

# Yearbook of International Disaster Law

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# Statehood, Human Rights and Sea-Level Rise

## *A Response to the International Law Commission's Second Issues Paper on Sea-Level Rise in Relation to International Law*

*Bruce Burson,\* Walter Kälin\*\* and Jane McAdam\*\*\**

### 1 Introduction

In December 2018, the UN General Assembly noted the inclusion of ‘sea-level rise in relation to international law’ as a new topic in the long-term work programme of the International Law Commission (ILC), having been proposed by the ILC earlier that year.<sup>1</sup> In 2019, it was inscribed in the ILC’s current programme of work and a Study Group was established on the topic. In 2020, the Study Group, under the co-chairpersonship of Bogdan Aurescu and Nilüfer Orali, produced its first issues paper on the law of the sea.<sup>2</sup>

In April 2022, the Study Group released its second issues paper, this time under the co-chairpersonship of Patrícia Galvão Teles and Juan José Ruda Santolaria, on statehood and the protection of persons affected by sea-level rise.<sup>3</sup> This paper – which, for ease of reference, we will term a ‘report’ – provides the focus for our contribution to the present volume. The report is a highly detailed, focused and clear analysis of important issues relating to this

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1 UNGA Res 73/265 (22 December 2018) UN Doc A/RES/73/265.

2 ILC, ‘Sea-Level Rise in relation to International Law: First Issues Paper by Bogdan Aurescu and Nilüfer Orali, Co-Chairs of the Study Group on Sea-Level Rise in relation to International Law (27 April–5 June and 6 July–7 August 2020)’ (28 February 2020) UN Doc A/CN.4/740.

3 ILC, ‘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 (18 April–3 June and 4 July–5 August 2022)’ (19 April 2022) UN Doc A/CN.4/752.

topic, with a breadth and depth of research and consideration typical of the ILC's publications. It complements the work which we have been undertaking since 2013 as members of the International Law Association (ILA) Committee on International Law and Sea Level Rise, of which Professor Galvão Teles is also a member.<sup>4</sup>

## 2 The Structure of the ILC Report

The report is organised into four parts. It commences with a general overview of the topic in Part 1, before examining issues of (a) statehood and (b) the protection of persons affected by sea-level rise in more depth in Parts 2 and 3. It concludes with a series of preliminary observations, guiding questions for the Study Group and a future programme of work. Part 3 helpfully includes a mapping of legal frameworks potentially applicable to the protection of persons affected by sea-level rise, as well as relevant State practice and that of key international organisations and bodies.

In our discussion below of the ILC report, we focus on certain elements of the two substantive areas of consideration – statehood and the protection of persons affected by sea-level rise. In doing so, our aim is not to provide a comprehensive analysis or overview, but rather to engage with discrete aspects either by developing the ideas presented in the report or by raising questions for further discussion. By way of conclusion, we offer some remarks on priorities for the next stage of the ILC's work.

## 3 Statehood

### 3.1 *Ongoing Statehood in the Context of Sea-Level Rise*

International law scholarship has grappled for some time with the question whether statehood will continue if a State's entire territory is inundated by rising seas. This has effectively limited the discussion to the fate of a relatively small number of low-lying atoll States, largely neglecting the impacts of sea-level rise on States such as Bangladesh or Belize. Although unlikely to be fully inundated, these countries may still lose substantial parts of their

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4 For an overview of the Committee and its mandate, see <<https://www.ila-hq.org/index.php/committees>> last accessed (as any subsequent URL) on 30 July 2022.



territory, with drastic consequences for the population and the ability of the government to address their needs.

Even with regard to atoll States, much of this analysis has been abstract and decontextualised, rather than grounded in concrete scenarios. As the ILC report acknowledges, sea-level rise 'is not uniform across time and space', and 'the nature and intensity of its physical impact will vary from region to region and locality to locality, depending, *inter alia*, on terrain, climatic conditions, wealth, economic conditions, infrastructure and political institutions'.<sup>5</sup> Although the 2021 Intergovernmental Panel on Climate Change (IPCC) report made clear that small island States will be exposed to some loss of land territory,<sup>6</sup> their geographies differ markedly. Further, it remains to be seen how adaptation measures (as legitimate mechanisms to provide for the State's conservation) will play out in terms of preserving land from inundation over time.

Importantly, the ILC report grounds its examination of this question in the statements of affected States themselves,<sup>7</sup> noting, for example, that prior to inundation, there may be insufficient fresh water supplies for the population<sup>8</sup> (meaning that people may need to move long before territory becomes uninhabitable).<sup>9</sup> It is important to note that the notion of diminishing territory has both a quantitative dimension (how much territory has been lost) and a qualitative dimension (the habituality/carrying capacity of the remaining territory). The interplay between the two will shape people's decisions about mobility at the individual and household levels, and, in turn, affect relationships between individuals (as rights holders) and States (as duty bearers).

The ILC also refers to concerns and positions raised by Pacific Island States in the Sixth Committee of the General Assembly in 2018, including that:

1. populations would move away in a 'gradual and random' manner, and 'slowly disintegrate and present a set of challenges such as legal, economic, financial, education, cultural, and many more';<sup>10</sup>

<sup>5</sup> ILC (n 3) para. 228 (citations omitted).

<sup>6</sup> Roshanka Ranasinghe et al., 'Climate Change Information for Regional Impact and for Risk Assessment' in Valérie Masson-Delmotte et al. (eds), *Climate Change 2021: The Physical Science Basis. Contribution of Working Group I to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* (CUP 2021) 1839–1841.

<sup>7</sup> See ILC (n 3) paras. 159–174.

<sup>8</sup> See *ibid.*, paras. 164, 427.

<sup>9</sup> Jane McAdam, *Climate Change, Forced Migration, and International Law* (OUP 2012) 124.

<sup>10</sup> ILC (n 3) para. 161 (citing Fiji: UN Doc A/C.6/73/SR.23, para. 63).

2. only States can generate maritime zones, and thus 'statehood was a threshold issue that was interrelated with questions regarding maritime zones';<sup>11</sup>
3. some, but by no means all, Pacific countries are considering the construction of artificial islands and coastal barriers;<sup>12</sup> and
4. there is a presumption of continuing statehood.<sup>13</sup>

Supporting the last of these points, the Solomon Islands emphasised that:

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.<sup>14</sup>

Liechtenstein, too, highlighted the fact that:

there is in practice a strong presumption of State persistence and dis-favouring 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.<sup>15</sup>

The report's summation of the debates revealed that no State suggested that statehood would be lost. This is significant. However, opinion otherwise was not uniform, with a number of States viewing the issue as too inchoate at the present time,<sup>16</sup> and Greece suggesting that the ILC was 'embarking on an exercise that was primarily *de lege ferenda*'.<sup>17</sup> Many more referred to the elements of statehood set out in art. 1 of the Montevideo Convention on the Rights and

11 *Ibid.*, para. 162 (citing Papua New Guinea: UN Doc A/C.6/73/SR.23, para. 36).

12 See discussions in *ibid.*, paras. 167–174.

13 *Ibid.*, paras. 184–185, 187 (referring to comments by the Solomon Islands, Samoa and Tuvalu).

14 *Ibid.*, para. 185 (citing the Solomon Islands: UN Doc A/C.6/76/SR.23, para. 4).

15 *Ibid.*, para. 191 (citing Liechtenstein: UN Doc A/C.6/76/SR.21, paras. 3–4).

16 *Ibid.*, para. 42 (referring to comments by Belarus, the Islamic Republic of Iran, the Russian Federation and the United States).

17 *Ibid.*, para. 26, referring to comments by Greece.

Duties of States,<sup>18</sup> but took different views to how these were impacted by the issue of sea-level rise. At one end of the spectrum was the view expressed by Singapore that, 'like other small, low-lying island States, the threat posed by rising sea levels is an existential one for Singapore',<sup>19</sup> although it was not clear whether this referred to factual impacts or the legal construct of statehood. At the other end of the spectrum was Tuvalu, which remarked that the art. 1 criteria were 'only for the determination of the birth of a State', rather than its ongoing existence.<sup>20</sup> Yet others made direct reference to the principle of cooperation between States as an important factor to consider.<sup>21</sup>

This charting of statements is important, especially since questions concerning ongoing statehood may ultimately be settled in the realm of international relations rather than developments in 'hard' international law.<sup>22</sup> Affected States are unlikely to renounce their claim to statehood, and it is equally unlikely that other States will proactively push to strike such countries off the list of member States of the international community.<sup>23</sup> For these reasons, it is helpful to consider the international law consequences of possible scenarios and their impact on the rights of affected populations (discussed in paragraph 4 below).

### 3.2 *A Rich Documentation of State Practice*

A particularly welcome element of the ILC report is the emphasis placed on identifying relevant State practice as regards the recognition of States, or of other entities regarded as having international legal personality. What these examples reveal collectively is a certain amount of pragmatism by States when entities suffer a loss or diminution of one or more of the criteria of statehood.

The report notes historical examples where entities such as the Holy See and the Sovereign Order of Malta maintained their international legal personality, notwithstanding their being deprived of defined territories over which they had exercised jurisdiction. Arguably more significant is the recording of how other States were willing to treat them as possessing such personality.

18 Montevideo Convention on the Rights and Duties of States, 26 December 1933.

19 ILC (n 3) para. 178 (citing Singapore: UN Doc A/C.6/76/SR.20, para. 22).

20 *Ibid.*, para. 187 (citing Tuvalu: UN Doc A/C.6/76/SR.23, para. 4).

21 See comments of Argentina (UN Doc A/C.6/76/SR.22, para. 31), Cuba (UN Doc A/C.6/76/SR.21, para. 32) and the Maldives (UN Doc A/C.6/76/SR.21, para. 139), referred to in ILC (n 3) paras. 31–34.

22 This is not to say that State practice is without legal implication: see e.g. James Crawford, *The Creation of States in International Law* (OUP 2006<sup>2</sup>) 704.

23 Walter Kälin, 'Conceptualising Climate-Induced Displacement' in Jane McAdam (ed), *Climate Change and Displacement: Multidisciplinary Perspectives* (Hart Publishing 2010) 102.

For example, the report observes that the Vatican City meets the conditions for statehood,

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 organisation (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.<sup>24</sup>

However, the Vatican City 'is, in practice, an instrument or means to ensure the independence of the Holy See': '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',<sup>25</sup> such as the exercise of the right of legation (in recognition of which many States have established diplomatic relations), signing treaty-like agreements, and acting with regard to the peaceful settlement of disputes.<sup>26</sup>

In relation to the Sovereign Order of Malta, the report quotes information provided by the Russian Federation that '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'.<sup>27</sup>

The report also notes exceptional situations when governments have been permitted to establish themselves in exile in the territory of other States (for instance, when occupied by a foreign power or there have been circumstances seriously undermining institutional order).<sup>28</sup> They have continued to 'exercise the right of legation, conclude treaties, participate in international organisations, assist their nationals, and carry out timely actions to preserve the assets, properties, rights and interests of their States abroad',<sup>29</sup> notwithstanding their loss of control over territory. In other words, 'the affected State maintains its status as such, and retains its international legal personality', and the existence

24 ILC (n 3) para. 124 (fn omitted).

25 *Ibid.*, para. 125.

26 *Ibid.*, paras. 124–125.

27 *Ibid.*, para. 130.

28 *Ibid.*, paras. 138–145.

29 *Ibid.*, para. 139.

of a government-in-exile 'constitutes evidence of the continuity of the State'.<sup>30</sup> The report provides multiple historical examples of governments operating in exile, and their recognition by other States.<sup>31</sup>

### 3.3 *An Innovative Approach to Continued Statehood*

Indeed, that last point is crucial and speaks in favour of Tuvalu's argument that the criteria enshrined in art. 1 of the Montevideo Convention are mainly relevant for the formation of a State, rather than its continued existence as a subject of international law. Arguably, one of the most important observations to emerge from the report concerns arts. 3 to 5 of the Montevideo Convention, which provide respectively that a State's political existence is independent of its recognition by other States and it has 'the right to defend its integrity and independence, to provide for its conservation and prosperity, and consequently to organise itself as it sees fit, to legislate upon its interests, administer its services, and to define the jurisdiction and competence of its courts' (art. 3); that a State's rights 'do not depend upon the power which it possesses to assure its exercise, but upon the simple fact of its existence as a person under international law' (art. 4); and that the 'fundamental rights of states are not susceptible of being affected in any manner whatsoever' (art. 5).

The report makes the interesting argument that, if the rights of a State do not derive from power, but rather from its mere *existence* as a person under international law, and its fundamental rights are not susceptible of being affected *in any manner whatsoever*, then each State has a 'right to defend its integrity and independence, to provide for its conservation and prosperity'.<sup>32</sup>

As such, the report concludes that:

it is valid to hold that once a State exists as such, in that it meets the conditions set out in article 1 of the Convention on the 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.<sup>33</sup>

<sup>30</sup> *Ibid.*, para. 140.

<sup>31</sup> *Ibid.*, paras. 142–154.

<sup>32</sup> *Ibid.*, para. 155; see also Charter of the Organization of American States (30 April 1948), arts. 10, 12 and 13.

<sup>33</sup> ILC (n 3) para. 158.

The implications of this conclusion for discussions concerning sea-level rise and statehood are both immediate and profound. The broad language framing the continued enjoyment of fundamental rights by small island States *already vested with existing international legal personality* opens the way for the progressive development of present international law. While art. 1 of the Montevideo Convention requires a ‘permanent’ population, the right to provide for its preservation arguably enables a transnationally distributed population – whether having been displaced, voluntarily migrated or relocated at the individual, household or community level (as the case may be) to another State’s territory – to maintain a presence in the home country, including by facilitating return visits or a smaller ‘rotating’ population.<sup>34</sup> A symbolic population could be permanently maintained, albeit comprised of different persons returning home for temporary periods.<sup>35</sup> Similarly, the element of territory must not be understood as a static concept. Just as the recognition of ‘airspace’ in international law took account of new circumstances – the development of aviation<sup>36</sup> – so, too, could submergence be a new circumstance requiring the evolution of international law. It might be possible to argue that, just as international law recognises that airspace adjacent to land, internal waters and territorial seas constitutes ‘territory’, aquatic space immediately above now submerged land remains territory relevant for the maintenance of statehood. These and other measures to safeguard the elements of statehood might be usefully explored in the next stage of the Study Group’s deliberations.

### 3.4 *Diminishing Capacity to Exercise the Functions of a State*

Even though to date, no State’s entire territory has been covered by the sea or rendered uninhabitable,<sup>37</sup> the report argues that the gravity of the situation demands clear thinking now.<sup>38</sup> It therefore sets out possible alternatives to traditional statehood, each underpinned by rich examples from State practice,

34 This has been a strategy used by the Banabans in Fiji/Kiribati; see e.g. Wolfgang Kempf, ‘The Diversification of Return: Banaban Home Islands and Movements in Historical Perspective’ in John Taylor and Helen Lee (eds), *Mobilities of Return: Pacific Perspectives* (ANU Press 2017). Also, note the constitutional right of Banabans to return to their ancestral home in Kiribati, even if they are not citizens of Kiribati: Jane McAdam, ‘“Under Two Jurisdictions”: Immigration, Citizenship and Self-Governance in Cross-Border Community Relocations’ (2016) 34 *Law and History Review*, 281, 309–328.

35 International law contains no specification of a minimum population. See James R. Crawford, ‘State’ in Rüdiger Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law*, vol IX (OUP 2012) 478, para. 21.

36 See Stephan Hobe, ‘Airspace’ in *ibid.*, vol I, 263, para. 3.

37 ILC (n 3) para. 175.

38 *Ibid.*, para. 176.

including: (a) the maintenance of international legal personality without a territory; (b) cession or assignment of portions of territory to other States, with or without transfer of sovereignty; (c) association with other State(s); (d) the establishment of confederations or federations; (e) unification with another State, including the possibility of a merger; and (f) possible hybrid schemes combining elements of more than one modality.<sup>39</sup>

The ILC report presents these alternatives as modalities to maintain or transform the legal personality of affected States to ensure that, in one way or another, they remain subjects of international law. With the exception of the first option, they deserve closer examination for another reason. Affected countries may be able to find ways to maintain the formal criteria of statehood. However, substantial loss of territory and – as a consequence of cross-border migration and displacement – of population is likely to cause a breakdown of the State's economy, infrastructure and services, and undermine the functioning of State institutions. Arguably, the ensuing decline and loss of capacity to exercise the functions of a State will become the key challenge long before most or all of the territory disappears. Cooperating and partnering with another State would not only provide affected populations with opportunities for regular migration within the new political entity, but would also compensate for dwindling State capacity by sharing some tasks with this other State.

#### 4 Protection of Persons Affected by Sea-Level Rise

Part 3 of the ILC report turns to the rights of persons affected by sea-level rise and the duties of States to protect them.<sup>40</sup> It examines rights that may be at risk, both in terms of lack of enjoyment of rights (an issue of climate justice) and violations of rights (an issue of accountability).<sup>41</sup> Sea-level rise, disasters and other factors<sup>42</sup> together 'have potentially significant socioeconomic, environmental

39 *Ibid.*, paras. 197–226. For these and other options to retain or transform statehood, see also International Law Association (ILA), 'Report of the Committee on International Law and Sea Level Rise' (Lisbon Conference, 2022) 28–32.

40 While States generally supported the inclusion of this topic in the Study Group's syllabus, some expressed concern, especially about the lack of State practice: see ILC (n 3) paras. 41–42.

41 On positive obligations, see ILA, 'Sydney Declaration of Principles on the Protection of Persons Displaced in the context of Sea Level Rise' (Annex to ILA Res 6/2018, August 2018) principle 6.

42 See Jane McAdam, Bruce Burson, Walter Kälin and Sanjula Weerasinghe, *International Law and Sea-Level Rise: Forced Migration and Human Rights*, FNI Report 1/2016 (Fridtjof Nansen Institute and Kaldor Centre for International Refugee Law 2016) para. 29.

and cultural consequences for human lives and living conditions in coastal and low-lying areas', threatening 'all aspects of human life'.<sup>43</sup> In reality, the 'potential' for such effects is already being realised: in the Pacific, for example, some communities have already relocated to higher ground, and burial sites have been washed away. This has profound consequences for people's sense of identity, belonging and mental health.<sup>44</sup>

While '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' (especially those of vulnerable or marginalised persons and groups).<sup>45</sup> While the second proposition is unquestionably the case, the first may become contestable given increasing attention on climate change as a justiciable matter before domestic and international courts<sup>46</sup> – particularly when it comes to States' duties to avert harm and protect human rights.

The ILC report sets out the human rights most commonly understood as impacted by sea-level rise. However, its more detailed examination begins with the discussion of the right to life (art. 6 of the ICCPR) and the prohibition on cruel, inhuman or degrading treatment (art. 7 of the ICCPR).<sup>47</sup> While these are unquestionably rights that will be impacted by sea-level rise – and, moreover, that may give rise to international protection obligations under international law<sup>48</sup> – their threshold requirements are relatively high. For the majority of affected people, the rights most likely to be impacted over the short-to-medium

43 ILC (n 3) para. 228.

44 See e.g. Karen E McNamara et al., 'Understanding and Responding to Climate-Driven Non-Economic Loss and Damage in the Pacific Islands' (2021) 33 *Climate Risk Management*, 100336.

45 ILC (n 3) para. 228 (citation omitted).

46 See, for example, *Urgenda Foundation v State of the Netherlands*, Rechtbank Den Haag, C/09/456689/HA ZA 13-1396 (24 June 2015), upheld on appeal, in which the tort of negligence was successfully used for the first time to hold a State liable for failing to adequately put in place effective climate change prevention and mitigation policies. See also the proposed request by Vanuatu to the International Court of Justice for an Advisory Opinion on the rights of present and future generations to be protected from climate change (Lagipoiva Cherelle Jackson, 'Vanuatu's Push for Legal Protection from Climate Change Wins Crucial Support' (The Guardian, 10 May 2022) <<https://www.theguardian.com/world/2022/may/11/vanuatus-push-for-legal-protection-from-climate-change-wins-crucial-support>>); UN Committee on the Rights of the Child, *Sacchi v Argentina*, Comm No 104/2019 (22 September 2021); *Minister for the Environment v Sharma* [2022] FCAFC 35.

47 ILC (n 3) paras. 252(a) and (b).

48 See Sydney Declaration of Principles on the Protection of Persons Displaced in the context of Sea Level Rise and Commentary in Davor Vidas, David Freestone and Jane McAdam (eds), *International Law and Sea Level Rise: Report of the International Law Association Committee on International Law and Sea Level Rise* (Brill 2018); UN Human Rights Committee, *Teitiota v New Zealand*, Comm No 2728/2016 (24 October 2019).



term are economic, social and cultural rights.<sup>49</sup> We recommend that the final report of the ILC reverse the order of this more detailed discussion of rights, which will also enable the analysis to better identify the evolving nature and content of obligations owed by States over time. Further, any discussion of the rights of protected persons must give a *prominent place to participatory rights*. Persons affected by sea-level rise, many of whom are from indigenous and/or marginalised communities, are not passive victims of sea-level rise but rather active participants in efforts to find rights-sensitive durable solutions to their predicament – and they must be empowered to that end. We therefore welcome the ILC's recognition of the importance of the rights of public participation, access to information and access to justice in this context.<sup>50</sup>

Mitigation and adaptation measures can help to build resilience and enable people to remain in their homes for as long as possible. However, at times, people may be displaced or left with little choice but to try to migrate or relocate elsewhere.<sup>51</sup> Some Pacific governments have adopted national guidelines on internal displacement and planned relocations as a pragmatic response.<sup>52</sup> Already, four communities have been relocated within Fiji, and another 80 have been earmarked for relocation.<sup>53</sup> This has not been an easy decision. For Pacific peoples, land and identity are enmeshed: dislocation from land impacts identity, belonging and well-being;<sup>54</sup> disrupts cultural and social networks; and can disconnect communities from critical resources.<sup>55</sup> For these reasons, it may represent the most significant form of loss and damage for Pacific peoples – an aspect that the next phase of the Study Group's work could usefully explore.

Thus, while we can expect that many people will seek to remain in their countries for as long as possible, some internal displacement is inevitable and

49 Of course, violations or deprivation of these rights may, in turn, amount to a risk to the right to life: see e.g. UN Committee on the Rights of the Child, 'General Comment No 7 (2005): Implementing Child Rights in Early Childhood' (2005) UN Doc CRC/C/GC/7/Rev.1, para. 10.

50 ILC (n 3) paras. 252, 435.

51 *Ibid.*, para. 229. On the mobility aspect, see Sydney Declaration and Commentary (n 48).

52 See e.g. Republic of Fiji, Planned Relocation Guidelines: A Framework to Undertake Climate Change Related Relocation (2018); Government of Vanuatu, National Policy on Climate Change and Disaster-Induced Displacement (2018).

53 ILC (n 3) para. 331.

54 See discussion in Samid Suliman et al., 'Indigenous (Im)mobilities in the Anthropocene' (2019) 14 *Anthropocene Mobilities*, 298; Carol Farbotko, 'No Retreat: Climate Change and Voluntary Immobility in the Pacific Islands' (Migration Policy Institute, 13 June 2018).

55 See Siobhan McDonell, 'The Importance of Attention to Customary Tenure Solutions: Slow Onset Risks and the Limits of Vanuatu's Climate Change and Resettlement Policy' (2021) 50 *Current Opinion in Environmental Sustainability*, 281.

already occurring,<sup>56</sup> creating specific human rights challenges.<sup>57</sup> For example, a localised depopulation arising from a partial inundation of State territory, but a total and irreversible inundation of ancestral land, will raise significant issues concerning the enjoyment of cultural rights, individual and communal well-being, and social organisation. It may also differentially impact on existing marginalised or vulnerable communities and exacerbate existing patterns of rights deprivation.

Affected persons remain right-holders wherever they are located, engaging the obligations of whichever State(s) under whose jurisdiction they find themselves. Precisely what this means for States of origin, transit and destination begs more detailed analysis.<sup>58</sup> As the IPCC notes,<sup>59</sup> there will be a transition period – likely years in duration – between the ‘population scenarios’. Any arrangement must ensure that adequate levels of rights enjoyment are attained by those who stay in place (e.g. no premature withdrawal of health services), as well as for those who move elsewhere. The ILC might therefore engage in further analysis of how the various alternatives to traditional statehood (discussed in section V.C of the report), along with the general duty of international cooperation, could assist affected States to fulfil their human rights obligations.

## 5 Some Suggested Steps for the Next Phase of the ILC’s Work

The report provides an excellent foundation for the next phase of work – not only by the ILC, but also by the ILA Committee and others engaged with these issues. Below, we make four recommendations for the Study Group’s next stage of work.

56 Internal Displacement Monitoring Centre (IDMC), ‘Global Report on Internal Displacement 2021: Internal Displacement in a Changing Climate’ (IDMC 2021).

57 The ILA Committee examined these in the Sydney Declaration and Commentary (n 48) principle 8 (in particular).

58 See also the ILA Report (n 39) 33.

59 IPCC, ‘Summary for Policymakers’ in H-O Pörtner et al. (eds), *Climate Change 2022: Impacts, Adaptation, and Vulnerability. Contribution of Working Group II to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* (CUP 2022). This notes that, over the medium to long term between 2041–2100, displacement will increasingly arise due to sea-level rise and involuntary migration ‘from regions with high exposure and low adaptive capacity’ (at 15–16).

### 5.1 *Integrate the Strands of Study for Greater Coherency*

In our view, it is important that the two core elements of the ILC study – statehood, and protection of affected persons – are more closely integrated in the next phase of study. There are two dimensions to this.

First, while the separation of the issues has enabled a more focused and manageable workload – both for the ILC Study Group and the ILA Committee, which adopted the same approach – it is important that the issues do not become siloed and the linkages between these issues unexplored. We believe that it is only through understanding these synergies that international law can truly protect the rights of persons affected by sea-level rise. For example, one of the principal benefits of the argument that maritime boundaries should not be recalculated if sea-level rise changes a country's land mass is the preservation of the State's financial capacity to self-govern – including the discharge of obligations under international human rights law towards the protection of affected persons (which itself is a corollary of the State having international legal personality). There will no doubt be other interrelationships.

Secondly, it is important that debates about the commonly accepted indicia of statehood are not siloed, and that the relationships between each element are understood and examined. The ILC report correctly acknowledges that the long-term horizon of potentially complete inundation will be preceded by more immediate, if gradual, loss of habitable land (coupled with the potential for fortifying or building up land artificially, as well as natural accretion). It is only through this lens that it is possible to identify a range of indicative scenarios around which to model the changing nature of States' obligations towards affected populations (for example, under international human rights law). While affected States, as duty bearers, must respect the human rights of their citizens regardless of the circumstances, the process of diminishing State capacity mentioned above will also undermine their ability to protect and fulfil such rights.<sup>60</sup> This raises the question whether and how international cooperation,<sup>61</sup> or the different forms of State transformation mentioned above, could compensate for this. Such issues will become particularly acute at a later stage in scenarios where States affected by sea-level rise maintain only a token presence in small parts of their remaining territory.

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60 ILA Report (n 39) 33.

61 See International Covenant on Economic, Social and Cultural Rights, 16 December 1966, art. 2(1).

## 5.2 *Explore the Issue of the Protection of Affected Persons as a Dynamic and Complex Amalgam of Co-existing Obligations of One or More States as Duty Bearers*

As already noted, all persons affected by sea-level rise will remain rights holders under international law. At every point in time, there will be at least one State or other entity with international legal personality exercising jurisdiction over them, jointly or severally, which at the very least will entail certain core protection-related obligations, such as non-discrimination and *non-refoulement* (where relevant). In all cases, States exercising jurisdiction will have obligations to respect human rights; the more challenging, context-specific questions concern the scope and content of their obligations to protect and fulfil such rights.

As such, we would suggest that the ILC could engage in a fruitful detailed analysis of: (a) the distribution of obligations among potential duty-bearing States or entities; and (b) the substantive content of those obligations.<sup>62</sup>

There are two threshold points to note here. First, the analysis must be based on realistic and representative future scenarios, informed by up-to-date climate science and data, which take account of the differences between small island States' geographies, capacities (financial, technical and governance) and known opportunities for planned movement. In turn, it will be important to recognise that which rights will be impacted, and to what extent, will vary over different timeframes. It is here that discussion of the duty to cooperate arguably resonates loudest: what does it mean for States to support other States whose capacity to govern is being substantially diminished by sea-level rise? Which States are the duty bearers, and by what criteria are they to be identified? Is it possible or feasible to make a claim that being a historic emitter with UNFCCC Annex I status<sup>63</sup> provides an entry point for determining specific duties to cooperate? Such a proposition is likely to be contentious. Moreover, it is important in our view not to be overly ambitious in seeking a ready-made answer to this as a matter of international law, at least in the short term. More important will be to map and track current State practice whereby both (a) States with existing historical and/or cultural ties to affected States, and within which the population of the affected State is already in part distributed, and (b) other States or entities with international legal personality (such as

62 This builds on what is already reflected in ILC (n 3) para. 435.

63 Annex I Parties include the industrialised countries that were members of the Organisation for Economic Co-operation and Development (OECD) in 1992, plus countries with economies in transition (the EIT Parties), including the Russian Federation, the Baltic States and several Central and Eastern European States.

the European Union) have assumed different – and, sometimes, overlapping – obligations (e.g. in relation to finance, capacity building, adaptation measures, migration pathways) towards the same affected State (and its population) on a bilateral or sub-regional basis. Only once this has been done will it be possible to draw some meaningful conclusions about just how far the duty to cooperate has crystallised in this context, and what it evidences as to the content of the duty as a core norm of international law.

Secondly, consideration should be given to existing practice in situations where more than one State owes (potentially different) obligations towards the same rights holders – for example, the duties owed by States of origin, transit and destination towards migrants, or of States partnering through means of association, federation, merger or the other options mentioned above. State practice concerning stranded migrants during COVID-19 will be particularly important to chart. In some instances, both origin and destination States provided financial support to enable people to meet basic needs in response to the same hazard.<sup>64</sup>

### 5.3 *The Issue of Statelessness*

As the ILC rightfully observes,<sup>65</sup> any risk of statelessness is unlikely to result from sea-level rise and loss of territory per se. Rather, it will more commonly arise from nationality laws that deprive people of citizenship if they reside abroad for a particular period and/or prevent them from passing down their nationality to their children; the inability to prove nationality when documents are lost (e.g. during a disaster); or the inability to access consular services to receive (e.g. for children born abroad) and replace documentation.<sup>66</sup>

These risks highlight the importance of affected States ensuring that their citizens can preserve their nationality (and associated) rights if they move abroad. If people who reside outside a State's territory lose the right to retain their nationality, pass it down to their children and/or vote in/stand for national elections – which is currently the law of some Pacific States – then

64 See discussion in Bruce Burson, Richard Bedford and Charlotte Bedford, *In the Same Canoe: Building the Case for a Regional Harmonisation of Approaches to Humanitarian Entry and Stay in 'Our Sea of Islands'* (Platform on Disaster Displacement 2021) 79–80.

65 ILC (n 3) paras. 252, 398.

66 UNHCR, Norwegian Refugee Council and Peter McMullin Centre on Statelessness, 'Statelessness and Climate Change' (October 2021) 1 <<https://www.refworld.org/pdfid/617c0da4.pdf>>. See also Michelle Foster, Nicola Hard, Hélène Lambert and Jane McAdam, *The Future of Nationality in the Pacific: Preventing Statelessness and Nationality Loss in the Context of Climate Change* (Kaldor Centre for International Refugee Law, Peter McMullin Centre on Statelessness and UTS 2022).

the State's 'population' will start to decline. If implemented at scale under particular scenarios where much of the population resides abroad, the ability to preserve a 'government' could also be impacted.<sup>67</sup> Over time, the absence of such safeguards could have profound implications for the continuation of statehood (or maintenance of some other international legal personality).

## 6 Conclusion

The ILC report on statehood and the protection of persons affected by sea-level rise is an invaluable contribution to discussions in this field. The Study Group's rigorous analysis of the legal issues, detailed compilation of State practice and forward-looking approach provide a robust foundation for its programme of work over the next five years.

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67 See Foster, Hard, Lambert and McAdam (n 66).