

Statehood and the Protection of Persons in the Context of Sea-Level Rise: the International Law Association's Contribution

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1 Introduction****

It is hard to imagine worse disasters for States than those that threaten their very existence. At certain thresholds of climate change, sea-level rise may pose serious risks to Small Island Developing States (SIDS), both physically and legally. In particular, people's enjoyment of human rights may be seriously jeopardised if the socio-economic impacts of the loss of habitable land, and related challenges, overwhelm the capacity of affected governments. Safeguarding the rights of those at risk – including the risk of displacement – requires decisive action.

During its 12-year tenure, the International Law Association Committee on International Law and Sea Level Rise (ILA Committee or Committee) developed a series of recommendations to address this conundrum, drawing and building on the law of the sea, human rights law and general international law. This article – written by three members of the ILA Committee – shows how the Committee's work influenced the understandings of statehood and the protection of persons in the context of sea-level rise since its inception. The Committee set out to study the possible impacts of sea-level rise and their broader implications and to develop proposals for the interpretation and progressive development of international law in relation to the possible loss of

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territory and maritime zones, including the impacts on statehood, nationality and human rights. As its mandate concludes in June 2024, we trace how the Committee raised, as well as provided potential answers to, fundamental questions of international law which are now being taken up in other international and regional fora. We argue that the Committee's membership and methodology proved to be innovative in connecting legal scholars and practitioners from various legal sub-disciplines, while also drawing on a range of other disciplines. This multidisciplinary approach – drawing on expertise from the law of the sea, human rights, cultural rights, displacement and migration, statelessness and nationality, statehood, geography, geology and climate science – enabled a far deeper, richer and more nuanced understanding and analysis of the issues at play, facilitating a holistic appraisal of both the legal questions and answers. Furthermore, the scenario-based approach developed by the Committee – based on near-term, mid-term and long-term archetypes of climate futures – enabled a concrete analysis of how the law would apply to changing circumstances over time by mapping shifting legal relationships and responsibilities, as well as highlighting potential gaps. Indeed, this aided the Committee in bridging the gap between theory (at times quite abstract) and practical solutions.

The impact of the Committee's work can already be seen in the wide range of initiatives now underway, including the International Law Commission (ILC) Study Group on sea-level rise in relation to international law; a series of regional declarations in the Pacific concerning maritime boundaries, statehood and climate mobility; discussions in the UN General Assembly and its Sixth Committee, in particular; and the approaches of States themselves.¹

In this article, we first examine the trajectory of the ILA Committee's work from its inception in 2012 to its conclusion in 2024. Section 2 traces the evolution of the Committee's research agenda on the protection of persons in the context of sea-level rise, which was, at times, in dialogue with other international processes – not least, the work of the ILC whose parallel mandate proved to be very instructive. Section 3 introduces the ILA Committee's scenario-based approach. Section 4 turns to the challenge of safeguarding statehood by preserving territory as a prerequisite for the continued presence of a population, as well as ensuring continued legal personality. Section 5 focuses on human mobility and the Committee's findings with respect to the protection of people moving within affected countries and across international borders, and the

1 These are referenced and discussed in detail below.

corresponding obligations of States.² The final section reflects upon what the Committee achieved, and, perhaps more importantly, the next steps needed in this area.

2 Where the Committee Began and What It Did

2.1 *Mandate and Working Methods*

In November 2012, the ILA's Executive Council approved the establishment of the ILA Committee on International Law and Sea-Level Rise.³ Its creation was prompted by a resolution adopted in August 2012 which recognized that prospects of substantial territorial loss resulting from sea-level rise raised fundamental considerations under a number of areas of international law. The Committee's mandate was:

- 1) to study the possible impacts of sea-level rise and the implications under international law of the partial and complete inundation of state territory, or depopulation thereof, in particular of small island and low-lying states; *and*
- 2) to develop proposals for the progressive development of international law in relation to the possible loss of all or of parts of state territory and maritime zones due to sea-level rise, including the impacts on statehood, nationality, and human rights.⁴

In essence, three avenues of enquiry were initially considered as relevant, namely, the consequences of sea-level rise on:

- maritime zones and their limits, and maritime boundaries;

2 This analysis also focuses on 'immobility', which may be voluntary (if people choose to remain in their homes) or involuntary (if people wish to move but do not have the networks, resources and/or opportunities to do so).

3 International Law Association (ILA), 'Minutes of the Meeting of the Executive Council' (London, 10 November 2012), 5. The Committee was chaired by Professor Davor Vidas (Norway), who initiated it at the 75th ILA Biennial Conference in Sofia in August 2012 and served as the Chair from its formation in November 2012 to the completion of the Committee's mandate in June 2024. Professor David Freestone (United Kingdom), Professor Jane McAdam (Australia, 2012–18), Professor Maxine Burkett (United States, 2019–21) and Professor Elisa Fornalé (Switzerland, 2021–24) acted as Co-Rapporteurs.

4 Interim Report of the ILA Committee (Johannesburg, 2016) 1, published in ILA, 'Report of the Seventy-Seventh Conference, held in Johannesburg, August 2016', 2017, 842–875 (hereafter 'Johannesburg Report'). The page numbers cited here are those of the ILA online published versions available at <https://www.ila-hq.org/en_GB/committees/international-law-and-sea-level-rise> last accessed (as any subsequent URL) on 30 August 2024.

- human rights and mobility (displacement, migration and planned relocation); and
- statehood.

The Committee divided the work thematically into two main stages. The first (2012–18) involved two parallel streams of study: one on the law of the sea issues, and the other on the human rights and mobility issues. The second stage (2019–24) moved to consideration of the statehood question as the point of commonality of both streams.

From its inception, the Committee was conceived as a mechanism to bring together scholars from diverse sub-fields, including the law of the sea, refugee law, human rights law, statehood and climate science. Each part of its mandate – law of the sea, protection of persons, and issues relating to statehood – separately had been the subject of considerable scholarly analysis; the innovation of the Committee was to bring them together in a focused way. This enabled interlinkages to be identified and a novel synthesis of ideas that overcame popular narratives, such as the notion that people from affected States would become ‘stateless’ or lack protection because their countries would ‘sink’ and, as a consequence, lose their statehood.

Initially, many Committee members were experts in the law of the sea, while a smaller number had expertise in refugee and human rights law. That smaller group (including ourselves) worked on mobility and human rights during the first stage of the report. This work was enriched and informed by the wider Committee’s input, as well as by the fact that most of the smaller group’s members were actively involved in myriad other processes concerning these questions. This assisted, first, in determining the particular expertise the ILA could bring to the table; secondly, in isolating the specific legal issues that demanded further analysis and interpretation; and thirdly, in discerning how, where and when the Committee’s work could usefully inform and influence deliberations in other fora. In that regard, the fact that several Committee members were also members of the ILC and that one of them (Patrícia Galvão Teles) was, in the course of the ILA Committee’s work, appointed as co-chair of the ILC’s Study Group on sea-level rise in relation to international law, was particularly significant for the Committee’s impact.

By chance, the Committee was formed almost simultaneously with the creation of the Nansen Initiative on Disaster-Induced Cross-Border Displacement, launched in October 2012. This was the first intergovernmental initiative with a concerted focus on human mobility in the context of climate change and disasters. Through a series of regional and sub-regional consultations, underpinned by expert research, it sought to develop an evidence-based approach to addressing cross-border movement in this context, including protection

gaps.⁵ The ILA Committee recognized the importance of reflecting the dynamics of population movement in its own analysis and anchoring its approach in empirical evidence – in particular, recognizing that most displacement is likely to be internal, at least initially, and that individual and household migration, should it occur, is far more likely than cross-border community relocations. These factors were relevant to the way the Committee approached the legal issues. From its inception, it was stressed that ‘[i]n legal terms, the absence of population, rather than of territory, may provide the first signal that an entity no longer displays the full indicia of statehood’.⁶

2.2 *Outputs*

The work of the Committee resulted in altogether four reports (two of which were interim reports),⁷ as well as three substantive resolutions adopted by the ILA.⁸

The Committee’s first major output in 2016 was an interim report.⁹ It provided a short summary of the insights of climate science as to the impacts of sea-level rise and, in turn, explained their relationship and interaction with the criteria of statehood, human rights and mobility. It observed that ‘the combined and cumulative impacts of relative sea level rise, sea-level extremes and other effects of climate change present a range of direct and indirect negative

5 See Nansen Initiative, ‘Agenda for the Protection of Cross-Border Displaced Persons in the Context of Disasters and Climate Change’, vol 1 (December 2015).

6 Proposal for the Establishment of a New ILA International Committee on ‘International Law and Sea-Level Rise’ (12 October 2012) 2, drawing on Jane McAdam, *Climate Change, Forced Migration, and International Law* (Oxford University Press 2012) 124.

7 ‘Johannesburg Report’ (n 4); Report of the ILA Committee (Sydney 2018) 866–915, published in ILA, ‘Report of the Seventy-Eighth Conference, held in Sydney, 19–24 August 2018’, 2019, 866–915, and also published separately in an edited version as: 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 2019) (hereafter ‘Sydney Report’); Interim Report of the ILA Committee (Lisbon 2022), published in ILA, ‘Report of the Eightieth Conference, held in Lisbon, 19–24 June 2022’, 2023, 506–57 (hereafter ‘Lisbon Report’); Final Report of the ILA Committee (Athens 2024), published in ILA, ‘Report of the Eighty-First Conference, held in Athens’, 25–28 June 2024, 2024 (hereafter ‘Athens Report’). The page numbers in the following footnotes are those of the ILA printed published versions available at <https://www.ila-hq.org/en_GB/committees/international-law-and-sea-level-rise>.

8 ILA resolutions 5/2018 and 6/2018, in English and French, published in ILA, ‘Report of the Seventy-Eighth Conference’ (n 7) 29–40. ILA resolution 1/2024, in English and French, published in ILA, ‘Report of the Eighty-First Conference’ (n 7).

9 This report formed the basis of discussions on ‘forced migration and human rights’ in the context of sea-level rise at the Committee’s inter-sessional meeting in Oslo in June 2015.

consequences for human lives and living conditions in coastal and low-lying areas,¹⁰ including risks to a wide range of human rights. The interim report also analysed the impact of sea-level rise on maritime zones and their legal consequences. It concluded that the interpretation of the law of the sea rules according to which maritime limits and boundaries would recede as a consequence of changes in coastlines was inadequate in the context of climate change-induced sea level rise.

The report presented in 2018 at the ILA's 78th conference in Sydney addressed both challenges.¹¹ It proposed an interpretation of the UN Convention on the Law of the Sea (UNCLOS) ensuring that maritime limits and maritime boundaries would remain fixed even if coastlines and other relevant natural features were changed in the process of submergence by climate change-induced sea level rise. Regarding the maritime limits in particular, a precondition would be that States had deposited relevant charts or lists of geographical coordinates of points, specifying the geodetic datum, with the UN Secretary-General in accordance with, and when required by, UNCLOS.¹² Regarding the protection of persons, the report included the Sydney Declaration on the Protection of Persons in the context of Sea-Level Rise,¹³ focusing on all aspects of human mobility ranging from evacuations and internal displacement through to planned relocations and cross-border migration, as well as important principles to help communities remain in place. The conference endorsed the report and adopted Resolution 5/2018, on maritime limits and boundaries, and Resolution 6/2018, including the Sydney Declaration annexed to it.¹⁴

The Committee's 2022 interim report, prepared for the 80th ILA conference in Lisbon,¹⁵ recounted the impact of its recommendations on the law of the sea in discussions at the UN and regional fora.¹⁶ It also paved the way for the Committee's future work on statehood and the protection of persons in the context

10 'Johannesburg Report' (n 4) 18.

11 'Sydney Report' (n 7).

12 *Ibid.*, 8–25; see United Nations Convention on the Law of the Sea (UNCLOS), 10 December 1982, arts. 16, 47–49, 75, 84. For further discussion see Section 4.1.

13 Sydney Declaration on the Protection of Persons in the context of Sea-Level Rise, annexed to ILA resolution 6/2018 (n 8). This is discussed further in Section 5.1.

14 ILA resolutions 5/2018 and 6/2018 (n 8).

15 'Lisbon Report' (n 7). For a detailed review of the work of the ILA Committee, with a particular focus on the law of the sea segment of its mandate from 2012 until 2022, including the 'Lisbon Report', see: 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' (2022) 37 *International Journal of Marine and Coastal Law*, 673.

16 *Ibid.*, 9 ff.

of sea-level rise. Importantly, the 2022 report introduced the need for a scenario-based approach, discussed in the next section, which was thereafter developed by the Committee in its work on the 2024 final report. The final report of 2024 concluded the work of the Committee and was endorsed by the 81st ILA conference in Athens.¹⁷

3 A Scenario-Based Approach

As noted above, the final phase of the Committee's workplan concerned questions about continuing statehood, potential State transformation and the protection of persons in the context of sea-level rise. Determined to ensure that its deliberations were grounded in concrete scenarios rather than abstract theory, the Committee devised three possible mid-term (2041–60) and long-term (end of the century) scenarios:¹⁸

- **Scenario 1:** States that are able to maintain *substantial parts* of their habitable territory in the mid-term and, possibly, longer-term owing to geomorphological facts (such as topography) or processes (e.g., accretion), or through human interventions (e.g., coastal management, artificial elevation of existing islands);
- **Scenario 2:** States able to maintain *small parts* of their habitable territory as a consequence of geomorphological facts and processes (e.g., existence of elevated atolls; accretion) or through human interventions (e.g., coastal management, artificial elevation of existing islands), allowing for a symbolic presence and, at the same time, able to create special relationships with (an)other State(s) (e.g., confederation, federation, etc.);
- **Scenario 3:** States no longer exercising sovereignty over any *habitable* territory in either the mid-term or the longer-term.¹⁹

The Committee refrained from examining this last scenario as it would have required too many hypothetical assumptions about law and facts in a still rather distant future.²⁰

¹⁷ 'Athens Report' (n 7); ILA resolution 1/2024 (n 8).

¹⁸ Based on the Intergovernmental Panel on Climate Change's characterization of those periods: see 'Athens Report' (n 7) 4, fn 17.

¹⁹ 'Athens Report' (n 7) 4 (citations omitted). For further analysis, see Bruce Burson, Walter Kälin and Jane McAdam, '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' (2021) 4 Yearbook of International Disaster Law, 265.

²⁰ According to the 'Athens Report' (n 7) 40 (citations omitted): 'Only the Maldives and Tuvalu have all of their territory at elevations of less than five meters above present sea

The Committee recognized 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 territory remaining). The relationship 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)'.²¹ As the ILC had acknowledged in its Second Issues Paper, 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'.²²

Accordingly, the ILA Committee examined four interrelated aspects:

- 1) 'scientific data and knowledge on processes and elements underlying the three scenarios, in particular regarding the geomorphological implications for the territories of low-lying SIDS';
- 2) 'overarching principles and objectives of continuing validity important for facing the challenge of sea level rise to statehood of affected States and the rights of affected populations, in particular legal certainty and stability, equity, and international cooperation';
- 3) 'rules and measures to facilitate the safeguarding of statehood in the three scenarios, including both physical and legal measures';
- 4) 'rules and measures to facilitate the safeguarding of the rights of affected persons belonging to, or constituting, the population of the affected low-lying SIDS in the three scenarios'.²³

As regards the protection of affected people, this scenario-based approach enabled a far more concrete and considered analysis of the distribution of rights and obligations over time. The analysis sought to draw attention to the responsibility of individual States by stressing their duty to act locally on a global issue and to deepen and expand human rights,²⁴ while also stressing

levels, while Marshall Islands and Kiribati have, respectively, 99% and 96% of their territory at elevations of less than five meters above present sea levels. (...) Some of those States are already implementing or planning to implement measures to build up islands which might allow them to keep at least a symbolic presence'.

21 Burson, Kälin and McAdam (n 19) 267.

22 International Law Commission (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), UN doc A/CN.4/752 (19 April 2022), para 228 (citations omitted).

23 'Athens Report' (n 7) 4.

24 ILA Committee syllabus (19 November 2022) 2.

States' collective responsibilities to cooperate by offering innovative human mobility options at the domestic, regional and international levels.

4 Safeguarding Statehood

4.1 *Preserving Land Territory*

For the population of affected States, the economic and cultural value of safeguarding its maritime zones may be counterbalanced by the loss of land territory, including if it becomes uninhabitable to the extent that most of its population has to move abroad.²⁵ Preserving land territory is an essential element of safeguarding statehood. In this regard, the Committee identified a series of physical measures that could help to preserve it, including hard defences such as sea walls and wave reduction systems; soft engineering coastal protection measures, including the planting of coastal vegetation (mangroves, etc) and the manipulation of sediment flows; and investments in land reclamation, the artificial raising of existing islands and the construction of new ones.²⁶

While States certainly have a right to preserve their land territory,²⁷ the Committee asked whether they might also have a *duty* to do so, including through international cooperation. Referring to the UN Human Rights Committee's views in *Daniel Billy et al v Australia* (the 'Torres Strait Eight' case)²⁸ and the European Court of Human Rights' judgment in *Budayeva et al v Russia*,²⁹ the ILA Committee concluded that to some extent, such a duty 'can be derived from States' human rights obligation to protect the life, security and health of affected members of their population, guarantees that may require taking physical measures to safeguard territory'.³⁰

25 Although international law does not stipulate a minimum number of members of a State's population: James R Crawford, 'State' in Rüdiger Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law*, vol 1X (Oxford University Press 2012) 478.

26 'Athens Report' (n 7) 17 ff.

27 See Montevideo Convention on Rights and Duties of States, 26 December 1933, art 3, providing that a State has the right, among others, 'to provide for its conservation'.

28 UN Human Rights Committee, *Daniel Billy et al v Australia*, Comm No 624/2019 (views adopted 21 July 2022) para 8.12.

29 European Court of Human Rights, *Budayeva et al v Russia*, App Nos 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02, Judgment, (20 March 2008).

30 'Athens Report' (n 7) 48 (citations omitted).

4.2 *Preserving Maritime Areas under Sovereignty and Sovereign Rights*

International law identifies territory as one of the essential elements of statehood, in addition to a permanent population, a government and the capacity to enter into relations with other States.³¹ Territory – and with it, territorial sovereignty – is a prerequisite for authorities to be able to protect affected people within the borders of their State.

A State's territory under its sovereignty not only comprises its land mass but also internal waters, the territorial sea and, in the case of an archipelagic State, its archipelagic waters,³² and thus consists of areas of land as well as water. This means that the borders of such States are defined by the outer limits of the territorial sea. States can set these limits at a distance of up to 12 nautical miles measured from baselines determined in accordance with UNCLOS. Rising sea levels can erode coastlines and submerge reefs and rocks, causing some base points to disappear while the coastline moves landward, a process resulting in the physical loss of territory.³³ The interpretation that, as a consequence of this physical process, legal baselines are also ambulatory would affect a State's maritime areas, including the exclusive economic zone (EEZ), adjacent to the territorial sea.³⁴ EEZs constitute a potential source of income on which authorities might depend, including to fund adaptation measures necessary to safeguard land territory (section 4.2 below) or to fulfil their positive human rights obligations towards those within their territory.

For archipelagic States, such losses can be very substantial,³⁵ such as when small outer islands are submerged.³⁶ From a climate justice perspective,³⁷ an interpretation that baselines are ambulatory appears highly problematic given that affected low-lying SIDS have contributed the least to global warming. If, however, baselines and outer limits of maritime zones remained fixed regardless of whether original landmarks serving as basepoints disappeared, then

31 Montevideo Convention, art 1.

32 UNCLOS, arts 2(1), 46–54.

33 See 'Johannesburg Report' (n 4) 13.

34 UNCLOS, art 55.

35 Kiribati's territory is comprised of 810km² of land and an exclusive economic zone of 3,550,000km²: Food and Agriculture Organization of the United Nations, 'Fishery and Aquaculture Country Profiles: Kiribati', <<https://www.fao.org/fishery/en/facp/kir>>.

36 This could occur in the later stages of scenario 1 described above, and become acute in scenario 2. See also David Freestone and Clive Schofield, 'Sea Level Rise and Archipelagic States: A Preliminary Risk Assessment' (2021) 35 *Ocean Yearbook*, 340.

37 See e.g. Climate Migration Council, 'Advocating for Change: A Compendium on Climate Mobility' (April 2024) 48 ff.

affected States could safeguard their sea areas even if some or much of their land were submerged.³⁸

Whether and how this would become possible was a focus of the Committee's deliberations throughout its existence and was considered in detail in all its reports.³⁹ For the purposes of the present article, it suffices to highlight the following conclusion in ILA Resolution 5/2018, based on emerging State practice in the Pacific region⁴⁰ and the principles of legal certainty and stability:

on the grounds of legal certainty and stability, provided that the baselines and the outer limits of maritime zones of a coastal or an archipelagic State have been properly determined in accordance with the 1982 Law of the Sea Convention, these baselines and limits should not be required to be recalculated should sea level change affect the geographical reality of the coastline.⁴¹

As a consequence, affected SIDS would be able to safeguard the outer limits of their maritime zones for at least as long as some land territory remained above water.⁴² While recognizing that the law of the sea does not provide a basis for assessing whether or not a State exists, the Committee highlighted that this body of law was still relevant for the statehood of low-lying SIDS because 'the sovereignty of a State extends to the outer limit or boundary of the *territorial sea*' and the statehood criterion of territory 'under international law that has been reflected also in the text of the Montevideo Convention is not limited to the "land territory" but relates to a "defined territory" of a State', which includes the territorial sea 'as a significant component' of it.⁴³

The ILA endorsed⁴⁴ and reaffirmed⁴⁵ the principle that, for reasons of legal certainty and stability, coastal or archipelagic States whose geographical reality is altered by sea-level rise should not be required to recalculate baselines and outer limits of maritime zones provided they are determined and notified to the UN Secretary-General in accordance with UNCLOS.

38 See further Vidas and Freestone (n 15).

39 See also *ibid.*

40 'Sydney Report' (n 7) 16 ff.

41 ILA resolution 5/2018 (n 8).

42 See scenario 2. The Committee decided not to venture into adopting conclusions and proposing solutions *de lege ferenda* once the whole land territory is submerged (scenario 3); see further discussion in 'Athens Report' (n 7) 46–47, 50.

43 'Athens Report' (n 7) 46.

44 ILA resolution 5/2018 (n 8).

45 ILA resolution 1/2024 (n 8).

This approach has already found support among a significant number of States. For instance, in 2019, the leaders of the Pacific Islands Forum declared that they were committed ‘to a collective effort, including to develop international law, with the aim to ensure that once a Forum Member’s maritime zones are delineated in accordance with the 1982 United Nations Convention on the Law of the Sea (UNCLOS), that the Member’s maritime zones could not be challenged or reduced as a result of sea level rise and climate change.’⁴⁶ When the ILC invited States to submit examples of State practice relevant to sea-level rise in relation to the law of the sea, and when the issue was discussed in the UN General Assembly’s Sixth Committee in 2019, a number of States commented positively on the idea of moving away from the view that baselines are ‘ambulatory’ in the context of climate change.⁴⁷

In 2021, the leaders of the Pacific Islands Forum adopted the Declaration on Preserving Maritime Zones in the Face of Climate Change-Related Sea-Level Rise, stating that:

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.⁴⁸

A similar statement was adopted by the Heads of State and Government of the Alliance of Small Island States (AOSIS) later that year.⁴⁹ These positions found support among States participating in late October and early November 2021 in the Sixth Committee debate on the topic of sea level rise and international law and other fora.⁵⁰

In its own intervention in the Sixth Committee in October 2023, New Zealand summarized these developments by highlighting that:

46 Pacific Islands Forum, Kainaiki II Declaration for Urgent Climate Action (2019), para 14.

47 See ‘Lisbon Report’ (n 8) 9–11.

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

49 Alliance of Small Island States Leaders’ Declaration (2021), <<https://www.dropbox.com/s/95vlq1wmn81zn1h/AOSIS%20Leaders'%20Declaration%20-%20in%20the%20face%20of%20Climate%20Change-related%20Sea-level%20rise%20-%202021.doc?e=2&dl=0%3C>>.

50 See ‘Lisbon Report’ (n 8) 15–19.

in the two years since the [2021 Pacific Islands Forum] Declaration was issued *over one hundred states have endorsed the approach* of not updating baselines. This marked support from a wide range of geographically diverse states reinforces the importance of the principles of legal stability and equity that underpin the UN Convention on the Law of the Sea. Preserving maritime zones is important not only for our neighbours in the Pacific but for the international community as a whole.⁵¹

While some States have taken a more cautious approach, and others have not yet taken a position, there is a clear indication of an emerging consensus on the interpretation of relevant provisions of UNCLOS. ILA Resolution 1/2024 therefore endorsed the recommendation by the Committee

that baselines and limits of maritime zones that are in compliance with the Convention [on the Law of the Sea] and deposited with the UN Secretary-General, and have not met with objection by other States, should continue in place even if the territory involved gradually changes as a result of climate change-related impacts including sea level rise in the process or submergence⁵²

and it welcomed its suggestion that accepting this principle, for instance, in the form of a General Assembly resolution, ‘would significantly contribute to facilitating legal certainty concerning the stability of baselines and maritime limits in the context of sea level rise’.⁵³

4.3 *Preserving Population*

The fact that most of the population of affected States may need to move to other States at a later stage does not affect this element of statehood unless, as a consequence, its citizens become stateless. In this regard, the Committee affirmed that ‘statelessness is not primarily a consequence of sea level rise’ but may result ‘from an affected State’s domestic law when its people move abroad’⁵⁴ – for instance, if it restricts the acquisition of citizenship to those

51 Statement by New Zealand, UNGA Sixth Committee, 78th session, 25th meeting (25 October 2023) (emphasis added); see also ‘Athens Report’ (n 7) 43.

52 ‘Athens Report’ (n 7) 47.

53 *Ibid.*, 44.

54 *Ibid.*, 36, referring to Michelle Foster et al, *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).

born on the territory of the affected State or prohibits dual nationality.⁵⁵ ‘Such domestic provisions of an affected State may thus contribute to a rapid decline in the number of its citizens over only a few generations’,⁵⁶ and, in turn, of those enfranchised to vote for the State’s government. For this reason, the Committee recommended that both affected and host States permit dual nationality and absentee voting ‘to help affected States retain a population capable of shaping political life, and thus the exercise of State authority as criteria of statehood, even in conditions of large-scale loss of habitable territory’.⁵⁷

4.4 *Preserving Legal Personality*

Particularly when large swathes of territory have become uninhabitable or submerged (in situations contemplated in scenario 2, above) and there are increasing pressures on the (remaining) population and government capacity, affected States might look for strategies to preserve their interests by gaining access to land on the territory of another State. The Committee identified a series of legal tools that would make this possible.⁵⁸ They range *inter alia* from the acquisition of land in another State based on a treaty that would provide for the transfer of the territorial title – and thus of sovereignty – to the purchasing State,⁵⁹ through to the association with another State⁶⁰ or the creation of a confederation.⁶¹ However, it is difficult to imagine why non-affected States, even if willing to receive members of affected populations, would be interested in sharing, or even relinquishing, sovereignty.

This raises the question whether affected States run the risk of losing their statehood if they can only secure a small piece of land territory that allows for at least the symbolic presence of a small population and governmental actors. While the statehood criteria reflected in the Montevideo Convention

55 ‘Athens Report’ (n 7) 36.

56 *Ibid.* See further Jane McAdam, ‘Preserving Statehood through Population and Government: Safeguarding Nationality and Franchise in the context of Sea-Level Rise and Mobility’ (2022) 20 *New Zealand Yearbook of International Law* 3.

57 ‘Athens Report’ (n 7) 50.

58 *Ibid.*, 20 ff.

59 For example, in 1867, the United States purchased Alaska from the Russian Empire on the basis of a bilateral agreement that provided for the transfer of sovereignty. In contrast, the purchase of land in Fiji by Kiribati was a private property law transfer: see ‘Athens Report’ (n 7) 21.

60 Examples include the compacts of free association of Micronesia, the Marshall Islands and Palau with the United States <<https://www.doi.gov/oia/budget/authorities-public-law>>, and the associations of the Cook Island, Niue and Tokelau with New Zealand.

61 Despite its name, the ‘Australia – Tuvalu Falepili Union’ does not create a confederation <<https://www.dfat.gov.au/geo/tuvalu/australia-tuvalu-falepili-union>>.

are relevant for the creation of a new State, the Committee recognized that ‘international law, while addressing the demise of a State in the context of State succession triggered by political changes, does not explicitly address the particular situation of States’ whose existence is threatened by sea-level rise.⁶² This gap in international law becomes particularly evident when reading article 6 of the Montevideo Convention, which provides that the recognition of one State by another ‘is unconditional and irrevocable’. Relying on this provision, the ILC Study Group suggested that in the case of SIDS whose territory becomes covered by the sea or uninhabitable, ‘a strong presumption in favour of continuing statehood should be considered’.⁶³ The ILA Committee went one step further by recognizing that ‘[t]he principle set out in Article 6 provides for and supports the objective of international law to facilitate legal certainty and stability’;⁶⁴ it also highlighted that the UN Charter would not provide any basis for excluding affected SIDS from UN membership on account of loss of statehood criteria. It recommended that the principle of unconditional and irrevocable recognition of a State

should therefore *be recognized as the key guidance* for addressing the unprecedented challenge faced by low-lying SIDS in a mid- to long-term perspective, when most of their land territory may become uninhabitable or submerged in consequence of sea level rise. In that context, an affected State continues to hold a legitimate claim to its recognition as being unconditional and irrevocable.⁶⁵

This recommendation, endorsed by ILA resolution 1/2024, reflects emerging, albeit still limited, State practice. In October 2023, the United States declared in the UN General Assembly’s Sixth Committee that ‘sea-level rise driven by human-induced climate change should not cause any country to lose its statehood or its membership in the United Nations, its specialized agencies, or other international organizations’.⁶⁶ In November 2023, the leaders of the

62 ‘Athens Report’ (n 7) 14.

63 ILC, ‘Second Issues Paper’ (n 22) para 194.

64 ‘Athens Report’ (n 7) 15.

65 *Ibid* (emphasis added).

66 See Statement by the United States Mission to the United Nations, 24 October 2023 in the UNGA Sixth Committee on Agenda Item 77, <https://www.un.org/en/ga/sixth/78/pdfs/statements/ilc/24mtg_us_1.pdf>; and, for President Biden’s statement, White House, ‘Fact Sheet: Enhancing the U.S.–Pacific Islands Partnership’ (25 September 2023), issued in connection with the US–Pacific Islands Forum meeting held at the White House, Washington DC, 25–26 September 2023 <<https://www.whitehouse.gov/briefing-room>

Pacific Islands Forum adopted the Declaration on the Continuity of Statehood and the Protection of Persons in the Face of Climate Change-related Sea-Level Rise. It highlights international law's 'general presumption that a State, once established, will continue to exist and endure, and maintain its status and effectiveness and that international law does not contemplate the demise of statehood in the context of climate change-related sea-level rise' and affirms that 'the statehood and sovereignty of Members of the Pacific Islands Forum will continue, and the rights and duties inherent thereto will be maintained, notwithstanding the impact of climate change-related sea-level rise'.⁶⁷ While it is too early to conclude that this will become a new rule of international law, it is interesting to see how the popular, if misconceived, notion of the 'sinking island State' has triggered developments in an area of international law that many would have considered settled even a decade or two ago.

5 Protecting Affected People

5.1 *Moving People out of Harm's Way*

In its first interim report,⁶⁸ the ILA Committee expressed concern that current legal instruments do not explicitly address the movement of people across borders either in response to, or in anticipation of, disasters and other climate change-related harms – including evacuations from hazards, displacement, voluntary migration as a longer-term coping strategy, and permanent planned relocations when areas are no longer habitable.⁶⁹

/statements-releases/2023/09/25/fact-sheet-enhancing-the-u-s-pacific-islands-partner-ship/>. For similar opinions expressed by other States, see ILC, 'Sea-Level Rise in relation to International Law: Additional Paper to the Second Issues Paper (2022) by Patrícia Galvão Teles and Juan José Ruda Santolaria, Co-Chairs of the Study Group on Sea-Level Rise in relation to International Law' (9 February 2024) UN doc A/CN.4/774 1, para 26 ff. Other States, such as Chile, France and Malaysia, took a more cautious position (see para 28).

67 2023 Declaration on the Continuity of Statehood and the Protection of Persons in the face of Climate Change-Related Sea-Level Rise (52nd Pacific Islands Forum, November 2023) para 8 <<https://forumsec.org/sites/default/files/2024-02/2023%20PIF%20Declaration%20on%20Statehood%20and%20Protections%20of%20Persons.pdf>>.

68 'Johannesburg Report' (n 4) 25.

69 The term 'human mobility' was used as an umbrella term to cover these different forms of movement.

This interim report⁷⁰ drew on a 2016 background paper on human mobility and the protection of persons.⁷¹ The starting point of this paper was that the relationship between human mobility and climate change, including sea-level rise, is ‘complex and non-linear, and depends on a range of interacting factors.’⁷² As a ‘multi-causal phenomenon in which climate change impacts interact with other economic, social, and political drivers (or stressors) that themselves affect migration,’⁷³ it will often be impossible to discern the role sea-level rise plays in people’s decisions to move. The ILA Committee’s initial approach was thus to identify: (a) gaps in the legal/normative framework concerning both internal and cross-border displacement; (b) operational/practical needs to ensure the protection of human rights of those affected by sea-level rise; and (c) the threshold/content of protected rights.

Building on this, a range of tools required to address the impacts of sea-level rise were identified, both to enable people to remain in their homes, but also to facilitate their movement elsewhere when desired. In short, this requires States to: (a) undertake disaster risk reduction and climate adaptation measures; (b) respond to displacement; (c) facilitate voluntary migration; and (d) consider planned relocations. In all cases, the principles of human dignity and non-discrimination must be paramount.⁷⁴ The final part of the report drew out key areas and principles of international law with the capacity to lend clarity and content to States’ obligations to address the challenges presented by sea-level rise. It concluded that further guidance was needed about how the international community’s collective responsibility to adapt to the impacts of climate change could be translated into more specific obligations, including through further examination of two general principles of international law: the duty to cooperate, and the principle of common but differentiated

70 ‘Johannesburg Report’ (n 4) 18–28: part III: ‘International Law and Sea-level Rise: (Forced) Migration and Human Rights’.

71 This background paper was published by the Fridtjof Nansen Institute (FNI) under the joint auspices of the FNI and the Andrew and Renata Kaldor Centre for International Refugee Law, UNSW: see Jane McAdam et al, ‘International Law and Sea-Level Rise: Forced Migration and Human Rights’ (FNI Report 1/2016, 2016).

72 *Ibid.*, para 48, referring to Walter Kälin, ‘Conceptualising Climate-Induced Displacement’ in Jane McAdam (ed), *Climate Change and Displacement: Multidisciplinary Perspectives* (Hart Publishing, 2010) 82.

73 McAdam et al (n 71) para 48, referring to Foresight, ‘Migration and Global Environmental Change’ (The Government Office for Science, 2011); McAdam (n 6).

74 See e.g. ‘The Nansen Principles’, namely, the recommendations stemming from the Nansen Conference on Climate Change and Displacement in the 21st Century (Oslo, 6–7 June 2011) <https://www.regjeringen.no/globalassets/upload/ud/vedlegg/hum/nansen_prinsipper.pdf>. Principle 1 specifically references human dignity.

responsibilities. Also, elementary considerations of humanity and the concept of human dignity ‘may provide overarching normative concepts to guide the development of strategies to respond to the impacts of sea-level rise, acting as meta-principles guiding necessary conduct.’⁷⁵

Following on from these findings, the Committee’s focus turned to developing a set of principles ‘to provide guidance to States in averting, mitigating, and addressing displacement occurring in the context of sea level rise, based on and derived from relevant international legal provisions, principles, and frameworks’.⁷⁶

The Sydney Declaration on the Protection of Persons in the context of Sea-Level Rise, annexed to ILA Resolution 6/2018, is derived from international human rights law as well as other relevant international legal principles and frameworks, including in the areas of international cooperation, disaster risk management and reduction, and climate change. It both codifies and progressively develops relevant norms of international law relevant to both internal and cross-border ‘human mobility’⁷⁷ in the context of sea-level rise – namely, displacement (which is forced), migration (which is predominantly voluntary), planned relocation (which may be forced or voluntary), and evacuations (which may be forced or voluntary). The Declaration also emphasizes States’ responsibility to respect the right of affected populations to choose their place of residence.

The Committee was well aware of the ILC’s Draft Articles on the Protection of Persons in the Event of Disasters,⁷⁸ and some of the principles in the Sydney Declaration can be understood as a contribution to operationalizing some of the Draft Articles. Thus, Principle 2 on the duty to respect the human rights

75 McAdam et al (n 71) para 122.

76 ‘Sydney Declaration’ (n 13) ‘Purpose’.

77 There is no internationally agreed definition of human mobility, but the notion is increasingly used as an umbrella term covering different forms of such mobility, including in the New York Declaration for Refugees and Migrants, UNGA res 71/1 (19 September 2016) para 3; Sendai Framework for Disaster Risk Reduction 2015–2030, UNGA res 69/283 (23 June 2015) para 30 (1); and UNFCCC Conference of the Parties, Decision 3/CP.18, ‘Approaches to address loss and damage associated with climate change impacts in developing countries that are particularly vulnerable to the adverse effects of climate change to enhance adaptive capacity’, in Report of the Conference of the Parties on its Eighteenth Session, held in Doha from 26 November to 8 December 2012: Addendum: Part Two: Action taken by the Conference of the Parties at its Eighteenth Session, UN doc FCCC/CP/2012/8/Add.1, 22–23, para 7 (a) (vi).

78 See the multiple references in the ‘Sydney Report’ (n 7) to the Draft Articles on the Protection of Persons in the Event of Disasters, adopted by the ILC at its 68th session in 2016 and submitted to the General Assembly as part of the ILC’s report of that session: UNGA Official Records Supp No 10, UN doc A/71/10.

of affected persons concretizes the general obligation of ILC Draft Article 5 to respect and protect the rights of persons affected by disasters by spelling out a series of guarantees that States of origin, transit and destination have to respect and protect. Principle 4 details what the duty to cooperate – enshrined in Draft Article 7 – means specifically in this context. It states that international cooperation between States, and with relevant international organizations and agencies, is required ‘to assist States affected by sea level rise to prevent, avoid, and respond to disaster- and climate change-related risks, including the risk of displacement’. This may include cooperation with respect to disaster risk reduction, climate change adaptation, community resilience-building, evacuations, migration, humanitarian assistance, recovery efforts, durable solutions and technical and financial support.

As the Commentary to the Sydney Declaration notes:

While sea level rise is a challenge for all States, it is poorer States that will be disproportionately affected, with their responsive capacity already hampered by insufficient resources, limited technical and institutional support, and other stressors such as population growth, few educational opportunities, and weak human rights protection. Significantly, it is those Small Island Developing States (SIDS) facing the greatest threats from the impacts of sea level rise which may possess the least domestic responsive capacity, and are thus the greatest potential beneficiaries of enhanced international cooperation. Such States will require support – technical, financial, and operational – to assist and protect their own populations and to respect, protect, and fulfil their human rights obligations.⁷⁹

The Sydney Declaration continues to provide one of the most authoritative statements on the international protection issues that arise in the context of sea-level rise, and it has informed the development of other frameworks, including the 2023 Pacific Regional Framework on Climate Mobility⁸⁰ and the Kaldor Centre Principles on Climate Mobility.⁸¹ The ILC has recognized the Sydney Declaration as an important source of guidance.⁸² It was referred to

79 Commentary to the ‘Sydney Declaration’ (n 13) 54.

80 Pacific Regional Framework on Climate Mobility (52nd Pacific Islands Forum, November 2023) <<https://forumsec.org/sites/default/files/2024-02/Pacific%20Regional%20Framework%20on%20Climate%20Mobility.pdf>>.

81 Jane McAdam and Tamara Wood, ‘Kaldor Centre Principles on Climate Mobility’ (2023) <https://www.unsw.edu.au/content/dam/pdfs/uns-w-adobe-websites/kaldor-centre/2023-11-others/2023-11-Principles-on-Climate-Mobility_v-4_DIGITAL_Singles.pdf>.

82 ILC, ‘Second Issues Paper’ (n 22) para 433; reiterated in ILC, ‘Additional Paper’ (n 66) para 125.

authoritatively in The White House's *Report on the Impact of Climate Change on Migration*,⁸³ and cited extensively by the UN Special Rapporteur on the Human Rights of Internally Displaced Persons in her submission to the Inter-American Court of Human Rights concerning the Advisory Opinion request made by Chile and Colombia on the climate emergency and human rights.⁸⁴

5.2 *Allocating Human Rights Responsibilities between States*

While the Sydney Declaration focused on affected persons as right holders, the Committee's final report in 2024 examined the human rights obligations not only of affected States, but also of States of transit and destination (called 'host States', for the sake of brevity).⁸⁵ As the Committee had pointed out from the start, long before States lose habitable territory, people will need to move; the question was what would happen to their rights, as individuals and communities, if and when they did.

The Committee concluded that an understanding of the dynamics of human mobility was

critical to determine the distribution of human rights obligations between affected States, States that temporarily or permanently receive members of the population of affected States (hereafter host States), and the international community at large. (...) The balance of obligations between affected and host States, as they relate to individuals, can be expected to adjust with changes in the distribution of at-risk populations between them.⁸⁶

Importantly, by emphasizing that 'all persons affected by sea level rise will, at all times, remain rights holders under international human rights law',⁸⁷ the Committee showed that there should never be a human rights vacuum; rather, attention was directed towards the distribution of different States'

83 The White House, 'Report of the Impact of Climate Change on Migration' (October 2021) 23 <<https://www.whitehouse.gov/wp-content/uploads/2021/10/Report-on-the-Impact-of-Climate-Change-on-Migration.pdf>>.

84 Special Rapporteur on the Human Rights of Internally Displaced Persons, 'Response to Request for an Advisory Opinion by the Inter-American Court of Human Rights: Human Mobility and Climate Change' (7 December 2023) <https://corteidh.or.cr/sitios/observaciones/OC-32/8_un_special.pdf>.

85 'Athens Report' (n 7) 27.

86 *Ibid.*

87 'Lisbon Report' (n 7) 38.

legal obligations towards people at different points in time. In this regard, the Committee highlighted that

international human rights law determines at all times who the duty bearers are and, particularly in the context of migration and cross-border displacement, typically regulates the ‘distribution’ of human rights duties and responsibilities between States. (...) States are typically required to respect and protect the rights of persons in any territory under their jurisdiction, which can include foreign territory. Thus, should a State other than the affected State exercise jurisdiction over territory where the persons are located, that State will assume certain obligations towards them. This means that, as a rule, there will be at least one State (...) exercising jurisdiction over persons impacted by sea level rise.⁸⁸

As long as affected States are able to safeguard substantial parts of habitable territory, the allocation of responsibility to respect, protect and fulfil the human rights of the members of their population is weighted towards them. The Committee recognized, however, that due to ‘declining revenues from fishery, or shrinking tax revenues as a result of economic downturns [and] reduced government resources (...) at a time when other pressing climate-related demands (e.g., coastal protection measures) will likely be growing’, the adverse impacts of climate change are likely to undermine the capacity and ability of affected States to protect people from risks to their lives, mental and physical harm, or homes and property, or the enjoyment of their cultural heritage, a duty that according to settled jurisprudence also exists if natural hazards are the cause of harm.⁸⁹ Shrinking governmental capacity will also affect the degree to which authorities are able to take positive action to ensure the realization and enjoyment of economic, social and cultural rights, including the rights to food, water, health and adequate housing at times when coastal erosion and salinization of soil and groundwater increase the needs of affected people.⁹⁰ At the same time, efforts to preserve ‘habitable territory through human intervention, as a means to cope with climate change-related hazard, would be tantamount to partially fulfilling the obligation to protect economic and cultural rights’, not least because the loss of land will ‘jeopardize the right to take part in cultural life, or the cultural component of “home” and “family”, particularly where

88 ‘Athens Report’ (n 7) 27.

89 *Ibid.*, 28 with references to the case law of the European Court of Human Rights and the practice of UN treaty bodies. See *ibid.*, 31 ff for a list of examples.

90 *Ibid.*, 29.

land remains integral to identity and provides intimate connection between the community and ancestors even if it becomes uninhabitable.⁹¹ This recognition of this close relationship between the protection of human rights, including cultural rights, and the need to take measures to preserve land territory (section 4.2 above) was a particularly interesting aspect of the Committee's work.

In order to meet their obligations, affected States will have to request assistance from other States and the international community to the extent that their capacity is undermined by the impacts of sea-level rise.⁹² For their part, other States and the international community, as appropriate, have a responsibility to respond positively to such calls so as to give practical effect to the principle of international cooperation. To be effective, cooperative measures must also be predictable. To ensure both the predictability and effectiveness of cooperation, the Committee noted the importance of increasing the availability of, and facilitating access to, funding and financing in ways that enable affected States to meet their human rights obligations. The Committee also drew attention to different modalities for effecting cooperation, such as bilateral or sub-regional agreements with affected States.⁹³

Importantly, the Committee's work emphasized how the preservation of State capacity to discharge obligations under international human rights law is a critical, but overlooked, dimension of discussions about the continuing statehood of affected States. The key point is that the necessary corollary of such an obligation – in governance terms – is the existence of an apparatus of public administration directed towards the implementation of policies aimed at discharging the obligation to respect protect and fulfil rights. This means that retaining and even strengthening the ability of affected States to meet their human rights obligations is critical, even if some obligations are not able to be discharged in relation to some rights under certain scenarios. What is important is that ensuring the continuing ability of affected States to discharge some obligations in respect of some rights will be a demonstration of their ability to govern and exercise authority – an indicium of statehood.⁹⁴

Cultural rights may assume particular significance in this regard, especially in the Pacific where the misplaced 'sinking island' narrative is focused. If land becomes uninhabitable, this also deprives the physical territory of its cultural significance. Notwithstanding a partial discharge of

91 *Ibid.*, 33 (citations omitted).

92 As envisaged in the International Covenant on Economic, Social and Cultural Rights (ICESCR), 16 December 1966, art 2(1); see 'Athens Report' (n 7) 33.

93 'Athens Report' (n 7) 49.

94 *Ibid.*

the obligation to protect cultural rights by maintaining habitable territory through human intervention, other measures may also be needed to meet the obligation to fulfil where such loss of habitable land has impacted upon the enjoyment by persons of their right to take part in cultural life or the cultural component of 'home' and 'family'.⁹⁵ For indigenous communities, even if land is not habitable, the land itself will remain integral to identity and land provides an intimate connection between the individual, the community and ancestors. Further steps may need to be taken to protect ancestral remains even where land is not habitable. Protecting and fulfilling 'the cultural component of home and family life' will require the ongoing exercise of government authority;⁹⁶ for example, by organizing and conducting temporary returns by some members of the affected population to connect with ancestral land and/or a journey over ancestral waters and fishing grounds. There is also growing recognition of the trauma associated with loss of connection to 'place' in the form of ancestral lands and water and, conversely, the positive mental health benefits associated with connection to 'place'. Facilitating temporary return would, therefore, be a clear discharge of the obligation to ensure the highest attainable standard of mental health under Article 12 of the ICESCR. Thus, even when most or all of the land territory has become uninhabitable (scenario 3), should the governance structure of the affected State be administratively located on the territory of a host State, the discharge of such obligations over the affected State's land territory or maritime areas will be a powerful demonstration of its continued governance capacity.

The Committee's roadmap also charts how, over time, the allocation of responsibility becomes increasingly weighted towards host States – as climate change impacts reach the point where an affected State has lost most of its habitable territory, and most of its population has moved abroad, but it still retains its statehood. This weighting means that the primary responsibility to respect, protect and fulfil the human rights of those affected shifts to the State(s) where people now live. In this regard, the Committee highlighted the rights of members of minorities as enshrined in article 27 of the ICCPR, which are highly relevant if affected communities forced to move to another State become a cultural minority there. In this regard, article 27's prohibition of all forms of coercive integration and assimilation, which aims at ensuring 'the survival and continued development of the cultural, religious and social

95 International Covenant on Civil and Political Rights (ICCPR), 19 December 1966, art 17; ICESCR, art 15.

96 'Athens Report' (n 7) 33.

identity of the minorities concerned',⁹⁷ becomes particularly important. At the same time, the responsibility of the affected State is never fully extinguished for some obligations – such as those related to issues of nationality and voting rights (section 4.3 above) or obligations to respect the rights of those persons who temporarily return to the country of origin, for instance, to visit families or friends. This may raise questions of overlapping jurisdictions.

Overall, according to the Committee, 'the determination of positive measures and the allocation of powers and responsibilities will require agreements between the affected State and the host State receiving members of its population',⁹⁸ as well as support by the international community for States hosting the newcomers permanently to enable them to discharge their own obligations towards the realization of their economic, social and cultural rights.

6 Achievements, Innovations and Influence

6.1 *Contributions to Disaster Law*

Through its formal interventions, as well as from the scholarship stimulated by its work,⁹⁹ the Committee significantly furthered understandings of the relationship between sea-level rise, mobility and statehood, and the role of international law. These understandings have not only contributed to very important developments in the law of the sea (section 4.1 above),¹⁰⁰ but also to international disaster law. The Committee's work sharpened understandings of how obligations under international human rights law may require States to adopt effective disaster risk reduction laws, policies and practices in order to help people stay and exercise their right to choose their place of habitual residence, but also, at times, to move people out of harm's way, whether through evacuations or planned relocations. The Committee's scenario-based approach enabled a more nuanced and meaningful articulation of how, when and where people may move, and the shifting legal relationships as they do. In this way, the work of the Committee importantly contributes to clarifying the meaning of ILC Draft Article 5 on respect for and protection of human rights¹⁰¹

97 UN Human Rights Committee, 'General Comment No 23: Article 27 (Rights of Minorities)' (1994) para 9, cited in 'Athens Report' (n 7) 39.

98 'Athens Report' (n 7) 39.

99 See *Ibid.*, Annex: 'Bibliography: Selected Publications by the Committee Members on Aspects of International Law and Sea Level Rise, Published from 2012 to 2024'.

100 See further Vidas and Freestone (n 15).

101 ILC, 'Report of the International Law Commission: Sixty-Eighth Session' (2 May–10 June and 4 July–12 August 2016), UN doc A/71/10, 13–73. See also Walter Kälin, 'Protection of

as applied to situations of sea-level rise. The same is true for Draft Article 7 on international cooperation.

Indeed, the Committee's short-term, mid-term and long-term methodology, including its scenario-based approach, was a distinguishing feature of its work and a contribution commended by some States.¹⁰² The multidisciplinary expertise of the Committee was instructive in devising realistic scenarios that drew on both scientific and legal insights. Prior to its reports on these aspects, most international legal analysis had focused on an assumed end-point – when States are uninhabitable – rather than the process of movement and the changing nature of legal relationships this may generate over time.¹⁰³

6.2 *Influence on Other Processes*

While difficult to measure, it is undeniable that the Committee's work influenced the development of other initiatives and instruments – and, in turn, was influenced by them. A particular innovation was in viewing affected States' existing international legal personality as an opportunity 'for both interpretation and the progressive development of present international law', rather than the more common starting point 'of whether States can continue to exist even if their territory becomes uninhabitable'.¹⁰⁴ Indeed, as mentioned above, this seems to have influenced the 2023 Pacific Declaration on the Continuity of Statehood and the Protection of Persons in the face of Climate Change-Related Sea-Level Rise, which stressed that 'international law supports a presumption of continuity of statehood and does not contemplate its demise in the context of climate change-related sea-level rise', and that 'the statehood and sovereignty of Members of the Pacific Islands Forum will continue, and the rights and duties inherent thereto will be maintained, notwithstanding the impact of climate change-related sea-level rise'.¹⁰⁵ The ILC has described this instrument as 'a genuine milestone on the subject'.¹⁰⁶

The same is true, as noted above, for the Declaration on Preserving Maritime Zones in the Face of Climate Change-Related Sea-Level Rise, and the Pacific Regional Framework on Climate Mobility. This was not accidental: a number

Victims of Disasters: The "Vertical" Dimension of the Draft Articles on the Protection of Persons in the Event of Disasters' (2018) 1 Yearbook of International Disaster Law 28, 30–32.

102 See 'Athens Report' (n 7) 4 fn 18.

103 This aspect was introduced in the 'Lisbon Report' (n 8) 22–24, drawing on a short background paper prepared on these issues.

104 ILC Committee syllabus (n 24) 3.

105 2023 Declaration on the Continuity of Statehood (n 67) paras 12, 13 (respectively).

106 ILC, 'Additional Paper' (n 66) para 70.

of experts involved in the initial development of these instruments were also members of the ILA Committee.¹⁰⁷

A notable development during the Committee's lifespan was the creation of the ILC Study Group on sea-level rise in relation to international law.¹⁰⁸ Inspired by the ILA Committee's work (and with some cross-over in membership), its Second Issues Paper of April 2022, co-authored by Patrícia Galvão Teles and Juan José Ruda Santolaria,¹⁰⁹ was particularly instructive for the Committee's own deliberations on statehood and the protection of persons – especially its rich compilation of State practice.

Conversely, the ILA Committee's framework and approach had a clear influence on the Study Group's work.¹¹⁰ A whole section of its Second Issues Paper was dedicated to the Committee's consideration of the topic.¹¹¹ In particular, it relied on the Sydney Declaration '[f]or guidance on the applicability and scope of the principles of international cooperation'¹¹² and the principles applicable to the protection of persons affected by sea-level rise.¹¹³ The ILC stated that the ILA's works may 'qualify as "teachings of the most highly qualified publicists"', and that '[t]he term "works" covers not only the final outcomes of the expert bodies but also their work leading up to the final outcome'.¹¹⁴

In early 2024, the ILC issued an additional paper to its Second Issues Paper, noting that it had 'continued to follow closely' the ILA Committee's work.¹¹⁵ Three substantive sections expressly drew on the Committee's (then forthcoming) final report: (i) 'General human rights obligations – including with regard to civil, political, economic, social and cultural rights – in the context of the protection of persons affected by sea-level rise';¹¹⁶ (ii) 'Different human rights duties and different human rights duty bearers in the context

107 The final adopted texts, however, went through a process of political discussion and were ultimately endorsed by political leaders. As such, they represent the consensus of governments in the Pacific region.

108 The ILC included the topic in its long-term work programme in 2018, and inscribed it in its work programme in 2019, creating an open-ended Study Group <https://legal.un.org/ilc/summaries/8_g.shtml>.

109 ILC, 'Second Issues Paper' (n 22).

110 For our analysis of its work, see Burson, Kälin and McAdam (n 19).

111 ILC, 'Second Issues Paper' (n 22) paras 52–59.

112 ILC, 'Report of the International Law Commission Seventy-Third Session' (18 April–3 June and 4 July–5 August 2022), UN doc A/77/10, 337.

113 ILC, 'Second Issues Paper' (n 22) para 433; reiterated in ILC, 'Additional Paper' (n 66) para 125.

114 ILC (n 112) 46 (citations omitted).

115 ILC, Additional Paper (n 66) para 68.

116 *Ibid.*, paras 199–211.

of sea-level rise’;¹¹⁷ and (iii) ‘Principle of international cooperation as key to ensuring the protection of persons affected by sea-level rise’.¹¹⁸ The approach to questions of statelessness and nationality also reflected views expressed by the Committee.¹¹⁹

It remains to be seen whether and to what extent the work of the Committee will become relevant for the forthcoming advisory opinions of the International Court of Justice and the Inter-American Court of Human Rights. The UN General Assembly resolution requesting an Advisory Opinion from the International Court of Justice on States’ obligations with respect to climate change does not specifically raise displacement. However, risks to the rights to life, culture and self-determination, for instance, may be impacted or amplified by displacement, and ‘the questions posed to the court are sufficiently broad to enable it to undertake a more explicit analysis of States’ obligations to avert, minimize and address displacement in this context if it so wishes’.¹²⁰ In particular, a preambular paragraph to the resolution states that countries ‘particularly vulnerable to the adverse effects of climate change’, including ‘small island developing States’, are already experiencing increased ‘drought and extreme weather events, land loss and degradation, sea level rise, coastal erosion, ocean acidification and the retreat of mountain glaciers, *leading to displacement of affected persons* and further threatening food security, water availability and livelihoods’,¹²¹ opening up the possibility for displacement (and specifically in the context of sea-level rise) to be considered. Also, the question of loss and damage, mentioned twice in the resolution’s preambular paragraphs, could enable analysis of States’ legal obligations with respect to averting, minimizing and addressing displacement. Ultimately, whether,

117 *Ibid.*, paras 212–21.

118 *Ibid.*, paras 271–84.

119 *Ibid.*, para 269.

120 Jane McAdam, ‘How the ICJ Could Shape Protection for People Displaced in the Context of Climate Change’, *Researching Internal Displacement* (24 January 2024) <https://researchinginternaldisplacement.org/short_pieces/how-the-icj-could-shape-protection-for-people-displaced-in-the-context-of-climate-change/>.

121 Request for an Advisory Opinion of the International Court of Justice on the Obligations of States in respect of Climate Change (adopted 29 March 2023), UN doc A/77/L.58 (emphasis added) <<https://www.icj-cij.org/sites/default/files/case-related/187/187-20230630-req-03-00-en.pdf>>. McAdam (n 120) notes that: ‘The characterization of climate impacts as “leading to displacement” is somewhat unfortunate in that it suggests a direct causal link is necessary. Drivers of movement in this context are “complex and multifaceted”. Accordingly, the relevant issue is to understand how climate change interacts with and amplifies other social, economic, cultural and political factors, thereby increasing risks, vulnerabilities and exposure to rights violations’.

and how extensively, the court examines displacement may depend on States' own submissions on this point.

The request for an Advisory Opinion on the Climate Emergency and Human Rights submitted by Colombia and Chile to the Inter-American Court of Human Rights in January 2023¹²² directly addresses the issue of human mobility. The request recognizes that the climate crisis is having a greater impact on some regions and populations, including the Caribbean, island and coastal countries and their populations and asks how the obligations of cooperation between States should be interpreted in this regard. It also requests the Court to clarify which obligations and principles should guide measures to be taken individually or collectively by States in the region to address non-voluntary human mobility exacerbated by the climate emergency. These are questions where the work of the Committee could become directly relevant.

7 Conclusion

From the ILA Committee's inception, the objective of facilitating legal certainty and stability was central to its approach.¹²³ Through its proposals for the progressive development of international law in relation to maritime zones, statehood and the protection of affected persons, it made a significant contribution to knowledge and legal understanding. The Committee's comprehensive, multidisciplinary analysis of the possible impacts of sea-level rise – and, in particular, its scenario-based approach – facilitated a deeper and more nuanced analysis of changing legal relationships and responsibilities over time. It may be expected that its methodologies and findings will continue to influence jurisprudence, scholarship and State practice into the future.

122 Available at <https://www.corteidh.or.cr/docs/opiniones/soc_1_2023_es.pdf>.

123 'Athens Report' (n 7) 7.