation of existing maritime boundaries and entitlements in the face of sea-level rise could be considered to be an equitable principle and could operate as an exception to the principle that "the land dominates the sea";

(b) while the principle that "the land dominates the sea" has had wide acceptance and application by courts and tribunals, as well as States, it is not an absolute rule, for two reasons:

(i) first, the principle of the natural prolongation of the continental shelf, which developed in parallel to the principle that "the land dominates the sea", is an example of an exception to existing principles of international law being made for pragmatic reasons and in order to achieve an equitable solution. An analogous approach could be applied in relation to sea-level rise and the preservation of existing baselines. The rigid application of the principle that "the land dominates the sea" would not provide a solution to the inequitable outcome of many States losing existing maritime entitlements because of sea-level rise. Instead, that principle should be assessed in the light of equity and other principles, such as the stability of boundaries, which is also a recognized rule of customary rule. This would be analogous to the Court's approach in replacing the codified and customary rule of natural prolongation with that of the emerging trend of the distance criterion under the United Nations Convention on the Law of the Sea;

(ii) second, if the necessary conditions are met, as provided for under the Convention, the permanent character of the outer limits of the continental shelf would mean that they would remain fixed in case of a landward shift of the baseline. This is an example of where the principle that "the land dominates the sea" does not apply, meaning, therefore, that it is not absolute. In other words, the freezing of baselines and the outer limits of the other maritime zones is not inconsistent with the principle that "the land dominates the sea". There are examples in international law to support a flexible interpretation of the principle that "the land dominates the sea" that would allow for the preservation of baselines or the outer limits of maritime zones.

VII. Historic waters, title and rights

A. Development of the principle of historic waters, title and rights

156. The origin of the concept of historic waters and rights lies in the development of the notion of historic bays and gulfs.[346] The subject of historic bays was addressed early on in the Conference for the Codification of International Law in 1930. In the

[346] The issue of the possible application of historic waters and historic title was raised by a member of the Study Group on sea-level rise in relation to international law at a meeting during the seventy-second session of the Commission, in 2021. The member stated that by taking into account the specific maritime areas of States affect by sea-level rise and considering their individual relationship with those maritime areas, historic titles could potentially be established, and that further exploration of historic titles to preserving maritime entitlements in the light of sea-level rise was warranted in any case. The history of the development of the principle of historic waters and title is detailed in the study, prepared by the Secretariat in 1962, into the juridical regime of historic waters, including historic bays (*Yearbook ... 1962*, vol. II, document A/CN.4/143, p. 1).

Commission's draft articles concerning the law of the sea, only a brief reference is made in the commentary explaining the exclusion of historic bays from draft article 7.[347] At the request of the General Assembly, the Secretariat, in 1962, prepared a study on the juridical regime of historic waters, including historic bays.[348] The Commission, at its fourteenth session, also in 1962, decided to include the topic of juridical regime of *historic waters*, including *historic* bays, in its programme of work, following a request from the General Assembly.[349] However, the Commission ultimately decided not to place the topic on its active work programme.[350]

157. There is limited reference to historic waters or title in the 1958 Convention on the Territorial Sea and the Contiguous Zone and in the 1982 the United Nations Convention on the Law of the Sea. Neither Convention provides any definition of historic waters or title. Moreover, no express reference is made to historic rights. In sum, there is limited codification of the regime of historic waters and title. The lack of a definition or regime for historic waters or historic titles was noted by the International Court of Justice in the *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* case,[351] and reiterated in *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)*, noting that they were regulated by general rules of international law.[352]

158. The study prepared by the Secretariat remains the most comprehensive, and it is relied upon by courts and tribunals.[353] According to the study, the term "historic rights" goes beyond "historic bays":

> Historic rights are claimed not only in respect of bays, but also in respect of maritime areas which do not constitute bays, such as the waters of archipelagos and the water area lying between an archipelago and the neighbouring mainland; historic rights are also claimed in respect of straits, estuaries and other similar bodies of water. There is a growing tendency to describe these areas as "historic waters", not as "historic bays".[354]

159. The Secretariat highlighted three factors that must be taken into consideration in determining whether a State has acquired an historic title to a maritime area:

> First, the State must exercise authority over the area in question in order to acquire [an] historic title to it. Secondly, such exercise of authority must have continued for a considerable time; indeed it must have developed into a usage. More controversial is the third factor, the position which the foreign States may have taken towards this exercise of authority. Some writers assert that

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[347] *Yearbook … 1956*, vol II, document A/3159, p. 269.

[348] *Yearbook … 1962*, vol. II, document A/CN.4/143, p. 1. See *Official Records of the United Nations Conference on the Law of the Sea, Geneva, 24 February–27 April 1958,* vol. II, *Plenary Meetings*, document A/CONF.13/L.56 resolution VII, p. 145. The initial proposal for a study on the regime of historical bays and waters was made by India and Panama. See also Myron H. Nordquist *et al.*, eds., *United Nations Convention on the Law of the Sea 1982: A Commentary*, vol. II (Dordrecht, Martinus Nijhoff, 1993), p. 118, para. 10.5 (e).

[349] See *Yearbook … 1967*, vol. II, document A/CN.4/L.119, p. 341, para. 14; and General Assembly resolution 1686 (XVI) of 18 December 1961.

[350] *Yearbook … 1977*, vol. II, p. 129, para. 109.

[351] *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* (see footnote 236 above), pp. 73–74, para. 100.

[352] *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)* (see footnote 220 above), pp. 588–589, para. 384.

[353] *Official Records of the United Nations Conference on the Law of the Sea, Geneva, 24 February–27 April 1958,* vol. I, *Preparatory Documents*, document A/CONF.13/1.

[354] *Yearbook … 1962*, vol. II, document A/CN.4/143, p. 5, para. 29 (citing *Official Records of the United Nations Conference on the Law of the Sea, Geneva, 24 February–27 April 1958*, vol. I, *Preparatory Documents*, document A/CONF.13/1, p. 2, para. 8).

acquiescence of other States is required for the emergence of an historic title; others think that absence of opposition by these States is sufficient.[355]

B. Case law and application of the principle of historic waters, title and rights

160. Historic waters, title and rights have been addressed in several international cases related to maritime delimitation. In the 1910 *North Atlantic Coast Fisheries* Arbitration between the United Kingdom and the United States, the Tribunal of the Permanent Court of Arbitration recognized the existence of "historic bays", although rejected the claim by the United States in the case.[356] In 1917, the Central American Court of Justice declared the Gulf of Fonseca to be an historic bay.[357] The International Court of Justice, in the 1951 *Fisheries Case (United Kingdom* v. *Norway)* case, defined "historic waters" as "waters which are treated as internal waters but which would not have that character were it not for the existence of an historic title".[358] In *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)*, the Chamber recalled that definition with reference to the Gulf of Fonseca, noting that– "historic waters" were generally understood to mean "waters which are treated as internal waters but which would not have that character were it not for the existence of an historic title".[359] On the basis of the 1917 judgement of the Central American Court of Justice, the Chamber determined the following:

> [T]he Gulf waters, other than the 3-mile maritime belts, are historic waters and subject to a joint sovereignty of the three coastal States. … The reasons for this conclusion, apart from the reasons and effect of the 1917 decision of the Central American Court of Justice, are the following: as to the historic character of the Gulf waters, the consistent claims of the three coastal States, and the absence of protest from other States. As to the character of rights in the waters of the Gulf: those waters were waters of a single-State bay during the greater part of their known history.[360]

161. In the *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* case, the International Court of Justice recognized that "[h]istoric titles must enjoy respect and be preserved as they have always been by long usage".[361] However, the Court did not recognize as historic rights activities that did not lead to "the recognition of an exclusive quasi-territorial right".[362] In the *Eritrea/Yemen* arbitration, Eritrea and

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[355] *Yearbook … 1962*, vol. II, document A/CN.4/143, p. 13, para. 80. For comprehensive explanation of the three elements of historic title, see *ibid.*, pp. 13–19, paras. 80–132.

[356] *The North Atlantic Coast Fisheries Case (Great Britain/United States of America), Award of 7 September 1910,* Case No. 1909-01, Permanent Court of Arbitration, United Nations, *Reports of International Arbitral Awards,* vol. XI, p. 167 (see also https://pca-cpa.org/en/cases/74).

[357] Central American Court of Justice, *El Salvador v. Nicaragua*, Judgment of 9 March 1917, *American Journal of International Law*, vol, 11, No. 3 (July 1917), pp. 674–730.

[358] *Fisheries Case* (see footnote 328 above), pp. 130. See also the dissenting opinion of Sir Arnold McNair, *ibid*., pp. 158–185, at p. 184; the dissenting opinion of Judge J. E. Read, *ibid*., pp. 186–206, at pp. 194–195; and Clive R. Symmons, *Historic Waters in the Law of the Sea: A Modern Re-Appraisal* (Leiden and Boston, Martinus Nijhoff, 2008).

[359] *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)* (see footnote 220 above), p. 588, para. 384.

[360] *Ibid.*, p. 601, paras. 404–405.

[361] *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* (see footnote 236 above),pp. 73–74, para. 100. See also *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)* (see footnote 220 above), pp. 588–589, para. 384.

[362] *Maritime Delimitation and Territorial Questions between Qatar and Bahrain* (see footnote 324 above), p. 112, para. 236. Bahrain had claimed its pearling or fishing activities as historic rights.

Yemen requested the arbitral tribunal to decide questions of territorial sovereignty over disputed islands in the Red Sea in accordance with applicable international law principles, rules and practices including historic titles. The arbitral tribunal concluded that "[i]n the end neither [p]arty has been able to persuade the Tribunal that the history of the matter reveals the juridical existence of an historic title, or of historic titles, of such long-established, continuous and definitive lineage to these particular islands, islets and rocks as would be a sufficient basis for the Tribunal's decision".[363]

162. A number of cases also assessed historic rights as a relevant circumstance or equitable criterion. In the *Gulf of Maine* case, the Chamber of the International Court of Justice found that the scale of historic fishing activities did not constitute a relevant circumstance or equitable criterion in determining the course of the third segment of the delimitation line.[364] Likewise, the arbitral tribunal in *Barbados/Trinidad and Tobago* did not accept that the claim of Barbados to historic fishing activities in the waters off Trinidad and Tobago warranted the adjustment of the maritime boundary, with the following caveat: "This does not, however, mean that the argument based upon fishing activities is either without factual foundation or without legal consequences."[365]

163. More recently, the arbitral tribunal in the *South China Sea* case noted the following:

> The term "historic rights" is general in nature and can describe any rights that a State may possess that would not normally arise under the general rules of international law, absent particular historical circumstances. Historic rights may include sovereignty, but may equally include more limited rights, such as fishing rights or rights of access, that fall well short of a claim of sovereignty.[366]

Citing the 1962 study by the Secretariat, the arbitral tribunal observed the following:

> [T]he process for the formation of historic rights in international law … requires the continuous exercise of the claimed right by the State asserting the claim and acquiescence on the part of other affected States. Although the [study by the Secretariat] discussed the formation of rights to sovereignty over historic waters, … historic waters are merely one form of historic right and the process is the same for claims to rights short of sovereignty.[367]

164. The *South China Sea* tribunal also held that historic rights that were at variance with the maritime zones stipulated under the United Nations Convention on the Law of the Sea were superseded by that Convention,[368] and that the formation of historic rights after the Convention's entry into force would the same three elements with

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[363] *Territorial Sovereignty and Scope of the Dispute (Eritrea and Yemen)*, Award of 9 October 1998, *Reports of International Arbitral Awards,* vol. XXII, pp. 209–332, at p. 311, para. 449.

[364] *Delimitation of the Maritime Boundary in the Gulf of Maine* (see footnote 325 above), p. 342, para. 237.

[365] *Arbitration between Barbados and the Republic of Trinidad and Tobago*, Case No. 2004-02, Permanent Court of Arbitration, Award, 11 April 2006, p. 84, para. 272. Available from https://pca-cpa.org/en/cases/104. However, the arbitral tribunal found that it did not have jurisdiction to make an award establishing a right of access for Barbadian fishers to flying fish within the exclusive economic zone of Trinidad and Tobago, by virtue of article 297, paragraph 3 (a), of the United Nations Convention on the Law of the Sea (*ibid.*, p. 87, para. 283).

[366] *South China Sea Arbitration between the Philippines and the Peoples' Republic of China*, Case No. 2013-19, Permanent Court of Arbitration, Award, 12 July 2016, p. 96, para. 225. Available from https://pca-cpa.org/en/cases/7.

[367] *Ibid.*, p. 113, para. 265.

[368] *Ibid.*, p. 103, para. 246.

respect to historic rights would apply. A number of scholars have written on the issue of historic rights in the *South China Sea* case and the decision of the tribunal.[369]

C. State practice

165. In terms of State practice regarding claims to historic rights and historic waters, Zou and the Chinese Society of International Law cite the following: an agreement between India and Sri Lanka on the boundary in historic waters between the two countries, on 26 June 1974;[370] Territorial Waters and Maritime Zones Act, 1976, of Pakistan;[371] Maritime Zones Law, 1976, of Sri Lanka, providing for the declaration of the territorial sea and other maritime zones of Sri Lanka and all other matters connected therewith or incidental thereto; [372] a presidential proclamation of 15 January 1977, of Sri Lanka, claiming that "the historic waters in the Palk Bay and Palk Strait shall form part of the internal waters of Sri Lanka", and "the historic waters in the Gulf of Mannar shall form part of the territorial sea of Sri Lanka";[373] the Law on the State Boundary of the former Union of Soviet Socialist Republics, which entered into force on 1 March 1983, providing that the waters of bays, inlets, coves, and estuaries, sea and straits, historically belonging to the Union, were relegated to internal waters of the Union;[374] and Oceans Act of 1996 in Canada.[375]

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[369] Robert Beckman, "UNCLOS Part XV and the South China Sea", in *The South China Sea Disputes and Law of the Sea*, S. Jayakumar, Tommy Koh and Robert Beckman, eds. (Cheltenham, Edward Elgar, 2014), pp. 229–264, at pp. 260–261; Stefan Talmon, "The South China Sea arbitration: is there a case to answer?", in *The South China Sea Arbitration: A Chinese Perspective*, Stefan Talmon and Bing Bing Jia, eds. (Oxford, Hart Publishing, 2014), pp. 15–79, at. p. 51; Keyuan Zou, "Historic rights in the South China Sea" in *UN Convention on the Law of the Sea and the South China Sea*, Shicun Wu, Mark Valencia, and Nong Hong, eds. (London, Routledge, 2015), pp. 239–250; Clive R. Symmons, "Historic waters and historic rights in the South China Sea: a critical appraisal" in *ibid.*, pp. 191–238, at pp. 195–196 (see also Clive R. Symmons, "First reactions to the *Philippines v China* arbitration award concerning the supposed historic claims of China in the South China Sea", *Asia-Pacific Journal of Ocean Law and Policy*, vol. 1, 2016, pp. 260–267); Sreenivasa Rao Pemmaraju, "The South China Sea arbitration (*The Philippines v. China*): assessment of the award on jurisdiction and admissibility", *Chinese Journal of International Law*, vol 14, No. 2 (June 2016), pp. 265–307, at pp. 293–294, para. 54; Sophia Kopela, "Historic titles and historic rights in the law of the sea in the light of the South China Sea arbitration", *Ocean Development and International Law*, vol. 48, No. 2 (2017), pp. 188–207; Yoshifumi Tanaka, "Reflections on historic rights in the *South China Sea* arbitration (merits)", *International Journal of Marine and Coastal Law*, vol 32, 2017, pp. 458–483, at pp. 474–475; Andrea Gioia, "Historic titles", in Wulfrum, ed., *Max Planck Encyclopedia of Public International Law* (see footnote 219 above), para. 21; Chinese Society of International Law, "The South China Sea arbitration awards: a critical study", *Chinese Journal of International Law*, vol. 17, No. 2 (June 2018) , pp. 207–748; and Clive R. Symmons, *Historic Waters and Historic Rights in the Law of the Sea: A Modern Reappraisal*, 2nd ed. (Leiden, Brill Nijhoff, 2019), pp. 1–3.

[370] Zou, "Historic rights in the South China Sea" (see footnote 369 above), p. 242.

[371] Chinese Society of International Law, "The South China Sea arbitration awards": a critical study" (see footnote 369 above), p. 443, para. 488.

[372] Zou, "Historic rights in the South China Sea" (see footnote 369 above), p. 242.

[373] Chinese Society of International Law, "The South China Sea arbitration awards" (see footnote 369 above), pp. 443–444, para. 488.

[374] Zou, "Historic rights in the South China Sea" (see footnote 369 above), p. 242.

[375] Chinese Society of International Law, "The South China Sea arbitration awards" (see footnote 369 above), pp. 443–444, para. 488.

D. Application to sea-level rise

166. A number of scholars have delved into the potential application of historic rights and historic waters to sea-level rise.[376] For example, Caron suggested that historic rights could be one way in which States freeze their maritime boundaries. However, he also acknowledges that the assertion of historic rights is more easily contested than the location of a baseline.[377] Soons examines claims of historic rights as a means of maintaining maritime entitlements:

> A coastal State could maintain the outer limits of its territorial sea and of its [exclusive economic zone] where they were originally located before significant sea level rise occurred. As a consequence, the breadth of its territorial sea would gradually become more than 12 [nautical miles] (or a territorial sea enclave would exist where a former island had disappeared), and the outer limit of its [exclusive economic zone] would be located ever further than 200 [nautical miles] from the baseline (or, in an extreme case of a submerged island, the [exclusive economic zone] could become an enclave in the high seas).[378]

Soons cautions the following, however:

> Such claims must be distinguished from claims to historic waters. … Historic waters can be defined as waters over which the coastal State, in deviation of the general rules of international law, has been exercising sovereignty, clearly and effectively, without interruption and during a considerable period of time, with the acquiescence of the community of States. Such areas are governed by the regime of maritime internal waters.[379]

167. Although Soons accepts the theoretical possibility of using historic rights regime as a way to preserve existing maritime entitlements, he argues that such a solution would result in varying outcomes for different States as it "would involve assessing each individual claim by a coastal State in the light of the particular circumstances and conduct of that State, and the reactions of other interested States over a period of

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[376] David D. Caron, "When law makes climate change worse: rethinking the law of baselines in light of a rising sea level", *Ecology Law Quarterly*, vol. 17, No. 4, 1990, pp. 621–653, at pp. 650–651; Frances Anggadi, "Establishment, notification, and maintenance: the package of State practice at the heart of the Pacific Islands Forum Declaration on Preserving Maritime Zones", *Ocean Development and International Law*, vol. 53, No. 1, 2022, pp. 19–36, at p. 22; Karen Scott, "Rising seas and Pacific maritime boundaries", Australian Institute of International Affairs, 3 September 2018; Vladyslav Lanovoy and Sally O'Donnell, "Climate change and sea-level rise: is the United Nations Convention on the Law of the Sea up to the task?", *International Community Law Review*, vol. 23, No. 2–3 (June 2021), pp. 133–157, pp. 137 and 139; and Egdardo Sobenes Obregon, "Historic waters regime: a potential legal solution to sea-level rise", *International Journal of Maritime Affairs and Fisheries*, vol. 7, No. 1 (June 2015), pp. 17–32.

[377] Caron, "When law makes climate change worse" (see footnote 376 above), pp. 650–651.

[378] Alfred H.A. Soons, "The effects of sea-level rise on baselines and outer limits of maritime zones", in *New Knowledge and Changing Circumstances in the Law of the Sea*, Thomas Heidar, ed. (Leiden and Boston, Brill Nijhoff, 2020), pp. 358–381, at p. 372.

[379] *Ibid.*, pp. 372–373.. See also Eric Bird and Victor Prescott, "Rising global sea levels and national maritime claims", *Marine Policy Reports*, vo. 1, No. 3, 1989; and David Freestone and John Pethick, "Sea-level rise and maritime boundaries: international implications of impacts and responses", in *World Boundaries*, vol. 5, *Maritime Boundaries*, Gerald Blake, ed. (London and New York, Routledge, 1994), pp. 73–90.

time", and would result in unequal outcomes in response to the problem of sea-level rise, which requires a general solution capable of protecting the rights of all States.[380]

E. Preliminary observations

168. Historic waters, title and rights are acquired by a State through long usage and through recognition by other States. They are waters, title or rights to which a State would not otherwise be legally entitled. In other words, it is a principle that preserves long-standing rights exercised by a State over a maritime area. It has also been considered as a relevant circumstance for maritime delimitation. There is doctrinal support that an analogous principle or rule could be applied to preserve existing maritime zones and entitlements that may disappear as a result of sea-level rise.

169. In conclusion, the following observation of a preliminary nature can be made: the principle of historic waters, title or rights provides an example of the preservation of existing rights in maritime areas that would otherwise not be in accordance with international law.

VIII. Equity

A. Statements by Member States in the Sixth Committee of the General Assembly

170. The issue of equity has been raised by a number of States in relation to sea-level rise in their comments in the Sixth Committee and in their submissions in response to the request by the Commission. Antigua and Barbuda, in its submission to the Commission, highlights the importance of equity in relation to determining rights on maritime areas and boundaries decided by international adjudication, recalling the statement by the arbitral tribunal in the *Barbados/Trinidad and Tobago* that "[c]ertainty, equity and stability are thus integral parts of the process of delimitation",[381] and observes that challenging existing maritime boundaries would be inequitable. [382]

171. Maldives, in its submission to the Commission, includes several references to equity. For example, it observes that "considerations of equity and fairness require that [small island developing States'] maritime entitlements are protected, especially given the particular vulnerability of [those States] to climate change". [383] Maldives also expresses the following view:

> [C]onsiderations of fairness and equity mean that it is critically important that international law operates to maintain [small island developing States'] existing maritime entitlements, as established under [the United Nations Convention on

[380] Soons, "The effects of sea-level rise" (see footnote 378 above), p. 373. See also Alfred H.A. Soons, "The effects of a rising sea level on maritime limits and boundaries", *Netherlands International Law Review*, vol. 37, No. 2 (August 1990), pp. 207–232, at pp. 223–226. The following articles raise potential matters that would need to be addressed if the proposal of freezing maritime spaces were to be adopted (although these articles do not specifically mention historic titles or rights): Vincent P. Cogliati-Bantz, "Sea-level rise and coastal States' maritime entitlements", *Journal of Territorial and Maritime Studies*, vol. 7, No. 1 (Winter/Spring 2020), pp. 86–110, at pp. 95–96; Clive Schofield, "A new frontier in the law of the sea? Responding to the implications of sea-level rise for baselines, limits and boundaries", in *Frontiers in International Environmental Law: Oceans and Climate Challenges – Essays in Honour of David Freestone*, Richard Barnes and Ronán Long, eds. (Leiden, Brill Nijhoff, 2021), pp. 171–193, at pp. 188–191.

[381] *Arbitration between Barbados and Trinidad and Tobago* (see footnote 365 above), p. 74, para. 244.

[382] Submission of Antigua and Barbuda (see footnote 46 above).

[383] Submission of Maldives (see footnote 257 above).

> the Law of the Sea]. A failure to do so would result in inequitable and unfair treatment of [small island developing States] such as Maldives, who would be disproportionately affected by any change to their maritime entitlements, notwithstanding that they have contributed virtually nothing to the climate crisis.[384]

172. The Islamic Republic of Iran, in its statement in the Sixth Committee in 2021, in relation to sea-level rise and possible changes to baselines and outer limits of maritime zones, expresses the view "that any change in lines shall be based on principles of equity and fairness".[385] The Philippines observes that "[e]cological equity as a principle is key: no State should suffer disproportionately from effects of climate change affecting all".[386] According to Singapore, "the principle of equity could be particularly relevant when considering the impact of climate change-induced sea-level rise on the development needs of small island developing States", and that such considerations may operate differently depending on "the extent to which the interests of third States and the freedom of navigation are engaged".[387] The Federated States of Micronesia emphasizes the following:

> [T]he core notion under existing relevant international law that the rights and entitlements that flow from maritime zones that are originally established by a coastal State must never be reduced solely on the basis of climate change-related sea-level rise. In our view, the preservation of maritime zones and the rights and entitlements that flow from them is the most suitable and equitable approach in order to achieve that goal.[388]

B. Equity in general

173. Cottier notes that equity "has been a companion of the law ever since rule-based legal systems emerged. It offers a bridge to justice where the law itself is not able to adequately respond. Equity essentially remedies legal failings and shortcomings".[389] The well-known trio of functions of equity are equity *infra legem*, equity *praeter legem* and equity *contra legem*.[390] Equity *infra legem* is a method of interpreting and adapting the applicable law to the specific circumstances of the case using elements

[384] *Ibid.*

[385] Statement of the Islamic Republic of Iran in 2021. Available from https://www.un.org/en/ga/sixth/76/summaries.shtml#20mtg.

[386] Statement of the Philippines in 2021 (see footnote 112 above).

[387] Statement of Singapore in 2021 (see footnote 269 above).

[388] Statement of the Federated States of Micronesia in 2021 (see footnote 78 above).

[389] Thomas Cottier, *Equitable Principles of Maritime Boundary Delimitation: The Quest for Distributive Justice in International Law* (Cambridge, United Kingdom, Cambridge University Press, 2015), p. 8. See also Francesco Francioni, "Equity in international law", in Wulfrum, ed., *Max Planck Encyclopedia of Public International Law* (see footnote 219 above), updated November 2020.

[390] Michael Akehurst, "Equity and general principles of law", *International and Comparative Law Quarterly*, vol. 25, No. 4 (October 1976), pp. 801–825.

of reasonableness, flexibility, fairness, judgment and individualized justice.[391] It allows a judge a certain amount of discretion to apply the law to individual cases with different circumstances.[392]As the International Court of Justice stated in the *Fisheries Jurisdiction (United Kingdom* v. *Iceland)* case, citing the *North Sea Continental Shelf* cases, "[i]t is not a matter of finding simply an equitable solution, but an equitable solution derived from the applicable law".[393] According to Francioni, the Court's decision in the *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* case was the "high-water mark in the development of a concept of equity *praeter legem* endowed with its autonomous normativity".[394] Equity *contra legem* enables departure from strict positive law.[395]

174. Equity is considered to be included generally as part of Article 38, paragraph 1 (c), of the Statute of the International Court of Justice, and included specifically under Article 38, paragraph 2, under which the Court may decide a case *ex aequo et bono* if the parties agree thereto.[396] As examples of equity, Cottier cites "the principle of proportionality, of good faith, and the protection of legitimate

[391] *Frontier Dispute (Burkina Faso/Republic of Mali)* (see footnote 218 above), pp. 567–568, para. 28; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda)*, Reparations, 9 February 2022, General List No. 116. In the latter case, in a separate opinion, Judge Robinson observed the following: "When the Court applies the principle of equitable considerations, it is applying equity *intra legem*, equity within the law … the elements of the principle of equitable considerations are reasonableness, flexibility, judgment, approximation and fairness. Consequently, the Court's finding that it may form an appreciation of the extent of damage is nothing but an illustration of the principle of equitable considerations, which allows for reasonableness and judgment … and flexibility" (para. 31). See also Catharine Titi, *The Function of Equity in International Law* (Oxford, Oxford University Press, 2021), p. 73 ("Equity as a corrective and as individualised justice aims to adjust the law to the particular factual situation not in order to reject the general law but in order to avert an injustice"); Francioni, "Equity in international law" (see footnote 389 above), para. 7; and Akehurst, "Equity and general principles of law" (see footnote 390 above), p. 801.

[392] Werner Scholtz, "Equity" in *The Oxford Handbook of International Environmental Law*, 2nd ed., Lavanya Rajamani and Jacqueline Peel, eds. (Oxford, Oxford University Press, 2021), pp. 335–350.

[393] *Fisheries Jurisdiction (United Kingdom* v. *Iceland), Merits, Judgment, I.C.J. Reports 1974*, p. 3, at p. 33, para. 78. See also *North Sea Continental Shelf* (see footnote 322 above), p. 46, para. 85.

[394] Francioni, "Equity in international law" (see footnote 389 above), para. 15.

[395] For example, in *Cameroon* v. *Nigeria*: "The Court notes, however, that now that it has made its findings that the frontier in Lake Chad was delimited long before the work of the [Lake Chad Basin Commission] began, it necessarily follows that any Nigerian *effectivités* are indeed to be evaluated for their legal consequences as acts *contra legem*." *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening*) (see footnote 227 above), p. 351, para. 64; and Robert Kolb, *International Court of Justice* (Oxford, Hart Publishing, 2013), p. 365.

[396] Francioni, "*Equity in international law"* (see footnote 389 above).

expectations and more particularly of estoppel and acquiescence, the doctrine of abuse of rights".[397]

175. In the *North Sea Continental Shelf* cases, the International Court of Justice stated that the rule of equity means that its judicial decisions "must by definition be just, and therefore in that sense equitable".[398] In the *Tunisia/Libyan Arab Jamahiriya* case, the Court stated that "[e]quity as a legal concept is a direct emanation of the idea of justice. The Court whose task is by definition to administer justice is bound to apply it".[399] The Court also stated that the "result of the application of equitable principles must be equitable".[400]

176. The principle of equity has also developed in other disciplines of law, such as the law of the sea, environmental law, human rights law and investment law. However, for the purpose of the present report, the focus will be on equity as relevant to sea-level rise, in the context of the law of the sea, in relation to maritime boundaries and entitlements.

C. Equity and the law of the sea

177. There are numerous references to equity in the United Nations Convention on the Law of the Sea. For example, "the equitable and efficient utilization of their resources" and "the realization of a just and equitable international economic order";[401] the resolution "on the basis of equity" of conflicts between the interests of the coastal State and any other State when the Convention does not attribute rights or jurisdiction to either;[402] the enjoyment by landlocked States[403] and by geographically disadvantaged States of their rights "on an equitable basis"[404] the delimitation of the maritime boundaries of the exclusive economic zone[405] and the continental shelf[406] by means of "an equitable solution"; the "equitable sharing of financial and other economic benefits derived from activities in the Area";[407] and the transfer of marine

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[397] Cottier, *Equitable Principles of Maritime Boundary Delimitations* (see footnote 426 above), p. 14. See, for example, Cayuga Indian Claims, Great Britain v United States, Award, (1955), *Reports of International Arbitral Awards* VI 173, (1926) 20 *Asian Journal of International Law* 574, 22nd January 1926, Arbitral Tribunal (Great Britain-United States 1910); *Case Relating to the Diversion of the Water From the Meuse*; Russian Claim for Interest on Indemnities (Damages Claimed by Russia for Delay in Payment of Compensation Owed to Russians Injured During the War of 1877-1878), Russia v Turkey, Award, (1961) *Reports of International Arbitral Awards* XI 421, ICGJ 399 (PCA 1912), (1912) 1 HCR 547, 11th November 1912, Permanent Court of Arbitration [PCA]; Orinoco Steamship Company Case, United States v Venezuela, Award, (1961) *Reports of International Arbitral Awards* XI 227, (1961) *Reports of International Arbitral Awards* XI 237, ICGJ 402 (PCA 1910), (1910) 1 HCR 228, 25th October 1910, Permanent Court of Arbitration [PCA]; *Norwegian Shipowners' Claims, Norway v United States*, Award, (1948) *Reports of International Arbitral Awards* I 307, ICGJ 393 (PCA 1922), (1932) 1 I.L.R. 189, (1919-1922) ADIL 189, (1932) 2 Hague Rep 69, 13th October 1922, Permanent Court of Arbitration [PCA]; Eastern Extension, Australasia and China Telegraph Company Limited (Great Britain) v United States, (1955) *Reports of International Arbitral Awards* VI.

[398] *North Sea Continental Shelf* (see footnote 322 above), p. 48, para. 88.

[399] *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* (see footnote 236 above), p. 60, para. 71.

[400] *Ibid.*, p.59, para. 70.

[401] United Nations Convention on the Law of the Sea, preamble.

[402] *Ibid.*, article 59.

[403] *Ibid.*, article 69.

[404] *Ibid.*, article 70.

[405] *Ibid.*, article 74, paragraph 1.

[406] *Ibid.*, article 83, paragraph 1.

[407] *Ibid.*, article 140.

technology.[408] However, it is in the field of maritime delimitation where equity and equitable principles have flourished.[409]

178. The arbitral tribunal in *Barbados/Trinidad and Tobago* observed that, "[s]ince the very outset, courts and tribunals have taken into consideration elements of equity in reaching a determination of a boundary line over maritime areas".[410] The role of equity in relation to maritime delimitation was core to the landmark decision by the International Court of Justice in the 1969 *North Sea Continental Shelf* cases, in which the Court decided that "delimitation is to be effected by agreement in accordance with equitable principles, and taking account of all the relevant circumstances".[411] Equity has since been applied to all cases concerning maritime delimitation.[412] Jennings wrote that "the process of delimitation involves both law and equity", and that "law and equity working together should serve the ends of justice by introducing flexibility, adaptability, and even limitations upon the application and meaning of legal rules".[413]

179. The International Court of Justice and tribunals have consistently rejected recognizing any single method of delimitation, preferring instead equity, as was first articulated by the Court in the *North Sea Continental Shelf* cases, in which it declared that "delimitation is to be effected by agreement in accordance with equitable principles, and taking account of all the relevant circumstances",[414] despite the codification of the equidistance method in the 1958 Convention on the Territorial Sea and the Contiguous Zone. The equity method was subsequently codified in the United Nations Convention on the Law of the Sea, in article 83, paragraph 1, for the continental shelf and article 74, paragraph 1, for the exclusive economic zone, each providing that the objective of maritime delimitation is to achieve an equitable solution. In the *Tunisia/Libyan Arab Jamahiriya* case, the Court articulated an "outcome" approach, whereby it was not the strict application of specific equitable principles but the equitable outcome that mattered:

> It is, however, the result which is predominant; the principles are subordinate to the goal. The equitableness of a principle must be assessed in the light of its usefulness for the purpose of arriving at an equitable result. It is not every such principle which is in itself equitable; it may acquire this quality by reference to the equitableness of the solution. The principles to be indicated by the Court have to be selected according to their appropriateness for reaching an equitable result.[415]

A similar view was expressed by the International Tribunal for the Law of the Sea in the 2012 *Bangladesh/Myanmar* case, in which it stated that "[t]he goal of achieving

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[408] *Ibid.*, article 266, paragraph 3.

[409] Cottier, *Equitable Principles of Maritime Boundary Delimitations* (see footnote 389 above), p. 4.

[410] *Arbitration between Barbados and Trinidad and Tobago* (see footnote 365 above), p. 70, para. 229.

[411] *North Sea Continental Shelf* (see footnote 322 above), p. 53, para. 101.

[412] See, for example, *Continental Shelf (Libyan Arab Jamahiriya/Malta*) (see footnote 330 above), pp. 51–52, para. 70.

[413] Robert Y. Jennings, "Equity and equitable principles", *Annuaire Suisse de Droit International*, vol. XLII (1986), pp. 27–38, at p. 36; and Robert Y. Jennings, "The principles governing marine boundaries", in *Staat und Völkerrechtsordnung*, Kay Hailbronner, Georg Ress and Torsten Stein, eds. (Berlin, Springer, 1989), pp. 397–408, at p. 400. See also Barbara Kwiatkowska, "Equitable maritime boundary delimitation, as exemplified in the work of the International Court of Justice during the presidency of Sir Robert Yewdall Jennings and beyond", Ocean Development and International Law, vol 28, No. 2 (1997), pp. 91–145, at p. 101.

[414] *North Sea Continental Shelf* (see footnote 322 above), p. 53, para. 101.

[415] *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* (see footnote 236 above), p. 59, para. 70.

an equitable result must be the paramount consideration guiding the action of the Tribunal in this connection". [416]

180. The process of achieving the equitable result has been crystallized in the three-step method of delimitation recognized by the International Court of Justice in the *Maritime Delimitation in the Black Sea* case.[417] It begins with the identification of the relevant coastal area to be delimited and the drawing of a provisional equidistance line.[418] Equitable considerations are applied to determine whether the provisional equidistance line needs to be adjusted to achieve an equitable solution. Relevant circumstances could be geographic and non-geographic. Geographic factors include the general configuration of the coasts of the States, the presence of any unusual or special features, reasonable proportionality of the coastal line and any "cut-off" effect.[419] Other considerations raised have been the general geographical context in which the delimitation is to be effected,[420] such as the enclosed nature of the sea[421] or the concavity of a gulf.[422] In practice, geographic circumstances have played a dominant part in cases in which the court or tribunal has made adjustments to the provisional equidistance line.

181. Among the non-geographic and socioeconomic relevant circumstances considered by the International Court of Justice are past conduct of the parties, such as hydrocarbon licensing practice,[423] historic fishing rights,[424] fishing activities,[425] oil and gas concessions,[426] possible third-State claims,[427] existing delimitations already effected in the region,[428] security and defence concerns,[429] naval patrols,[430] and economic disparity.[431] However, in practice, these circumstances have not been applied. Indeed, the Chamber in the *Gulf of Maine* case set a high threshold for non-geographic factors such as fisheries activities, navigation, defence, petroleum exploration and exploitation, stating the scale of such activities "cannot be taken into account as a relevant circumstance or … equitable criterion to be applied in determining the delimitation line" unless the result should be revealed as "likely to entail catastrophic repercussions for the livelihood and economic well-being of the population of the countries concerned""[432] This high threshold of having catastrophic

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[416] *Delimitation of the maritime boundary in the Bay of Bengal (Bangladesh/Myanmar*) (see footnote 325 above), p. 67, para. 235.

[417] *Maritime Delimitation in the Black Sea (Romania* v. *Ukraine)* (see footnote 325 above), pp. 101–103, paras. 115–122.

[418] *Ibid.*

[419] See *North Sea Continental Shelf* (see footnote 322 above).

[420] See *Continental Shelf (Libyan Arab Jamahiriya/Malta)* (see footnote 330 above).

[421] See *Maritime Delimitation in the Black Sea (Romania* v. *Ukraine)* (see footnote 325 above).

[422] See *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria: Equatorial Guinea intervening)* (see footnote 227 above). However, the Court did not find it to be relevant: *ibid.*, pp. 445–446, para. 297.

[423] See *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* (see footnote 236 above).

[424] *Ibid.*, pp. 76–77, para. 105.

[425] See *Maritime Delimitation in the Black Sea (Romania* v. *Ukraine)* (see footnote 325 above).

[426] *Ibid*. In *Cameroon* v. *Nigeria*, the Court did not consider the oil practice of the parties to be a relevant circumstance. *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria: Equatorial Guinea intervening)* (see footnote 227 above), pp.447–448, para. 304.

[427] See *Continental Shelf (Libyan Arab Jamahiriya/Malta)* (see footnote 330 above).

[428] See *Maritime Delimitation in the Black Sea (Romania* v. *Ukraine)* (see footnote 325 above).

[429] *Ibid.*

[430] *Ibid*.

[431] *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* (see footnote 236 above); and *Continental Shelf (Libyan Arab Jamahiriya/Malta)* (see footnote 330 above), p. 41, para. 50.

[432] *Delimitation of the Maritime Boundary in the Gulf of Maine Area* (see footnote 325 above), p. 342, para. 237.

consequences would clearly apply to sea-level rise for many States should their maritime boundaries be reduced or changed as a result.

182. In the third and final step of the maritime delimitation process, the court or tribunal verifies whether there is a marked disproportion between the ratio of the respective coast lengths and the relevant maritime areas of the coastal States in relation to the provisional delimitation line drawn.[433] In practice, the court or tribunal has rarely adjusted the provisional equidistance line.

D. Preliminary observations

183. In conclusion, the following observations of a preliminary nature can be made:

(a) equity plays different functions in law. However, the notion of justice is core: as stated by the International Court of Justice, equity is "a direct emanation of the idea of justice". Equity provides for methods of interpretation and allows for flexibility to ensure justice where strict application of rules may produce inequitable results. Indeed, this is also at the foundation of the preference of the Court and of tribunals for the application of equitable principles in lieu of established methods of delimitation such as equidistance. For the purposes of maritime delimitation, the overarching objective is to achieve an equitable solution through the application of equitable principles or relevant circumstances. As addressed in chapter VI, achieving an equitable result had priority over the principle of natural prolongation in the *Tunisia/Libyan Arab Jamahiriya* case;[434]

(b) the United Nations Convention on the Law of the Sea includes many references to equity, and equity is integral to the interpretation and application of the Convention. Considerations of the inequitable impact of sea-level rise on particularly vulnerable countries, such as small island developing States and low-lying coastal developing States, should also be considered when assessing the legal impact of sea-level rise on maritime zones and associated entitlements of these States and when considering potential solutions, especially as the loss of maritime entitlements will result in catastrophic consequences for many of these States;

(c) the potential significant loss of maritime entitlements due to sea-level rise if the baseline shifts landward, or if islands are rendered unable to sustain human habitation or an economic life of their own, would constitute an inequitable outcome and would not fulfil the notions of justice under international law. The preservation of existing maritime entitlements, on the other hand, would prevent potentially catastrophic consequences and provide for an equitable outcome, as mandated under the United Nations Convention on the Law of the Sea and international law;

(d) equity, as a method under international law for achieving justice, should be applied in favour of the preservation of existing maritime entitlements, the loss of which would result in catastrophic consequences for the most vulnerable States.

[433] Stephen Fietta and Robin Cleverly, *A Practitioner's Guide to Maritime Boundary Delimitation* (Oxford, Oxford University Press, 2016), p. 93.

[434] *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* (see footnote 236 above), pp. 46–47, para. 44.

IX. Permanent sovereignty over natural resources

A. Development of the principle of permanent sovereignty over natural resources

184. The assertion by Antigua and Barbuda, in its submission to the Commission in 2021, that "[a]mbulatory baselines would violate State sovereignty and the principle of permanent sovereignty of people and States over their natural wealth and resources"[435] underscores the important relationship between sovereignty and the preservation of existing rights of coastal States over their marine natural resources lawfully established. Permanent sovereignty over natural resources emerged as a fundamental principle of decolonization together with the principle of self-determination. It served as a foundation stone for economic development, especially for developing countries.[436] Economic independence, self-determination and development were key issues for the developing world, and an integral component was the principle of permanent sovereignty over natural resources.[437]

185. There have been a plethora of General Assembly resolutions invoking the right of permanent sovereignty over natural resources. The essence of those adopted in the period between the 1950s and 1970s was to secure economic rights for and the development of developing countries.[438] Schrijver, in his extensive study of the principle of permanent sovereignty of natural resources, observes two roots for the principle: first, permanent sovereignty as a part of the movement to strengthen the political and economic sovereignty of the newly independent States and, second, a part of the development of the principle of self-determination.[439]

186. During the 1950s, the General Assembly adopted a series of resolutions concerning permanent sovereignty over natural resources.[440] In 1958, the General

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[435] Submission of Antigua and Barbuda (see footnote 46 above).

[436] Nico Schrijver, "Fifty years permanent sovereignty over natural resources: the 1962 UN Declaration as the *opinio iuris communis*" in Marc Bungenberg and Stephan Hobe (eds.), *Permanent Sovereignty over Natural Resources* (Springer, 2015), p. 16; Nico Schrijver, *Sovereignty over Natural Resources: Balancing Rights and Duties* (Cambridge, United Kingdom, Cambridge University Press, 1997).

[437] For a detailed history of the development of the principle of permanent sovereignty over national resources see, Schrijver, *Sovereignty over Natural Resources: Balancing Rights and Duties*.

[438] Schrijver, *Sovereignty over Natural Resources: Balancing Rights and Duties,* pp. 82-118.

[439] Schrijver, "Fifty years permanent sovereignty over natural resources …", p. 16. See also Stephan Hobe, "Evolution of the principle on permanent sovereignty over natural resources from soft law to a customary law principle?" in Bungenberg and Hobe, *Permanent Sovereignty over Natural Resources*, p. 3. See also *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Written Statement of Mauritius (1 March 2018), p. 220; See also *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Written Statement of the African Union, para. 242; See also separate opinion of Judge Cançado Trindade; Portugal also invoked the right to self-determination and permanent sovereignty over natural resources in *East Timor (Portugal v. Australia), Judgment, I.C.J. Reports 1995*, p. 90. See also the dissenting opinion of Judge Weeramantry, stating "I would reaffirm the importance of the right of the people of East Timor to self-determination and to permanent sovereignty over natural resources …" p. 204.

[440] General Assembly resolution 523 (VI) of 12 January 1952 on "Integrated economic development and commercial agreements", followed by resolution 626 (VII) of 21 December 1952, which in paragraph 3 of its preamble declared "the right of peoples freely to use and exploit their natural wealth and resources *is inherent in their sovereignty* and is in accordance with the Purposes and Principles of the Charter of the United Nations". This was followed by General Assembly resolutions 837 (IX) of 14 December 1954 "Recommendations concerning international respect for the right of peoples and nations to self-determination" (request to the Commission on Human Rights to complete its work on self-determination); 1314 (XIII) of 12 December 1958, "Recommendations concerning international respect for the right of peoples and nations to self-determination", which in its preamble stated "Noting that the right of peoples and nations to self-determination as affirmed in the two draft Covenants completed by the Commission on Human Rights includes 'permanent sovereignty over their natural wealth and resources'".

Assembly established the Commission on Permanent Sovereignty over Natural Resources, which was followed by the adoption by the General Assembly of the Declaration on Permanent Sovereignty over Natural Resources.[441] The preamble included the "recognition of the inalienable right of all States freely to dispose of their natural wealth and resources in accordance with their national interests, and on respect for the economic independence of States". Article I, paragraph 1, declared, "[t]he right of peoples and nations to permanent sovereignty over their natural wealth and resources must be exercised in the interest of their national development and of the well-being of the people of the State concerned." Some decades later, the International Court of Justice recognized the principle of permanent sovereignty over natural resources, as enshrined in General Assembly resolution 1803 (XVII), as a principle of customary international law.[442]

187. The integral link between economic development and the right to exercise permanent sovereignty over natural resources developed over the next series of General Assembly resolutions.[443] In 1964, the first meeting of the United Nations Conference on Trade and Development (UNCTAD) adopted a set of principles to guide trade relations,[444] of which principle 3 provided: "Every country has the sovereign right freely to trade with other countries, and freely to dispose of its natural resources in the interest of the economic development and well-being of its own people."[445] Notably, in its resolution 2158 (XXI), adopted on 25 November 1966 by a vote of 104 for, 0 against, with 6 abstentions, the General Assembly reaffirmed the "inalienable right of all countries to exercise permanent sovereignty over their natural

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[441] General Assembly resolution 1803 (XVII) of 14 December 1962.

[442] However, the Court denied the claim of Uganda that the Democratic Republic of the Congo had violated its right to permanent sovereignty over its natural resources, as the resolution did not contain anything to suggest it would apply to looting, pillage and exploitation of natural resources by the military of another State. *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)* (see footnote 424 above), para 244. Judge Koroma, in his separate declaration, disagreed with this view stating "in my view, the exploitation of the natural resources of a State by the forces of occupation contravenes the principle of permanent sovereignty over natural resources, as well as the Hague Regulations of 1907 and the Fourth Geneva Convention of 1949" as well as noting that both were parties to the African Charter on Human and Peoples' Rights of 1981 that provided "In no case shall a people be deprived" of their right "to freely dispose of their wealth and natural resources" (Separate declaration of Judge Koroma, *ibid*., pp. 289-290); See also *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Written Statement of the African Union (1 March 2018), paras. 102 and 242.

[443] General Assembly resolution 1515 (XV) of 15 December 1960 on "Concerted action for economic development of economically less developed countries", which in paragraph 5 reads: "Recommends further that the sovereign right of every State to dispose of its wealth and its natural resources should be respected in conformity with the rights and duties of States under international law"; General Assembly resolution 1803 (XVII) of 14 December 1962 on "Permanent sovereignty over natural resources", paragraph 1, which stated: "The right of peoples and nations to permanent sovereignty over their natural wealth and resources must be exercised in the interest of their national development and of the well-being of the people of the State concerned"; General Assembly resolution 2158 (XXI) of 25 November 1966 on "Permanent sovereignty over natural resources", which in paragraph 1 reads: "Reaffirms the inalienable right of all countries to exercise permanent sovereignty over their natural resources in the interest of their national development."

[444] General and Special Principles to govern international trade relations and trade policies conducive to development, *Proceedings of the United Nations Conference on Trade and Development, Geneva, 23 March–16 June 1964*, vol. I, *Final Act and Report* (E/CONF.46/141, Vol. I; United Nations publication, Sales No.: 64.II.B.11), annex A.I.1.

[445] As Schrijver describes the adopted text was initially contested by developed countries represented in the B group [Group B: Western Europe a by ninety-four votes to four (Australia, Canada, the UK and the USA), with eighteen abstentions (Group B countries plus Cameroon, Nicaragua, Peru and South Africa) and other industrialized countries with a market economy] who did, however, agree to the text, which was adopted. Schijver, *Sovereignty over Natural Resources: Balancing Rights and Duties*, p. 84.

resources in the interests of their national development". There was no opposition to such right being "inalienable".[446]

188. The principle of permanent sovereignty over natural resources was also adopted in the International Covenant on Civil and Political Rights,[447] the Vienna Convention on Succession of States in Respect of Treaties,[448] the African Charter of Human and Peoples' Rights (1986)[449] and Protocol to the Pact on Security, Stability and Development in the Great Lakes Region against the Illegal Exploitation of Natural Resources.[450] It is also reflected in instruments related to conservation of natural resources such as Principle 21 of Declaration of the United Nations Conference on the Human Environment,[451] Principle 2 of the Rio Declaration on the Environment and Development,[452] African Convention on the Conservation of Nature and Natural Resources,[453] 1982 World Charter for Nature,[454] 2002 Johannesburg World Summit on Sustainable Development,[455] and the 2012 Rio+20 Conference on Sustainable Development.[456] The first issues paper also outlined the economic importance to the livelihoods of developing States, especially the small island developing States.[457]

B. Definition of permanent sovereignty

189. According to Brownlie, "Loosely speaking, permanent sovereignty is the assertion of the acquired rights of the host State which are not defeasible by contract

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[446] General Assembly resolution 3171 of 17 December 1973 also referred to the "inalienable right of each State to the full exercise of national sovereignty over its natural resources" and that this had been "repeatedly recognized by the international community in numerous resolutions of various organs of the United Nations." (see Zhifeng comments on the opposition to "inalienable"); General Assembly resolution 41/128 on "Declaration on the Right to Development" of 4 December 1986, which stated the "right to development is an inalienable right" and such right to development "implies the full realization of the right of people's to self-determination which includes … the exercise of their *inalienable* right to full sovereignty overall their natural wealth and resources" (emphasis added).

[447] Article 1, paragraph 2, which also states that, "In no case may a people be deprived of its own means of subsistence". International Covenant on Civil and Political Rights (New York, 16 December 1966), United Nations, *Treaty Series*, vol. 999, No. 14668, p. 171.

[448] Article 13 provides the following: "Nothing in the present Convention shall affect the principles of international law affirming the permanent sovereignty of every people and every State over its natural wealth and resources."

[449] African Charter on Human and Peoples' Rights (Nairobi, 27 June 1981), United Nations, *Treaty Series*, vol. 1520, No. 26363, p. 217, art. 9.

[450] Protocol to the Pact on Security, Stability and Development in the Great Lakes Region against the Illegal Exploitation of Natural Resources, 30 November 2006.

[451] Declaration of the United Nations Conference on the Human Environment, Stockholm, 16 June 1972 (A/CONF.48/14 and Corr.1).

[452] 4 June 1992, in *Report of the United Nations Conference on Environment and Development* (A/CONF.151/26/Rev.1(Vol.I)), Annex I.

[453] African Convention on the Conservation of Nature and Natural Resources (with annexed list of protected species), United Nations, *Treaty Series*, vol. 1001, 1968, p. 3.

[454] General Assembly resolution 37/7, the preamble of which solemnly invited Member States, in the exercise of their permanent sovereignty over their natural resources, to conduct their activities in recognition of the supreme importance of protecting natural systems, maintaining the balance and quality of nature and conserving natural resources, in the interests of present and future generations.

[455] A/CONF.199/20, in which States declare "We strongly reaffirm our commitment to the Rio principles", *Report of the World Summit on Sustainable Development*, p. 8.

[456] A/CONF.216/L.1, Reaffirming the principles of the Rio Declaration on Environment and Development, para 15.

[457] First issues paper, para. 181.

or, perhaps, even by international agreement."[458] Hossain writes that "At the core of the concept of permanent sovereignty is the inherent and overriding right of a state to control and dispose of the natural wealth and resources in its territory for the benefit of its own people." [459] According to Cullinan, "[t]he doctrine of permanent sovereignty over natural resources … recognizes that all states have the inalienable right to dispose of their natural wealth and resources in accordance with their national interests and is one of the most fundamental doctrines in international environmental law."[460] Sanita van Wyk writes "terms such as 'permanent', 'full' or 'inalienable' are often used when referring to the state's sovereignty over natural resources. … the right to permanent sovereignty over natural resources does not need to be secured by a treaty or a contract."[461] And "the term 'inalienable' is understood to denote exactly the same characteristics as the term 'permanent' or 'full' when used in conjunction with the phrase 'the principle of sovereignty over natural resources'. In other words, the "rights that are awarded to a state in terms of [permanent sovereignty over natural resources] can never be taken from that state."[462]

C. Permanent sovereignty over marine resources

190. An early act of claiming permanent sovereignty over marine natural resources is the 1945 Truman Proclamation on the Continental Shelf, in which the United States extended its sovereign rights of over the natural resources of its continental shelf.[463] This was followed with the 1952 Declaration of Santiago on the Maritime Zone by Chile, Ecuador and Peru.[464] Since then the right of permanent sovereignty over natural resources in the marine environment has been recognized in a number of General Assembly resolutions. These include General Assembly resolution 2692 (XXV) of 1970, which recognized "the necessity for all countries to exercise fully their rights so as to secure the optimal utilization of their natural resources, *both land and marine*" (emphasis added); General Assembly resolution 3016 (XXVII) of 18 December 1973 on the "Permanent sovereignty over natural resources of developing countries", which emphasized "the great importance for the economic progress of all countries, especially the developing countries, of their fully exercising their rights so as to secure the maximum yield from their natural resources, both on land and in their coastal waters". It also reaffirmed "the right of States to permanent sovereignty over all their natural resources, on land within their international boundaries as well as those found in the seabed and subsoil thereof within their national jurisdiction and in the superjacent waters". General Assembly resolution 3171 (XXVIII) of 17 December 1973, which strongly reaffirmed "the inalienable rights of States to permanent

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[458] Ian Brownlie, "Legal status of natural resources in international law", *Collected Courses of the Hague Academy of International Law*, vol. 162 (1979), pp. 255–271, at pp. 270–271.

[459] Kamal Hossain, "Introduction" in Kamal Hossain and Subrata Roy Chowdhury (eds.), *Permanent Sovereignty over Natural Resources in International Law: Principle and Practice* (London, Pinter, 1984), p. xiii.

[460] Cormac Cullinan, "Earth jurisprudence" in Lavanya Rajamani and Jacqueline Peel (eds.), *The Oxford Handbook of International Environmental Law* (Oxford, Oxford University Press, 2021), p. 246.

[461] Sanita van Wyk, *The Impact of Climate Change Law on the Principle of State Sovereignty Over Natural Resources* (Baden Baden, Nomos Verlag, 2017), pp. 73-74. See also Subrata Roy Chowdhury, "Permanent sovereignty over natural resources: substratum of the Seoul Declaration" in Paul de Waart, Paul Peters and Erik Denters (eds.), *International Law and Development* (1988).

[462] Van Wyk, *The Impact of Climate Change Law on the Principle of State Sovereignty Over Natural Resources* (see previous footnote), pp. 75-76.

[463] Executive Order 9633 of September 28, 1945, 10 Fed. Reg. 12,305 (1945).

[464] Chile, Ecuador and Peru Declaration on the Maritime Zone, signed at Santiago on 18 August 1952, United Nations, *Treaty Series*, vol. 325, No. 1006.

sovereignty over all their natural resources, on land within their international boundaries as well as those in the seabed and the subsoil thereof within their national jurisdiction and in the superjacent waters".[465] The principle of permanent sovereignty over natural resources also featured prominently in the Declaration on the Establishment of a New International Economic Order adopted by the General Assembly in 1974,[466] which described it as an "inalienable right".[467]

191. In relation to the law of the sea, Schrijver observes how developing countries in becoming independent "have broadened the scope of [permanent sovereignty over natural resources] by claiming exclusive rights over the natural resources of the sea in waters adjacent to their coast. To a considerable extent these claims have been accepted and recognized in the modern law of the sea."[468] Permanency is also an integral aspect of the regime of the continental shelf under article 76 of the United Nations Convention on the Law of the Sea if all the conditions are met. Moreover, it is well accepted that the coastal State rights over the continental shelf exist *ipso facto* and *ab initio*. Moreover, if the outer limits of the continental shelf are permanent, this would logically mean that the coastal State has permanent sovereign rights over its resources. Permanent sovereignty over the natural resources would equally apply to the exclusive economic zone and territorial sea in the situation of where States risk losing such rights outside their own volition. Such loss, as a result of imposing a legal requirement to move the baseline landward under the United Nations Convention on the Law of the Sea because of sea-level rise, would arguably result in a violation of the inalienable or permanent character of the principle.

D. Preliminary observations

192. The principle of permanent sovereignty over natural resources is a principle of customary international law as recognized by the International Court of Justice and expressed in multiple General Assembly resolutions, as well as recognized in binding international instruments. It was critical to the decolonization process and the achievement of self-determination. The permanent sovereignty over natural resources is inherent to the sovereignty of the State (see General Assembly resolution 626 (VII) of 21 December 1952) and is inalienable, meaning that States cannot be deprived of it against their volition. Moreover, it is integral to the social and economic rights of developing States. The principle of permanent sovereignty over natural resources applies equally to marine resources, as reflected in numerous General Assembly resolutions. It applies *ipso facto* and *ab initio* over the coastal State's continental shelf.

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[465] Emphasis added. See also *Proceedings of the United Nations Conference on Trade and Development, Third session*, Principle XI of Res. 46 (III), 18 May 1972, which states. "Coastal States have the right to dispose of marine resources within the limits of their national jurisdiction, which must take duly into account the development and welfare needs of their peoples." (p. 60). Emphasis added.

[466] General Assembly resolution S-6/3201, Declaration on the Establishment of a New International Economic Order, adopted 1 May 1974 in paragraph 4 (e) provides "Full permanent sovereignty of every State over its natural resources and all economic activities. In order to safeguard these resources, each State is entitled to exercise effective control over them and their exploitation with means suitable to its own situation, including the right to nationalization or transfer of ownership to its nationals, this right being an expression of the full permanent sovereignty of the State. No State may be subjected to economic, political or any other type of coercion to prevent the free and full exercise of this inalienable right."

[467] General Assembly resolution 3281 (XXIX), "Charter of Economic Rights and Duties of States", of 12 December 1974, stating the right of every State to freely exercise full permanent sovereignty over its natural resources.

[468] Schrijver, *Sovereignty over Natural Resources: Balancing Rights and Duties*, p. 214.

193. Many of the States that are or will be adversely impacted by sea-level rise are developing States whose livelihoods and economies rely heavily on marine natural resources. The landward shift of baselines or the possible loss, through loss of islands, of their capacity to sustain human habitation or an economic life of their own risks the loss of valuable marine natural resources critical to their economies and economic development as outlined in the first issues paper (paras. 179–183). If these States were to lose these entitlements outside of their own volition, this could be a violation of their "inalienable rights" inherent their sovereignty, as recognized by States. The principle of permanent sovereignty over natural is also consistent with the solution of legal preservation of maritime zones and the natural resources as way to prevent the loss of existing entitlements.

194. In conclusion, the following observations of a preliminary nature can be made:

(a) the principle of permanent sovereignty over natural resource is a rule of customary international law according to which a State cannot be deprived of its inherent and inalienable sovereign right over its natural resources, including marine resources;

(b) the loss of marine natural resources important for the economic development of States as a result of sea-level rise would be contrary to the principle of the permanent sovereignty over natural resources. Whereas, the legal and practical solution of the preservation of existing maritime entitlements would also be in line with this principle.

X. Possible loss or gain by third States

195. The first issues paper included an examination in some detail of the possible consequences on the rights and obligations of States in maritime zones in the case of a landward shift of the baseline resulting in a landward shift of the maritime zones.[469] It concluded the following: "Overall, third States stand to benefit from these changes, but at the expense of the coastal State."[470] However, while no State raised this issue, the present chapter contains an examination in greater detail, at the request of the Study Group at the seventy-second session of the Commission, of the possible benefits and losses to third States resulting from any landward shift of a new baseline in the case of an ambulatory baseline that is adjusted.

196. As stated in the first issues paper, "if the baselines and the outer limits of the various maritime spaces move landward, this means that the legal status and legal regime of the maritime zones change: for example, part of the internal waters becomes territorial sea, part of the territorial sea becomes contiguous zone and/or exclusive economic zone, and part of the exclusive economic zone becomes high seas, with implications for the specific rights of the coastal State and third States, and their nationals (innocent passage, freedom of navigation, fishing rights, etc.). Sea-level rise also poses a risk to an archipelagic State's baselines".[471] Each of these scenarios is examined below.

A. Part of the internal waters becomes territorial sea

197. Internal waters are those that lie on the landward side of the baselines from which the territorial sea and other maritime zones are measured, as codified in

[469] A/CN.4/740 and Corr.1, paras. 172–190.
[470] *Ibid.*, para. 190 (g).
[471] *Ibid.*, para. 76.

article 5 of the 1958 Convention on the Territorial Sea and the Contiguous Zone and article 8 of the 1982 the United Nations Convention on the Law of the Sea, with the exception of archipelagic waters.[472] However, neither instrument provides for the rights and obligations of States in internal waters, an area that is firmly under the sovereignty of the coastal State, in which it has full prescriptive and enforcement jurisdiction, civil and criminal, over foreign-flagged vessels and all other activities, notwithstanding the debate over rights of access to ports.[473]

198. The landward shift of the baseline where part of the internal waters of the coastal State becomes part of the territorial sea would result in foreign-flagged vessels gaining the right, under customary international law, of innocent passage in the territorial sea. The one exception is in the case provided for under article 8, paragraph 2, of the United Nations Convention on the Law of the Sea, whereby the establishment by the coastal State of a straight baseline has the effect of enclosing as internal waters areas which had not previously been considered as such. In this case, foreign vessels have the right of innocent passage.

199. The right of innocent passage, as defined in articles 19 and 45 of the United Nations Convention on the Law of the Sea, apply to both merchant and military vessels and, in certain straits used for international navigation, may not be suspended.[474] In short, if part of the internal waters were to become part of the territorial sea, foreign-flagged vessels would benefit from broader unimpeded navigational rights and the coastal State would, in contrast, lose some of its prescriptive and enforcement rights as provided for under the Convention and under the rules of international law. Nonetheless, foreign-flagged vessels engaged in innocent passage would still have to comply with the rules and regulations of the coastal State on the safety of navigation and protection of the marine environment, such as those on the use of sea lanes, traffic separation schemes[475] and requirements for foreign nuclear-powered ships and ships carrying nuclear or other inherently dangerous or noxious substances to carry documents.[476]

B. Part of the territorial sea becomes part of the contiguous zone

200. The contiguous zone, as provided for in article 33 of the United Nations Convention on the Law of the Sea, which may be established by a coastal State, is a belt of waters extending up to 24 nautical miles from the baselines from which the breadth territorial sea is measured. In the contiguous zone, the coastal State may exercise not sovereign rights, but the control necessary to prevent infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea, and to punish infringements of such laws and regulations committed within its territory or territorial sea. Article 33 of the Convention is considered to

[472] Article 49 of the United Nations Convention on the Law of the Sea provides that archipelagic waters are those "waters enclosed by the archipelagic baseline drawn in accordance with article 47".

[473] See Haijiang Yang, *Jurisdiction of the Coastal State over Foreign Merchant Ships in Internal Waters and the Territorial Sea* (Berlin, Heidelberg and New York; Springer; 2006), pp. 45–114. The author provides an overview of the debate, noting the decisions of the International Court of Justice in which the Court recognized that the coastal State, by virtue of its sovereignty, could regulate access to its ports (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment. I.C.J. Reports 1986*, p. 14, at pp. 21–22, para. 21; and *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)* (see footnote 220 above), pp. 382–383, para. 35). See also the United Nations Convention on the Law of the Sea, article 211, paragraph 3.

[474] See *Corfu Channel case, Judgment of April 9th, 1949, I.C.J. Reports 1949*, p. 4.

[475] United Nations Convention on the Law of the Sea, article 22.

[476] *Ibid.*, article 23.

codify customary international law.[477] According to the International Court of Justice in its judgment in the *Alleged Violations (Nicaragua* v. *Columbia)* case, the contiguous zone of one coastal State may overlap with the exclusive economic zone of another State, given the different nature of the respective zones.[478] Consequently, the landward movement of the contiguous zone of one State that overlaps with the exclusive economic zone of another State would benefit both States where the overlap disappears.

C. Part of the territorial sea becomes part of the exclusive economic zone

201. The coastal State enjoys sovereign rights over the exclusive economic zone, which is a zone beyond and adjacent to the territorial sea that, cannot extend beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured.[479] Specifically, the coastal State has sovereign rights in the exclusive economic zone for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds.[480]Among the other rights and duties that the coastal State has in the exclusive economic zone, as provided for in the United Nations Convention on the Law of the Sea, it has jurisdiction with regard to the establishment and use of artificial islands, installations and structures; marine scientific research; and the protection and preservation of the marine environment.[481] In addition, the coastal State has the exclusive right to construct and to authorize and regulate the construction, operation and use of artificial islands, installations and structures, although due notice must be given of the construction of such islands, installations and structures.[482]

202. Third States have an important entitlement in the exclusive economic zone that does not apply in the territorial sea. The coastal State must give other States access to the surplus of the allowable catch in its exclusive economic zone that it does not have the capacity to harvest, subject to the conditions enumerated in the United Nations Convention on the Law of the Sea.[483] Consequently, the shifting of the territorial sea to the exclusive economic zone would potentially create a right of access for third-party States to living natural resources where no such entitlement existed previously.

203. In addition, while coastal States have the right to regulate, authorize and conduct marine scientific research in their exclusive economic zone and on their continental shelf, the requirement for them to grant consent for such research applies “in normal circumstances” only.[484] Such a qualification does not exist in the case of the territorial sea. For purposes of the present paper, without engaging in a detailed analysis as to what “normal circumstances” entail, it can be asserted that there is a slight benefit to third States when part of the territorial sea becomes part of the exclusive economic

[477] *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua* v. *Colombia)*, Judgment, 21 April 2022, General List No. 55, para. 164.
[478] *Ibid*., paras. 160–161.
[479] United Nations Convention on the Law of the Sea, article 57,
[480] *Ibid.*, article 56, paragraph 1 (a).
[481] *Ibid.*, article 56, paragraph 1 (b) and (c).
[482] *Ibid.*, article 60, paragraphs 1–3.
[483] *Ibid.*, article 62.
[484] *Ibid.*, article 246.

zone, as they cannot be denied consent to conduct marine scientific research absent "abnormal" circumstances.

204. The greatest benefit to third States in the case of part of the territorial sea becoming part of the exclusive economic zone concerns the acquisition of the freedom of navigation and overflight in the area, and the right to lay submarine cables and pipelines.[485] The gains would be significant, as third States would have the freedom of overflight for aircraft in an area in which even the right of innocent passage was not recognized. Ships would enjoy most aspects of freedom of navigation as on the high seas, but not all. In both the exclusive economic zone and the high seas, however, the exercise of freedom of navigation is subject to the obligation to show due regard for the interests of other States.[486]

205. However, the rights of foreign-flagged vessels to freedom of navigation in the exclusive economic zone of another State are not identical to their rights to freedom of navigation in the high seas. For example, in the *M/V "Virginia G"* prompt release case, the International Tribunal for the Law of the Sea decided that regulation by a coastal State of bunkering of foreign vessels fishing in its exclusive economic zone is among those measures that the coastal State may take in its exclusive economic zone to conserve and manage its living resources under article 56 of the United Nations Convention on the Law of the Sea, and that such bunkering is not part of the freedom of navigation of the foreign-flagged vessel.[487] Consequently, the coastal State retains both prescriptive and enforcement jurisdiction over bunkering activities if its law has expressly subjected such activities to its regulations on the conservation of fisheries. It remains to be seen whether the same would apply to coastal State law regulating the protection of the marine environment in general, such as in the case of marine protected areas.

206. Under article 73 of the United Nations Convention on the Law of the Sea, the coastal State has relatively broad enforcement competence: "The coastal State may, in the exercise of its sovereign rights to explore, exploit, conserve and manage the living resources in the exclusive economic zone, take such measures, including boarding, inspection, arrest and judicial proceedings, as may be necessary to ensure compliance with the laws and regulations adopted by it in conformity with this Convention."[488]

207. In contrast to the broad and exclusive enforcement competence of coastal States under article 73 of the United Nations Convention on the Law of the Sea, their enforcement competence in relation to violations committed by foreign-flagged vessels in the exclusive economic zone is limited. First, the coastal State may request information from the foreign-flagged vessel only where there are clear grounds for believing that, while navigating in the exclusive economic zone, the vessel committed a violation of applicable international rules and standards for the prevention, reduction and control of pollution from vessels, or of laws and regulations adopted by the coastal State in accordance with and giving effect to such international rules and standards. Second, the coastal State may undertake physical inspection of the

[485] *Ibid.*, article 58. See also *ibid.*, para. 87.

[486] See Rolf Einar Fife, "Obligations of 'due regard' in the exclusive economic zone: their context, purpose and State practice", *International Journal of Marine and Coastal Law*, vol. 34, No. 1 (February 2019), pp. 43–55.

[487] *M/V "Virginia G" (Panama/Guinea-Bissau), Judgment, ITLOS Reports 2014*, p. 4, at p. 69, para. 217. See also Bernard H. Oxman and Vincent P. Cogliati-Bantz, "The *M/V "Virginia G" (Panama/Guinea-Bissau*)", *American Journal of International Law*, vol. 108, No. 4 (October 2014), pp. 769–775.

[488] See *M/V "SAIGA" (Saint Vincent and the Grenadines* v. *Guinea), Prompt release, Judgment, ITLOS Reports 1997*, p. 16, in which the application of article 73 to the arrest and detention of a bunkering vessel is addressed.

vessel only if the violation results in a substantial discharge causing or threatening significant pollution of the marine environment, and only if the foreign-flagged vessel has refused to give information, or the information supplied by the vessel is manifestly at variance with the evident factual situation, and the circumstances of the case justify such inspection. In other words, the coastal State has significantly limited competence to exercise its enforcement powers for violations of its laws and regulations when committed in its exclusive economic zone.[489]

D. Part of the exclusive economic zone becomes part of the high seas

208. In the high seas, all vessels enjoy the long-standing customary right of freedom of the high seas, which comprises freedom of navigation, freedom of overflight, marine scientific research, freedom to lay submarine cables and pipelines, freedom to construct artificial islands and other installations permitted under international law, freedom of fishing and freedom of scientific research.[490] In the high seas, the flag State has exclusive jurisdiction over ships under its flag. Absent consent, no other State may board, inspect, detain or otherwise interfere with its freedom of navigation. However, warships on the high seas may board a vessel without the consent of the flag State if there are reasonable grounds for suspecting that the vessel is engaged in piracy, the slave trade or (if the warship has jurisdiction under article 109) unauthorized broadcasting, or that the ship is without nationality or, though flying a foreign flag or refusing to show its flag, the ship is, in reality, the same nationality as the warship.[491] The right of hot pursuit also operates as an exception to the exclusive jurisdiction of the flag State on the high seas if the necessary conditions are fulfilled.[492]

209. In the case of part of the exclusive economic zone becoming part of the high seas, third States would gain significant rights of freedom of the high seas at the expense of the coastal State. An area that was once under the exclusive jurisdiction of the coastal State regarding the adoption of rules and legislation for the protection of the marine environment and the conservation of living resources would become an area subject only to the exclusive jurisdiction of the flag State.

210. The high seas are also considered to be a global commons in which all States have an interest and obligations *erga omnes* apply.[493] So the question should also be posed as to the benefit or loss that would accrue to the international community if an area that was once under the prescriptive and enforcement competence of the coastal State is fragmented into the multiplicity of flag States with significant differences in relation to navigational safety, protection of the marine environment and conservation of marine living resources. Indeed, this very concern of fragmentation and the governance gap in the high seas are reasons why States are in the process of negotiating an internationally legally binding instrument for the conservation and sustainable use of biological diversity in areas beyond national jurisdiction.[494]

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[489] *Ibid.*, article 220, paragraph 2.

[490] *Ibid.*, article 87.

[491] *Ibid.*, article 110. In general, see Efthymios Papastavridis, *The Interception of Vessels on the High Seas, Contemporary Challenges to the Legal Order of the Oceans* (Oxford, Hart, 2013); and Douglas Guilfoyle, *Shipping Interdiction and the Law of the Sea* (Cambridge, United Kingdom, Cambridge University Press, 2009).

[492] United Nations Convention on the Law of the Sea, article 111.

[493] *Responsibilities and obligations of States with respect to activities in the Area, Advisory Opinion, 1 February 2011, ITLOS Reports 2011*, p. 10, at p. 59, para. 180.

[494] See General Assembly resolution 72/249 of 24 December 2017.

E. Loss of the archipelagic baseline

211. As discussed in the first issues paper, sea-level rise could affect the right of an archipelagic State to maintain its archipelagic straight baseline in case of submergence of the outermost islands or drying reefs that constitute the basis of its baseline, meaning that it would no longer meet the requirements of article 47 of the United Nations Convention on the Law of the Sea. This vulnerability is not theoretical, but is a genuine risk that several of the 22 archipelagic States are facing.[495] For example, in Indonesia, the National Research and Innovation Agency has projected that at least 115 of the State's islands will be under water by 2100.[496]

212. The sovereignty of an archipelagic State over its archipelagic waters extends to its airspace and to the seabed and subsoil, similar to the territorial sea of a coastal State. Foreign-flagged vessels have innocent passage rights, except where the archipelagic State designates sea lanes and air routes thereabove, suitable for the continuous and expeditious passage of the foreign ships and aircraft through or over its archipelagic waters.[497]

213. Each island that makes up the archipelagic State, if entitled under article 121 of the United Nations Convention on the Law of the Sea, may be in a situation to establish new baselines for measuring individual territorial seas, exclusive economic zones and continental shelves. Depending on the archipelago, this could result in the emergence of areas of high seas in what were archipelagic waters over which the archipelagic State once exercised sovereignty or sovereign rights. In all cases, the archipelagic State would stand to lose more rights than third States would gain.[498]

F. Preliminary observations

214. In conclusion, the following observations of a preliminary nature can be made:

(a) in cases where the baseline or outer limits of the baseline move landward, third States stand to gain additional rights overall to those to which they would otherwise be entitled. These include gaining innocent passage rights in waters that were previously internal waters and now formed part of the territorial sea of the coastal State. In the case of the contiguous zone, a landward shift that reduces any overlap between those of two opposite coastal States would be beneficial to both. In cases where the territorial sea becomes part of the exclusive economic zone, third States will possibly gain access to any surplus of the allowable catch of the coastal State that the latter does not have the capacity to harvest. A slight benefit may also accrue to third States since, in the exclusive economic zone, the coastal State is required "under normal circumstances" to grant authorization for marine scientific research to third States. A much broader right of unimpeded navigation is the greatest gain for third States if part of the territorial sea becomes part of the exclusive economic zone, which is akin to freedom of navigation in the high seas, but with some limitations. Likewise, third States would gain additional rights especially if the exclusive economic zone becomes part of the high seas in cases where archipelagic States lose their archipelagic baselines as a result of the inundation of outermost

[495] See David Freestone and Clive Schofield, "Sea-level rise and archipelagic States: a preliminary risk assessment", *Ocean Yearbook Online*, vol. *35,* No. 1 (July 2021), pp. 340–387. The authors point to examples such as Bahamas, Comoros, Fiji, Grenada, Indonesia, Jamaica, Kiribati, Maldives, Marshall Islands, Mauritius (Chagos archipelago), Papua New Guinea, Philippines, Sao Tome and Principe, Seychelles, Solomon Islands and Tuvalu.

[496] Dita Liliansa, "Sea-level rise may threaten Indonesia's status as an archipelagic country" The Conversation, 19 January 2023.

[497] United Nations Convention on the Law of the Sea, article 53.

[498] See Freestone and Schofield, "Sea-level rise and archipelagic States" (see footnote 495 above).

islands or drying reefs, thus no longer fulfilling the requirements of article 47 of the United Nations Convention on the Law of the Sea;

(b) however, as observed in the first issues paper, these gains are at the considerable expense of the coastal State. These aspects are outlined in detail in the first issues paper. Consideration should also be given to equity where one party stands to gain significantly more than another for circumstances that are not caused by the coastal State. Such changes in maritime entitlements do bring the risk of creating uncertainty, instability and the possibility of disputes. The preservation of existing rights and obligations – in other words, maintaining the *status quo* of maritime entitlements established in accordance with international law and the Convention – would not result in any loss to either party.

XI. Nautical charts and their relationship to baselines, maritime boundaries and the safety of navigation

215. During the discussions of the Study Group at the seventy-second session of the Commission, in 2021, the issue of navigational charts was raised. A view was expressed that updating them was important in the interests of navigational safety, while another view maintained that the potential dangers to navigation might be rather exceptional given that the coast receded landward in case of sea-level rise and that satellite technology was more accessible than ever. Support was expressed for the proposal made by the Co-Chairs that the issue of navigational charts could be subject to additional study. For example, such study could examine the different functions of navigational charts as required under the rules of the International Hydrographic Organization and of the charts that are deposited with the Secretary-General of the United Nations for purposes of registration of maritime zones.[499]

A. Submissions of Member States to the Commission

216. The Kingdom of the Netherlands, in its submission to the Commission in 2022, provides information on its practice:

> The Netherlands Hydrographic Office (part of the Ministry of Defence), which is responsible for the publication of accurate and up-to-date nautical charts, has a risk-based resurvey plan. This plan divides the Dutch part of the North Sea in pieces with a resurvey frequency between 2 and 25 years. The part of the North Sea near the coastline falls under the responsibility of the Ministry of Infrastructure and Water Management and is monitored even more frequently for coastal defence purposes. The results of the surveys of both Ministries are combined and published in the official charts, issued by the Netherlands Hydrographic Office. … On average, the maritime limits of the [Kingdom of the] Netherlands change 1–2 times per year. These changes are not deposited with the Secretary-General of the United Nations on a regular basis.[500]

217. Colombia, in its submission to the Commission, notes that "[i]t might be considered that the coastal State in question should take into account the need to update the relevant information (nautical charts) to reflect current conditions in order to ensure, in particular, the safety of navigation for the exercise of the right of innocent passage and for access to inland waters and ports".[501] Estonia expressed support for "the idea to stop updating notifications, in accordance with the [United

[499] A/76/10, para. 276.
[500] See footnote 66 above.
[501] See footnote 53 above.

Nations Convention on the Law of the Sea], regarding the baselines and outer limits of maritime zones measured from the baselines and, after the negative effects of sea-level rise occur, in order to preserve … States' entitlements".[502]

218. France, in its submission in response to the request of the Study Group, notes that the United Nations Convention on the Law of the Sea "does not provide for an obligation to update the charts and lists of geographical coordinates, once published pursuant to its provisions. The navigational charts are prepared and published, as necessary, by the French Naval Hydrographic and Oceanographic Service, under guidelines set by the International Hydrographic Organization."[503]

219. Germany, in its submission, expresses its view as follows:

> [The United Nations Convention on the Law of the Sea] does not contain any explicit obligations to update [either] normal baselines that have been marked ([a]rticle 5 …) [or] straight baselines that have been marked, published and deposited ([a]rticle 16 …), as well as no further obligation to update a State's relevant charts and lists of geographical coordinates with regards to the [exclusive economic zone] ([a]rticle 75 …) and the continental shelf ([a]rticle 84 …)." [504]

Moreover, in direct response to the request from the Commission on practice, Germany replies as follows: "The maritime boundary charts still reflect the proclamations of 1994. New editions of the latest nautical charts, particularly the detailed large-scale charts, are published regularly. However, changes in the maritime boundaries in these charts only affect the normal baselines (0-metre depth contour) in the areas for which no straight baselines have been defined."[505]

220. Ireland, in its submission to the Commission, states the following:

> [C]oastal States are not required by the [United Nations Convention on the Law of the Sea] to deposit details of normal baselines with the Secretary-General as the low water line along the coast may be established from the relevant official large-scale charts, being nautical charts produced to the relevant international standard, suitable and reliable for navigation. Ireland understands that the rationale for the obligations under the Convention to deposit details of straight baselines with the Secretary-General and otherwise to give them due publicity is that these baselines may not be marked on the relevant nautical charts, in which case they could not be ascertained.[506]

221. Morocco, in its submission to the Commission in 2022, indicates the following:

> The navigational charts used to determine the baselines and outer limits of the exclusive economic zone and the continental shelf are updated periodically, in keeping with the standards of the International Hydrographic Organization. … [A]s part of the project to extend its continental shelf (preliminary dossier), Morocco had updated base points and baselines along its entire Atlantic seaboard, in 2015–2016, on the basis of new reference nautical charts published by the French Naval Hydrographic and Oceanographic Service … and the United Kingdom Hydrographic Office.[507]

222. New Zealand, in its submission, responds as follows:

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[502] See footnote 131 above.
[503] See footnote 60 above.
[504] See footnote 62 above.
[505] *Ibid*.
[506] See footnote 65 above.
[507] Submission of Morocco. Available from https://legal.un.org/ilc/guide/8_9.shtml#govcoms

> On 8 March 2006 … New Zealand deposited with the United Nations Secretary-General [10] nautical charts showing the baselines from which the breadth of the territorial sea is measured, together with the outer limits of its territorial sea and its exclusive economic zone ….
>
> New Zealand has not updated this maritime zone submission since it was submitted. In the event that New Zealand experiences coastal regression as a result of climate change-related sea-level rise, New Zealand does not intend to update its notification of 8 March 2006.
>
> The charts that New Zealand deposited with the Secretary-General in 2006 are not used by mariners for navigation purposes. New Zealand's government agency Land Information New Zealand produces official nautical charts for safe navigation in New Zealand's [exclusive economic zone]. These charts are updated regularly based on the latest topographic and hydrographic data obtained by [Land Information New Zealand] and are freely available to all mariners on [its] website. [508]

223. The Philippines, in its submission, notes the following:

> The updating of charts due to coastal changes is done as soon as possible for purposes of navigational safety and coastal zone management. The updating and publication of baselines for areas under the Regime of Islands can also be done as part of the mapping and charting mandates of the national mapping agency, which in the Philippines is the National Mapping and Resource Information Authority …, and pursuant to relevant provisions of RA 9522 and [a]rticles 5, 6 and 7 of [the United Nations Convention on the Law of the Sea]. However, absent clear legal guidance on the matter, [the Authority] would seek the concurrence of relevant authorities before publishing such changes.[509]

224. Poland, in its submission, informs the Commission that, "[a]s regards the charts, the Hydrographic Office of the Polish Navy, responsible, *inter alia*, for preparing and publishing of nautical charts, has not found it necessary to amend relevant nautical charts due to sea-level rise for now." [510]

225. The United Kingdom, in its submission in 2022, advises the following:

> The [United Kingdom Hydrographic Office] publishes Admiralty Standard Nautical Charts and Electronic Navigational Charts, on various scales and levels of detail, of areas around the world. Updates are published weekly.
>
> In relation to [the United Kingdom] in particular, the frequency of surveys and of updates to these charts is likely to depend to some extent on the nature of the coast. For example, charts of areas with shifting sandbanks, extensively used for navigation, may be updated as often as weekly. Charts of hard, rocky coastlines may not need to be update[d] for years. Not all changes to charts will necessarily be relevant to the location of baselines. [United Kingdom] [t]erritorial [s]ea, [c]ontinental [s]helf and exclusive economic zone limits are shown on these charts.[511]

226. The United States, in its submission in 2022, explains the following:

> The United States agency responsible for charts depicting the limits of its maritime zones is the National Oceanic and Atmospheric Administration …. [The Administration] updates its suite of nautical chart products based upon new

[508] See footnote 54 above.
[509] See footnote 58 above.
[510] See footnote 67 above.
[511] See footnote 68 above.

> source as it is received. The prioritization of chart updates is based upon the criticality of the new source and resources available to action this new source. The [United States] [b]aseline and [m]aritime [l]imits are updated on [the Administration's] charts as changes are noted from incoming source[s] and when those changes are reviewed by the [United States] Baseline Committee.[512]

227. Samoa, in its statement in the Sixth Committee on behalf of the Pacific small island developing States in 2021, notes the following:

> The … Declaration on Preserving Maritime Zones in the Face of Climate Change-related Sea-Level Rise [issued by the Pacific Islands Forum Leaders on 6 August 2021] affirms that once Pacific islands have established and notified their maritime zones to the Secretary-General … such maritime zones and the rights and entitlements that flow from them shall not be reduced irrespective of the physical effects of climate change-related sea-level rise …. States [p]arties of [the United Nations Convention on the Law of the Sea] are not obligated to update their maritime zone coordinates or charts once deposited with the … Secretary-General.[513]

Antigua and Barbuda, in its statement in the Sixth Committee on behalf of Alliance of Small Island States in 2021, reiterates that position.[514]

228. In addition, in its statement in the Sixth Committee in 2021, Cyprus expresses the view that the obligation under article 16 of the United Nations Convention on the Law of the Sea for the coastal State to show the baselines for measuring the breadth of the territorial sea, or the limits "derived therefrom", on charts or a list of geographical coordinates of points is meant to establish legal security, and that no indication is provided for that these charts are to be periodically revised.[515]

B. Purpose of nautical charts under international law

229. For purposes of determining the limits of the territorial seas, articles 5 and 6 of the United Nations Convention on the Law of the Sea reflect a limited function for nautical charts "officially recognized by the coastal State", which is for the purpose of measuring the breath of the territorial sea. No other function for the baseline is mentioned. The *Virginia Commentaries* explain that the term "officially recognized by the coastal State" "implies that the charts in question do not have to be produced by the coastal State", which may adopt charts produced by foreign hydrographic services.[516] This is indeed the practice of many States. It is also an indication that the use of nautical charts for the purposes of drawing baselines does not mean that the coastal State has an obligation to update those charts for the purposes of safety of navigation. This means that the two functions of nautical charts are distinct, as discussed in greater detail below.

230. Under the International Convention for the Safety of Life at Sea,[517] a "nautical chart" (or "nautical publication") is defined as "a special-purpose map or book, or a specially compiled database from which such a map or book is derived, that is issued officially by or on the authority of a Government, authorized Hydrographic Office or

[512] See footnote 271 above.
[513] See footnote 77 above.
[514] See footnote 99 above.
[515] See footnote 133 above.
[516] Nordquist *et al.*, eds., *United Nations Convention on the Law of the Sea 1982: A Commentary*, vol. II (see footnote 348 above), p. 90, para. 5.4 (d).
[517] International Convention for the Safety of Life at Sea, 1974 (London, 1 November 1974), United Nations, *Treaty Series*, vol 1184, No. 18961, p. 2.

other relevant government institution and is designed to meet the requirements of marine navigation". [518] The principal function of nautical charts is for safety of navigation.[519] Since 2000, IMO has been promoting the use of electronic chart display and information systems, with official electronic navigational charts. The International Convention for the Safety of Life at Sea, which is the principal global instrument for the safety of navigation, provides for a set of obligations concerning nautical charts and the safety of navigation. According to regulation V/9 of the Convention, contracting Governments are required to ensure that hydrographic surveying is carried out, as far as possible, adequate to the requirements of safe navigation; to prepare and issue nautical charts, sailing directions, lists of lights, tide tables and other nautical publications, where applicable, satisfying the needs of safe navigation; to promulgate notices to mariners in order that nautical charts and publications are kept, as far as possible, up to date; and to provide data management arrangements to support these services. [520] There is no mention of updating of baselines as part of the obligation to update charts for the purposes of ensuring the safety of navigation.

231. The different functions of nautical charts are illustrated by the practice of the United States. The National Oceanic and Atmospheric Administration, which is the officially recognized charting agency of the United States, depicts on its nautical charts not the actual baseline, but the official limits of national jurisdiction.[521] The baseline is determined not by that Administration, but by the United States Baseline Committee, which is chaired by the United States Department of State.[522] Westington and Slagel note the following: "Since the nautical chart is a document compiled from many sources of information and is designed for safe and efficient navigation, supplemental information, such as a hydrographic or topographic survey, is critical to precisely determine the baseline from which the [United States] maritime limits are measured."[523]

232. This separation of function of nautical charts is also supported by the Division for Ocean Affairs and the Law of the Sea, of the Office of Legal Affairs, which is the substantive unit of the United Nations Secretariat responsible for the custody of charts and lists of geographical coordinates deposited in accordance with the United Nations Convention on the Law of the Sea.[524] In its *Handbook on the Delimitation of Maritime Boundaries*, and in relation to the low-water line, the Division states as follows: "The low-water line along the coast is a fact irrespective of its representation on charts. The maritime zones claimed by the coastal State exist even if no particular low-water line has been selected or if no charts have been officially recognized."[525] There is no mention of the use of the baseline for the purposes of navigational safety. The

[518] *Ibid*., annex, chapter V, regulation 2, paragraph 2 (as amended in IMO, resolution MSC.99(73) of 5 December 2000, para. 7, at p. 117).

[519] Meredith A. Westington and Matthew J. Slagel, "U.S. maritime zones and the determination of the national baseline", National Oceanic and Atmospheric Administration (2007), p. 4. The authors explain as follows: "The nautical chart is constructed to support safe navigation; its general purpose is to inform the mariner of hazards and aids to navigation as well as the limits of certain regulatory areas."

[520] International Convention for the Safety of Life at Sea, annex, chapter V, regulation 9 (as amended in IMO, resolution MSC.99(73) of 5 December 2000, para. 7, at pp. 121–122). See also the submission by IMO to the Commission; available from https://legal.un.org/ilc/guide/8_9.shtml#govcoms.

[521] Westington and Slagel, "U.S. maritime zones" (see footnote 519 above), p. 1.

[522] *Ibid*., p. 2.

[523] *Ibid*., p. 13.

[524] *Handbook on the Delimitation of Maritime Boundaries* (United Nations publication, 2000), p. 11, para. 65..

[525] *Ibid*., p. 4, para. 19.

independence of the low-water line (which is to be used for the baseline) from the chart would indicate this.

233. An important element that must be considered in assessing the obligations of States is that not all Governments have the capacity to produce their own nautical charts. This element is reflected in the use of the term "officially recognized by the coastal State" and is explained in the authoritative *Virginia Commentaries*.[526] In practice, those States that do not have their own capability to develop nautical charts will use the nautical charts prepared by hydrographic offices of other States. This means that the updating of charts will depend upon the capacity of those Governments to provide data to the Governments preparing such nautical charts. This was recognized by the IMO Assembly, which in 2004 adopted a resolution in which it invited member Governments to cooperate in the collection and dissemination of hydrographic data with other Governments having little or no hydrographic capability.[527] As noted in its submission to the Commission, IMO "has continuously encouraged Governments, in particular coastal States, to develop or improve their hydrographic capabilities and consider becoming members of the [International Hydrographic Organization], and provided technical assistance to its [m]ember States, as and when requested in cooperation with [that Organization]."[528]

234. If not all Governments are able to provide the hydrographic services necessary to produce and update charts, it would be unreasonable to impose an obligation to resurvey their baselines and update nautical charts. The use of the qualified language "as far as possible" in regulation V/9 of the International Convention for the Safety of Life at Sea constitutes recognition of the differing capabilities of its contracting Governments.

C. Information provided by the International Hydrographic Organization and the International Maritime Organization

235. In response to the request from the Commission, in 2022, the International Hydrographic Organization and IMO kindly provided information. According to the submission of the former:

> The International Hydrographic Organization … is the intergovernmental international organization whose principal aim is to ensure that all the world's oceans, seas and navigable waters are properly surveyed and charted. The work is done by bringing together the national agencies responsible for the conduct of hydrographic surveys, the production of nautical charts and related publications, and the distribution of [m]aritime [s]afety [i]nformation … in accordance with the requirement set out in the International Convention for the Safety of Life at Sea … and other international regulations.[529]

236. IMO, in its submission, lays out the obligations of contracting Governments under regulation V/9 of the International Convention for the Safety of Life at Sea to maintain hydrographic services and products. In particular, contracting Governments are required to cooperate in carrying out, as far as possible, a range of nautical and hydrographic services, in the manner most suitable for the purpose of aiding navigation. These services include ensuring that hydrographic surveying is carried

[526] Nordquist *et al.*, eds, *United Nations Convention on the Law of the Sea 1982: A Commentary* (see footnote 348 above), p. 90, para. 5.4 (d).

[527] Submission of IMO to the Commission (see footnote 520 above), para. 1.

[528] *Ibid*.

[529] Submission of the International Hydrographic Organization to the Commission, p. 1. Available from https://legal.un.org/ilc/guide/8_9.shtml#govcoms.

out, as far as possible, adequate to the requirements of safe navigation; promulgating notices to mariners in order that nautical charts and publications are kept, as far as possible, up to date; and preparing and issuing nautical charts, sailing directions, lists of lights, tide tables and other nautical publications, where applicable, satisfying the needs of safe navigation.[530] In addition, at its twenty-third session, in 2004, the IMO Assembly invited Governments, in addition to their existing obligations under regulation V/9: to promote the use of electronic chart display and information systems; to cooperate, as appropriate, in the collection and dissemination of hydrographic data with other Governments having little or no hydrographic capability; to promote support for Governments that might require technical assistance; and establish hydrographic offices where they did not exist, in consultation with the International Hydrographic Organization.[531]

237. The International Hydrographic Organization is a consultative and technical organization. Its current membership stands at 98 member States and 55 non-member States.[532] The latter States do not have national hydrographic offices. Consequently, these States do not have the capacity or capability to conduct their own hydrographic surveys.[533] This is why an important objective of the Organization is to provide technical assistance and capacity-building to Governments. The object of the Organization includes the promotion of the use of hydrography for the safety of navigation and for all other marine purposes.[534] These include supplementary purposes, as the Organization explains in its submission:

> Although safety of navigation remains a major driver for the [Organization], hydrographic products and services support all activities associated with the oceans, seas, and navigable waters. As accurate depth data (bathymetry) and sea-level data is essential to the generation of nautical charts and publications and the substantiation of the … claims [under the United Nations Convention on the Law of the Sea] of coastal States to maritime territory and resources, hydrography is essential in helping coastal states protect their maritime zones and populations in the face of sea-level rise. All coastal States should be encouraged to ensure that their seas and coastal areas are properly surveyed and charted. This will directly allow them to protect their maritime rights, [and] mitigate and adapt to the impacts of climate change and displaced persons.[535]

238. The International Hydrographic Organization notes the various adverse consequences of sea-level rise on countries, including "altering access to food, increasing the impact of storms and storm surges [and] displacing populations". It observes that data on physical features of the ocean can used in efforts to mitigate and adapt to the negative impact of sea-level rise.[536] The Organization explains that, recognizing the importance of such hydrographic information, its member States agreed in 2020 to include a goal in its Strategic Plan "targeting the increased use of hydrographic data beyond the traditional charts".[537]

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[530] Submission of IMO (see footnote 520 above), p. 1.

[531] *Ibid.*

[532] International Hydrographic Organization, *Yearbook: 9 March 2023* (Monaco, 2023), pp. 5–9.

[533] This point was highlighted by authors who wrote that Poland had "limited technical capabilities" and did not have an up-to-date set of geographic data on the Baltic Sea that established the maritime boundary of the State. Cezary Specht and others, "A new method for determining the territorial sea baseline using an unmanned hydrographic surface vessel", *Journal of Coastal Research*, vol. 35, No. 4 (July 2019), pp. 925–936, at p. 926.

[534] International Hydrographic Organization, "Strategic Plan for 2021–2026)", November 2020, p. 1.

[535] Submission of the International Hydrographic Organization (see footnote 529 above), para. 2.

[536] *Ibid*., para. 15.

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

239. There are two key points to be deduced from the information provided by the International Hydrographic Organization. The first point is that nautical charts and hydrographic services support the claims of coastal States to maritime territory and resources and help to protect these zones and their population. The second point, as demonstrated by the use of the verb "encourage", is that there is no obligation for all coastal States to survey and chart their seas and coastal areas. Such an obligation would be difficult to impose, given that many coastal States lack such capacity. Moreover, while the Organization includes as one of its objectives to assist with mitigation of and adaptation to the negative impact of sea-level rise, there is no mention of any objective to ensure the resurveying and updating of bathymetry for baselines used for maritime boundaries in relation to the safety of navigation.

240. The International Hydrographic Organization is also actively engaged in providing digital navigation support in the context of the requirements under the International Convention for the Safety of Life at Sea to enhance the safety of navigation, and the implementation of "e-navigation", led by IMO. Since easy access to standardized high-quality digital geospatial information is required, the International Hydrographic Organization has continued to work on products including one called "S-121", on maritime limits and boundaries, whose purpose is to provide support to the Division for Ocean Affairs and the Law of the Sea regarding deposit requirements. In addition, the product is to provide the clarity necessary for good governance by: (a) providing coordinate-based spatial representations of maritime limits and boundaries that are accurate, reliable and easy to interpret; (b) facilitating States parties' obligation under the United Nations Convention on the Law of the Sea to deposit their outer limits of maritime zones, together with the lines of delimitations (marine boundaries) with the Secretary-General of the United Nations through the Division of Ocean Affairs and the Law of the Sea. Thus, "S-121 supports ocean governance in the context of sea-level rise by supporting legal procedures through the provision of output that is legally readable, targeted to the issues and provides historical information and source validation."[538] There is no mention of baselines in the Organization's submission, only a reference to the "outer limits of maritime zones".

241. Moreover, IMO and the International Hydrographic Organization have, in collaboration, undertaken 11 capacity-building activities to improve hydrographic services and the production of nautical charts between 2012 and 2018. They were mostly regional activities in the Pacific, Asia, Latin America and Eastern Europe, with some national activities focusing on the Sudan and Kenya in the Africa region.[539] Three activities were delivered under the United Nations "Delivering as one" initiative, whereby common technical cooperation activities were identified and delivered as part of a joint initiative on capacity-building matters by the International Hydrographic Organization, IMO, the Intergovernmental Oceanographic Commission, the World Meteorological Organization, the International Association of Marine Aids to Navigation and Lighthouse Authorities, the International Atomic Energy Agency and the International Federation of Surveyors.[540]

[538] *Ibid*., paras. 9–10.
[539] Submission of IMO (see footnote 520 above), p. 2.
[540] *Ibid.*

D. Survey by the Division for Ocean Affairs and the Law of the Sea, Office of Legal Affairs, of charts or lists of geographical coordinates deposited with the Secretary-General

242. In response to the request of the Commission,[541] the Division for Ocean Affairs and the Law of the Sea of the Office of Legal Affairs conducted a survey of charts or lists of geographical coordinates deposited with the Secretary-General of the United Nations that had been modified or updated during the period from 1990 to the present, and any additional explanatory information. The Division notes that the United Nations Convention on the Law of the Sea does not explicitly address the "modification or updating" of deposits made. The Division reports that the first deposit with the Secretary-General under the Convention was made in March 1995, and that, in September 2022, a total of 86 coastal States had made a total of 157 deposits to the Secretary-General. Of the 86 depositing States, 17 made subsequent deposits (that is, later deposits for the same region and under the same articles of the Convention).[542] Of these, 16 States conveyed their intention to supersede an earlier deposit, in part or fully, indicating whether an earlier deposit should be considered superseded.

243. The Division highlights that in discharging its mandate concerning deposits under the United Nations Convention on the Law of the Sea, the Secretariat carries out a review of the deposited charts or lists of geographical coordinates of points with a view to ascertaining whether they correspond to the stated intention of the depositing State and meet the requirements specified in the Convention. The Secretariat is not mandated, however, to make any determination as to the conformity of the deposited material with the relevant provisions of the Convention. The Secretariat is also not mandated to determine whether the new charts and lists of geographical coordinates of points amount to a "modification or update" of any charts and lists deposited earlier.

244. The Division clarifies as follows:

> Given the international nature of an act of deposit of charts and/or lists, it is expected that such an act would be effected in the form of a note verbale or a letter from a person who is considered a representative of the coastal State addressed to the Secretary-General. In virtue of their functions, such persons can be any of the following: a Head of State; a Head of Government; a minister for foreign affairs; or a permanent representative or a permanent observer to the United Nations.[543]

In other words, the deposit of charts and/or lists is not done by the technical offices of the coastal State, such as the hydrographic office, as it is a legal act, not a technical one.

[541] A/77/10, para. 27 (a).

[542] Belgium, Brazil, Chile, Cook Islands, Fiji, France, Iraq, Japan, Lebanon, Madagascar, Nicaragua, Norway, Samoa, Seychelles, Spain, Tuvalu and United Arab Emirates.

[543] SPLOS/30/12, para. 16.

E. Preliminary observations

245. A number of States provided information on their practice and views concerning nautical charts in relation to maritime boundaries. Few States reported that they update charts regularly or periodically and most States indicated their view and practice that there is no requirement to update nautical charts under the United Nations Convention on the Law of the Sea in relation to baselines. No statement was made by any State indicating the view that an obligation exists under the Convention or international law to survey their baselines periodically, update the nautical charts and deposit the updated charts with the Secretary-General.

246. As explained by IMO and the International Hydrographic Organization, nautical charts are used principally for the purposes of safety of navigation, as provided for under the International Convention for the Safety of Life at Sea. However, the International Hydrographic Organization explains that hydrographic services and products can fulfil supplementary functions, including providing support in substantiating maritime zones, helping States to protect their maritime zones and population and supporting adaptation to the impact of sea-level rise. The information provided by the International Hydrographic Organization does not indicate any practice or obligation under the International Convention for the Safety of Life at Sea to the effect that baselines are relevant to the safety of navigation and must be depicted or updated on nautical charts. In other words, there are two different uses for nautical charts: for the safety of navigation, and for supplementary functions, such as indicating maritime zones. For example, the practice of the United States is not to show the baseline on the nautical charts prepared by the National Oceanic and Atmospheric Administration. This is supported by the *Handbook on the Delimitation of Maritime Boundaries*, prepared by the Division for Ocean Affairs and the Law of the Sea of the Office of Legal Affairs, according to which the "low-water line along the coast is a fact irrespective of its representation on charts". There is no evidence of general practice among States of updating their baselines on their nautical charts for the purposes of the safety of navigation. In the survey conducted by the Division, States did not indicate their reasons for adjusting their baselines.

247. Nautical charts are developed by national hydrographic offices. However, both IMO and the International Hydrographic Organization recognize that not all Governments have the capacity to establish hydrographic offices or to undertake hydrographic surveys. Many States do not have hydrographic offices and do not produce their own nautical charts. This concept is reflected in articles 5 and 6 of the United Nations Convention on the Law of the Sea, in which reference is made to charts that are "officially recognized by the coastal State". It would thus seem unreasonable to impose an obligation on States to conduct hydrographic surveys and update nautical charts, and there is no support in the instruments or in practice to do so.

248. These preliminary observations support a plain reading of article 5 of the United Nations Convention on the Law of the Sea, whereby the normal baseline is used only for measuring the breadth of the territorial sea, and, as stated in the first issues paper, "the Convention does not indicate *expressis verbis* that new baselines must be drawn".[544] The updating of charts for the purposes of the safety navigation is separate from the updating of charts and lists of coordinates concerning baselines and maritime zones under the Convention and international law in relation to maritime zones.

[544] A/CN.4/740 and Corr.1, para. 78.

249. In conclusion, the following observations of a preliminary nature can be made:

(a) nautical charts are principally used for the purposes of the safety of navigation, and the depiction of baselines or maritime zones is a supplementary function;

(b) there is no evidence of general practice among States of updating their baselines on their nautical charts for the purposes of the safety of navigation under the United Nations Convention on the Law of the Sea or international law;

(c) there is no evidence of State practice in support of the view that an obligation exists under the Convention or other sources of international law to regularly revise charts for the purposes of updating baselines or maritime zones.

XII. Relevance of other sources of law

250. In the Commission's 2021 annual report,[545] it was suggested by the members of the Study Group that, beyond the United Nations Convention on the Law of the Sea and the 1958 Geneva Conventions:[546]

> [T]he Study Group would examine other sources of law – relevant multilateral, regional and bilateral treaties or other instruments relating, for example, to fisheries management or the high seas that define maritime zones, or the 1959 Antarctic Treaty and its 1991 Protocol on Environmental Protection, the IMO treaties defining pollution or search and rescue zones, or the 2001 Convention on the Protection of the Underwater Cultural Heritage, …, as well as the regulations of relevant international organizations such as the International Hydrographic Organization. The purpose of this examination would be to determine the *lex lata* in relation to baselines and maritime zones, without prejudice to the consideration of the *lex ferenda* or policy options. It would also aim at assessing whether these instruments permit or require (or not) the adjustment of baselines in certain circumstances, and whether a change of baselines would entail a change of maritime zones.

251. Member States did not refer specifically in their submissions and interventions to certain treaties that they consider of relevance to be further examined. It can be noted that the Alliance of Small Island States expressed in its 2021 statement certain reservations to the need to embark on such an analysis: "We are interested in understanding how the 1958 Geneva Conventions …, which were negotiated when many of the [small island developing States] were under colonial administration, are relevant to our interpretation of the law of the sea under the present circumstances". The United States, in its 2021 statement, was also very direct: "We query whether other sources of law identified by the Study Group could override or alter such universally accepted provisions reflected in [the United Nations Convention on the Law of the Sea]".

252. The Antarctic Treaty of 1959[547] does not contain references to baselines or maritime zones (with the exception of high seas). Article IV of the Treaty contains only references to rights of, claims to or bases of claims to "territorial sovereignty in

[545] A/77/10, para. 294 (a).

[546] In fact, already examined in the first issues paper.

[547] The Antarctic Treaty (Washington, 1 December 1959), United Nations, *Treaty Series*, vol. 402, No. 5778, p. 71.

Antarctica".[548] Only on the remote possibility that, after a future hypothetical termination of the Treaty, some States would have territorial sovereignty over (parts of) Antarctica, could the issue of baselines and maritime zones and, consequently, of their relation to sea-level rise arise. Article VI, which establishes the area of application of the Treaty, sets forth that "nothing in the present Treaty shall prejudice or in any way affect the rights, or the exercise of the rights, of any State under international law with regard to the high seas within that area". Taking into account the current legal regime of Antarctica, it is quite clear that this provision has no effect on the present topic.

253. Neither the 1991 Protocol on Environmental Protection to the Antarctic Treaty,[549] nor the 1972 Convention for the Conservation of Antarctic Seals[550] include references to baselines or maritime zones. The 1980 Convention on the Conservation of Antarctic Marine Living Resources[551] does not contain any reference to baselines or maritime zones either. Article IV of that Convention contains a similar text to article IV of the Antarctic Treaty[552] and a reference to article VI thereof. The same conclusion can therefore be drawn as for the Antarctic Treaty. Furthermore, article XI of the Convention on the Conservation of Antarctic Marine Living Resources provides that:

> The Commission [for the Conservation of Antarctic Marine Living Resources, created by the Convention on the Conservation of Antarctic Marine Living Resources] shall seek to cooperate with Contracting Parties which may exercise jurisdiction in marine areas adjacent to the area to which this Convention applies in respect of the conservation of any stock or stocks of associated species which occur both within those areas and the area to which this Convention applies, with a view to harmonizing the conservation measures adopted in respect of such stocks.

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[548] Art. IV: "1. Nothing contained in the present Treaty shall be interpreted as: (a) a renunciation by any Contracting Party of previously asserted rights of or claims to territorial sovereignty in Antarctica; (b) a renunciation or diminution by any Contracting Party of any basis of claim to territorial sovereignty in Antarctica which it may have whether as a result of its activities or those of its nationals in Antarctica, or otherwise; (c) prejudicing the position of any Contracting Party as regards its recognition or non-recognition of any other State's right of or claim or basis of claim to territorial sovereignty in Antarctica. 2. No acts or activities taking place while the present Treaty is in force shall constitute a basis for asserting, supporting or denying a claim to territorial sovereignty in Antarctica or create any rights of sovereignty in Antarctica. No new claim, or enlargement of an existing claim, to territorial sovereignty in Antarctica shall be asserted while the present Treaty is in force."

[549] Protocol on Environmental Protection to the Antarctic Treaty (Madrid, 4 October 1991), United Nations, *Treaty Series*, vol. 2941, annex A, No. 5778, p. 3.

[550] Convention for the Conservation of Antarctic Seals (London, 1 June 1972), *ibid.*, vol. 1080, No. 16529, p. 172.

[551] Convention on the Conservation of Antarctic Marine Living Resources (Canberra, 20 May 1980), *ibid.*, vol. 1329, No. 22301, p. 47.

[552] Article IV: "1. With respect to the Antarctic Treaty area, all Contracting Parties, whether or not they are Parties to the Antarctic Treaty, are bound by Articles IV and VI of the Antarctic Treaty in their relations with each other. 2. Nothing in this Convention and no acts or activities taking place while the present Convention is in force shall: (a) constitute a basis for asserting, supporting or denying a claim to territorial sovereignty in the Antarctic Treaty area or create any rights of sovereignty in the Antarctic Treaty area; (b) be interpreted as a renunciation or diminution by any Contracting Party of, or as prejudicing, any right or claim or basis of claim to exercise coastal state jurisdiction under international law within the area to which this Convention applies; (c) be interpreted as prejudicing the position of any Contracting Party as regards its recognition or non-recognition of any such right, claim or basis of claim; (d) affect the provision of Article IV, paragraph 2, of the Antarctic Treaty that no new claim, or enlargement of an existing claim, to territorial sovereignty in Antarctica shall be asserted while the Antarctic Treaty is in force."

This text does not distinguish to which "marine areas adjacent to the area to which this Convention applies" it refers. Since the Antarctic Treaty excludes any territorial sovereignty over Antarctica, the continent does not have maritime zones. As to the maritime zones of the adjacent States, the stability (fixing) of baselines would not affect the implementation area of the Convention, nor would a landward adjustment of baselines and of outer limits of maritime zones because of sea-level rise, where the respective States applied the ambulatory rule.

254. Analysis of IMO treaties regarding pollution or search and rescue zones has given the following conclusions. The International Convention for the Prevention of Pollution from Ships of 1973, as modified by the Protocol of 1978 relating thereto and by the Protocol of 1997,[553] does not include references to maritime zones. Article 3, paragraph 2, of the 1973 Convention mentions that, "[n]othing in the present Article shall be construed as derogating from or extending the sovereign rights of the Parties under international law over the sea-bed and subsoil thereof adjacent to their coasts for the purposes of exploration and exploitation of their natural resources", but this provision has no relevance as to the permission or requirement (or otherwise) to adjust the baselines, or to the situation where a change of baselines would entail a change of maritime zones.

255. Annex I, entitled, "Regulations for the prevention of the pollution by oil", to the 1973 Convention includes a reference to baselines:

> Regulation 1. Definitions
>
> …
>
> (9) 'Nearest land'. The term 'from the nearest land' means from the baseline from which the territorial sea of the territory in question is established in accordance with international law, except that, for the purposes of the present Convention 'from the nearest land' off the north eastern coast of Australia shall mean from a line drawn from a point on the coast of Australia [defined by certain coordinates specified in the text].

This definition is relevant to the rules set forth in that annex, by which any discharge into the sea of oil or oily mixtures from ships shall be prohibited except when a number of conditions are met, including the one that the oil "tanker is more than 50 nautical miles from the nearest land"[554] or the "400 tons gross tonnage and above other than an oil tanker" ship "is more than 12 nautical miles from the nearest land".[555] Similar references are included in regulation 10 in the annex ("[t]he discharge is made as far as practicable from the land, but in no case less than 12 nautical miles from the nearest land")[556] and regulation 15 ("within 50 miles from the nearest land").[557] Other such references can be found in annex II, entitled "Regulations for the control of pollution by noxious liquid substances in bulk": under those regulations, the discharge of such substances is prohibited, but it can be permitted when a number of conditions are met, including the one that the "discharge is made at a distance of not

[553] International Convention for the Prevention of Pollution from Ships, 1973 (London, 2 November 1973), United Nations, *Treaty Series*, vol. 1340, No. 22484, p. 184; Protocol of 1978 relating to the International Convention for the Prevention of Pollution from Ships, 1973 (London, 17 February 1978), *ibid*., vol. 1340, No. 22484, p. 61; Protocol of 1997 to amend the International Convention for the Prevention of Pollution from Ships, 1973, as modified by the Protocol of 1978 relating thereto (London, 26 September 1997), United Nations, *Juridical Yearbook 1997* (Sales No. E.02.V.1), p. 300.

[554] Regulation 9, "Control of discharge of oil", para. 1 (a) (ii).

[555] *Ibid*., para. 1 (b) (ii).

[556] Regulation 10, "Methods for the prevention of oil pollution from ships while operating in special areas", para. 3 (a) (iii) (emphasis added).

[557] Regulation 15, "Retention of oil on board", para. 5.

less than 12 nautical miles from the nearest land and in a depth of water of not less than 25 metres".[558] Annex IV, entitled "Regulations for the prevention of pollution by sewage from ships", also includes the same definition as presented in annex I and used for the other annexes, as well as references to "nearest land" in regulation 8, entitled, "Discharge of sewage" ("a distance of more than four nautical miles from the nearest land", "a distance of more than 12 nautical miles from the nearest land").[559] Annex V, entitled "Regulations for the prevention of pollution by garbage from ships", repeats the definition of the "nearest land" and includes references thereto in regulation 3, "Disposal of garbage outside special areas" ("if the distance from the nearest land is less than: (i) 25 nautical miles …; (ii) 12 nautical miles …"; "as far as practicable from the nearest land but in any case is prohibited if the distance from the nearest land is less than 3 nautical miles"),[560] as well as in regulation 5, "Disposal of garbage within special areas" ("not less than 12 nautical miles from the nearest land").[561]

256. The "nearest land" is defined as the "baseline … established in accordance with international law".[562] The analysis of the provisions of International Convention for the Prevention of Pollution from Ships shows that this instrument does not require the adjustment of baselines in certain circumstances. At the same time, ambulatory baselines would not affect the implementation of this Convention (since the baseline is the mark for measuring the distances set forth in the Convention), while the option of fixed baselines, although not affecting the implementation of the Convention, would mean that the coastline (which recedes in case of sea-level rise) would be at a greater distance from the (frozen) baseline and consequently from the limit of the area beyond which the discharge of oil, noxious liquid substances, sewage and garbage is permitted in accordance with the strict conditions established by the Convention. Accordingly, from the perspective of the protection of coastal environment (and land territory of the coastal State) from pollution from ships, the option of fixed baselines produces a more favourable effect in terms of fulfilling (at least part of) the object and purpose of the Convention, as reflected in the preamble of the Convention: "the need to preserve the human environment in general and the marine environment in particular".

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[558] Regulation 5, "Discharge of noxious liquid substances", paras. 1 (c), 2 (e), 3 (e), 4 (c), 7 (c), 8 (e), and 9 (e). Paragraph 4 (c) alone does not include the reference to "the depth of water of not less than 25 metres".

[559] Regulation 8, "Discharge of sewage", para. 1 (a): "(1) Subject to the provisions of Regulation 9 of this Annex, the discharge of sewage into the sea is prohibited, except when: (a) The ship is discharging comminuted and disinfected sewage using a system approved by the Administration in accordance with Regulation 3 (l) (a) at a distance of more than four nautical miles from the nearest land, or sewage which is not comminuted or disinfected at a distance of more than 12 nautical miles from the nearest land …".

[560] Regulation 3, "Disposal of garbage outside special areas", para. 1 (b): "The disposal into the sea of the following garbage shall be made as far as practicable from the nearest land but in any case is prohibited if the distance from the nearest land is less than: (i) 25 nautical miles for dunnage, lining and packing materials which will float; (ii) 12 nautical miles for food wastes and all other garbage including paper products, rags, glass, metal, bottles, crockery and similar refuse"; and para. 1 (c): "Disposal into the sea of garbage specified in sub-paragraph (b)(ii) of this Regulation may be permitted when it has passed through a comminuter or grinder and made as far as practicable from the nearest land but in any case is prohibited if the distance from the nearest land is less than 3 nautical miles".

[561] Regulation 5, "Disposal of garbage within special areas", para. 2 (b): "Disposal into the sea of food wastes shall be made as far as practicable from land, but in any case not less than 12 nautical miles from the nearest land."

[562] Annex I, regulation 1, para. 2, and annex V, para. 2.

257. The 1969 International Convention relating to Intervention on the High Seas in Cases of Oil Pollution Casualties[563] – also an IMO instrument – includes references to the high seas. Its preamble includes references to "the need to protect the interests of their peoples against the grave consequences of a maritime casualty resulting in danger of oil pollution of sea and coastlines" and "measures of an exceptional character to protect such interests might be necessary on the high seas and that these measures do not affect the principle of freedom of the high seas". In addition, article 1, paragraph 1, provides that:

> Parties to the present Convention may take such measures on the high seas as may be necessary to prevent, mitigate or eliminate grave and imminent danger to their coastline or related interests from pollution or threat of pollution of the sea by oil, following upon a maritime casualty or acts related to such a casualty, which may reasonably be expected to result in major harmful consequences.

In the case of an ambulation of baselines, following sea-level rise, the maritime zones (territorial sea, exclusive economic zone) of the coastal States would remain the same, while the high seas would extend in surface. It is difficult to assess in exact terms to what extent an extension of the surface of the high seas would impact upon the obligations of the coastal State as provided for in the Convention, but, in principle, since the surface is larger, the efforts of the coastal State to intervene would be greater. In the case of fixed baselines, decided as a measure to respond to the effects of sea-level rise, there is no change in the position of (limits of) maritime zones and high seas (nor in the latter's surface), so there is no alteration to the regime set forth in the Convention, while coastlines will be physically at a greater distance from the place of pollution, a situation which produces a more favourable effect in terms of fulfilling of the object and purpose of the Convention.

258. The 1972 Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter,[564] another IMO instrument, does not distinguish between various maritime zones, with few exceptions: according to article III, paragraph 3, sea means "all marine waters other than the internal waters of States"; article VII, paragraph 1 (b), includes a mention of "vessels and aircraft loading in its territory or territorial seas matter which is to be dumped". An ambulation of the baselines would have as effect the change in position of both internal waters and territorial sea of the coastal State, which would have an impact upon the location of the loading of the matter to be dumped: locations that used to be in the territorial sea may, after ambulation, be in the exclusive economic zone, with the consequence of diminishing the jurisdiction of the coastal State, which, according to the Convention, has to apply measures to vessels and aircraft loading in territorial sea. The option of fixed baselines does not change the position of maritime zones and consequently does not affect the implementation of the Convention.

259. The 1990 International Convention on Oil Pollution Preparedness, Response and Cooperation[565] – also an IMO instrument – includes references to "coastline" (preamble and art. 2, para. 2), "coastal State" (e.g., art. 4), but no reference to baselines or maritime zones.

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[563] International Convention relating to Intervention on the High Seas in Cases of Oil Pollution Casualties (Brussels, 29 November 1969), United Nations, *Treaty Series*, vol. 970, No. 14049, p. 211.

[564] Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (London, Mexico City, Moscow and Washington, 29 December 1972), United Nations, *Treaty Series*, vol. 1046, No. 15749, p. 120.

[565] International Convention on Oil Pollution Preparedness, Response and Cooperation, 1990 (London, 30 November 1990), United Nations, *Treaty Series*, vol. 1891, No. 32194, p. 51.

260. The 2000 Protocol on Preparedness, Response and Co-operation to Pollution Incidents by Hazardous and Noxious Substances,[566] another IMO instrument, refers to "marine environment" and "coastline", but it does not include any reference to baselines and maritime zones.

261. The 2001 International Convention on the Control of Harmful Anti-fouling Systems on Ships,[567] also an IMO instrument, refers to "marine environment" (preamble) and "sea-bed and subsoil thereof adjacent to the coast over which the coastal State exercises sovereign rights for the purposes of exploration and exploitation of their natural resources" (art. 2, para. 1), but makes no other reference to baselines or maritime zones.[568]

262. The 2004 International Convention for the Control and Management of Ships' Ballast Water and Sediments,[569] another IMO treaty, includes a reference to "exploration and exploitation of the sea-bed and subsoil thereof adjacent to the coast over which the coastal State exercises sovereign rights for the purposes of exploration and exploitation of its natural resources" (art. 1, para. 1), "waters under the jurisdiction of [a] Party" (e.g., art. 3, para. 2, and art. 6), but no other reference to baselines or maritime zones,[570] with the exception of a reference to high seas in paragraph 4 of regulation A-3, "Exceptions" (contained in the annex to the Convention). Regulation B-4, entitled "Ballast water exchange", includes references to the "nearest land" ("at least 200 nautical miles from the nearest land" and "at least 50 nautical miles from the nearest land" (paras. 1.1 and 1.2, respectively)). The reasoning set forth above (para. 228 above) in connection with the similar provisions of the International Convention for the Prevention of Pollution from Ships is thus also applicable here.

263. The Hong Kong International Convention for the Safe and Environmentally Sound Recycling of Ships, 2009,[571] also an IMO treaty, includes no references to baselines and maritime zones.

264. The 1979 International Convention on Maritime Search and Rescue,[572] a further IMO treaty, contains no reference to baselines. It includes, like other IMO treaties, a no prejudice provision[573] in relation to the (then future) the United Nations

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[566] Protocol on Preparedness, Response and Co-operation to pollution Incidents by Hazardous and Noxious Substances (London, 15 March 2000), IMO, *OPRC–HNS Protocol*, London, 2002.

[567] International Convention on the Control of Harmful Anti-fouling Systems on Ships (London, 5 October 2001), IMO document AFS/CONF/26, annex.

[568] Article 15 states that, "[n]othing in this Convention shall prejudice the rights and obligations of any State under customary international law as reflected in the United Nations Convention on the Law of the Sea."

[569] International Convention for the Control and Management of Ships' Ballast Water and Sediments (London, 13 February 2004), IMO document BWM/CONF/2004, annex.

[570] Article 16 states that, "[n]othing in this Convention shall prejudice the rights and obligations of any State under customary international law as reflected in the United Nations Convention on the Law of the Sea."

[571] Hong Kong International Convention for the Safe and Environmentally Sound Recycling of Ships, 2009 (Hong Kong, China, 15 May 2009), International Maritime Organization, document SR/CONF/45, annex.

[572] International Convention on Maritime Search and Rescue (Hamburg, 27 April 1979), United Nations, *Treaty Series*, vol. 1405, No. 23489, p. 97.

[573] Art. II: "(1) Nothing in the Convention shall prejudice the codification and development of the law of the sea by the United Nations Conference on the Law of the Sea convened pursuant to resolution 2750 (XXV) of the General Assembly of the United Nations' nor the present or future claims and legal views of any State concerning the law of the sea and the nature and extent of coastal and flag State jurisdiction.
(2) No provision of the Convention shall be construed as prejudicing obligations or rights of vessels provided for in other international instruments."

Convention on the Law of the Sea. The annex thereto refers to notions like "Search and rescue region", which is "an area of defined dimensions within which search and rescue services are provided" (para. 1.3.1), which "shall be established by agreement among Parties concerned" (para. 2.1.4); paragraph 2.1.7 specifies that "[t]he delimitation of search and rescue regions is not related to and shall not prejudice the delimitation of any boundary between States". Chapter 3, entitled "Cooperation", of the annex includes a number of references to the permission to be granted by a party for rescue units of other parties to enter the former's territorial sea. Neither the ambulation of baselines, nor the option of fixed baselines affect the implementation of the Convention since the reference therein is to "territorial sea" and not to the coast (even if in the case of ambulation, the territorial sea "moves" landward, while the option of fixed baselines "maintains" the territorial sea within the same coordinates).

265. The 2001 Convention on the Protection of the Underwater Cultural Heritage[574] of the United Nations Educational, Scientific and Cultural Organization includes in article 1, paragraph 5, a reference to "area" as "the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction", while articles 11 and 12 set forth the obligation of States parties to report, notify and protect underwater cultural heritage in the Area. Article 3 includes a no prejudice provision[575] in relation to the United Nations Convention on the Law of the Sea. Articles 7 to 10 include references to maritime zones and the obligations of States parties under the Convention in relation to each such zone. Article 7 refers to internal waters, archipelagic waters and territorial sea; article 8 to the contiguous zone and articles 9 and 10 to reporting, notifying of and protecting underwater cultural heritage in the exclusive economic zone and on the continental shelf. Article 29, on "Limitations to geographical scope", regulates the possibility for States parties to make a declaration at the time of ratifying, accepting, approving or acceding to this Convention, "that this Convention shall not be applicable to specific parts of its territory, internal waters, archipelagic waters or territorial sea", and provides that such States parties shall "promote conditions under which this Convention will apply to the areas specified in its declaration". Since the legal regime applicable is different depending on the maritime zone where the location of a discovery of underwater cultural heritage is, an ambulatory system of baselines in case of sea-level rise could result in the change of the maritime zone of the mentioned location and, consequently, of the legal regime to be applied, while the option of fixed baselines has the advantage of ensuring the legal stability of the regime under the Convention.

266. As to the treaties relating to fisheries management, the instruments listed were examined.

267. The World Trade Organization 2022 Agreement on Fisheries Subsidies[576] includes a reference to the jurisdiction of a coastal member or a coastal non-member[577] and to the exclusive economic zone.[578] Article 11, paragraph 2 (b), refers

[574] 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.

[575] "Nothing in this Convention shall prejudice the rights, jurisdiction and duties of States under international law, including the United Nations Convention on the Law of the Sea. This Convention shall be interpreted and applied in the context of and in a manner consistent with international law, including the United Nations Convention on the Law of the Sea."

[576] Agreement on Fisheries Subsidies (Geneva, 17 June 2022), World Trade Organization document WT/MIN(22)/33–WT/L/1144, annex.

[577] Art. 5, para. 1: "No Member shall grant or maintain subsidies provided to fishing or fishing related activities outside of the jurisdiction of a coastal Member or a coastal non-Member and outside the competence of a relevant [Regional Fisheries Management Organization or Arrangement]."

[578] Art. 8, para. 1 (b) (i), footnote 14: "The term 'shared stocks' refers to stocks that occur within the [exclusive economic zones] of two or more coastal Members, or both within the [exclusive economic zone] and in an area beyond and adjacent to it."

to "territorial claims or delimitation of maritime boundaries".[579] A landward ambulatory baseline because of sea-level rise could have as a consequence that a certain fish stock that used to be in the exclusive economic zone of a State could end up outside that maritime zone or that State's jurisdiction, while a fixed baseline has the advantage of preserving the maritime zones within the same coordinates, thus preserving the respective fish stocks and the legal stability of the regime under the Convention.

268. The 1966 International Convention for the Conservation of Atlantic Tunas[580] defines in article I the "area to which this Convention shall apply" as "all waters of the Atlantic Ocean, including the adjacent Seas", and includes a reference to territorial sea in article IX, by which the parties commit to setting up "a system of international enforcement to be applied to the Convention area except the territorial sea and other waters, if any, in which a State is entitled under international law to exercise jurisdiction over fisheries" (para. 3). A landward ambulatory baseline because of sea-level rise could have as a consequence that the area of water to which such a system of enforcement would apply expands to areas formerly within the territorial sea and "other waters, if any, in which a State is entitled under international law to exercise jurisdiction over fisheries". While from the perspective of the legal regime set forth by the Convention this situation may be seen as an advantage, it might not be the same from the perspective of the coastal State. In the case of fixed baselines, the maritime zones remain within the same coordinates, so the enforcement system mentioned continues to be implemented in the same area as before sea-level rise.

269. The 1978 Convention on Cooperation in the Northwest Atlantic Fisheries[581] refers to exclusive economic zones, to coastal State (defined in article I (c), as "a Contracting Party having an exclusive economic zone within the Convention Area", which is defined by geographic coordinates in article IV), to "conservation and management of fishery resources and their ecosystems within areas under the jurisdiction of that coastal State" (art. VII, para. 10 (b)). It also includes a no prejudice provision[582] in relation to the United Nations Convention on the Law of the Sea. A similar assessment, adapted to the specificity of this Convention, as to the International Convention for the Conservation of Atlantic Tunas, analysed above, is valid for this one as well.

270. The 1993 Agreement for the Establishment of the Indian Ocean Tuna Commission[583] has no explicit references to baselines and maritime zones, but includes, in its article XVI on "Coastal States' rights", a no prejudice provision: "This Agreement shall not prejudice the exercise of sovereign rights of a coastal state in accordance with the international law of the sea for the purposes of exploring and

[579] "A panel established pursuant to Article 10 of this Agreement shall make no findings with respect to any claim that would require it to base its findings on any asserted territorial claims or delimitation of maritime boundaries."

[580] International Convention for the Conservation of Atlantic Tunas (Rio de Janeiro, 14 May 1966), United Nations, *Treaty Series*, vol. 673, No. 9587, p. 63.

[581] Convention on Cooperation in the Northwest Atlantic Fisheries (Ottawa, 24 October 1978), *ibid*., vol. 1135, No. 17799, p. 369. For the consolidated version, see Northwest Atlantic Fisheries Organization, *Convention on Cooperation in the Northwest Atlantic Fisheries*, Halifax, Canada, 2020.

[582] Art. XXI, para. 2: "Nothing in this Convention shall prejudice the rights, jurisdiction and duties of Contracting Parties under the 1982 Convention or the 1995 Agreement [for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks]. This Convention shall be interpreted and applied in the context of and in a manner consistent with the 1982 Convention and the 1995 Agreement."

[583] Agreement for the Establishment of the Indian Ocean Tuna Commission (Rome, 25 November 1993), United Nations, *Treaty Series*, vol. 1927, No. 32888, p. 329.

exploiting, conserving and managing the living resources, including the highly migratory species, within a zone of up to 200 nautical miles under its jurisdiction." That provision makes implicit reference to the baselines from which this distance is usually measured. In the case of a landward ambulatory baseline because of sea-level rise, the outer limit of this zone of 200 nautical miles would also move landward, thus possibly leaving species previously under the jurisdiction of the coastal State outside it. In the case of a fixed baseline, the respective zone remains within the same parameters and the regime provided by the Convention enjoys legal stability.

271. The 2003 Convention for the Strengthening of the Inter-American Tropical Tuna Commission Established by the 1949 Convention between the United States of America and the Republic of Costa Rica[584] includes in its preamble a reference to "the sovereign rights of coastal States for the purpose of exploring and exploiting, conserving and managing the living marine resources within areas under national jurisdiction as provided for in [the United Nations Convention on the Law of the Sea], and the right of all States for their nationals to engage in fishing on the high seas in accordance with [that Convention]". It also has a no prejudice provision in article V:

> 1. Nothing in this Convention shall prejudice or undermine the sovereignty or sovereign rights of coastal States related to the exploration and exploitation, conservation and management of the living marine resources within areas under their sovereignty or national jurisdiction as provided for in [the United Nations Convention on the Law of the Sea], or the right of all States for their nationals to engage in fishing on the high seas in accordance with [the United Nations Convention on the Law of the Sea].
>
> 2. The conservation and management measures established for the high seas and those adopted for areas under national jurisdiction shall be compatible, ….

Article XVII also mentions that, "[n]o provision of this Convention may be interpreted in such a way as to prejudice or undermine the sovereignty, sovereign rights, or jurisdiction exercised by any State in accordance with international law, as well as its position or views with regard to matters relating to the law of the sea." Article XX, paragraph 3, sets forth that, "each Party shall take such measures as may be necessary to ensure that vessels flying its flag do not fish in areas under the sovereignty or national jurisdiction of any other State in the Convention Area without the corresponding license, permit or authorization issued by the competent authorities of that State" Article XXIII, paragraph 1, refers to the support to be granted to developing States "to enhance their ability to develop fisheries under their respective national jurisdictions and to participate in high seas fisheries on a sustainable basis" There are no other references in this Convention to baselines and maritime zones. Based on the above, this Convention does not therefore require the adjustment of baselines in certain circumstances, but a change of baselines would entail a change of position of maritime zones ("areas under sovereignty or national jurisdiction"), which would result in a change to the regime applicable, while fixed baselines would ensure the legal stability of the implementation of the Convention.

272. A review of the 13 sustainable fisheries partnership agreements concluded by the European Commission on behalf of the European Union with non-European Union

[584] Convention for the Strengthening of the Inter-American Tropical Tuna Commission Established by the 1949 Convention between the United States of America and the Republic of Costa-Rica (Washington, 14 November 2003), *Treaties and Other International Acts*, Series 16-325.1.

countries[585] (out of which 9 are tuna agreements[586] and 4 are mixed agreements)[587] revealed the conclusions below. (The analysis below is presented in a more detailed way for the first three agreements, selected as examples, while for the rest it is presented in a more concise manner, since their provisions are quite similar.)

273. The 2006 Fisheries Partnership Agreement with Cabo Verde[588] mentions that the latter "exercises its sovereign rights or jurisdiction over a zone extending up to 200 nautical miles from the baselines in accordance with the United Nations Convention on the Law of the Sea" (preamble), but the area where the Agreement applies is defined as "the territories in which the Treaty establishing the European Community applies, under the conditions laid down in that Treaty, and … to the territory of Cape Verde" (art. 10), which is quite imprecise. At the same time, article 2 (c) mentions that, "'Cape Verde waters' means the waters over which Cape Verde has sovereignty or jurisdiction" and chapter 2 of the annex to the implementing Protocol mentions that "Community vessels may carry out fishing activities … beyond 12 nautical miles from the baselines". This means that, in the case of a landward ambulatory baseline because of sea-level rise, the fishing area also moves landward, while in the case of fixed baselines the fishing area remains within the same coordinates, thus staying at a greater distance from the coast.

274. The 2007 Fisheries Partnership Agreement with Côte d'Ivoire has similar provisions.[589] For instance, article 2 (c) defines "Côte d'Ivoire's fishing zone" as "the waters over which, as regards fisheries, Côte d'Ivoire has sovereignty or jurisdiction", while the area to which the Agreement applies is defined in similar terms as in the Cabo Verde agreement cited above. Chapter 2 of the annex to the implementing Protocol contains an almost identical text: "Community vessels may carry out fishing activities in waters beyond 12 nautical miles from the base lines in the case of tuna seiners and surface longliners." The same reasoning as set forth above is thus valid.

275. Similar provisions are included in the 2016 Fisheries Partnership Agreement with the Cook Islands:[590] the recognition in the preamble of the fact that "Cook Islands exercises its sovereign rights or jurisdiction over a zone extending up to 200 nautical miles from the baseline in accordance with the United Nations Convention on the Law of the Sea", the definition of the Cook Islands "fishery waters" as "the waters over which the Cook Islands have sovereign rights or fisheries jurisdiction" (art. 1 (f)); and the same definition of the area of application by reference to the territory of European Union and the Cook Islands (art. 10). Chapter I, section 2, paragraph 1, of the annex to the implementing Protocol refers to the fishing areas: "Union vessels … shall be authorised to engage in fishing activities in the Cook Islands' fishing areas, meaning the Cook Islands' fishery waters except protected or prohibited areas. The coordinates of the Cook Islands' fishery waters and of protected

[585] See https://oceans-and-fisheries.ec.europa.eu/fisheries/international-agreements/sustainable-fisheries-partnership-agreements-sfpas_en.

[586] Concluded with Cabo Verde, the Cook Islands, Côte d'Ivoire, Gabon, the Gambia, Mauritius, Sao Tome and Principe, Senegal and Seychelles. These agreements allow European Union vessels to pursue migrating tuna stocks as they move along the shores of Africa and through the Indian Ocean.

[587] Concluded with Guinea-Bissau, Mauritania and Morocco, and Greenland. These agreements provide access for European Union vessels to a wide range of fish stocks in the partner country's exclusive economic zone.

[588] Fisheries Partnership Agreement between the European Community and the Republic of Cabo Verde (Brussels, 19 December 2006), *Official Journal of the European Union,* L 414, p. 3.

[589] Fisheries Partnership Agreement between the European Community and the Republic of Côte d'Ivoire on fishing in Côte d'Ivoire's fishing zones for the period from 1 July 2007 to 30 June 2013 (Brussels, 12 February 2008), *ibid*., L 48, p. 41.

[590] Sustainable Fisheries Partnership Agreement between the European Union and the Government of the Cook Islands (Brussels, 29 April 2016), *ibid*., L 131, p. 3.

areas or closed fishing areas shall be communicated by the Cooks Islands to the Union …". The same reasoning as laid out above is applicable.

276. Similar provisions can be found in the other Fisheries Partnership Agreements, with certain nuances. For instance, in the annex to the 2021 implementing Protocol of Fisheries Partnership Agreement concluded in 2007 with Gabon,[591] chapter 1, section 2, states that:

> 2.1. The coordinates of the Gabonese fishing zone covered by this Protocol are set out in Appendix 1. Before the start of the provisional application of this Protocol, Gabon shall inform the Union of the geographical coordinates of the baselines of the Gabonese fishing zone and of all zones which are closed to navigation and fishing.
>
> 2.2. Union vessels may not engage in fishing activities within a band of 12 nautical miles from the baselines.
>
> …

The same reasoning as set forth above is applicable. Another Agreement, concluded in 2021 with Greenland (and Denmark),[592] provides that the "Parties hereby undertake to secure continued sustainable fishing in the Greenlandic [exclusive economic zone] in line with [the United Nations Convention on the Law of the Sea] provisions" (art. 3, para. 1); in the annex to the Protocol implementing the Agreement,[593] chapter I, paragraph 3, regulates the fishing zone: the exclusive economic zone and the baselines are defined by reference to domestic legislation, while "the fishery shall take place at least 12 nautical miles off the baseline". Again, the same reasoning as noted above is applicable.

277. Similar provisions can be found in the Fisheries Partnership Agreements concluded in 2007 with Guinea-Bissau (implementing Protocol from 2019),[594] Mauritania (2021 Agreement and implementing Protocol),[595] Mauritius (2012 Agreement and 2017 Protocol),[596] Morocco (2019 Agreement and implementing

[591] Fisheries Partnership Agreement between the Gabonese Republic and the European Community (Luxembourg, 16 April 2007), *ibid*., L 109, p. 1, and Implementing Protocol to the Fisheries Partnership Agreement between the Gabonese Republic and the European Community (2021–2026) (Brussels, 29 June 2021), *ibid*., L 242, p. 5.

[592] Sustainable Fisheries Partnership Agreement between the European Union, of the one part, and the Government of Greenland and the Government of Denmark, of the other part (Brussels, 22 April 2021), *ibid*., L 175, p. 3.

[593] Protocol Implementing the Sustainable Fisheries Partnership Agreement between the European Union, of the one part, and the Government of Greenland and the Government of Denmark, of the other part (Brussels, 18 May 2021), *ibid.*, p. 14.

[594] Fisheries Partnership Agreement between the European Community and the Republic of Guinea-Bissau for the period 16 June 2007 to 15 June 2011 (Brussels, 4 December 2007), *ibid*., L342, p. 5, and Protocol on the implementation of that Agreement (Brussels, 15 June 2019), *ibid*., L 173, p. 3. The annex to the Protocol provides in chapter I, paragraph 2, that "The baselines shall be defined by national legislation."

[595] Partnership Agreement on sustainable fisheries between the European Union and the Islamic Republic of Mauritania (Brussels, 15 November 2021), *ibid*., L 439, p. 3, and Protocol implementing that Agreement, *ibid*., p. 14. In accordance with appendix 1 to annex III of that Protocol, the Mauritanian fishing zone is defined by geographic coordinates, so the ambulation or fixing of baselines can have no effect on this fishing zone.

[596] Fisheries Partnership Agreement between the European Union and the Republic of Mauritius (Brussels, 21 December 2012), *ibid*., L 79, p. 3, and Protocol setting out the fishing opportunities and the financial contribution provided for by the Fisheries Partnership Agreement between the European Union and the Republic of Mauritius (Brussels, 23 October 2017; no longer in force), *ibid*., L 279, p. 3. The annex to the Protocol defines, in chapter I, paragraph 2, "Mauritius waters" "as beyond 15 nautical miles from the baselines".

Protocol),[597] São Tome and Principe (2007 Agreement and 2019 Protocol),[598] Senegal (2014 Agreement and 2019 Protocol),[599] Seychelles (2020 Agreement and Protocol),[600] and the Gambia (2019 Agreement and Protocol).[601]

278. The conclusion of this analysis is that these fisheries agreements concluded by European Union with 13 States do not require the adjustment of baselines, although they do not forbid such adjustment. As already mentioned above, a change of baselines entails a change of maritime zones, but it affects the implementation of the agreements: in the case of a landward ambulatory baseline because of sea-level rise, the fishing area also moves landward. In the case of the application of fixed baselines, the fishing area remains within the same coordinates, thus staying at a greater distance from the coast. At the same time, in the specific cases of those agreements that define the fishing zones by geographic coordinates expressly mentioned in the text, the ambulation or fixing of baselines can have no effect on this fishing zone.

279. The reading of the regulation B-440, entitled, "International boundaries and national limits" of the International Hydrographic Organization,[602] which presents, in a descriptive manner, the various maritime zones and other notions/concepts related to them, including baselines and limits of maritime zones, did not reveal any reference to a permission or requirement (or not) of the adjustment of baselines in certain circumstances.

280. In conclusion, as observations of a preliminary nature, sources of law other than the United Nations Convention on the Law of the Sea, as examined in the present chapter, are of very limited, if any, relevance.

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[597] Sustainable Fisheries Partnership Agreement between the European Union and the Kingdom of Morocco (Brussels, 14 January 2019), *ibid*., L 77, p. 8, and Protocol on the implementation of that Agreement, *ibid*., p. 18. The Agreement defines the fishing zone by coordinates.

[598] Fisheries Partnership Agreement between the Democratic Republic of São Tomé and Príncipe and the European Community (Brussels, 23 July 2007), *ibid*., L 205, p. 36, and Protocol on the implementation of that Agreement (Brussels, 19 December 2019), *ibid*., L 333, p. 3. Chapter I, paragraph 2, of the annex to the Protocol defines the fishing zone by reference to exclusive economic zone of Sao Tome and Principe, "with the exception of areas reserved for small-scale and semi-industrial fishing", and mentions that "the coordinates of the [exclusive economic zone] shall be those notified to the United Nations on 7 May 1998".

[599] Agreement on a Sustainable Fisheries Partnership between the European Union and the Republic of Senegal (Luxembourg, 8 October 2014), *ibid*., L 304, p. 3, and Protocol on the implementation of that Agreement (Brussels, 14 November 2019), *ibid*., L 299, p. 13. The annex to the Protocol defines, in chapter I, paragraph 2, the "Senegalese fishing zones" as "those parts of Senegalese waters in which Senegal authorises Union fishing vessels to carry out fishing activities", and mentions that "[t]he geographical coordinates of the Senegalese fishing zones and the baselines shall be communicated to the Union … in accordance with Senegalese legislation".

[600] Sustainable Fisheries Partnership Agreement between the European Union and the Republic of Seychelles (Brussels, 20 February 2020), *ibid*., L 60, p. 5, and Protocol on the implementation of that Agreement, *ibid*., p. 15. According to the Agreement, article 2 (e), "the Seychelles fishing zone" means "the part of the waters under the sovereignty or jurisdiction of Seychelles, in accordance with the Maritime Zones Act and other applicable laws of Seychelles …".

[601] Sustainable Fisheries Partnership Agreement between the European Union and the Republic of the Gambia (Brussels, 31 July 2019), *ibid*., L 208, p. 3, and Protocol on the implementation of that Agreement, *ibid*., p. 11. The annex to the Protocol defines in chapter I, paragraphs 2 and 3, the Gambian fishing zone by "geographic coordinates", which shall be notified by the Gambian authorities to the Union services, together with "the geographical coordinates of the Gambian baseline" and of "zones closed to shipping and fishing".

[602] International Hydrographic Organization, *Regulations of the IHO for International (Int) Charts and Chart Specifications of the IHO*, ed. 4.8.0 (Monaco, 2018), pp. 265–268. Available at https://iho.int/iho_pubs/standard/S-4/S4_V4-8-0_Oct_2018_EN.pdf

XIII. Future work of the Study Group

281. In 2024, the Study Group will revert to the subtopics of issues related to statehood and those related to the protection of persons affected by sea-level rise. In 2025, the Study Group will then seek to finalize a substantive report on the topic as a whole by consolidating the results of the work undertaken.

Chapter VIII
Sea-level rise in relation to international law

A. Introduction

128. At its seventy-first session (2019), the International Law Commission decided to include the topic "Sea-level rise in relation to international law" 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. The Study Group discussed its composition, its proposed calendar and programme of work, and its methods of work. 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.[271]

129. At its seventy-second session (2021), the Commission reconstituted the Study Group, and considered the first issues paper on the topic, related to the law of the sea,[272] which had been issued together with a preliminary bibliography.[273] At its 3550th meeting, on 27th July 2021, the Commission took note of the joint oral report of the Co-Chairs of the Study Group.[274]

130. At its seventy-third session (2022), the Commission reconstituted the Study Group, and considered the second issues paper on the topic, related to statehood and the protection of persons affected by sea-level rise,[275] which had been issued together with a preliminary bibliography.[276] At its 3612th meeting, on 5 August 2022, the Commission considered and adopted the report of the Study Group.[277]

B. Consideration of the topic at the present session

131. At the present session, the Commission reconstituted the Study Group on sea-level rise in relation to international law, chaired by the two Co-Chairs on issues related to the law of the sea, namely Mr. Aurescu and Ms. Oral.

132. In accordance with the agreed programme of work and methods of work, the Study Group had before it the additional paper (A/CN.4/761) to the first issues paper on the topic, prepared by Mr. Aurescu and Ms. Oral, and issued on 20 April 2023. A selected bibliography, prepared in consultation with members of the Study Group, was issued on 9 June 2023 as an addendum to the additional paper (A/CN.4/761/Add.1).

133. The Study Group, which at the current session comprised 32 members, held 12 meetings, from 26 April to 4 May and from 3 to 5 July 2023.

134. At its 3655th meeting, on 3 August 2023, the Commission considered and adopted the report of the Study Group on its work at the present session, as reproduced below.

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271 *Official Records of the General Assembly, Seventy-fourth Session, Supplement No. 10* (A/74/10), paras. 265–273.
272 A/CN.4/740 and Corr.1.
273 A/CN.4/740/Add.1.
274 *Official Records of the General Assembly, Seventy-sixth Session, Supplement No. 10* (A/76/10), paras. 247–296.
275 A/CN.4/752.
276 A/CN.4/752/Add.1.
277 *Official Records of the General Assembly, Seventy-seventh Session, Supplement No. 10* (A/77/10), paras. 153–237.

1. Introduction of the additional paper (A/CN.4/761 and Add.1) to the first issues paper by the Co-Chairs

(a) General introduction of the topic

135. At the first meeting of the Study Group, held on 26 April 2023, four of the Co-Chairs (Mr. Aurescu and Ms. Oral, and Ms. Galvão Teles and Mr. Ruda Santolaria) noted that the topic had generated great and increased interest among members of the Commission and Member States, including, but not exclusively, those particularly affected by sea-level rise. The Co-Chairs briefly recalled the manner in which the topic had been placed on the programme of work of the Commission, underlining the progress that had been achieved so far on all three subtopics under consideration through robust discussions within the framework of the Study Group and the Commission and further enriched by Member States' comments conveyed either in the Sixth Committee or in response to questions raised by the Commission. Within a few years, the topic had become cross-regional and global in nature, and of immediate relevance to Member States, which required global solutions of varying kinds. Some regions, including those most affected by the phenomenon, had been particularly active in shedding light on the urgency of addressing the multiple challenges ahead and in identifying potential legal solutions. In that regard, three of the Co-Chairs (Ms. Galvão Teles, Ms. Oral and Mr. Ruda Santolaria) indicated that they had participated in a regional conference on preserving statehood and protecting persons in the context of sea-level rise, organized by the Pacific Islands Forum and held in Nadi, Fiji, from 27 to 30 March 2023, and they stressed the importance of the work of such regional organizations. In addition to the Commission, the Security Council and various United Nations bodies had addressed the topic of sea-level rise, and the topic had been included in requests for advisory opinions addressed first to the International Tribunal for the Law of the Sea[278] and then to the International Court of Justice.[279]

(b) Procedure followed by the Study Group

136. Also at the first meeting of the Study Group, Mr. Aurescu and Ms. Oral, in their capacity as Co-Chairs addressing issues related to the law of the sea, indicated that the purpose of the meetings scheduled in the first part of the session was to allow for an exchange of views on the additional paper. The content of the additional paper had been guided by the outcome of the meetings of the Study Group held during the seventy-second (2021) session of the Commission,[280] and by the specific issues flagged by Member States in comments conveyed either in the Sixth Committee or in response to questions raised by the Commission. As such, the additional paper addressed a number of principles and issues on which the Study Group had specifically requested further study in 2021. In that regard, the Co-Chairs explained that, owing to word-count limitations, they had addressed a selection of these principles and issues only, giving priority to those on which Member States' had commented. The additional paper was structured in such a way as to including preliminary observations on each principle or issue addressed, with the expectation that the members of the Study Group would then reach conclusions and define practical solutions. The Co-Chairs invited members to engage in a structured and interactive debate, drawing upon the contents of the additional paper, and to provide input on a draft bibliography on the subtopic, to be issued as an addendum to the additional paper. As had been the case for the topic during the two preceding sessions of the Commission, the outcome of the first part of the session would be an interim report of the Study Group, to be considered and complemented during the second part of the session so as to reflect a further interactive discussion on the future programme of work. The report would then be agreed upon in the Study Group and

[278] International Tribunal for the Law of the Sea, Request for Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law, Order of 16 December 2022, *ITLOS Reports 2022–2023*, to be published.

[279] International Court of Justice, Request for an advisory opinion of the International Court of Justice on the obligations of States in respect of climate change, General Assembly resolution 77/276 of 29 March 2023.

[280] *Official Records of the General Assembly, Seventy-sixth Session, Supplement No. 10* (A/76/10), paras. 247–296.

subsequently presented by the Co-Chairs to the Commission, with a view to being included in the annual report of the Commission. That procedure, agreed upon by the Study Group, was based on the 2019 report of the Commission.[281]

137. The Co-Chairs also recalled that, as outlined in chapter XIII of the additional paper, which addressed the future programme of work of the Study Group, in the present quinquennium, the Study Group would revert to each of the subtopics – the law of the sea, statehood and the protection of persons affected by sea-level rise – and would then seek to prepare a substantive report on the topic as a whole by consolidating the results of the work undertaken since 2019, expected to be issued in 2025.

2. Summary of the exchange of views

138. Members of the Study Group underscored the importance of the topic for the international community, noting that sea-level rise would have a large impact on people in a broad range of areas and that it was of direct relevance to the question of peace and security. In that regard, they recalled that the Security Council had held a meeting on 14 February 2023 on the subject of "Sea-level rise: implications for international peace and security", under the agenda item "Threats to international peace and security", at which Mr. Aurescu, in his capacity as Co-Chair, had delivered a briefing on the progress of the Commission's work.[282] Furthermore, the Inter-American Juridical Committee had recently appointed a rapporteur on the topic of legal implications of sea-level rise in the inter-American regional context, Mr. Julio José Rojas Báez. Among other initiatives, a special meeting of the Committee on Juridical and Political Affairs of the Organization of American States was held on 4 May 2023 on the consequences of sea-level rise and its legal implications. In that regard, the Study Group should exercise caution when interpreting the silence of some affected States, which does not necessarily reflect a position on the interpretation of the United Nations Convention on the Law of the Sea.[283] Sea-level rise had led to the emergence of new concepts, such as "climate displacement", "climate refugees" and "climate statelessness", that were undefined in international law, and the term "specially affected State" ought to be used with caution, given its multiple implications since it did not reflect the fact that a large number of States were affected, in particular developing countries.

139. Members welcomed the work of the Co-Chairs and the methodological, detailed and comprehensive nature of the additional paper, underlining that it was well researched and constituted a sound basis for the Commission to meaningfully discharge its mandate.

(a) Issue of "legal stability" in relation to sea-level rise, with a focus on baselines and maritime zones

(i) Introduction by the Co-Chair

140. At its first and second meetings, held on 26 and 27 April 2023, the Study Group had an exchange on chapter II of the additional paper, on the issue of "legal stability" in relation to sea-level rise, with a focus on baselines and maritime zones. The Co-Chair (Mr. Aurescu) recalled that the preliminary observations in paragraphs 82 to 95 of the additional paper were based on numerous views expressed over the period from 2021 to 2022 on the meaning of the terms "legal stability", "certainty" and "predictability", including in the Sixth Committee, where some Member States had requested further exploration of those terms. The Co-Chair noted that Member States had adopted a pragmatic approach, referring to legal stability as inherently linked to the preservation of maritime zones, and that no States, even those with national legislation providing for ambulatory baselines, had contested that approach or the preliminary observations in paragraph 104 of the first issues paper, which supported the solution of fixed baselines.

141. The Co-Chair observed that Member States had underlined the need to interpret the United Nations Convention on the Law of the Sea in such a way as to effectively address

[281] *Ibid., Seventy-fourth Session, Supplement No. 10* (A/74/10), paras. 270–271.
[282] See S/PV.9260 and S/PV.9260 (Resumption 1).
[283] United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982), United Nations, *Treaty Series*, vol. 1833, No. 31363, p. 3.

sea-level rise in order to provide practical guidance to affected States. Although, in the past, before the Commission had embarked on the topic of sea-level rise, the doctrine had interpreted the Convention to the effect that the baselines and outer limits of the territorial sea, contiguous zone and exclusive economic zone were ambulatory, Member States had, in ever-increasing numbers, expressed the contrary view, pointing to an interpretation of the Convention in the sense that it did not forbid or exclude the option of fixing baselines. In doing so, they had stressed the importance of interpreting the Convention with a view to preserving maritime zones, and had noted that the Convention did not prohibit the freezing of baselines.

142. The Co-Chair noted that few Member States had made references to customary international law, and that those States had considered that there was no obvious evidence of *opinio juris* concerning the existence of a custom regarding the fixing of baselines.

(ii) Concept of legal stability

143. Members of the Study Group noted that the concept of legal stability was encapsulated in the United Nations Convention on the Law of the Sea. In addition, it contributed to the maintenance of international peace and security. Although a general view was expressed emphasizing the importance of that legal concept, it was also pointed out that there was a need to exercise caution when approaching it, as it could not be considered in a vacuum and was difficult to separate from other concepts, such as the principle of the immutability of boundaries. It was also noted that the loss of land territory, which could result from failure to respect the concept of legal stability, would lead to catastrophic consequences for the most vulnerable States.

144. It was further stated that the concept of legal stability was not necessarily linked only to the safety of navigation: the concepts of legal stability and respect for existing boundaries reflected customary international law, and as such could also be applied to maritime boundaries. A view was expressed that the freezing of baselines, and the consequent lack of an obligation to report on updated baselines, could pose hazards to the safety of navigation and could potentially be in contravention of the relevant instruments concerning the safety of navigation.

(iii) Ways in which the concept of legal stability is reflected in the context of sea-level rise

a. Interpretation of the United Nations Convention on the Law of Sea

145. Members of the Study Group broadly supported the preliminary observations of the Co-Chairs in favour of fixed baselines, considering, *inter alia*, that the United Nations Convention on the Law of the Sea did not prohibit the option of fixed baselines, and that it was critical that the final outcome of the Commission's work on the topic should guarantee the sovereign rights that States were claiming over their maritime spaces. Caveats and doubts relating to the interpretation of the Convention were expressed, including in relation to the manner in which to achieve that objective.

146. A view was expressed that the United Nations Convention on the Law of the Sea did not equate the declaration and publication of the baselines with the acquisition of sovereignty or sovereign rights over the spaces affected by those baselines; otherwise, it could be concluded that the Convention allowed a State to decide unilaterally on its maritime spaces.

147. Differing views were expressed as to the applicability to sea-level rise of the concept of the legal stability of baselines under article 7, paragraph 2, of the United Nations Convention on the Law of the Sea and of the outer limits of the continental shelf under article 76, which had been raised in the first issues paper and by some States.

148. Another suggested option to ensure legal stability was to amend the United Nations Convention on the Law of the Sea, which was deemed difficult. A meeting of States parties to the Convention might be considered with a view to interpreting that instrument, including a close examination of the text, context, and object and purpose of its relevant provisions.

b. Emergence of rules of customary international law

149. Some members considered that a further option with a view to ensuring legal stability would be the emergence of a rule of customary international law. Reference was made to the prima facie indication of the formation of a new rule of customary international law providing for fixed baselines. However, it was opined that it was too early to draw any related conclusions as to the existence of widespread practice and *opinio juris* in favour of fixed baselines and the preservation of maritime zones, whether on the regional or the international plane. Emphasis was nonetheless placed on the new trend of practices and views of States based on a good-faith interpretation of the United Nations Convention on the Law of the Sea. It was further stressed that the Commission should be clear in stating that the existence of practice could justify not only a rule of customary international law, but a certain interpretation of the Convention. A view was expressed that determining whether a rule of customary international law existed was beyond the mandate of the Commission.

150. On the issue of fixed baselines, and recalling the 2021 declarations by the Pacific Islands Forum and the Alliance of Small Island States,[284] members stressed that there was no explicit provision in the United Nations Convention on the Law of the Sea requiring State parties to update their baselines and outer limits of maritime zones in response to changes in coastlines as a result of sea-level rise. In that regard, it was observed that there was a difference between legally freezing the territorial sea baselines and not updating published baselines, since the latter was simply an administrative matter, while the former could possibly involve the creation of a new rule of law and should be done with great caution. It was nonetheless noted that if there was an obligation to update baselines, it should have been expressly mentioned in the Convention. At the same time, it was also stated that the Commission should not take a one-sided position, as both the permanent and ambulatory approaches were legal and viable, and should instead consider favouring practical solutions.

c. Subsequent agreements and subsequent practice

151. It was suggested that subsequent agreements, as provided for in article 31 of the Vienna Convention on the Law of Treaties,[285] might be useful as an authentic means of interpretation of the United Nations Convention on the Law of the Sea. Such interpretation could take the form of a resolution of a meeting of States parties to the Convention, as referred to in paragraph 148 above. It was underlined that subsequent practice as a means of interpretation of the United Nations Convention on the Law of the Sea might also be a useful way forward in lieu of the emergence of a rule of customary international law. Some members expressed the view that consideration would then also need to be given to how subsequent practice satisfied the relevant legal benchmarks, as developed by the Commission.[286]

152. It was further emphasized that the current practice was insufficient to justify the existence of either a regional or a general rule of customary international law. It could nonetheless be used to support a particular interpretation of the United Nations Convention on the Law of the Sea.

(iv) Sui generis *regimes*

153. On the topic of *sui generis* regimes, questions were raised as to how the international community could address the problems encountered by States who faced a loss of territory

[284] Pacific Islands Forum Leaders' Declaration on Preserving Maritime Zones in the Face of Climate Change-related Sea-level Rise, 6 August 2021 (available at https://www.forumsec.org/2021/08/11/declaration-on-preserving-maritime-zones-in-the-face-of-climate-change-related-sea-level-rise/); and Alliance of Small Island States Leaders' Declaration, 22 September 2021 (available at https://www.aosis.org/launch-of-the-alliance-of-small-island-states-leaders-declaration/).

[285] Vienna Convention on the Law of Treaties (Vienna, 23 May 1969), United Nations, *Treaty Series*, vol. 1155, No. 18232, p. 331.

[286] See conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, *Official Records of the General Assembly, Seventy-third Session, Supplement No. 10* (A/73/10), para. 51.

owing to sea-level rise. It was suggested that the Study Group should consider *sui generis* status for territories submerged owing to sea-level rise, in particular because sea-level rise was not a natural phenomenon, but was human-caused. While support was expressed for adopting a flexible approach to baselines – ambulatory baselines for certain scenarios and fixed baselines for others – a call was made for reflection and deliberation on the merits of *sui generis* regimes.

(v) Concluding remarks by the Co-Chairs

154. In his concluding remarks, the Co-Chair (Mr. Aurescu) thanked the members of the Study Group for their valuable contribution and welcomed their focus on the question of the interpretation of the United Nations Convention on the Law of the Sea, which was an important subject for Member States, as reflected in the additional paper.

155. As concerns had been expressed that the additional paper did not provide a clear direction for the Study Group's future work, he recalled that it was the Co-Chairs' duty to present their analysis, including preliminary observations, to enable the Study Group to collectively reflect on the issues addressed and reach conclusions.

156. The Co-Chair stressed the importance of further exploring the issue of submerged territories, which had not been raised in 2021. Given that the issue was related to the law of the sea and to statehood, he suggested that it be addressed in the Study Group's consolidated final report, expected to be issued in 2025.

157. The Co-Chair recalled that interest had been expressed in determining the moment of reference from which it could be considered that baselines were fixed, which could be done in consultation with scientists on sea-level rise.

158. With regard to the suggestion to amend the United Nations Convention on the Law of the Sea, he recalled that the Commission had agreed, in the syllabus prepared in 2018,[287] to limit the Study Group's mandate so that it would not propose any amendments to the Convention, as also reflected in the positions expressed by Member States in the light of the delicate balance between the rights and obligations under the Convention. Nonetheless, consideration could be given to interpreting the Convention.

159. Noting the suggestion that the Study Group could prepare practical guidance for States, the Co-Chair expressed the view that consideration ought to be given to providing practical legal solutions in line with the requests conveyed by Member States, so as to ensure legal stability as an outcome of the various measures that they could take.

160. The Co-Chair welcomed the view that the term "specially affected State" should be used with caution, given that two thirds of Member States were currently or could in the future be affected in some way by sea-level rise.

161. The Co-Chair noted that it was difficult to evaluate State practice within the context of sea-level rise, as it appeared to be the decision of certain States or groups of States not to update coordinates or charts deposited with the Secretary-General. As such, practice in those cases was in fact inaction, absent the visibility usually relied upon to determine the content of such practice.

162. The Co-Chair (Ms. Oral) noted that the mandate of the Study Group was a mapping exercise of the legal questions raised by sea-level rise and its interrelated issues, and that the additional paper had been based on the requests made by members of the Study Group further to the debate in 2021, except for the issue of nautical charts.

(b) Immutability and intangibility of boundaries

(i) Introduction by the Co-Chair

163. At the third meeting of the Study Group, held on 1 May 2023, the Co-Chair (Ms. Oral) recalled that chapter III of the additional paper related to the existing definitions and functions of boundaries, and contained an examination of relevant international case law and

[287] *Ibid*., annex B.

preliminary observations in paragraph 111. The chapter further addressed the principle of *uti possidetis juris* and its applicability to existing maritime boundaries. The Co-Chair observed that the intention had not been to conclude that *uti possidetis juris* should apply to maritime delimitations within the context of sea-level rise, but rather to emphasize the importance accorded to ensuring the continuity of pre-existing boundaries in the interests of legal stability and the prevention of conflict.

(ii) General comments

164. Several members generally agreed with the Co-Chairs' preliminary observations. It was also emphasized that the question of immutability and intangibility of boundaries should be addressed from the perspective of the principle of legal stability.

165. Some members noted that the intangibility of boundaries was a fundamental principle of international law, and called upon the Study Group to place more emphasis on it. At the same time, a view was expressed that the legal stability of boundaries had limited application in the field of the law of the sea. According to another view, application of the principle of the immutability of boundaries to maritime delimitations should have some degree of flexibility, as maritime entitlements were always based on geographic features and there was no settled case law with regard to the effect of physical land changes on maritime boundaries.

(iii) Application of the principle of uti possidetis juris

166. Several members called for caution in applying the principle of *uti possidetis juris*, which in their view was predominantly or exclusively applied in the context of succession of States. It was also recalled that the principle had been crystallized in the context of decolonization. Several members disagreed with the view expressed in the additional paper that *uti possidetis juris* was considered a general principle of law. Some members emphasized that the principle was applicable to pre-existing titles only. A view was expressed that introducing *uti possidetis juris* to maritime delimitations could affect the integrity of the United Nations Convention on the Law of the Sea, which did not include that principle.

167. It was noted that the principle of *uti possidetis juris* was not helpful or relevant within the context of the topic. It was argued that *uti possidetis juris* implied a different dynamic, where factual realities were not affected by the change in the broader legal framework, while the present topic sought to ensure consistency of the legal framework despite radical factual changes. Furthermore, some members emphasized that the application of *uti possidetis juris* required a critical date. According to one view, such a date was difficult to determine for a gradual process such as sea-level rise. Several members observed that the principle was not applicable to maritime boundaries. Nonetheless, for certain members application of *uti possidetis juris* to maritime delimitations should not be excluded.

168. It was observed that the principle of *uti possidetis juris*, which was linked to the issues of legal stability and security, was intended to prevent a legal vacuum and avoid conflicts between States. In that regard, some members proposed that *uti possidetis juris*, if not directly applicable, could be used as a source of inspiration, as the Study Group had similar objectives. It was emphasized that the principle supported the continuity of pre-existing boundaries.

169. The Co-Chairs were requested to clarify the meaning of paragraph 111 (*b*) of the additional paper, according to which the principle of the intangibility of boundaries, as developed under the principle of *uti possidetis juris*, was considered a general principle of law beyond application to the traditional decolonization process and was a rule of customary international law. It was argued that those observations were not supported by international case law. The Co-Chair (Ms. Oral) responded that the point was not the applicability of the principle of *uti possidetis juris* to maritime boundaries in the context of sea-level rise, but the example of the preservation of existing boundaries under international law for the purposes of legal stability and the prevention of conflict.

(iv) Self-determination

170. The importance of the principle of self-determination was recalled in the present context. It was noted that self-determination was closely linked to sovereignty over natural

resources and the territorial integrity of States. With regard to the latter, it was observed that the principle of self-determination implied that States should not lose their right to territorial integrity as a result of sea-level rise. The Co-Chairs (Ms. Galvão Teles and Mr. Ruda Santolaria) observed that the principle of self-determination was relevant to all three subtopics under consideration and that it would be addressed by the Study Group during the next session of the Commission, to be held in 2024.

(c) Fundamental change of circumstances (*rebus sic stantibus*)

171. At the third meeting of the Study Group, held on 1 May 2023, the Co-Chair (Ms. Oral) introduced chapter IV of the additional paper, on fundamental change of circumstances (*rebus sic stantibus*). She recalled that the question as to whether sea-level rise would constitute an unforeseen change of circumstances within the meaning of article 62, paragraph 2, of the Vienna Convention on the Law of Treaties had been addressed in the first issues paper,[288] and in the presentation on the practice of African States given by the Co-Chair (Mr. Cissé) during the Commission's seventy-second session (2021).[289] Both had reflected the view that the cited provision could not be applied in the context of sea-level rise. In the course of their discussion in 2021, members of the Study Group had nonetheless concluded that additional study should be undertaken on the issue. Furthermore, a number of delegations in the Sixth Committee had shared the view expressed by the Co-Chairs in the first issues paper, underlining the need for legal stability, and no delegations had conveyed that they were in favour of the application of article 62, paragraph 2, of the Vienna Convention on the Law of Treaties in the context of sea-level rise, although one delegation had indicated that it was still considering the matter. The Co-Chair also recalled that article 62, paragraph 1, of that Convention established a high threshold for invoking fundamental change of circumstances, and that it was thus noted in the preliminary observations, in paragraph 125 (*d*) of the additional paper, that the objective of preserving the stability of boundaries and peaceful relations under article 62 would equally apply to maritime boundaries, as underlined by the International Court of Justice and arbitral tribunals in three cases addressing the issue.[290]

172. Members of the Study Group generally expressed support for the Co-Chairs' preliminary observations, considering that the principle of fundamental change of circumstances was not applicable to maritime boundaries because the latter involved the same element of legal stability and permanence as land boundaries and were thus subject to the exclusion foreseen in article 62, paragraph 2 (*a*), of the Vienna Convention on the Law of Treaties. It was noted that the principles of legal stability and certainty of treaties would accordingly support an argument against the use of the principle *rebus sic stantibus* to upset the maritime boundary treaties resulting from the rise in sea levels. It was further noted that the principle was difficult to invoke successfully in practice.

173. The following additional points were raised by individual members:

(a) It would be useful to clarify what should be considered as a cut-off date on which baselines and outer limits of maritime zones had been fixed, as it was unrealistic to decide on uniform dates for all States. In paragraph 104 (*e*) and (*f*) of the first issues paper, reference was made to the moment of deposit of coordinates or charts with the Secretary-General, which would, however, disadvantage those States that had not made such deposits;

(b) There was a difference in international case law between the delimitation and the delineation of maritime zones. Delimitation applied where States with adjacent or

[288] A/CN.4/740 and Corr.1, paras. 113–141. See also *Official Records of the General Assembly, Seventy-sixth Session, Supplement No. 10* (A/76/10), para. 281.

[289] *Official Records of the General Assembly, Seventy-sixth Session, Supplement No. 10* (A/76/10), para. 261 (*b*).

[290] *Aegean Sea Continental Shelf, Judgment, I.C.J. Reports 1978*, p. 3, at pp. 35–36, para. 85; *Bay of Bengal Maritime Boundary Arbitration (Bangladesh v. India)*, Case No. 2010-16, Permanent Court of Arbitration, Award, 7 July 2014, p. 63, paras. 216–217 (available from www.pca-cpa.org/en/cases/18); and *Maritime Delimitation in the Indian Ocean (Somalia v. Kenya), Judgment, I.C.J. Reports 2021*, p. 206, at p. 263, para. 158.

opposite coasts had overlapping maritime claims, and, unlike delineation, was covered by an agreement. As such, delimitation agreements were governed by the law of treaties;

(c) There was a need to study a number – albeit limited – of specific cases that might constitute a fundamental change of circumstances, such as when two States merge into a single State or when a decision is taken to reduce the maritime space of a State applying ambulatory baselines;

(d) Similarly, it might be helpful to consider whether and to what extent article 62 of the Vienna Convention on the Law of Treaties might apply in the case of treaties establishing provisional boundaries, as opposed to permanent boundaries, or treaties simultaneously establishing maritime boundaries and regimes for the shared exploitation of resources;

(e) Further study could be conducted on the requirements to be fulfilled in order to invoke fundamental change of circumstances as grounds for terminating or withdrawing from a treaty where such a possibility had not been foreseen, and on the extent to which the impossibility of performance might be invoked within the context of sea-level rise.

(d) Effects of the potential situation whereby overlapping areas of the exclusive economic zones of opposite coastal States, delimited by bilateral agreement, no longer overlap, and the issue of objective regimes; effects of the situation whereby an agreed land boundary terminus ends up being located out at sea; judgment of the International Court of Justice in the *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica v. Nicaragua)* case

174. At the fourth meeting of the Study Group, held on 2 May 2023, the Co-Chair (Mr. Aurescu) introduced chapter V of the additional paper, including preliminary observations in paragraph 147, on the following: effects of the potential situation whereby overlapping areas of the exclusive economic zones of opposite coastal States, delimited by bilateral agreement, no longer overlapped, and the issue of objective regimes; effects of the situation whereby an agreed land boundary terminus ended up being located out at sea; and the judgment of the International Court of Justice in the *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica v. Nicaragua)* case.[291] He emphasized that the issues addressed in the chapter had been selected on the basis of suggestions made by members of the Study Group in 2021. The Co-Chairs had explored, *inter alia*, the supervening impossibility of performance, obsolescence, objective regimes, and situations of submerged land boundaries, and had described relevant State practice and case law on those issues.

175. Some members agreed with the Co-Chairs' preliminary observations in paragraph 147 of the additional paper.

176. A view was expressed that maritime delimitation treaties took varying approaches to respond to potential physical changes in the basepoints and baselines used. While some treaties contained a mechanism to readjust the boundary, most were silent on that and the broader issue of legal stability and did not include amendment provisions. Moreover, there had been revisions of baselines without any readjustment of the boundary.

177. In line with the findings of the additional paper, some members were doubtful as to the relevance and applicability of the supervening impossibility of performing a treaty, as enshrined in article 61 of the Vienna Convention on the Law of Treaties, to the sea-level rise context. It was noted, as also mentioned in the additional paper, that article 61 was not automatically applied, and that sea-level rise could not have an effect on the performance of a maritime delimitation treaty. An abstract examination of that rule was seen as not helpful to the work of the Study Group. According to one view, the only practical scenario in which the impossibility of performance could arise was where a treaty established additional legal

[291] *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica v. Nicaragua)* and *Land Boundary in the Northern Part of Isla Portillos (Costa Rica v. Nicaragua), Judgment, I.C.J. Reports 2018*, p. 139.

regimes together with maritime delimitation. However, even in that case, article 62 of the Convention would be more appropriate.

178. A question was raised as to whether legal regimes could be regarded "an object indispensable for the execution of the treaty", as referred to in article 61 of the Vienna Convention on the Law of Treaties. Members expressed diverging views on that question. It was recalled that the International Court of Justice had avoided pronouncing on the question in the *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* case.[292] At the same time, it was noted that article 61 of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations could be construed as allowing for a legal regime to be considered an object indispensable for the execution of the treaty.[293] Given the lack of clarity in international law in that respect, it was proposed that the Study Group should not focus its work on the question of the applicability of article 61 of the Vienna Convention on the Law of Treaties.

179. With respect to cases in which an agreed land boundary terminus ended up being located out at sea, it was observed that two legal options existed: to recognize, as a legal fiction, that the land boundary remained; or to conclude that it had become a maritime boundary. With respect to the latter case, it was recalled that article 15 of the United Nations Convention on the Law of the Sea provided that the delimitation of the territorial sea between States with opposite or adjacent coasts should be done on the basis of the median line. However, the submerged land boundary would not always coincide with the median line, and such a case would require an interpretation of article 15 to allow a special circumstance to be taken into account. It was also noted that the method of using fixed points at sea could be applied in such cases for maritime delimitation between States with adjacent coasts.

180. With respect to the issue of objective regimes, it was noted that maritime delimitation agreements should not be considered as imposing any objective regime *vis-à-vis* third States. It was proposed that the issue be approached from the perspective of the legal effects of acquiescence. It was also noted that articles 11 and 12 of the 1978 Vienna Convention on the Succession of States in respect of Treaties, as referred to in paragraph 141 of the additional paper, were not applicable in the context of sea-level rise.[294]

181. In line with the additional paper, the question of obsolescence, or desuetude, of treaties was seen as highly controversial and hardly helpful in the context of sea-level rise. It was proposed that the Study Group should not focus on it.

182. Some members agreed on the relevance of the *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica v. Nicaragua)* case of the International Court of Justice in the sea-level rise context.[295] However, it was noted that the conclusions reached by the Court in that case could not be generally applied in all situations. It was also emphasized that the Court had never held that baselines should be fixed. A view was expressed that the statement of Costa Rica, cited in paragraph 146 of the additional paper, in which that State noted that legal stability did not necessarily require a fixed delimitation line and could also be achieved with a moving delimitation line, introduced too much complexity and should be taken with caution.

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[292] *Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, p. 7, at p. 63, para. 103.

[293] Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (Vienna, 21 March 1986, not yet in force), *Official Records of the United Nations Conference on the Law of Treaties between States and International Organizations or between International Organizations (Documents of the Conference)*, vol. II, document A/CONF.129/15 (reproduced in A/CONF.129/16/Add.1 (Vol. II)).

[294] Vienna Convention on Succession of States in respect of Treaties (Vienna, 23 August 1978), United Nations, Treaty Series, vol. 1946, No. 33356, p. 3.

[295] *Maritime Delimitation in the Caribbean Sea and in the Pacific Ocean (Costa Rica v. Nicaragua)* and *Land Boundary in the Northern Part of Isla Portillos (Costa Rica v. Nicaragua)* (see footnote 291 above).

(e) Principle that "the land dominates the sea"

183. At the fourth meeting of the Study Group, held on 2 May 2023, the Co-Chair (Ms. Oral) introduced chapter VI of the additional paper, including preliminary observations in paragraph 155, on the principle that "the land dominates the sea". She explained that it had been the Co-Chairs' intention not to reconsider the principle, but rather to highlight the fact that it was a judicially established principle that was broadly applied, and to examine it in the context of sea-level rise further to a mapping exercise of the relevant practice and case law. She stressed that the Co-Chairs had specifically aimed to consider whether the principle was an absolute rule, and whether it could be applicable in cases where portions of land had become submerged. She presented the principle of natural prolongation, a codified rule that, for practical reasons, had fallen into disuse by the International Court of Justice and arbitral tribunals, and the principle of the permanency of the outer boundaries of the continental shelf, under article 76 of the United Nations Convention on the Law of the Sea. Both of those principles had been cited by the Co-Chairs as examples of exceptions to the application of the rule that "the land dominates the sea".

184. In the course of their exchange, members expressed diverging views on the nature and status of the concept in international law. Some members of the Study Group noted that "the land dominates the sea" was neither a principle nor a rule of customary international law. Another view was expressed that it was a question not of contemplating exceptions to the principle that "the land dominates the sea", but of establishing solid support for the preliminary observations in favour of preservation and permanency of baselines and maritime boundaries.

185. Some members considered that "the land dominates the sea" was rather a legal maxim developed in international case law and that, while rights over maritime spaces depended on the sovereignty over the coastline, "the land dominates the sea" was not a rule that could be used in practice to determine maritime zones. A view was expressed that, with the exception of historic title and rights, every privilege enjoyed by States in the form of maritime spaces under their jurisdiction was based on their sovereignty over the coastline. There was, however, no overarching principle that made it possible for States to determine, in accordance with the traditional sources of international law, another rationale for the granting of privileges over the sea. Rather, maritime entitlements were determined on the basis of the baselines rule, on which, it was thus suggested, the Study Group should therefore focus. It was also recalled that the outer limits of the continental shelf remained fixed despite the landward shift of baselines, which showed that the principle that "the land dominates the sea" was not universal.

186. According to another view, the principle that "the land dominates the sea" was a long-existing principle of international law, stemming from the cannon-shot rule, and was used in practice for maritime delimitation. It was also noted that the principle was a rule of customary international law and was reflected in various international instruments, including the United Nations Convention on the Law of the Sea. At the same time, the necessity for consistent treatment of changes in coastlines and changes in maritime features was stressed.

187. It was emphasized that maritime spaces existed in direct relation to the land and that it would be helpful to reconsider the matter in the context of the subtopic on statehood.

188. It was suggested that the Study Group explore further the issue of basepoints, which were also used for maritime delimitation, to consider, in particular, whether basepoints could be fixed, similarly to baselines. In that regard, a call was made for States, in particular those facing the threat of sea-level rise, to publish their basepoints.

(f) Historic waters, title and rights

189. At the fifth meeting of the Study Group, held on 3 May 2023, the Co-Chair (Ms. Oral) introduced chapter VII of the additional paper, including preliminary observations in paragraphs 168 and 169, on historic waters, title and rights. She noted that the chapter explored the history of the development of the principle, its application by States and international courts and tribunals, and its possible applicability in the context of sea-level rise for the purposes of preserving existing rights in maritime areas.

190. Some members noted the exceptional nature of the principle of historic waters, title and rights. Several members called for caution in examining the applicability of the principle in the context of sea-level rise. A view was expressed that the content of the principle was ambiguous. It was also emphasized that international law did not provide for a single regime for historic waters, title or rights, but provided only for a particular regime for each individual case. Furthermore, it was recalled that the International Court of Justice, in the *Territorial and Maritime Dispute (Nicaragua v. Colombia)* case in 2012, had pronounced that historic considerations did not create legal rights *per se*, but had primarily evidentiary value in confirming that the disputed territory belonged to a specific State.[296]

191. It was recalled that the establishment of a historic regime was conditioned on several requirements, including the need to exercise effective authority over a region. The requirement of effective authority, beyond mere legal pronouncements, was seen as potentially problematic for small island and archipelagic States, as it required considerable financial and technical resources.

192. It was noted that the principle of historic waters, title and rights would be relevant if an ambulatory baselines approach were adopted. Some members expressed reservations as to the applicability of the principle in the context of sea-level rise. In particular, a concern was expressed that the universal nature of sea-level rise would render all existing maritime titles historic. At the same time, it was noted that the principle could be useful in situations of submerged land boundaries.

193. A view was expressed that the Co-Chairs should refrain from citing the *South China Sea Arbitration* award as it exceeded the scope of the United Nations Convention on the Law of the Sea and the award had been criticized.[297] A contrary view was expressed, recalling that the South China Sea was a sensitive area.

194. The Co-Chair (Ms. Oral) noted that the principle of historic waters, title and rights had led to an exceptional regime of limited application, which, by its nature, would be considered on a case-by-case basis rather than as a general rule applicable to sea-level rise, and was relevant only if baselines were accepted as ambulatory. Moreover, she stressed that, in her opinion, the principle was relevant to the present study as it provided an example of the preservation of existing rights in maritime areas that would otherwise not be in accordance with international law.

(g) Equity

195. At the fifth meeting of the Study Group, held on 3 May 2023, the Co-Chair (Ms. Oral) introduced chapter VIII of the additional paper, including preliminary observations in paragraph 183, on the question of equity. She noted that the request for the Study Group to examine the issue of equity had been made by several States, including small island and small island developing States. While equity was a broad concept of international law, the Co-Chairs had focused in the chapter on the issue of equity first in general and then in the context of the law of the sea and sea-level rise. She recalled that certain examples of case law and State practice had been reflected in the chapter.

196. It was noted that equity was an important principle that was enshrined in various international conventions and instruments, including the United Nations Convention on the Law of the Sea. It was recalled that those who stood to suffer the most from human-induced sea-level rise had contributed the least to the problem, and the preservation of baselines and maritime entitlements gave expression not only to the foundational principles of equity and legal stability, but also to notions of climate justice that were deeply rooted in human rights and general principles of international law. The link between the principle of equity and the principle of common but differentiated responsibilities was also mentioned by several members. It was noted that the latter principle, established in international law, was relevant to the obligations of all States to address climate change and its effects, including sea-level rise, and could prove useful in addressing the impact of sea-level rise through mitigation and

[296] *Territorial and Maritime Dispute (Nicaragua v. Colombia), Judgment, I.C.J. Reports 2012*, p. 624.

[297] *South China Sea Arbitration between the Philippines and the People's Republic of China*, Case No. 2013-19, Permanent Court of Arbitration, Award, 12 July 2016.

adaptation measures, especially in developing States. Furthermore, it was noted that legal stability and equity should be the guiding principles of the Study Group's work on rising sea levels, given that equity was at the heart of the object and purpose of the United Nations Convention on the Law of the Sea itself. A view was expressed that equity required that the special needs and interests of developing States, especially those vulnerable to climate change, be fully taken into account. A view was also expressed that the Study Group should conduct further research into the legal question of the application of the principle of equity to sea-level rise in the context of climate change.

197. A question was raised as to whether equity could be considered a rule of customary international law or a general principle of law. It was noted that equity as a source had been specifically excluded from article 38 of the Statute of the Permanent Court of International Justice, which had been transposed *verbatim* to the Statute of the International Court of Justice. Furthermore, since there was no single position among States on the legal character of equity, it was considered premature at the present stage to pronounce on whether equity was a source of international law within the meaning of Article 38 of the Statute of the International Court of Justice. According to another view, equity could be considered a general principle of law. It was recalled that the principle of equity had been referred to by the Commission in some of its previous work and had been reflected in international instruments. A question was also raised as to whether equity could be considered part of subsidiary means for the determination of rules of international law.

198. Some members recalled that equity was a broad concept, and stressed that particular care was needed in its application to the context of sea-level rise. It was noted that equity was a complex legal concept with various permutations, and that the interpretation of equity by the International Court of Justice in maritime delimitation cases was different from the concept of equity in general that was being discussed by the Study Group. Relatedly, one view was that the additional paper seemed to conflate the distinction between equity as a substantive rule and as a procedural ability of the Court in deciding specific cases. It was recalled that the Court had never resolved a case *ex aequo et bono* and suggested that the Study Group should likewise avoid that concept. A proposal was made for the Study Group to adopt a definition of equity for the purposes of its work on the topic. Some members disagreed with the idea that equity allowed a deviation from positive law.

199. A view was expressed that the concept of equity introduced a teleological dimension to the choice and implementation of applicable rules. It was noted that the notion of equitable results was universally present in the United Nations Convention on the Law of the Sea and that it was possible to consider equity as a legitimizing factor that would support, for example, the notion of fixed baselines. It was recalled that the Convention exempted developing States from certain obligations on account of equity. At the same time, it was emphasized that the notion of equitable results could not be used for all areas of international law. It was suggested that equity should be seen as the ultimate goal to be achieved, rather than a principle to be relied upon. It was also noted that the concept of equity in the context of sea-level rise meant that any solution to address the impact of sea-level rise on maritime entitlements ought to apply to all States, including the most vulnerable ones.

200. A view was expressed that the methodology for maritime delimitation, and in particular the role of equity in it, as described in the additional paper, was not necessarily up to date with international case law. The need for clarity with regard to the rules of maritime delimitation was therefore emphasized.

201. Some support was voiced for the Co-Chairs' preliminary observation that equity, as a method under international law for achieving justice, should be applied in favour of the preservation of existing maritime entitlements. In particular, a view was expressed that the legal stability principle invoked by States as a justification for the fixed baselines approach was supported by the application of equity. According to another view, while equity might strengthen the legal argument in favour of the solution of fixing baselines, the legal vagueness of the concept of equity meant that the fixed baselines approach should not at the present stage be seen as the only possible or preferable solution. It was emphasized that equity in some cases could contribute to legal instability.

202. Some members expressed reservations about the applicability of equity in the context of sea-level rise. It was noted that the preliminary observations contained the assumption that any loss of maritime entitlement would be inherently inequitable. A question was raised as to whether that would always be the case. In particular, doubt was expressed as to whether the landward shift of exclusive economic zones without change to their size could be considered inequitable. In that regard, it was noted that equity could work against the objective of the Study Group, namely that of ensuring the legal stability of the system in the light of the changing realities resulting from sea-level rise.

203. The Co-Chairs (Mr. Aurescu and Ms. Oral) recalled that the intention of the chapter was to map various issues related to equity and explore the applicability of the concept to the context of sea-level rise. The Co-Chairs expressed concern that the views of the Study Group could be interpreted as being against equity, and emphasized the need to reach a conclusion on how equity could be helpful in the context of sea-level rise.

(h) Permanent sovereignty over natural resources

204. At the sixth meeting of the Study Group, held on 4 May 2023, the Co-Chair (Ms. Oral) introduced chapter IX of the additional paper, including preliminary observations in paragraphs 192 to 194, on the principle of permanent sovereignty over natural resources. She recalled that members had raised the need for the Study Group to address the principle in greater detail. The chapter explored the development and scope of the principle of permanent sovereignty over natural resources, as reflected in relevant international instruments and the doctrine, and its application to marine resources. The Co-Chair also observed that the principle was widely recognized as a principle of customary international law.

205. Some members considered the principle of permanent sovereignty over natural resources to be relevant to the topic under consideration. Members agreed that it was a principle of customary international law, as outlined in the additional paper. It was recalled that, on 11 December 1970, the General Assembly had adopted resolution 2692 (XXV), entitled “Permanent sovereignty over natural resources of developing countries and expansion of domestic sources of accumulation for economic development”, whereby it recognized that the principle of permanent sovereignty over natural resources was applicable to marine natural resources. A doubt was expressed as to whether the loss by a State of its maritime entitlements outside of its own volition could be considered a violation of the inalienable rights, as recognized by other States, that were inherent in its sovereignty.

206. A view was expressed that a distinction should be drawn between natural resources in the seabed and subsoil and those in the water column. It was also noted that the principle of permanent sovereignty over natural resources had a special historical meaning and that the question of its applicability outside the colonial context was not yet settled.

207. Several members underlined the link between the principle of permanent sovereignty over natural resources and the right of peoples to self-determination. In that regard, it was recalled that examination of the principle of permanent sovereignty over natural resources could continue the following year, when the Study Group would return to the subtopics of statehood and the protection of persons affected by sea-level rise. The link between the principle of permanent sovereignty over natural resources and the presumption of continuity of statehood, as addressed in the subtopic of statehood, was also noted.

208. Support was expressed for the preliminary observations in paragraph 194 of the additional paper. At the same time, several members expressed doubt that the principle of permanent sovereignty over natural resources necessarily supported the observations in paragraph 194 (b), concerning the loss of marine natural resources. A view was expressed that the principle would not in itself be sufficient to override the change of maritime entitlements caused by changes to the coast. Another view was expressed that the principle of permanent sovereignty over natural resources was agnostic about the existence and spatial scope of sovereign rights and jurisdiction over maritime spaces, and instead identified the manner in which they could be exercised.

209. The Co-Chair (Ms. Oral) welcomed the rich discussion between the members of the Study Group on chapter IX of the additional paper. She emphasized that while the principle of permanent sovereignty over natural resources was linked to the decolonization process, it

continued to play an important part in economic development for many developing States. The Co-Chair noted that the principle was relevant in the context of sea-level rise, as it provided for additional layers of support for the concept of the preservation of maritime entitlements.

(i) Possible loss or gain by third States

210. At the sixth meeting of the Study Group, held on 4 May 2023, the Co-Chair (Ms. Oral) introduced chapter X of the additional paper, including preliminary observations in paragraph 214, on possible loss or gain by third States. She noted that the question of the possible legal effects of sea-level rise on the exercise of sovereign rights and jurisdiction of coastal States and third States had been addressed in the first issues paper.[298] She recalled that, during the seventy-second session (2021) of the Commission, the Study Group had decided that there was a need to explore the question further, in particular from the perspective of third States, which prompted the inclusion of the matter in the additional paper. The chapter thus explored different scenarios, triggered by baselines shifting landward, and their effect on the possible benefits and losses to third States, concluding that the preservation of existing baselines and maritime boundaries would not result in any loss to either party.

211. The Co-Chairs were commended for the clear and analytical discussion of possible loss or gain by third States. A view was expressed that the legal issues arising from scenarios addressed in the additional paper could occur only where there was no prior maritime delimitation agreement between States, and the question of practical relevance, given the limited number of scenarios in which the legal issues could occur, was therefore raised. It was further noted that the legal consequences of sea-level rise for existing delimitation treaties were of particular importance, in terms of their influence on third States specifically. In that regard, a proposal was made for the Study Group to explore available options for third States that could have an interest in the termination, owing to the effects of sea-level rise, of existing delimitation treaties to which they were not parties.

212. A view was expressed that sea-level rise, in the context of ambulatory baselines, would not disturb the balance established by the United Nations Convention on the Law of the Sea, as maritime zones would move landward, but their size would remain unchanged and loss by States would be limited to land territory. It was nonetheless observed that the fixed baselines approach, if adopted, would undoubtedly affect the rights of third States, and would also lead to significant changes in the rules governing the law of the sea. A concern was raised that the increase in portions of waters under the sovereignty of coastal States would have a considerable effect on the right of innocent passage for third States. At the same time, it was noted that the fixed baselines approach was indispensable to maintaining the predictability of maritime entitlements and preserving the balance of rights and obligations established by the Convention. A view was also expressed that, in addition to fixing baselines, the existing defined outer limits of maritime zones must be preserved in order to maintain the *status quo* of maritime entitlements as established in accordance with international law.

213. With regard to paragraph 199 of the additional paper, a point was made suggesting that there were different positions in international law as to whether the right of innocent passage applied to both merchant and military vessels.

214. The Co-Chair (Ms. Oral) emphasized the link between the matter under consideration and the principle of equity, discussed in chapter VIII of the additional paper.

(j) Nautical charts and their relationship to baselines, maritime boundaries and the safety of navigation

215. At the sixth meeting of the Study Group, held on 4 May 2023, the Co-Chair (Ms. Oral) recalled that the issue of navigational charts had been raised during the Study Group discussions during the seventy-second session (2021) of the Commission.[299] She noted that

[298] A/CN.4/740 and Corr.1, paras. 172–190.

[299] *Official Records of the General Assembly, Seventy-sixth Session, Supplement No. 10* (A/76/10), paras. 247–296.

the purpose of chapter XI of the additional paper was to examine in greater detail the various functions of navigational charts under international law and to determine whether States had an obligation to update such charts periodically under the United Nations Convention on the Law of the Sea. She also brought to the attention of the Study Group that the Co-Chairs had prepared the chapter on the basis, *inter alia*, of information from States and international organizations, in particular the International Hydrographic Organization, the International Maritime Organization and the Division for Ocean Affairs and the Law of the Sea of the United Nations Office of Legal Affairs.

216. Referring to the preliminary conclusions in paragraphs 245–249 of the additional paper, the Co-Chair emphasized that nautical charts were principally used for the purposes of the safety of navigation, and that the depiction of baselines or maritime zones was a supplementary function. The Co-Chair also observed that there was no evidence in practice or in sources of international law of an obligation on States to regularly update their nautical charts, particularly so since many States lacked the necessary capacity to conduct regular hydrographic surveys.

217. With regard to the purpose of the nautical charts under international law, several members recalled that such charts were predominantly used for the safety of navigation and that the maritime boundaries delimitation was a concern that was secondary in nature. Other members questioned whether the Study Group could conclude that the safety of navigation was the primary function of the navigation charts. The need to distinguish between nautical charts used for seafaring purposes and those used for recording maritime zones was emphasized.

218. Members expressed agreement that there was no obligation for States under the United Nations Convention on the Law of the Sea to update nautical charts, once duly deposited with the Secretary-General, for the purposes of depicting basepoints, baselines or maritime boundaries. Several members noted that there was also insufficient State practice to support the existence of such an obligation. It was also recalled that some States had difficulties in preparing charts as they did not have dedicated hydrographic agencies. It was further stressed that the need for legal stability should not have any effect on the question of updating navigational charts. A question was raised as to whether it would be beneficial to encourage States to register their nautical charts, and to provide technical assistance to that end. A concern was raised that the fixed baselines approach together with the lack of an obligation to update baselines could pose hazards to the safety of navigation as charts might not reflect physical reality, potentially in contravention of the relevant international instruments, in particular the International Convention for the Safety of Life at Sea.[300]

219. The Co-Chair (Ms. Oral) reiterated that the purpose of the chapter was to examine the role of navigational charts and, specifically, whether there was an obligation for States to update them. She recognized that the issue was linked to the debate on fixed versus ambulatory baselines and noted that the preliminary observations in paragraph 214 of the issues paper – in chapter X, on possible loss or gain by third States – did not contravene the fixed baseline approach.

(k) Relevance of other sources of law

220. At the seventh meeting of the Study Group, held on 4 May 2023, the Co-Chair (Mr. Aurescu) introduced chapter XII of the additional paper, on the relevance of other sources of law. He recalled that the members of the Study Group had suggested at the seventy-second session (2021) of the Commission that the Co-Chairs explore sources beyond the United Nations Convention on the Law of the Sea and the 1958 Geneva Conventions.[301] The chapter therefore listed a number of potentially relevant international instruments. The

[300] International Convention for the Safety of Life at Sea, 1974 (London, 1 November 1974), United Nations, *Treaty Series*, vol. 1184, No. 18961, p. 2.

[301] Convention on the High Seas (Geneva, 29 April 1958), United Nations, *Treaty Series*, vol. 450, No. 6465, p. 11; Convention on the Continental Shelf (Geneva, 29 April 1958), *ibid.*, vol. 499, No. 7302, p. 311; Convention on the Territorial Sea and the Contiguous Zone (Geneva, 29 April 1958), *ibid.*, vol. 516, No. 7477, p. 205; and Convention on Fishing and Conservation of the Living Resources of the High Seas (Geneva, 29 April 1958), *ibid.*, vol. 559, No. 8164, p. 285.

preliminary observations, reflected in paragraph 280, were that their relevance to the topic was limited, although the fixed baselines solution would favour the proper implementation of some of the international instruments examined.

221. Some members agreed with the preliminary observations of the additional paper as to the limited usefulness of exploring other sources of law. It was noted that a large number of multilateral and bilateral international instruments referred to various maritime zones, and that it was practically unfeasible for the Study Group to exhaustively explore the matter. The central role of the United Nations Convention on the Law of the Sea was thus emphasized.

3. Future work of the Study Group

222. Members 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.

223. First, it was underlined 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, expected 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.

224. Second, 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.

225. Third, several members were in favour of preparing an interpretative declaration on the United Nations Convention on the Law of the Sea, which could serve as a basis for future negotiations between States parties. In that connection, reference was made to the precedent of the fourth Review Conference (1996) of the Parties to the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction.[302] At the same time, it was stressed that the interpretation of treaties, including the United Nations Convention on the Law of the Sea, fell within the purview of States parties and the instrument's bodies. A view was expressed that in the light of inadequate State practice and insufficient scientific evidence, there was no need to reinterpret the existing regime on the United Nations Convention on the Law of the Sea. Another view was expressed that an interpretative declaration would not serve as a sufficient guarantee to the affected States in the future.

226. Fourth, the Co-Chairs stressed the importance of further exploring the issue of submerged territories, which had not been raised in 2021. Given that the issue was related both to the law of the sea and to statehood, they suggested that it be addressed in the Study Group's additional paper to the second issues paper, expected to be issued in 2024, and in the consolidated final report, expected to be issued in 2025.

227. 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.[303]

228. More generally, it was also suggested that any outcome of the Commission's work on the topic should guarantee the sovereign rights of States over their maritime spaces. It was recalled that, while the Commission's mandate allowed for promotion of the progressive development of international law, its work ought to be rooted within the existing international rules.

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[302] Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction (London, Moscow and Washington, 10 April 1972), United Nations, *Treaty Series*, vol. 1015, No. 14860, p. 163.

[303] 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.

229. In the light of recent requests for advisory opinions addressed first to the International Tribunal for the Law of the Sea and then to the International Court of Justice, a view was expressed that the Study Group should exercise caution in considering issues addressed by other bodies.

230. In 2024, the Study Group will revert to the subtopics of statehood and the protection of persons affected by sea-level rise. In 2025, the Study Group will then seek to finalize a substantive report on the topic as a whole by consolidating the results of the work undertaken.