Sea-level rise and submerged land territory: A study of the legal establishment of substitute artificial islands to sustain statehood and maritime zones of Small Island Developing States

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SEA-LEVEL RISE AND SUBMERGED LAND TERRITORY: A STUDY OF THE LEGAL ESTABLISHMENT OF SUBSTITUTE ARTIFICIAL ISLANDS TO SUSTAIN STATEHOOD AND MARITIME ZONES OF SMALL ISLAND DEVELOPING STATES

A THESIS

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ABSTRACT

Climate change and its consequence of rising sea levels threaten the existence of many Small Island Developing States (SIDS) across the globe. Sea-levels are rising at an inordinate pace, and international law has not yet adapted to mitigate the effects thereof.

SIDS are particularly vulnerable to the effects of sea-level rise as a result of their remote locations and low-lying island composition. As such, SIDS may become uninhabitable or wholly submerged within the century. Therefore, SIDS are currently fighting for survival physically and legally. The extinction of SIDS by way of rising sea levels is an eventuality we have not seen in international law, and as such, no precedent exists for this situation. A physical remedy exists for the survival of SIDS, including the creation of artificial islands to house their population so that they are more resilient to rising sea levels. However, this physical remedy does not account for the legal consequences of sea-level rise for SIDS under international law.

Sea-level rise presents challenges for SIDS within international law that include (i) continuity of statehood, (ii) the maintenance of maritime zones and the outer limits thereof, and (iii) the use of artificial islands as substitute island territory. These three issues, transversing international law and the law of the sea, are the focal points of this study. These issues are analysed to determine whether SIDS may maintain their statehood and maritime zones despite submerging island territory. The study then examines the legality of using artificial islands to substitute submerged natural island territory.

The study concludes by proposing a new negotiating text for a Convention that establishes substitute artificial islands in place of submerged or uninhabitable island territory and the maintenance of statehood and maritime zones despite rising sea levels. This recommendation is based upon the understanding that certainty and stability of SIDS in international law is in the interests of fairness and equity.

DECLARATION

I, the undersigned declare in terms of rule DR9(a) of the College Handbook that:

1. The research reported in this thesis, except where otherwise indicated, is my original research.
2. This thesis has not been submitted for any degree or examination at any other university.
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LIST OF ABBREVIATIONS

Abbreviation	Definition
AIS	Artificial islands, installations and structures
AOSIS	Alliance of Small Island Developing States
CLCS	Commission on the Limits of the Continental Shelf
COSIS	Commission on Small Island States on Climate Change and International Law
EEZ	Exclusive economic zone
EU	European Union
GCF	Green Climate Fund
GDP	Gross Domestic Profit
GMSL	Global Mean Sea Level
HAT	Highest Astronomical Tide
HW	Highest Water
ICC	International Criminal Court
ICJ	International Court of Justice
IHO	International Hydrographic Office
ILA	International Law Association
ILC	International Law Commission
IMF	International Monetary Fund
IPCC	Intergovernmental Panel on Climate Change
ITLOS	International Tribunal on the Law of the Sea
LDC	Least Developed Country
LTE	Low-tide elevation(s)
MSL	Mean Sea Level

PIF	Pacific Island Framework
SIDS	Small island developing State(s)
SLRC	Committee on International Law and Sea Level Rise (ILA)
TWAIL	Third World Approach to International Law
UK	United Kingdom
UN	United Nations
UNCLOS	United Nations Convention on the Law of the Sea
UNFCCC	United Nations Framework Convention on Climate Change
UNGA	United Nations General Assembly
USA	United States of America
USD	United States Dollar

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CHAPTER ONE

Introduction

1. Opening

Climate change is occurring worldwide, and no single nation is exempt from experiencing its devastating effects. Whilst we have only started to see significant changes more recently, scientists have been concerned about the possibility of widespread changes to the climate since the 1980s. As early as 1988, the Intergovernmental Panel on Climate Change (IPCC) was established to regularly assess the current knowledge base on changes to the climate.[1] The establishment of the IPCC followed a United Nations General Assembly (UNGA) Resolution that highlighted concerns relating to emerging evidence that human activities could affect climate patterns worldwide and, as such, could threaten future generations.[2] It was highlighted as early as 6 December 1988 that 'atmospheric concentrations of "greenhouse" gases could produce global warming', which would eventually result in rising sea levels with the potential to cause catastrophic effects for humanity.[3] The first report of the IPCC was published in 1990, highlighting that human activities have increased atmospheric concentrations of greenhouse gases, resulting in the warming of the Earth's surface and the natural greenhouse effect that keeps the earth warm naturally.[4] The earlier reports of the IPCC, including the 1990-1995[5] reports, were criticised for being limited in their worldview with emphasised inequality between both the global South and the North.[6] However, later reports addressed these critiques by including a more inclusive scenario design process and adding researchers and stakeholders from developing countries to develop more inclusive scenarios.[7] For instance, the 1996 report

[1] 'History' *IPCC* available at *https://www.ipcc.ch/about/history/* (accessed 17 January 2023).
[2] UNGA, Forty-third Session, Resolutions adopted on the reports of the Second Committee, Seventieth Plenary Meeting, U.N. Doc A/43/755, 6 December 1988.
[3] *Ibid*.
[4] IPCC, 1990: *Climate Change: The IPCC Scientific Assessment* [JT Houghton, GJ Jenkins, JJ Ephraums] Cambridge University Press, Cambridge, United Kingdom and New York, NY, USA X1.
[5] IPCC, 1990 and 1992: *Climate Change: The and 1992 IPCC Assessments IPCC First Assessment Report Overview and Policymaker Summaries and IPCC Supplement* Intergovernmental Panel on Climate Change, Canada.
IPCC, 1994 – J.T. Houghton, L.G. Meira Filho, J. Bruce, Hoesung Lee, B.A. Callander, E. Haites, N. Harris and K. Maskell (Eds.) Cambridge University Press, UK. pp 339
IPCC, 1995. Climate Change 1995: Economic and Social Dimensions of Climate Change. Contribution of Working Group III. Cambridge, England & Melbourne, Australia.
[6] JTS Pedersen, D van Vuuren, J Gupta, FD Santos, J Edmonds, R Swart 'IPCC emission scenarios: How did critique affect their quality and relevance 1990-2022?' 75 (2022) *Global Environmental Change* 6.
[7] *Ibid* 6.

of the IPCC included researchers and stakeholders from developing countries.[8] Over time, the IPCC appears to have been receptive to criticism, which has only made the subsequent studies more inclusive and accurate. Whilst additional criticisms may likely be levied against the IPCC reports, the work of the IPCC is important and continuously improving. In 2001, the IPCC highlighted the impacts of climate change and the need for adaptation in their impacts, adaptation and vulnerability report.[9] The report indicated that regional changes to the climate, with specific emphasis on the increase in temperatures, were already affecting biological and physical systems worldwide.[10]

From melting glaciers to weather pattern changes and even shifts in plant and animal ranges, scientists from all over the globe are presently reporting the effects of climate change.[11] Climate change is an issue that should be gaining the utmost respect and attention from politicians, scientists, conservationists, and policymakers worldwide. While climate change is on the agenda of the United Nations (UN) and many States worldwide, action has not been swift enough to mitigate humans' effects on the climate. Former UN Climate Change Executive Secretary Patricia Espinosa noted that governments must act more ambitiously nationally to create climate action plans.[12] The Former Executive Secretary stated that 'everyone, across all walks of life, needs to understand the causes and impacts of climate change and be educated and empowered to contribute to the solutions.'[13]

Many people discuss climate change interchangeably with the issue of global warming. However, it is important to indicate from the outset that climate change is a wide-ranging term for changes that are being observed worldwide in the climate. Therefore, climate change is much broader than global warming; the latter encompasses the prolonged warming of the earth's average temperatures, arguably a consequence of climate change.[14] The IPCC defines global warming as:

[8] IPCC, 1996. Report of the Twelfth Session of the IPCC. Mexico City, 11-13 September 1996.
[9] IPCC, 2001: *Climate Change 2001 Impacts, Adaptation, and Vulnerability* [JJ McCarthy, OF Canziani, NA Leary, DJ Dokken, KS White] Cambridge University Press, Cambridge, United Kingdom and New York, NY, USA 3.
[10] *Ibid*.
[11] 'The Effects of Climate Change' *NASA, Global Climate Change, Vital Signs of the Planet* available at *https://climate.nasa.gov/effects/*, (accessed 1 June 2020).
[12] 'More Ambitious Climate Plans Needed Ahead of COP27' *United Nations Climate Speech* available at *https://unfccc.int/news/more-ambitious-climate-plans-needed-ahead-of-cop27*, (accessed 28 February 2022).
[13] *Ibid*.
[14] 'Overview: Weather, Global Warming and Climate' *NASA, Global Climate Change, Vital Signs of the Planet* available at *https://climate.nasa.gov/resources/global-warming-vs-climate-change/*, (accessed 1 June 2020).

> '… the increase in global surface temperature relative to a baseline reference period, averaging over a period sufficient to remove interannual variations (e.g., 20 or 30 years). A common choice for the baseline is 1850–1900 (the earliest period of reliable observations with sufficient geographic coverage), with more modern baselines used depending upon the application.'[15]

To juxtapose the definition of global warming, we will review the definition of climate change in order to clarify the concept for the purposes of this study.

1.1 Defining Climate Change

Climate change covers various changes to the earth's average weather patterns, including the many effects directly attributed to these changes.[16] To define climate change, we must look to the United Nations Framework Convention on Climate Change[17] (UNFCCC) Article 1, which describes it as:

> 'a change of climate which is attributed directly or indirectly to human activity that alters the composition of the global atmosphere and which is, in addition to natural climate variability, observed over comparable time periods.'[18]

Whilst the UNFCCC provides a starting point, it is not the only current definition of climate change relevant to this study. The IPCC gives us a more comprehensive definition, which is articulated in the Climate Change 2023: Synthesis Report as follows:

> 'A change in the state of the climate that can be identified (e.g., by using statistical tests) by changes in the mean and/or the variability of its properties and that persists for an extended period, typically decades or longer. Climate change may be due to natural internal processes or external forcings such as modulations of the solar cycles, volcanic eruptions and persistent anthropogenic changes in the composition of the atmosphere or in land use.'.[19]

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[15] IPCC, 2022: Annex I: Glossary [van Diemen, R., J.B.R. Matthews, V. Möller, J.S. Fuglestvedt, V. Masson-Delmotte, C. Méndez, A. Reisinger, S. Semenov (eds)]. In IPCC, 2022: Climate Change 2022: Mitigation of Climate Change. Contribution of Working Group III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change [P.R. Shukla, J. Skea, R. Slade, A. Al Khourdajie, R. van Diemen, D. McCollum, M. Pathak, S. Some, P. Vyas, R. Fradera, M. Belkacemi, A. Hasija, G. Lisboa, S. Luz, J. Malley, (eds.)]. Cambridge University Press, Cambridge, UK and New York, 1803.

[16] NASA, Global Climate Change, Vital Signs of the Planet (note 14 above).

[17] United Nations Framework Convention on Climate Change, Date of Adoption 9 May 1992, UNTS 107, (entered into force 21 March 1994).

[18] UNFCCC, Article 1, Paragraph 2.

[19] IPCC, 2023: Annex I. In: Climate Change 2023: Synthesis Report. Contribution of Working Groups I, II and III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change [Core Writing Team, H.

The difficulty humanity faces is that human-induced climate change is happening considerably fast in conjunction with natural changes to the climate.[20] It is essential to highlight that changes to the environment have continually occurred naturally; however, the sheer rate at which humans are affecting changes to the climate has provided a significant cause for concern. Climate change is not a new phenomenon, but its consequences have only recently been realised.[21] Some of the changes that we are witnessing will be irreversible for decades.[22]

1.2 The Consequences of Climate Change For SIDS

Coastal and island States are considered especially vulnerable to some of the unique effects of climate change along their coastlines. For this reason, they were the subject of a unique study by the IPCC on the ocean and cryosphere in 2019.[23] The ocean, cryosphere and sea level change additionally received analysis in chapter 9 of the 2021 IPCC report,[24] and Small Islands received attention in chapter 15 of the 2022 IPCC report due to their increased vulnerabilities to the changing climate.[25] These States face the coastal-specific effects of climate change, such as sea-level rise, increased occurrence of tropical cyclones, more intense rainfall with the flooding of the coastal cities, increase in damage as a result of flooding, and the possibility of more than a billion people at risk of coastal-specific climate-related hazards as early as 2050.[26]

Lee and J. Romero (eds.)]. IPCC, Geneva, Switzerland, pp. 35-115, doi: 10.59327/IPCC/AR6-9789291691647 122.

[20] IPCC, 2021: Summary for Policymakers. In: Climate Change 2021: The Physical Science Basis. Contribution of Working Group I to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change [Masson-Delmotte, V., P. Zhai, A. Pirani, S.L. Connors, C. Péan, S. Berger, N. Caud, Y. Chen, L. Goldfarb, M.I. Gomis, M. Huang, K. Leitzell, E. Lonnoy, J.B.R. Matthews, T.K. Maycock, T. Waterfield, O. Yelekçi, R. Yu, and B. Zhou (eds.)]. Cambridge University Press, Cambridge, United Kingdom and New York, NY, USA, 21.

[21] *Ibid* 21.

[22] *Ibid* 21.

[23] IPCC, 2019: IPCC Special Report on the Ocean and Cryosphere in a Changing Climate [H.-O. Pörtner, D.C. Roberts, V. Masson-Delmotte, P. Zhai, M. Tignor, E. Poloczanska, K. Mintenbeck, A. Alegría, M. Nicolai, A. Okem, J. Petzold, B. Rama, N.M. Weyer (eds.)]. Cambridge University Press, Cambridge, UK and New York, NY, USA

[24] IPCC. 2021: Chapter 9 Ocean, Cryosphere and Sea Level Change. In IPCC, 2021: Climate Change 2021: The Physical Science Basis. Contribution of Working Group I to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change [Masson-Delmotte, V., P. Zhai, A. Pirani, S.L. Connors, C. Péan, S. Berger, N. Caud, Y. Chen, L. Goldfarb, M.I. Gomis, M. Huang, K. Leitzell, E. Lonnoy, J.B.R. Matthews, T.K. Maycock, T. Waterfield, O. Yelekçi, R. Yu, and B. Zhou (eds.)]. Cambridge University Press, Cambridge, United Kingdom and New York, NY, USA.

[25] IPCC, 2022: Climate Change 2022: Impacts, Adaptation and Vulnerability. Contribution of Working Group II to the Sixth Assessment Report of the
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[26] IPCC, 2022: Chapter 6 Cities, Settlements and Key Infrastructure. In IPCC, 2022: Climate Change 2022: Impacts, Adaptation and Vulnerability. Contribution of Working Group II to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change [H.-O. Pörtner, D.C. Roberts, M. Tignor, E.S. Poloczanska, K. Mintenbeck, A. Alegría, M. Craig, S. Langsdorf, S. Löschke, V. Möller, A. Okem, B. Rama (eds.)]. Cambridge University Press. Cambridge University Press, Cambridge, UK and New York, NY, USA.

Changes to the ocean and cryosphere may, in some instances, have already resulted in damage to essential services, including sanitation, energy, and transportation networks, the risks associated with fisheries, a decline in tourism, and the loss of cultural heritage.[27] The IPCC has stated that during the twentieth century, sea levels rose faster than any century over the last three millennia.[28] The most significant contributor to the Global Mean Sea Level (GMSL) over 2006 – 2018 has been the thermal expansion of the ocean and the loss of mass from glaciers.[29] The exact amount that sea levels are projected to rise is uncertain, but it is estimated that sea levels may rise between 0.28 – 1.02m depending on emission pathways.[30] However, the IPCC estimates are considered conservative due to the nature of the study and the number of scientists involved.[31]

It is estimated that 680 million people reside in coastal areas that are currently low-lying, and it is further asserted that the number of people living within these areas may increase to one billion by 2050.[32] Of these 680 million people, 65 million reside within SIDS.[33] Sea-level rise affects some communities within these low-lying coastal and island States daily. Whilst sea-level rise in the range of one metre would be problematic for many SIDS, perhaps the most concerning aspect highlighted within the latest reports from the IPCC is the predicted increase in 'extreme sea level events' in addition to rising sea levels.[34] Extreme sea level events include extreme changes in sea surface height, including both exceptionally low or high local sea surface, widespread flooding, typhoons, and tropical cyclones, amongst other aspects.[35] It is

[27] IPCC, 2019: Chapter 1 Framing and Context of the Report. In IPCC, 2019: IPCC Special Report on the Ocean and Cryosphere in a Changing Climate [H.-O. Pörtner, D.C. Roberts, V. Masson-Delmotte, P. Zhai, M. Tignor, E. Poloczanska, K. Mintenbeck, A. Alegría, M. Nicolai, A. Okem, J. Petzold, B. Rama, N.M. Weyer (eds.)]. Cambridge University Press, Cambridge, UK and New York, NY, USA 89 & 92.
[28] IPCC, 2021: Chapter 9 Ocean, Cryosphere and Sea Level Change. In IPCC, 2021: Climate Change 2021: The Physical Science Basis. Contribution of Working Group I to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change [Masson-Delmotte, V., P. Zhai, A. Pirani, S.L. Connors, C. Péan, S. Berger, N. Caud, Y. Chen, L. Goldfarb, M.I. Gomis, M. Huang, K. Leitzell, E. Lonnoy, J.B.R. Matthews, T.K. Maycock, T. Waterfield, O. Yelekçi, R. Yu, and B. Zhou (eds.)]. Cambridge University Press, Cambridge, United Kingdom and New York, NY, USA.
1216.
[29] *Ibid* 1216.
[30] IPCC, 2021: Chapter 3 Oceans, Ecosystems and Their Services. In IPCC, 2021: Climate Change 2021: The Physical Science Basis. Contribution of Working Group I to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change [Masson-Delmotte, V., P. Zhai, A. Pirani, S.L. Connors, C. Péan, S. Berger, N. Caud, Y. Chen, L. Goldfarb, M.I. Gomis, M. Huang, K. Leitzell, E. Lonnoy, J.B.R. Matthews, T.K. Maycock, T. Waterfield, O. Yelekçi, R. Yu, and B. Zhou (eds.)]. Cambridge University Press, Cambridge, United Kingdom and New York, NY, USA, 394.
[31] Garner AJ *et al* 'Evolution of 21st Century Sea-level rise Projections' (2018) 6 (11) *Earth's Future* para 4.
[32] IPCC, 2019: Chapter 1 Framing and Context of the Report (note 27) 77.
[33] *Ibid* 77.
[34] *Ibid* 77.
[35] IPCC, 2021: Chapter 9 Ocean, Cryosphere, and Sea Level Change. In IPCC, 2021: Climate Change 2021: The Physical Science Basis. Contribution of Working Group I to the Sixth Assessment Report of the Intergovernmental

estimated that extreme sea level events that have historically occurred once within a century will start to occur at least once per annum in numerous locations by the end of the century, regardless of any reductions in emissions worldwide.[36] Additionally, extreme sea-level events may occur annually by 2050 at some locations worldwide.[37]

SIDS are the most vulnerable to the effects of changes in the climate.[38] The SIDS comprise the following in the Indian Ocean region: Comoros, Republic of the Maldives (Maldives), Republic of Mauritius (Mauritius), Republic of Seychelles (Seychelles), Republic of Singapore (Singapore), Democratic Republic of Timor-Leste (Timor-Leste); in the Atlantic Ocean region: Antigua and Barbuda, Commonwealth of The Bahamas (Bahamas), Barbados, Belize, Republic of Cabo Verde (Cabo Verde), Republic of Cuba (Cuba), Dominica, Dominican Republic, Grenada, Guinea-Bissau, Guyana, Haiti, São Tomé and Príncipe, St Kitts and Nevis, St Lucia, St Vincent and the Grenadines, Suriname, and Trinidad and Tobago; and in the Pacific Ocean region: Republic of Fiji (Fiji), Republic of Kiribati (Kiribati), Republic of Marshall Islands (Marshall Islands), Federated States of Micronesia, Republic of Nauru (Nauru), Republic of Palau (Palau), Republic of Papua New Guinea (Papua New Guinea), Independent State of Samoa (Samoa), Republic of Soloman Islands (Soloman Islands), Republic of Tonga (Tonga), Tuvalu, and Republic of Vanuatu (Vanuatu).[39] These States face the everyday challenges[40] caused by the adverse effects of climate change and the added difficulties attributed to the coastal location of SIDS, such as rising sea levels.[41] Below, we will focus on three SIDS: Tuvalu, Kiribati, and the Maldives. These States are extraordinarily vulnerable to the effects of climate change and were highlighted in the 2019 Special Report on the Ocean and Cryosphere by the IPCC as examples of atolls under threat.[42] These States possess land

Panel on Climate Change [Masson-Delmotte, V., P. Zhai, A. Pirani, S.L. Connors, C. Péan, S. Berger, N. Caud, Y. Chen, L. Goldfarb, M.I. Gomis, M. Huang, K. Leitzell, E. Lonnoy, J.B.R. Matthews, T.K. Maycock, T. Waterfield, O. Yelekçi, R. Yu, and B. Zhou (eds.)]. Cambridge University Press, Cambridge, United Kingdom and New York, NY, USA 1309.

[36] *Ibid* 1312.

[37] *Ibid* 1312.

[38] I Kelman, J West 'Climate Change and Small Developing States: A Critical Review' (2009) 5(1) *Ecological and Environmental Anthropology* 7.

[39] 'List of SIDS' *United Nations* available at *https://www.un.org/ohrlls/content/list-sids* (accessed 1 December 2021).

[40] See section 1.2 above where the general consequences of climate change for SIDS are discussed.

[41] See section 2. Below where the 'An Introduction to the Specific Issues Being Faced by SIDS' which discusses some of the SIDS and the specific challenges that are being by SIDS specifically.

[42] IPCC, 2019: Chapter 4: Sea Level Rise and Implications for Low-Lying Islands, Coasts and Communities. In IPCC, 2019: IPCC Special Report on the Ocean and Cryosphere in a Changing Climate [H.-O. Pörtner, D.C. Roberts, V. Masson-Delmotte, P. Zhai, M. Tignor, E. Poloczanska, K. Mintenbeck, A. Alegría, M. Nicolai, A. Okem, J. Petzold, B. Rama, N.M. Weyer (eds.)]. Cambridge University Press, Cambridge, UK and New York, NY, USA 383.

territory less than four metres above sea level.[43] Additionally, these States are determined to raise awareness of the effects of climate change, with their governments often making bold statements on the issue, as will be discussed below.

The Maldives is a SIDS in the Indian Ocean with coral atolls between one and one and a half metres above sea level; as a result, climate change and rising sea levels pose a grave threat to this State.[44] The Maldives is one of the flattest countries in the world, with roughly 80% of its land territory less than one metre above sea level.[45] Former President of the Maldives, President Mohamed Nasheed, is considered a champion of the earth and has received global recognition for his efforts.[46] He addressed the General Assembly of the UN in September of 2009, urging leaders across the world to work together to reach an agreement to limit the global temperature increase to below one and a half degrees and noted that '…to do otherwise would be to sign the death warrant for the 300 000 Maldivians.'[47] The Former President also held an underwater meeting of his cabinet on the ocean floor to illustrate the real threats facing the Maldives.[48]

Kiribati in the Pacific Ocean has already seen the submergence of two islands due to rising sea levels.[49] Former President Tong of Kiribati delivered a keynote address during the 106th Session of the Council of the International Organisation for Migration. This speech provided insight into the harsh reality facing Kiribati and its people at present. He opened his address with the following forewarning:

> 'For low-lying atoll island nations like my country, climate change is an issue of survival with the very real possibility of our nation disappearing under the ocean within the century. What I want to share with you is that even before that happens, we are already experiencing extreme high tides, and more severe storms on an unprecedented magnitude. Damage to homes, severe inundation of the coastline, and consequent damage to food crops and portable water, are now

[43] *Ibid 383.*
[44] D Caron 'When Law Makes Climate Change Worse: Rethinking the Law of Baselines in Light of a Rising Sea level' (1990) 17 *Ecology Law Quarterly* at 628; C Schofield 'Shifting Limits? Sea-level rise and Options to Secure Maritime Jurisdictional Claims' (2009) 4 *Carbon and Climate Law Review* 406.
[45] World Bank Group, Asian Development Bank 'Climate Risk Country Profile Maldives' (2021) available at <https://climateknowledgeportal.worldbank.org/sites/default/files/2021-08/15649-WB_Maldives%20Country%20Profile-WEB.pdf (accessed 21 May 2023).
[46] 'H.E Mohamed Nasheed – Policy Leadership' *UN Environment programme* available at <https://www.unep.org/championsofearth/es/node/199> accessed 11 December 2022.
[47] The President's Office, Republic of Maldives 'Address by His Excellency President Nasheed at the United Nations General Assembly' available at *https://presidency.gov.mv/Press/Article/1769?term=4* (accessed 21 May 2023).
[48] 'H.E Mohamed Nasheed – Policy Leadership' *UN Environment programme* (note 46 above).
[49] J Kelley 'Climate Change and Small Island States: Adrift in a Raising Sea of Legal Uncertainty' (2011) *Sustainable Law & Policy* 56.

becoming even more frequent events. Relocation must therefore become part of our strategy for adaptation.'[50]

The Former President further indicated that part of Kiribati's climate mitigation plan is to prepare their people for relocation by upskilling them so that they may be able to provide vital skills to other countries where they may resettle.[51] It is said that many of Kiribati's islands can no longer support populations as there is not enough drinkable water available to support human habitation due to rising sea levels.[52] Despite these challenges, many of the people of Kiribati do not wish to leave the State, as they have highlighted the 'strong ties' they have with their land.[53] The government of Kiribati has purchased freehold land within the country of Fiji, which is currently used to create food security for the State.[54] This freehold land has not been ruled out as a possible location for the migration of their population on a small scale.[55]

Tuvalu is described by its President, Apisai Ielemia, as a coral atoll SIDS within the South Pacific that shares close ties to its marine environment, with fish being the most significant protein source for the people living there.[56] The Atoll State generally has a low elevation, but the nation's plight may be explained by using the island of South Tarawa as an example. South Tarawa's settlements are less than 1.80 metres above sea level, with critical infrastructure in flood-prone areas.[57] Salinisation is affecting groundwater, which makes access to water sources that are fit for human consumption and agriculture a considerable risk to the people residing in South Tarawa.[58] The IPCC estimates that GMSL in the region of 43cm would have a devastating effect on South Tarawa, which the warming and acidification of the ocean may also exacerbate.[59] Within this region, coastal erosion is also considered to be of significant concern.[60] Tuvalu's leadership has actively advocated for more robust measures to be taken against climate change. At the 26th UN Climate Change Conference of the Parties (COP26),

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[50] 'Keynote Address on the Second Day of the 106th Session of the IOM's Council' *IOM – UN Migration* 26 November 2015 available at <https://www.youtube.com/watch?v=rqrTOui2Bk0>, accessed 28 December 2019.
[51] Ibid.
[52] C Schofield D Freestone 'Options to protect coastlines and secure maritime jurisdictional claims in the face of global sea-level rise' 2013 *Faculty of Law, Humanities and the Arts – Papers* 6.
[53] E Hermann and W Kempf 'Climate Change and the Imagining of Migration: Emerging Discourses on Kiribati's Land Purchase in Fiji' (2017) 29(2) *The Contemporary Pacific* 232.
[54] *Ibid* 232.
[55] *Ibid* 232.
[56] A Ielemia 'A Threat To Our Human Rights: Tuvalu's Perspective On Climate Change' (2007) XLIV (2) *"Green Our World!"* available at *https://www.un.org/en/chronicle/article/threat-our-human-rights-tuvalus-perspective-climate-change a*ccessed 23 May 2023.
[57] IPCC, 2019: Chapter 4: Sea Level Rise and Implications for Low-Lying Islands, Coasts and Communities (note 42) 383.
[58] *Ibid* 383.
[59] *Ibid* 383.
[60] *Ibid* 383.

Prime Minister Kausea Natano highlighted that Tuvalu and other low-lying atoll nations "are sinking" and their land is quickly becoming submerged.[61] The Prime Minister made the statement in 2021 that 40% of the capital city of Tuvalu was already below sea level.[62] At the 27th UN Climate Change Conference of the Parties (COP27) address, the Prime Minister noted that Tuvalu is 'losing faith in this institution[63] to deliver a sustainable outcome that does not leave island communities and many of us behind.'[64]

One of the most notable advancements that have taken place within the past decade has been the Paris Agreement, which seeks to reduce global greenhouse gas emissions to prevent a global temperature over 1.5 degrees Celsius above pre-industrial levels.[65] The Paris Agreement is a step forward from the earlier Kyoto Protocol,[66] as the former takes an approach to climate mitigation that establishes essential obligations on all parties to the agreement. In contrast, the Kyoto Protocol clarified differences between developed and developing countries.[67] The Paris Agreement is an ancillary agreement to the UNFCCC. It intends to achieve its objective of 'stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system.'[68]

In addition, most recently, during COP27, there was a breakthrough agreement resulting in a new 'loss and damage' fund that aims to assist States that have been most affected by climate disasters.[69] Pledges over 211.6 million USD have been secured for the Adaptation Fund during COP27, 70.6 million USD in pledges were secured for the LDC Fund, 35 million USD in pledges for the Climate Change Fund, and 5.3 billion USD in pledges for the Global Environment Facility.[70] These funds are intended to assist with enhancing the resilience of

[61] COP26 'Tuvalu National Statement for the World Leaders Summit, Honourable Prime Minister Kausea Natano' *available at https://unfccc.int/sites/default/files/resource/TUVALU_cop26cmp16cma3_HLS_EN.pdf* (accessed 23 May 2023).
[62] *Ibid*.
[63] In reference to the COP.
[64] COP27 'National Statement, Prime Minister of Tuvalu Honourable Kausea Natano United Nations Framework Convention on Climate Change Conference of the Parties (COP27)' available at *https://unfccc.int/sites/default/files/resource/TUVALU_cop27cmp17cma4_HLS_ENG.pdf* (accessed 23 May 2023).
[65] Paris Agreement to the United Nations Framework Convention on Climate Change, Date of Adoption 12 December 2015, UNTS 3156, (entered into force 4 November 2016).
[66] Kyoto Protocol to the United Nations Framework Convention on Climate Change, Date of Adoption 11 December 1997, UNTS 2303, (entered into force 16 February 2005).
[67] D Bodansky 'Paris Agreement' (2021) *United Nations Audiovisual Library of International Law* 1.
[68] UNFCCC, Article 2.
[69] UNFCCC, Conference of the Parties, Report of the Conference of the Parties on its twenty-seventh session, held in Sharm el-Sheikh from 6 to 20 November 2022, FCCC/CP/2022/10/Add.2, 13/CP.27, 2.
[70] 'COP27 Reaches Breakthrough Agreement on New "Loss and Damage" Fund for Vulnerable Countries" *UN Climate Press Release* 20 November 2022 available at *https://unfccc.int/news/cop27-reaches-breakthrough-agreement-on-new-loss-and-damage-fund-for-vulnerable-countries* (accessed 19 January 2023).

people who are living in vulnerable communities that are most affected by climate change by 2030.[71] However, these efforts have not yet brought about real change. The UNFCCC and the Paris Agreement have not resulted in a decreased global warming trajectory.[72] Therefore, reliance on climate adaptation funds is more important now than ever; however, the process is more complex for SIDS than it should be.

The climate funds in place that are accessible for SIDS by way of application to assist with climate adaptation encompass twelve multilateral funds.[73] The largest of these funds is the Green Climate Fund (GCF), this fund has approved 950 million USD in funding to SIDS.[74] 50% of the funding from GCF goes to adaptation funding with half of this adaptation allocation split across Least Developed Countries (LDCs), SIDS and African States.[75] Some SIDS are LDCs, including the Solomon Islands, Tuvalu, Kiribati, and Haiti.[76] Cabo Verde, Maldives, Vanuatu, and Samoa are all graduating from the LDCs category.[77] The COP26 yielded more adaptation funding of 356 million USD, with an additional 605.3 million USD pledged to assist LDCs in developing resilience against climate change.[78] Whilst this finance assists some of the SIDS, the amount is often considered insignificant and unsustainable considering the devastating effects of climate change that these States are experiencing.

There are many gaps in the current financing regime. Finances have been provided to States in the form of loans; additionally, these funds are geared towards mitigating the effects of the changing climate rather than adaptation.[79] Lastly, the requirements to access the funding are incredibly burdensome.[80] Similarly, for SIDS that do not fall within the LDC category, climate funding is in short supply and more assistance is needed. It has been emphasised that developed

[71] *Ibid.*
[72] 'Climate Commitments Not on Track to Meet Paris Agreement Goals as NDC Synthesis Report is Published' *United Nations Climate Change* 26 February 2021 available at *https://unfccc.int/news/climate-commitments-not-on-track-to-meet-paris-agreement-goals-as-ndc-synthesis-report-is-published* (accessed 20 January 2023).
[73] C Watson L Schalatek A Evéquoz 'Climate Finance Regional Briefing: Small Island Developing States' (2022) 12 *Climate Finance Fundamentals* available at *https://climatefundsupdate.org/wp-content/uploads/2022/03/CFF12-SIDS_ENG-2021.pdf* (accessed 23 May 2023) 1.
[74] *Ibid* 2.
[75] *Ibid* 2.
[76] *Ibid* 2.
[77] 'UN list of least developed countries' *UNCTAD* available at *https://unctad.org/topic/least-developed-countries/list* (accessed 23 May 2023).
[78] UNFCCC, Report of The Conference of the Parties on its Twenty-Sixth Session, Held in Glasgow from 31 October to 13 November 2021, FCCC/CP/2021/12/Add.1, 4/CP.26, 12.
[79] 'COP26: Least developed countries need more funds to adapt to climate change' *UNCTAD* available at *https://unctad.org/topic/least-developed-countries/chart-november-2021* (accessed 11 December 2022).
[80] *Ibid*.

countries need to scale up efforts to bridge the gap in funding to allow for 'meaningful mitigation action'.[81]

The primary funding difficulties being faced by SIDS are as follows: (i) the portion of international climate finance that is attributed to SIDS, (ii) the inherent complexities that make it difficult for SIDS to access climate finance, (iii) the financing challenges for project related funding, and (iv) the lack of finance instruments and mechanisms for SIDS.[82] These obstacles will be discussed in turn.

In terms of the first difficulty faced by SIDS in accessing climate finance, it is essential to highlight that despite the unique circumstances of SIDS, special treatment is not given to these States in the funding regime.[83] Climate finance is inherently unpredictable. Despite the ambitious pledge of 100 billion USD per annum by developed countries to finance funds that flow to developing countries such as the GCF by 2020, such finance has not been forthcoming, with 2019's figures illustrating a deficiency in excess of 20 billion USD.[84] Furthermore, the finance provided does not filter sufficiently to SIDS. For instance, in 2019, LDCs received 15.4 billion USD in funding, whereas SIDS were provided with 1.5 billion USD.[85]

Secondly, the system of climate finance is outdated in that it does not account for the challenges that are unique to SIDS.[86] Where SIDS are making strides toward increasing economic potential graduating from low-income LDCs to middle or high-income countries, the vulnerability to sea-level rise and related aspects still persists.[87] For instance, these States still face climate-related challenges despite changes in GDP, including disasters that may create unprecedented economic challenges; therefore, these States require development financing to help transition through these periods.[88] SIDS have scant access to concessional funding terms that are considered more generous than ordinary loan terms despite the fact that these States often face a high debt burden.[89]

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[81] UNFCCC Report of the Conference of the Parties on its Twenty-sixth Session (note 79 above) 12.
[82] Climate Finance Access Network (CFAN) for United Nations Office of the High Representative for the Least Developed Countries, Landlocked Developing Countries and Small Island Developing States (UN-OHRLLS) 'Accessing Climate Finance: Challenges and opportunities for Small Island Developing States' (2022) available at *https://www.un.org/ohrlls/sites/www.un.org.ohrlls/files/accessing_climate_finance_challenges_sids_report.pdf* (accessed 23 May 2023) 9.
[83] *Ibid* 9.
[84] *Ibid* 9.
[85] *Ibid* 9.
[86] *Ibid* 9.
[87] *Ibid* 9.
[88] *Ibid* 9.
[89] *Ibid* 9.

Thirdly, accessing global climate funds is a complex process. Whilst there are multiple multilateral climate funds, challenges are involved in urgently accessing the funds in practice.[90] SIDS have limited access to the climate funds supporting them, with capacity difficulties making accessing funds more challenging.[91] Lastly, it is increasingly difficult for SIDS to access funding from multilateral climate funds directly.[92] These States must access funds from the GCF through international, regional or national access entities that act as a middle man in granting funds.[93] Very few SIDS have direct access to funding, there are four SIDS that have such access within the Pacific and Caribbean region.[94]

Therefore, SIDS that want to gather more climate finance may face the reality that they will have to access crowdfunding or private finance.[95] Whilst crowdfunding may sound ambitious for climate adaptation funding, it is not impossible. Kiva.org is a crowdfunding platform geared explicitly toward assisting micro-entrepreneurs in developing States.[96] Kiva has Microfinance Institution partners within various States that carry the risk of the loans.[97] Kiva has some lending partners in SIDS, such as Vanuatu and Haiti.[98] Therefore, it is suggested that there is potential for expansion to more SIDS, provided lending partners are approved in these areas for small-scale projects. Kiva has funded over 1.84 billion USD in loans internationally.[99] As such, it would not be difficult to raise funds for climate adaptation in this manner; it may just be for smaller-scale projects. It is also important to remember that many of these SIDS are already over-indebted, and as such, more climate finance will burden States that are experiencing financial difficulties.[100]

Accordingly, it is particularly vital and urgent for SIDS to campaign for no further anthropogenic changes to occur to the climate. This is to disrupt the current trajectory of global warming and secure the survival of many States scattered across the world, particularly SIDS. In many instances, climate finance may not guarantee the continued survival of these SIDS, as even in the event of adaptation, excessive changes to the climate may render adaptation

[90] *Ibid* 15.
[91] *Ibid* 14.
[92] *Ibid* 15.
[93] *Ibid* 15.
[94] *Ibid* 15.
[95] UNCTAD COP26 (note 80 above).
[96] K von Ritter D Black-Layne 'Crowdfunding for Climate Change, A new source of finance for climate action at the local level?' 2013 *European Capacity Building Initiative* 9.
[97] *Ibid*.
[98] 'Where does Kiva work' available at *https://www.kiva.org/about/where-kiva-works* (accessed 24 May 2023).
[99] 'About us' *Kiva* available *https://www.kiva.org/* (accessed 20 January 2023).
[100] UNCTAD, COP26 (note 80 above).

impossible. There has been a drive by SIDS to upscale collective efforts to seek climate justice within the international legal structures such as the International Court of Justice (ICJ), including requesting an advisory opinion on the responsibilities of States to protect the climate.

Recently, Vanuatu, joined by more than 100 States as co-sponsors,[101] approached the ICJ for an advisory opinion on the responsibilities that governments have across the world to ensure the protection of the climate for future generations.[102] The resolution was adopted by the UNGA without a vote and supported by multiple States across the world, including many SIDS, notably the Maldives, Nauru, Papua New Guinea, Seychelles, Solomon Islands, Tuvalu, Marshall Islands, Mauritius and other States, including the United Kingdom.[103] Vanuatu and its co-sponsors aim to clarify the obligations of States under international law. These questions include whether there is an obligation to protect the climate system and the environment for both present and future generations and the legal consequences for those States that have caused harm to the environment and climate system.[104] While this advisory opinion will not remedy the gap within international law being researched in the chapters to follow, it does provide important contributions to international law for SIDS in particular. This advisory opinion will help clarify the obligations of States to protect the environment, but it also aims to determine whether SIDS can hold other States legally liable for causing harm to the environment. The importance of this question is that for SIDS, the ability to gain financially from those States that have caused harm to the climate may be the difference between State extinction and survival. Therefore, deliberations on the legal basis for the survival of SIDS are more critical now than ever before.

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[101] Algeria, Andorra, Angola, Antigua and Barbuda, Australia, Austria, Azerbaijan, Bahamas, Bangladesh, Barbados, Belgium, Belize, Bulgaria, Cabo Verde, Canada, Chile, Colombia, Costa Rica, Croatia, Cyprus, Czechia, Denmark, Djibouti, Dominican Republic, Eritrea, Estonia, Fiji, Finland, France, Gabon, Gambia, Georgia, Germany, Ghana, Greece, Guinea-Bissau, Guyana, Hungary, Iceland, Ireland, Italy, Jamaica, Kiribati, Latvia, Lebanon, Libya, Liechtenstein, Lithuania, Luxembourg, Madagascar, Maldives, Malta, Marshall Islands, Mauritania, Mauritius, Mexico, Micronesia (Federated States of), Monaco, Montenegro, Morocco, Mozambique, Myanmar, Namibia, Nauru, Nepal, Netherlands, New Zealand, North Macedonia, Norway, Palau, Panama, Papua New Guinea, Portugal, Republic of Moldova, Romania, Rwanda, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Samoa, Serbia, Seychelles, Sierra Leone, Singapore, Slovakia, Slovenia, Solomon Islands, Spain, Sri Lanka, Suriname, Sweden, Switzerland, Timor-Leste, Togo, Tonga, Trinidad and Tobago, Tunisia, Tuvalu, Uganda, Ukraine, United Kingdom of Great Britain and Northern Ireland, United Republic of Tanzania, Vanuatu, Viet Nam and State of Palestine.

[102] UNGA, Seventy-seventh session, Request for an advisory opinion of the International Court of Justice on the obligations of States in respect of climate change, 1 March 2023, UN Doc A/77/L.58; UNGA, Seventy-seventh session, Resolution adopted by the General Assembly on 29 March 2023, UN Doc A/RES/77/276.

[103] UNGA, Seventy-seventh session, Request for an advisory opinion of the International Court of Justice on the obligations of States in respect of climate change, 1 March 2023 (note 103 above)

[104] UNGA, Seventy-seventh session, Resolution adopted by the General Assembly on 29 March 2023 (note 103 above).

2. An Introduction to the Specific Issues Being Faced By SIDS

Despite efforts to ensure physical mitigation by adapting to sea-level rise, the effects may be too significant for SIDS to withstand. Widespread relocation of a State's population may raise issues of State extinction, as statehood depends upon meeting specific criteria such as the exclusive control of a territory and a stable population.[105]

The requirements for statehood, as articulated in the Montevideo Convention on the Rights and Duties of States, 1933 (Montevideo Convention), provide the best indication of the non-negotiable requirements for statehood in international law.[106] Deliberations on State extinction is perhaps the most concerning consideration for SIDS.

Under the Montevideo Convention, the requirements for statehood are as follows:

> '…
>
> a. A permanent population.
> b. A defined territory.
> c. A government; and
> d. Capacity to enter into relations with other States.'[107]

From the wording of the Montevideo Convention, it is understood that it is essential for a State to comply with all of the above criteria to be considered eligible for statehood. While it has been understood that all four criteria must be adhered to, in practice, some requirements of statehood are more important than others. Stoutenburg notes that whilst the Montevideo Convention was initially drafted to provide the requirements for a State to be created, the continued existence of statehood is premised on the criteria subsisting in the State concerned.[108] However, she also observes that once a State has existing statehood, it is possible for some of these requirements to be temporarily absent and for statehood to continue.[109] The above requirements for statehood may appear simple enough to understand; however, each condition has specific practical considerations, as briefly considered below.

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[105] This issue is extensively discussed in Chapter Three of the thesis on State extinction.
[106] Convention on the Rights and Duties of States, adopted by the Seventh International Conference of American States, Date of Adoption 26 December 1933, LNTS 165, (entered into force 26 December 1934).
[107] Article 1, Montevideo Convention.
[108] JG Stoutenburg *Disappearing Island States* (2015) 250.
[109] *Ibid* 251.

Regarding a 'permanent population', a State must have a permanent population within its territory.[110] The population may comprise persons from different cultural, social and ethnic heritage.[111] A population also need not be a particular size; a State may have as few as 50 people residing within its territory as long as this population is permanent.[112] The permanency of the population is often observed by offering the inhabitants nationality.[113] Providing a population with nationality illustrates a legal link between a State and its people.[114]

In addition to a permanent population, it is essential that a State also has a defined territory. There is no prescribed size for the territory that a State possesses.[115] However, under international law, a State must exercise complete control over the designated area.[116] In the case of the *Island of Palmas,*[117] the International Court of Arbitration stated the following regarding the 'defined territory' requirement of statehood:

> 'International law, the structure of which is not based on any super-State organisation, cannot be presumed to reduce a right such as territorial sovereignty with which almost all international relations are bound up, to the category of an abstract right, without concrete manifestations. The principle that continuous and peaceful display of the functions of State within a given region is a constituent element of territorial sovereignty is not only based on the conditions of the formation of independent States and their boundaries (as shown by the experience of political history) as well as on an international jurisprudence and doctrine widely accepted.'[118]

Despite it being stressed that territory is an essential part of statehood, the borders of the territory do not specifically have to be ultimately settled.[119] Lastly, the Montevideo Convention requires that there is a government in place within a State and that the government is independent.[120] An independent government can enter into relations with other States under international law regardless of the governmental structure.[121]

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[110] L Yamamoto M Esteban 'Vanishing Island States and Sovereignty' (2010) 53(1) *Ocean & Coastal Management* 4.
[111] P Moscoso de la Cuba 'The statehood of 'collapsed States in Public International Law' (2011) XVIII *Agenda Internacional* 124.
[112] JG Stoutenburg (note 109 above) 247.
[113] P Moscoso de la Cuba (note 112 above) 124.
[114] *Ibid* 124.
[115] *Ibid* 124.
[116] *Ibid* 124.
[117] *Island of Palmas* case (Netherlands/USA) 4 April 1928, Reports of the International Arbitral Awards, Volume II 829 – 871.
[118] *Ibid* 839, 840.
[119] P Moscoso de la Cuba (note 112 above) 124.
[120] *Ibid* 124.
[121] *Ibid* 124.

Criticism has been levelled against the requirements set out in the Montevideo Convention as some conditions are said to be 'over-inclusive, under-inclusive and outdated'.[122] Grant notes that the criterion of capacity to enter into relations with other States is the most critiqued requirement of the Montevideo Convention.[123] Crawford asserts that the capacity to enter into relations with other States is not a criterion but a consequence of statehood, which depends upon the State concerned's status and situation.[124] Furthermore, Crawford stresses that capacity depends on the power of the State's internal government and the ability of the entity to be independent.[125] Crawford thus indicates that, whilst valuable, the criterion depends on other requirements, making it problematic.[126] Despite criticisms against the Convention, the Montevideo Convention criteria remain the formulation for statehood.[127]

The requirements of statehood will be discussed in more detail within Chapter 3 of this thesis. However, certain requirements of statehood are perhaps considered more fundamental in nature. The first of these requirements is a defined territory. It is essential to deliberate on when a State has to consider relocating to a new territory due to a rise in sea level. A State can relocate its population to an alternative land territory purchased for this purpose. In such an instance, it is understood that the new territory would be the new geographical basis of the State, and therefore, such a State would continue to exist.[128] Whilst it is unclear whether certain rights, such as maritime zones, would remain within the new territory, it presents fewer complexities for the issue of statehood specifically. The situation is more complex, where no alternative territory is available or alternative land is artificial.

Artificial islands are considered to be a possible mechanism to establish land for SIDS facing the effects of climate change.[129] One State that considers this as an option to ensure continued survival is the Maldives. The Maldives has constructed the island of Hulhumalé. This artificial island can accommodate a significant portion of its population, with estimates that it will house

[122] TD Grant 'Defining statehood: The Montevideo Convention and its Discontents' (1999) 37 (2) *Columbia Journal of Transnational Law* 453.
[123] *Ibid* 434.
[124] J Crawford 'The Criteria for statehood in International Law' (1977) 48 (1) *British Yearbook of International Law* 119.
[125] *Ibid* 119.
[126] *Ibid* 119.
[127] *Ibid* 111.
[128] P Moscoso de la Cuba (note 112 above) 135.
[129] G Tsaltas *et al* 'Artificial Islands and Structures as a Means of Safeguarding State Sovereignty Against Sea-level rise: A Law of the Sea Perspective' (2010) *6th ABLOS Conference "Contentious Issues in UNCLOS-Surely Not"* 4.

100,000 new inhabitants by 2030.[130] The island of Hulhumalé will serve as a proverbial Noah's Ark should there become a need to relocate much of the Maldivian population.

However, the use of artificial islands, installations and structures (AIS) presents some practical difficulties. States cannot claim maritime zones around artificial islands in terms of the United Nations Convention on the Law of the Sea (UNCLOS) provisions.[131] Article 60 of UNCLOS provides the following:

> '8. Artificial islands, installations, and structures do not possess the status of islands. They have no territorial sea of their own, and their presence does not affect the delimitation of the territorial sea, the exclusive economic zone or the continental shelf.'

Article 60 further provides that a coastal State that constructs the AIS does have 'exclusive jurisdiction' over the island.[132] It is also possible for the State to claim 'reasonable safety zones around such artificial islands'.[133] However, it must be noted that these safety zones may not exceed 500 metres around the perimeter of the artificial island.[134] This 500-metre safety zone is far from the vast maritime zones that may be claimed around natural island territory. This limitation within UNCLOS aims to prevent States from building artificial islands to extend claims to their maritime zones, as the purpose of building artificial islands has always been viewed as a means to explore existing maritime zones.[135] Although there are no express exceptions to UNCLOS, SIDS may require some form of provision for their unique circumstances.

Therefore, the imminent problem that emerges for SIDS is the possibility of the submergence of territory or territory becoming uninhabitable naturally. Where it becomes necessary to relocate a State's permanent population to an artificial island in place of alternative natural territory, it is unclear whether the State may legally exist as a State in terms of international law in the new location.[136] This is because a State inhabiting an artificial island may be incapable of fulfilling the criteria of a State under international law and incapable of claiming

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[130] R Stojanov *et al* 'Local perceptions of climate change impacts and migration patterns in Male, Maldives' (2017) 183 *The Geographical Journal* 374.
[131] United Nations Convention on the Law of the Sea, Date of Adoption 10 December 1982, UNTS 1833, (entered into force 16 November 1994), Article 60.
[132] Article 60, UNCLOS.
[133] *Ibid*.
[134] *Ibid*.
[135] AHA Soons, 'Artificial Islands and Installations in International Law' (1974) *Law of the Sea Institute, University of Rhode Island, Occasional Paper No. 22* 19.
[136] RG Rayfuse E Crawford 'Climate Change, Sovereignty and statehood' (2012) *International Law in the Era of Climate Change* 7.

maritime zones around artificial islands even where it becomes their new permanent territory in place of submerged natural territory. In addition to this, the maritime zones and the outer limits previously delineated by these islands may fall away, wherein a new artificial island substitutes submerged territory. Traditionally, maritime zones are dependent on the existence of the land territory which precedes them, often referred to as the 'land dominates the sea' principle.[137] The consequences of sea level rise for SIDS where submergence of land territory occurs is that the previously defined natural territory no longer has a population that depends on the resources within their maritime entitlements, and existing claims to the exclusive economic zone (EEZ)[138] would be negligible. Dependency on resources within the vast 200-nautical mile area of a State's EEZ is a prerequisite for its maintenance this assertion is based on the historical development of the EEZ but also the requirement that in order for the EEZ to be established the coastal or island State must be able to sustain human habitation or economic life.[139] The General Assembly has acknowledged that there is a threat to the survival of SIDS:

> '…climate change and sea level rise continue to pose a significant risk to Small Island Developing States and their efforts to achieve sustainable development, and for some, represent the gravest threat to their survival and viability'.[140]

Accordingly, there are two distinct threats to SIDS: Their legal status as a State and the difficulties in maintaining existing maritime zones. For SIDS, preserving maritime zones is a crucial issue to consider in conjunction with maintaining statehood. Maritime zones enable these States to exercise sovereignty and specific jurisdiction rights over large portions of the ocean that possess economic potential spanning 200 – 350 nautical miles. The importance of the EEZ, continental shelf and other related maritime zones for the survival of SIDS should not be underestimated. In the Maldives, fisheries are vital for the Gross Domestic Profit (GDP) and account for around 6% of the national GDP, with around 98% of the exports from the country

[137] JG Stoutenburg (note 109 above) 187.
[138] The exclusive economic zone is a maritime zone that provides the State that claims it with sovereign rights to explore, exploit, conserve and management the natural resources in the waters whether they are living or not. The State may also explore the seabed and subsoil of the area, establish artificial islands in the area, conduct marine research, and protect and conserve the marine environment therein as provided for within Article 56 of UNCLOS. The EEZ extends 200 nautical miles from the baseline from which the breadth of the territorial sea is measured.
[139] See *United Kingdom of Great Britain and Northern Ireland v. Iceland* 1974, p.3, 25 as a means to determine the nature of the EEZ before UNCLOS. See Article 121 (3) of UNCLOS the 'Regime of Islands' wherein it is expressly stated that 'Rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf'. This assertion lends itself to the idea of dependency on the resources by a population that resides near or adjacent to the EEZ.
[140] United Nations, General Assembly, 'Follow-up to and implementation of the SIDS Accelerated Modalities of Action (SAMOA) Pathway and the Mauritius Strategy for the Further Implementation of the Programme of Action for the Sustainable Development of Small Island Developing States' A/RES/72/217 20 December 2017 3.

derived from the fishing sector.[141] In 2013, fishing exports in Tuvalu contributed 18.6 million USD to the economy; in 2013, Tuvalu's total GDP was only 37.5 million USD.[142] Whilst fisheries are not immune to exploitation and depletion, a significant concern for many SIDS, there is evidence that oceans can recover. For this reason, they are a renewable source.[143] Therefore, despite possible declines in fishing stocks, an EEZ presents a valuable resource that can be revived over time.

3. *Research Undertaken to Mitigate the Legal Effects of Sea-Level Rise and Climate Change On SIDS*

The effects of climate change on the earth and the earth's oceans have progressed significantly over the last few decades, with little international legal development to mitigate the challenges these States face. The lack of action to prevent anthropogenic changes to the climate is mainly because government decisions and actions worldwide have not adequately reflected the urgency required to prevent emissions.[144]

Similarly, international law has struggled to evolve to account for the effects of rising sea levels. Some organisations have undertaken legal research to provide recommendations for a stable legal regime to deal with the effects of rising sea levels. One example is the Committee on International Law and Sea Level Rise (SLRC), which formed part of the International Law Association (ILA). This non-profit organisation studies and clarifies the law and has consultative status.[145] The SLRC adopted a resolution in 2018 in the interests of 'legal certainty and stability' to maintain maritime entitlements of coastal States, provided they have been validly claimed in terms of UNCLOS despite any physical changes that occur to the coast of these States.[146] This action by the SLRC was based upon their understanding of the law as it should be with emerging State practice in the South Pacific region indicating a drive to preserve baselines.[147]

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[141] A Powers 'Sea level Rise and its Impact on Vulnerable States' (2012) 73 *Louisiana Law Review* 159.
[142] 'Tuvalu, Fishery and Aquaculture Country Profile' *FAO* available at *http://www.fao.org/fishery/facp/TUV/en* (accessed 31 December 2019).
[143] CM Duarte *et al* 'Rebuilding marine life' (2020) 580 (7801) *Nature* 43.
[144] 'Climate Plans Remain Insufficient: More Ambitious Action Needed Now' *UN Climate Press Release* 26 October 2022 available at *https://unfccc.int/news/climate-plans-remain-insufficient-more-ambitious-action-needed-now* (accessed 19 January 2023).
[145] 'About us' *ILA* available at *https://www.ila-hq.org/en_GB/about-us* (accessed 20 January 2023).
[146]ILA 'Resolution 5/2018 Committee on International Law and Sea level Rise', 19 – 24 August, available at *https://www.ila-hq.org/en_GB/documents/conference-resolution-sydney-2018-english-2* (accessed 20 January 2023).
[147] *Ibid*.

3.1 Regional Efforts in the Pacific Region

The Pacific Island Forum (PIF) is a political and economic policy organisation for island States in the Pacific aiming to ensure peace, harmony, cooperation and collaboration among States with the mandate to represent their interests.[148] The forum has member States from the Pacific region.[149] It also recognises 18 dialogue members, including the United Kingdom (UK), the United States of America (USA), the People's Republic of China (China), the European Union (EU), France, and Germany, amongst other partners.[150] In conjunction with the Alliance of Small Island States (AOSIS) and the Asian-African Legal Consultative Organisation, the PIF has urged States to deposit their charts or list of geographical coordinates[151] of maritime zones with the UN.[152] The Pacific Island Forum also commissioned the creation of a document entitled the Framework for a Pacific Oceanscape.[153] The Framework asserts strategic priorities and actions, with strategic priority one being to 'establish jurisdictional rights and responsibilities over maritime zones' within the Pacific region.[154] Action 1A urges island States within the Pacific to deposit charts with baselines drawn around their territory with the UN to ensure that they have security over the resources within the areas of their oceans.[155]

Furthermore, in Action 1B, a follow-on from Action 1A, once the maritime baselines are drawn, there should be a regional push to create certainty on baselines so that other States cannot challenge them.[156] The PIF has also developed a declaration on preserving maritime

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[148] 'Who we are' *Pacific Islands Forum* available at *https://www.forumsec.org/who-we-arepacific-islands-forum/* (accessed 20 January 2023).

[149] Australia, Cook Islands, Federated States of Micronesia, Fiji French Polynesia, Kiribati, Marshall Islands, Nauru, New Caledonia, New Zealand, Niue, Palau, Papua New Guinea, Samoa, Solomon Islands, Tonga, Tuvalu, Vanuatu, and one associate member – Tokelau – See 'who we are' *Pacific Islands Forum* available at *https://www.forumsec.org/who-we-arepacific-islands-forum/* (accessed 20 January 2023).

[150] *Ibid*.

[151] Coordinates in this context refers to the geodetic datum that relates to the geographical coordinates concerning maritime zones inclusive of lines of delimitation of maritime zones in line with Article 16, 47, 75 and 84 of UNCLOS. The coordinates are usually measured in accordance with technical standards for collecting, storing and distributing this information. See: Division for Ocean Affairs and the Law of the Sea Office of Legal Affairs 'Guidelines on deposit with the Secretary-General of charts and lists of geographical coordinates of points under the United Nations Convention on the Law of the Sea' 2021 United Nations, New York 1, 5, 16. The significance of depositing these coordinates or list of geographical coordinates with the UN is an attempt to further cement the claims to maritime zone to ensure a level of permanency in these zones by showing other States the outer limit and lines of delimitation along the coast of the State concerned.

[152] Alliance of Small Island States (AOSIS), Pacific Island Forum (PIF) and Asian-African Legal Consultative Organization (AALCO) Virtual Information Discussion on Why it is Urgent to Register and Publish Maritime Zone Information in View of Rising Seas 'Concept Note' 29 October 2021 available at *https://www.un.org/en/ga/sixth/76/pdfs/events/29_october_2021_2.pdf* (accessed 20 January 2023).

[153] C Prat H Govan, 'Our Sea of Islands: Our Livelihoods, Our Oceania. Framework for A Pacific Oceanscape: a catalyst for implementation of ocean policy' (2011) available at *https://www.forumsec.org/wp-content/uploads/2018/03/Framework-for-a-Pacific-Oceanscape-2010.pdf*, (accessed 17 August 2019).

[154] *Ibid* 11.

[155] *Ibid* 11.

[156] *Ibid* 12.

zones in the face of climate change-related sea-level rises.[157] This declaration states that once coordinates have been deposited with the UN Secretary-General, there is an intention to maintain the existing maritime zones regardless of sea-level rise.[158]

A Commission of SIDS has been created following the Agreement for the Establishment of the Commission of Small Island States on Climate Change and International Law (COSIS); the Secretary-General of the UN has certified and received the multilateral treaty.[159] The COSIS requested from the International Tribunal for the Law of the Sea (ITLOS) an Advisory Opinion on the 'specific obligations' of States Parties to UNCLOS to 'prevent, reduce and control' pollution to the marine environment, which is likely to be caused by changes to the climate such as the warming of oceans, rising sea levels, the acidification of the ocean, and general changes as a result of gas emission.[160] The request also further requests ITLOS to provide an opinion on the obligations of States Parties to UNCLOS to preserve the marine environment and protect it from climate change and its impacts. The ITLOS order from the 30th of June 2023 notes the date for the hearing of oral arguments as 11 September 2023, and as such, hearings are ongoing.[161] However, COSIS has highlighted that the request for the advisory opinion is '…the opening chapter in the struggle to change the conduct of the international community by clarifying the obligation of States to protect the marine environment.'[162] The hearings should be seen as a step in the right direction for SIDS; however, they relate to the mitigation of the impacts of climate change rather than the mechanisms to adapt to the effects of climate in international law. It is hoped that deliberations of ITLOS regarding the advisory opinion will bring about positive contributions to international law for SIDS.

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[157] 'Declaration on Preserving Maritime Zones in the Face of Climate Change-related Sea-Level Rise' *Pacific Island Forum* 6 August 2021 available at *https://www.forumsec.org/2021/08/11/declaration-on-preserving-maritime-zones-in-the-face-of-climate-change-related-sea-level-rise/* (accessed 20 January 2023).

[158] *Ibid.*

[159] Agreement for the Establishment of the Commission of Small Island States on Climate Change and International Law, Date of Adoption 31 October 2021.

[160] Commission of Small Island States on Climate Change and International Law 'Request for Advisory Opinion' 12 December 2022, available at *https://www.itlos.org/fileadmin/itlos/documents/cases/31/Request_for_Advisory_Opinion_COSIS_12.12.22.pdf* (accessed 2 November 2023).

[161] ITLOS 'Request For An Advisory Opinion Submitted by the Commission of Small Island States on Climate Change and International Law (Request for Advisory Opinion Submitted to the Tribunal), Order' 30 June 2023 available at *https://www.itlos.org/fileadmin/itlos/documents/cases/31/C31_Order_2023_4_30_June_2023.pdf* (accessed 2 November 2023).

[162] ITLOS 'Public sitting held on Monday, 11 September 2023, at 10 a.m., at the International Tribunal for the Law of the Sea, Hamburg, President Albert J. Hoffmann presiding, Request For An Advisory Opinion Submitted by the Commission of Small Island States on Climate Change and International Law (Request for Advisory Opinion Submitted to the Tribunal), Verbatim Record' 11 September 2023 available at *https://www.itlos.org/fileadmin/itlos/documents/cases/31/Oral_proceedings/ITLOS_PV23_C31_1_Corr.1_E.pdf* (accessed 2 November 2023).

3.2 International Law Commission Study Group on Sea-level Rise Concerning International Law

There are also additional necessary efforts driven by the UN currently in process on the issue of rising sea levels. The International Law Commission (ILC), established by the UNGA, has a study group established to analyse sea-level rise concerning international law (sea-level rise study group).[163] The role of the sea-level rise study group is to conduct research and deliberate on aspects within their mandate. Their mandate includes the following: (i) law of the sea issues related to climate change; (ii) statehood issues as a result of climate change; and (iii) issues related to the protection of persons affected by sea-level rise.[164] The mandate relating to the law of the sea is broad enough to include the effects of sea-level rise on baselines and maritime spaces measured therefrom, the possible legal effects related to sea-level rise and maritime delimitations, the effects of sea-level rise on islands and their baselines, the legal status of artificial islands, reclamation of islands or activities intended to fortify islands for adaptation from sea-level rise, amongst other aspects.[165] The issues of statehood extend to the effects on the loss or continuity of statehood where island territory sinks or becomes uninhabitable, the possibility of reinforcing islands or creating artificial islands to preserve statehood, the possibility of freezing baselines before total inundation or the territory becoming uninhabitable, the possibility of transferring sovereignty of a portion of territory, as well as the possibility of merger.[166] The sea-level rise study group released their first report on the 15th of July 2022, shortly after the group‘s first meeting on the 20th of May 2022, but work is still ongoing.[167] This report and the corresponding issues papers will be discussed briefly below.

Within the first report of the sea-level rise study group, reference was made to the issues papers created by the co-chairs of the sea-level rise study group. The issue papers are created before the sea-level rise study group sessions to serve as a basis for discussion.[168] The first issue paper describes the general scope of the sea-level rise study group as outlined briefly above and further makes some observations thereon. The first topic in the first issues paper under consideration is that of baselines and sea-level rise.[169] The initial observations on the topic have

[163] ILC, Sea-Level Rise in Relation to International Law, *Annex II Yearbook of the International Law Commission Volume II* (2018).
[164] *Ibid* 226.
[165] *Ibid* 226.
[166] *Ibid* 226.
[167] UNGA, ILC, Seventy-third session, Study Group on sea-level rise in relation to international law Report, Geneva, 18 April-3 June and 4 July-5 August 2022, UN Doc A/CN.4/L.972 1.
[168] UNGA, ILC, Seventy-second session, Sea-level rise in relation to international law, First issues paper by Bogdan Aurescu and Nilüfer Oral, Co-Chairs of the Study Group on sea-level rise in relation to international law, Geneva, 27 April-5 June and 6 July-7 August 2020, UN Doc. A/CN.4/740 3.
[169] *Ibid* 25.

illustrated that the low-water line from which the baseline is measured would move landward due to rising sea levels.[170] The implication is that the ordinary baseline is ambulatory. The straight baseline, similarly, will move landward if the points they are measured from are inundated.[171]

Consequently, where the baseline is repositioned landward, the maritime zones measured therefrom would similarly move landward, including the territorial sea, the contiguous zone, and the EEZ.[172] The situation is different with internal waters. The internal waters may be maintained in the case of normal baselines or reduced in the case of straight baselines.[173] On the other hand, regarding Article 76 of UNCLOS, the coastal State can connect fixed points indicating the limits of the continental shelf when charts are deposited with the Secretary-General of the United Nations.[174] Where charts that map out the continental shelf are deposited, the continental shelf will remain in place despite rising sea levels and cannot be replaced by amended limits.[175] However, the co-authors then make a vital assertion concerning States that do not deposit their charts with the Secretary-General of the UN to map out their continental shelf. Where coastal States do not deposit their charts with the UN, the result is that the continental shelf will only be affected where the outer limit is fixed based on the outer edge of the continental margin rule.[176] It must be stressed that the outer limits of the EEZ are not permanently fixed, whereas the outer limits of the continental shelf are. Therefore, the consequence of ambulating baselines and the possible shift of maritime zones is that, in most instances, the EEZ and the continental shelf boundary coincide to allow a State to exercise rights over their continental shelf easily.[177] If the limits of the EEZ were to be ambulatory and move landward, this would mean that the vast majority of continental shelf claims would extend into the high seas, making it difficult for States to lay claim over the resources therein.[178]

As such, the issues paper made the preliminary conclusion that there is a customary rule regarding the preservation of baselines and the outer limits of maritime zones, which has emerged from regional customs.[179] This regional custom was founded in the Pacific and

[170] *Ibid* 25.
[171] *Ibid* 25.
[172] *Ibid* 25.
[173] *Ibid* 26.
[174] *Ibid* 26.
[175] *Ibid* 26.
[176] *Ibid* 26.
[177] *Ibid* 26.
[178] *Ibid* 26.
[179] *Ibid* 42.

Southeast Asia regions, and this assertion is supported by international organisations, diplomatic acts, diplomatic correspondence, legislative acts, administrative acts, resolutions, and operation conduct, and is consistent and widespread amongst the States in these regions.[180] However, the concession was made that additional submissions by Member States to the Commission would be needed to cement claims to a customary rule. It is asserted that the permanency of the continental shelf limits illustrates the intention for stability in this maritime zone. It is perhaps the overlooked observation by drafters of UNCLOS that the normal baseline and the maritime zones measured therefrom would also require the same level of permanency to keep such a maritime zone intact. It may, however, be that the permanency of the continental shelf was deliberate as distinct from baselines and other maritime zones.

In the additional first issues paper, the chairs Bogdan Aurescu and Nilüfer Oral deliberated on the following issues: (i) the meaning of legal stability, security, certainty, and predictability; support for the observations in the first issues paper including the fixing of baselines and outer limits; (ii) support for declaring the preservation of maritime zones, interpretation of the UNCLOS and the need to maintain its integrity; (iii) deliberations over issues of *uti possidetis*, the principle of good faith, the principle of 'the land dominates the sea', the principle of freedom of seas, obligations to settle disputes peacefully, the protection of rights of coastal and non-coastal States, and the permanent sovereignty over natural resources; preserving maritime boundaries; (iv) benefits to third party States; (v) studying navigational charts; and (vi) the issue of fixed versus ambulatory baselines more generally throughout the report and lastly the importance of distinguishing *lex lata* (the law as it is), *lex ferenda* (future law) and policy options in the prospective work on the topic.[181] These points will be discussed below.

On the first and second points, it was found in the submissions of States to the study group that States do not generally believe that there is anything within UNCLOS that prevents the freezing of baselines and/or the fixing of the outer limits of maritime zones.[182] There was also a general belief amongst States in their submissions to the sea-level rise study group that there is a need to interpret UNCLOS to account for the effects of rising sea levels.[183] Amongst the submissions, the co-chairs concluded that legal stability means that the States do not have to

[180] *Ibid* 42.
[181] UNGA, ILC, Seventy-fourth session, Sea-level rise in relation to international law, Additional paper to the first issues paper (2020), by Bogdan Aurescu and Nilüfer Oral, Co-Chairs of the Study Group on sea-level rise in relation to international law, Geneva, 24 April-2 June and 3 July-4 August, UN Doc A/CN.4/761 7-9.
[182] *Ibid* 33.
[183] *Ibid* 33.

update their baselines, and baselines can be fixed despite the landward regression of the sea.[184] The implication of the additional issues paper is that the fixing of baselines naturally will result in the fixing of the outer limits of maritime zones that are measured from those baselines.[185]

On the third issue covered by the additional first issues paper, the following was observed: the principle of stability and finality of boundaries is established in international law and means that boundaries cannot be continually called into question, especially once agreed upon.[186] The principle of intangibility of boundaries was observed to derive from the principle of *uti possidetis juris.*[187] This principle effectively means respecting the territorial boundaries of a State at the moment of independence of nations. Still, its application extends beyond the context of decolonisation.[188] The use of *uti possidetis* may be applied to baselines or the outermost limits of maritime zones should there be a need to prevent conflict.[189]

The principle of 'the land dominates the sea' is an essential issue in the context of sea-level rise. The principle denotes that the coastal State exercises rights over the waters due to the presence of the land territory. The observations of the co-chairs note that the 'land dominates the sea' must be interpreted 'in light of equity and other principles'; as such, it is not an absolute rule and is not inconsistent with the drive to fix baselines.[190] The principle of the land dominates the sea will be discussed in more detail in Chapter Four. The principle of equity is referenced within the UNCLOS and is essential in interpreting the Convention and its application.[191] The unequal impact of sea-level rise on SIDS would not be in the interests of justice under international law as the marginalised States who have not contributed significantly to the warming of the earth bear a disproportionately large burden of its effect resulting in inequity. The principle of equity should be applied to favour preserving existing maritime entitlements so that these States do not stand to loss their maritime zones partially or in totality.[192] The co-chairs highlighted the principle of permanent sovereignty over natural resources to be considered a customary rule of international law, which provides that a State may not have rights over the resources taken from them; this includes maritime rights.[193]

[184] *Ibid* 41.
[185] *Ibid* para 98.
[186] *Ibid* 42.
[187] *Ibid* 42.
[188] *Ibid* 43.
[189] *Ibid* 47.
[190] *Ibid* 63.
[191] *Ibid* 75.
[192] *Ibid* 75.
[193] *Ibid* 81.

Therefore, to deprive a State of its existing maritime resources would be contrary to the principle of permanent sovereignty over natural resources.[194]

On the fourth point within the additional first issues paper, there is the observation by the study group that where baselines move landward, there may be a situation wherein other States may gain additional rights to maritime territory that was once the territory of SIDS or other island States. Amongst these additional rights, States may be gaining rights to innocent passage in territorial waters that were once internal.[195] However, the most significant right which may accrue to third-party States is where a portion of the territorial sea becomes the EEZ, and by implication, a portion of the EEZ becomes the high seas.[196] The latter would occur particularly with archipelagic baselines wherein inundation of reefs or islands causes this shift.[197] However, the benefits that may be accrued to the third-party States due to a rise in sea level would be at a considerable loss for coastal States, including SIDS, and the principles of equity do not accord with such an approach.[198]

On the fifth point, the chairs considered the role of navigational charts. The co-chairs concluded that nautical charts are predominantly used for two distinct roles: (i) safety of navigation and (ii) depiction of baselines and maritime zones.[199] Most States assert that they do not often update their nautical charts regarding the safety of navigation under UNCLOS and do so more regularly for baselines and maritime zones under UNCLOS.[200] However, creating nautical charts for navigational safety is distinct from the provision of baselines and maritime zones on nautical charts.[201]

On the sixth point listed above of *lex lata,* the chairs examined various other sources of law not intended to affect the *lex feranda* or policy options available to the sea-level rise study group to determine if there is any other relevant international law on the subject. The sources considered by the co-chairs include the International Convention for the Prevention of Pollution from Ships of 1973,[202] the Protocol of 1978 relating to the International Convention

[194] *Ibid* 81.
[195] *Ibid* 86.
[196] *Ibid* 86
[197] *Ibid* 86.
[198] *Ibid* 87.
[199] *Ibid* 97.
[200] *Ibid* 97.
[201] *Ibid* 96.
[202] International Convention for the Prevention of Pollution from Ships, 1973 (London, 2 November 1973), United Nations, Treaty Series, vol. 1340, No. 22484, p. 184

for the Prevention of Pollution from Ships 1973,[203] the 2004 International Convention for the Control and Management of Ships' Ballast Water and Sediments,[204] 2001 Convention on the Protection of the Underwater Cultural Heritage,[205] World Trade Organization 2022 Agreement on Fisheries Subsidies[206] amongst many other sources.[207] However, the co-chairs' observations note that the other sources analysed have minimal impact on the topic.[208]

The second issues paper considers the topic of statehood and the protection of persons affected by sea-level rise. The issue of statehood was discussed by the chairs for these subject categories Patrícia Galvão Teles and Juan José Ruda, covering the Montevideo Convention and its requirements: (i) population, (ii) defined territory, (iii) government, and (iv) capacity to enter into relations with the other States and other subjects of international law.[209] In addition to interpretations of the requirements of the State, the writers note that the Montevideo Convention is intended to regulate the recognition of new States.[210] The observations on statehood also extend to a brief discussion of the 1949 draft Declaration on Rights and Duties of States, including the nature of the State, noting that the State has the right to exercise jurisdiction over both its things (living and non-living) and persons that live within the territory as well as the territory itself.[211] A State is also free and independent to exercise its powers and to elect its government.[212] The paper further mentions the Law of Treaties from the ILC Yearbook from 1956 (referred to as the 1956 draft articles on the law of treaties),[213] which defines the State as:

> '(i) … an entity consisting of a people inhabiting a defined territory, under an organized system of government, and having the capacity to enter into international relations binding the entity

[203] Protocol of 1978 relating to the International Convention for the Prevention of Pollution from Ships, 1973 (London, 17 February 1978), ibid., vol. 1340, No. 22484, p. 61; Protocol of 1997 to amend the International Convention for the Prevention of Pollution from Ships, 1973, as modified by the Protocol of 1978 relating thereto (London, 26 September 1997), United Nations, Juridical Yearbook 1997 (Sales No. E.02.V.1), p. 300.
[204] International Convention for the Control and Management of Ships' Ballast Water and Sediments (London, 13 February 2004), IMO document BWM/CONF/2004, annex.
[205] Convention on the Protection of the Underwater Cultural Heritage (Paris, 2 November 2001), United Nations, Treaty Series, vol. 2562 – Part I, No. 45694, p. 3.
[206] Agreement on Fisheries Subsidies (Geneva, 17 June 2022), World Trade Organization document WT/MIN(22)/33–WT/L/1144, annex.
[207] UNGA, ILC, Seventy-fourth session, Sea-level rise in relation to international law, Additional paper to the first issues paper (note 183 above) 97 – 109.
[208] *Ibid* 109.
[209] UNGA, ILC, Seventy-third session, 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, Geneva, 18 April-3 June and 4 July-5 August 20222, UN Doc. A/CN.4/752 21 – 27.
[210] *Ibid* 27.
[211] *Ibid* 28.
[212] *Ibid* 28.
[213] Law of Treaties, *Yearbook of the International Law Commission 1956 Volume II,* Document A/CN.4/101, 14 May 1956.

as such, either directly or through some other State; but this is without prejudice to the question of the methods by, or channel through which a treaty on behalf [of] any given State must be negotiated – depending on its status and international affiliations;

(ii) Includes the government of the State…'[214]

Additionally, the paper considers the other subjects of international law, including the Holy See, the Sovereign Order of Malta and governments in exile. However, the paper notes that we have yet to see a situation wherein an entire land territory of a State has become fully submerged.[215] However, it is crucial to consider that sea-level rise may make it so. It has been highlighted by many States that there is a presumption of State continuity, which the second issues paper considers to be a strong presumption.[216] The submission goes on to say that States have a right to provide for their preservation, which is also considered to be a strong presumption.[217] However, there is a concession by the co-chairs that the presumption of State continuity may have difficulties associated with it.[218] There is potential for populations to become stateless with difficulties in providing diplomatic protection to nationals of States affected by rising sea levels; governments may become ineffective and may struggle to exercise rights over their living and non-living maritime resources.[219] Similarly, it has been asserted that the presumption of statehood should not be seen as a mechanism by which a State continues to exist in perpetuity; there must be limits to the presumption.[220]

As such, the second issues paper provides for the following considerations to maintain statehood in international law in the absence of land territory: (i) transfer of sovereignty of land

[214] *Ibid*, Article 3.
[215] UNGA, ILC, Seventy-third session, Sea-level rise in relation to international law, Second issues paper (note 213 above) 48.
[216] *Ibid* para 183. See also some examples of State submissions on the presumption of continuity:
United Nations, General Assembly, Seventy-sixth Session, Submissions by Mr. Matea on behalf of Solomon Islands, UN Doc A/C.6/76/SR.23 available at *https://www.un.org/en/ga/sixth/76/pdfs/statements/ilc/22mtg_solomonis_2.pdf* (accessed 25 October 2023) para. 76-81.
United Nations, General Assembly, Seventy-sixth session, Summary Record of the 21st Meeting, Submissions by Ms, Carral Castelo on behalf of Cuba, UN Doc A/C.6/76/SR.21 available at *https://documents-dds-ny.un.org/doc/UNDOC/GEN/N21/314/65/PDF/N2131465.pdf?OpenElement* (accessed 25 October 2023) para. 28-33.
United Nations, General Assembly, Seventy-sixth Session, Submissions by Mr. Luteru on behalf of Samoa, UN Doc A/C.6/76/SR.19 available at *https://documents-dds-ny.un.org/doc/UNDOC/GEN/N21/311/11/PDF/N2131111.pdf?OpenElement* (accessed 25 October 2023).
[217] UNGA, ILC, Seventy-third session, Sea-level rise in relation to international law, Second issues paper (note 213 above) 48.
[218] *Ibid* 48.
[219] *Ibid* 48.
[220] D Wong 'Sovereignty Sunk? The Position of 'Sinking States' at International Law' (2013) 14 *Melbourne Journal of International Law* 21-22.

by one State to another to allow for sovereignty over a portion of its territory with the *caveat* that there would perhaps be too many hurdles to achieve this in practice; (ii) transfer of land without the sovereignty of a portion of its territory to another State; (iii) association with another State or States which involves signing an agreement with another State to allow citizenship to nationals of a State under pressure from sea-level rise; (iv) the establishment of confederations or federations; (v) unification with another State inclusive of merger with the *caveat* that allows for some autonomy preservation of the cultural identity of the merged territory;[221] (vi) hybrid schemes combining more than one modality of preservation an example being Bosnia and Herzegovina which provides for two entities to co-exist.[222]

The deliberations on statehood and State continuity are still ongoing. As such, in the first report of the sea-level rise study group, a summary is provided on the issue of statehood and the following was stated in response to the comments on statehood in the second issues paper:

> 'It was suggested that it should be possible for a State, in exceptional circumstances, to continue its existence despite no longer meeting some or all of the criteria set out in the Convention on the Rights and Duties of States. Yet, caution was called for, as practical situations would always be open to interpretation. At the same time, it was noted that the criteria of population and territory remained crucial, and that the prolonged or permanent loss of territory would inadvertently have an effect on statehood;'[223]

Therefore, it is essential to emphasise that State continuity and the existence of SIDS in the event of partial or total inundation are not settled matters. If we leave these issues up to interpretation, it opens these States up to increased vulnerability.

It is highlighted in this research that it is vital to consider the bargaining position of the SIDS. In terms of the context of SIDS, many of these States are not in an equal bargaining position to other, in some instances, more powerful States to negotiate land with or without sovereignty to account for cession as a valid remedy to the possible loss of statehood. The unequal bargaining position may be because these States are geographically isolated or have limited access to resources that may provide value to a transferring State, a merging State or a unifying State. It is important to outline that this does result in the unavailability of the options presented for

[221] UNGA, ILC, Seventy-third session, Sea-level rise in relation to international law, Second issues paper (note 213 above) 49.
[222] *Ibid* 49 – 55.
[223] United Nations, General Assembly, ILC, Seventy-third session, UN Doc A/CN.4/L.972 1 (note 168 above) Para 58.

preservation, as discussed by the sea-level rise study group in their preliminary papers and reports; it just makes implementing these options more difficult in practice.

It is asserted that to make the options for State continuity more viable for SIDS, and it would be necessary for there to be a level of responsibility on other States to consider options for SIDS that may provide for an equal negotiating field with SIDS. This is perhaps already within the mind of the co-chairs writing the second position paper as, by their concession, the paper notes that there is 'no binding international legal instrument that specifically includes provisions for cross-border movements induced by climate change'.[224] The latter submission is about the displacement of persons due to climate change, which has often been referred to as the creation of climate refugees, but the same is true for the survival of SIDS affected by climate change. These States need cooperation from other States. A level of necessity for action may elicit a better response from the international community.

Eventually, it is projected that the sea-level rise study group's work will progress, and more developments will result. However, this will require more time as the sea-level rise study group's work will be finalised in 2025 in a report that consolidates the results of all the work undertaken by the group.[225] It is a positive step forward that the sea-level rise study group is investigating the issue, and, as a result, resolutions, frameworks, and declarations are being considered for SIDS. However, more research and developments are required to enable more effective change within international law and ensure permanent change. This thesis aims to contribute to this research and provide a novel suggestion for allowing SIDS to have substitute artificial islands succeed in natural territory, which the ILC or any other regional or international organisations have not yet identified.

Primarily, the difficulty with the PIF efforts is that the organisation is a region-specific non-profit organisation, and as highlighted above, the SIDS affected by climate change span multiple areas globally.[226] Therefore, the sovereign rights of States external to the Pacific Region must be championed. Furthermore, it is essential to highlight that whilst both Resolution 5/2018 and the PIF declarations contribute significantly to this issue, they do not consider that maintaining maritime zones despite rising sea levels is not the only consideration for SIDS, as discussed below.

[224] *Ibid* 58.
[225] *Ibid* 18
[226] See 1.2 above for an indication of all the SIDS worldwide.

4. Identifying the Gap

SIDS stand to become uninhabitable or submerged due to sea-level rise and may lose their statehood and international legal personality in international law. It follows that the loss of the land territory would also result in the loss of maritime territory, as the coastline of a State cements the claim to maritime zones. As such, there is a need to consider how to ensure the legal survival of SIDS in international law to maintain statehood and maritime zones despite the disappearance of territory. The legal remedy suggested in this study to remedy this gap is a negotiating text intended to be utilised as a draft convention, which may stand as a basis for negotiations between States within United Nations structures. The issue of rising sea levels and the effects thereof on SIDS have not yet been accounted for in international law. It is considered particularly important for SIDS, which serves as a unique case of vulnerability to sea-level rise, for novel solutions in international law to be considered.

Statehood essentially hinges on the ability of SIDS to possess a population and natural territory, as both of these elements are crucial to maintaining statehood. As Stoutenburg notes, it is essential to ensure a remaining 'population nucleus' is present on the remaining territory of a State for the maintenance of statehood.[227] Regarding the maintenance of maritime zones, the ability to claim maritime zones in terms of UNCLOS altogether depends upon the land territory of the State that possesses them.[228] In the case of SIDS, losing their coastline would inevitably mean the loss of maritime zones. An island must be considered 'a naturally formed area of land, surrounded by water, which is above water at high tide' to enable the State who possesses such island to claim maritime zones around the feature.[229] If an island can no longer sustain 'human habitation or economic life of their own', it can no longer claim an EEZ or continental shelf.[230]

Similarly, artificial islands cannot be used as substitute territories for natural islands. Additionally, natural maritime features such as rocks in terms of UNCLOS may not be turned into an island by artificial interventions. Artificially altering rocks or LTEs to fully fledged islands would result in an artificial island, which is not considered the same as natural island territory under international law. Artificial islands cannot be used by a State as a means to claim maritime zones and are strictly governed by Article 60 of UNCLOS. In *The Republic of the*

[227] JG Stoutenburg (note 109 above) 297.
[228] *Fisheries Case* (note 191 above) 133.
[229] Article 121 (1), UNCLOS.
[230] Article 121 (3), UNCLOS.

Philippines v. The People's Republic of China[231] (*South China Sea Arbitration*), the tribunal found that 'a rock cannot be transformed into a fully entitled island through land reclamation', which essentially means that the act of turning a rock into an island by way of land reclamation is the creation of an artificial island. [232] The tribunal held that Articles 13 and 121 of the UNCLOS provide 'naturally formed area of land' criteria.

Consequently, a feature is examined in its natural condition to determine the entitlements that may be claimed around the maritime feature.[233] It is possible for land reclamation efforts to be considered controversial, as restoring a coast to the way it was before a drastic rise in sea level may then result in drawing baselines from the reclaimed territory.[234] This is because land reclamation is considered an artificial intervention despite using potentially natural resources.[235] It would depend on how widespread the land reclamation efforts are and whether the land reclamation results in the maritime feature no longer representing its natural capacity.[236]

As such, where a SIDS wants to establish an artificial island, by land reclamation or otherwise, to sustain its population and solidify its statehood and maritime zones long term, a reformation of international law is required. This thesis recommends the creation of a new convention to create clarity within international law.

Therefore, the legal difficulties that SIDS may soon face will be categorised and discussed within this thesis according to the following broad categories:

a) Statehood and State extinction;
b) Preserving maritime zones; and
c) Artificial islands.

5. Approach and Motivation for the Study

5.1 Primary Aim

The primary aim of this study is to answer the following research objectives:

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[231] *The Republic of Philippines v. The People's Republic of China* PCA Case Nº 2013-19 (PCA 12 July 2016),
[232]*Ibid* para 508.
[233] *Ibid* para 508.
[234] AGO Elferink *Artificial Islands, Installations and Structures. Max Planck Encyclopaedia of Public International Law* (2013) para 9.
[235] The issue of artificial intervention of existing natural territory is extensively considered in the arbitration of *The Republic of Philippines v. The People's Republic of China* PCA Case Nº 2013-19.
[236] See the *South China Sea Arbitration* (note 235 above) para 614 where the PCA notes that China had conducted significant land reclamation activities on Spratly Islands.

- To examine the legal effects of sea-level rise on statehood for SIDS under international law and the continuity of statehood despite rising sea levels.
- To consider the viability of maintaining maritime zones for SIDS under international law despite rising sea levels.
- To examine the status of artificial islands under international law where they are established to mitigate the effects of sea-level rise.
- To provide a viable solution for SIDS to maintain their statehood and maritime zones where they have elected to relocate to artificial islands due to the effects of sea-level rise.

The outcome of this study will be to present recommendations to contribute to the reformation and adaptation of the international legal regime regarding SIDS amid rising sea levels. The Montevideo Convention and the UNCLOS framework do not provide a remedy to SIDS contending with the effects of rising sea levels and climate change. The Montevideo Convention and UNCLOS were drafted before drastic changes to the climate occurred, and the rapid rate at which sea levels are rising could not have been foreseen. These conventions provide no basis for the continued existence of States facing climate change; as such, there is a gap in the law. There have been few changes to international law to tackle the situation facing SIDS due to climate change.[237] Much of the emphasis on climate change has centred around the relocation of climate refugees, mitigation of emissions, and adaptation measures.[238] However, less attention is placed on providing a legal means to allow State continuity for territories susceptible to extinction or widespread submergence.[239]

[237] Mechanisms to prevent climate change: Kyoto Protocol, Paris Agreement, and the UNFCCC. Additional mechanisms to investigate the effects of climate change both scientifically and legally: IPCC and ILA Committee on Sea-level rise.

[238] International Organization for Migration 'Migration and Climate Change' (2008) 31 *IOM Migration Research Series*; F Biermann, I Boas 'Protecting Climate Refugees: the case for a global protocol (2008) 50(6) *Environment: Science and Policy for Sustainable Development*; B Hartmann 'Rethinking climate refugees and climate conflict: Rhetoric, reality and the politics of policy discourse' (2010) 22 (2) *Journal of International Development*; F Biermann, I Boas 'Preparing for a warmer world: Towards a global governance system to protect climate refugees' (2010) 10 (1) *Global environmental politics.*

[239] Existing literature on the issue includes the following which will be discussed in more detail in the chapters to follow: JG Stoutenburg (note 109 above); R Rayfuse 'International Law and Disappearing States: Utilising Maritime Entitlements to Overcome the statehood Dilemma' 2010 *UNSW Law Research Paper No 2010-52*; RG Rayfuse E Crawford 'Climate Change, Sovereignty and statehood' (2012) *International Law in the Era of Climate Change*; R Rayfuse 'W(h)ither Tuvalu? International Law and Disappearing States' (2009) *UNSW Law Research Paper*; C Schofield D Freestone 'Islands Awash Amidst Rising Seas: Sea-level rise and Insular Status under the Law of the Sea' (2019) 34 (3) *International Journal of Marine and Coastal Law*; S Oliver 'A New Challenge to International Law: The Disappearance of the Entire Territory of a State' (2009) 16 *International Journal on Minority and Group Rights*; D Wong 'Sovereignty Sunk? The Position of 'Sinking States' at International Law' (2013) 14 *Melbourne Journal of International Law.*

The continuity of SIDS may hinge on the creation of artificial islands or the acquisition of freehold land for this purpose. Whilst the purchase of freehold land has been utilised by the Republic of Kiribati for food security, as indicated above, it is a more complicated issue to consider due to the existing sovereignty over the land by another State. In the government of Kiribati's official statement on the purchase of freehold land in Fiji, the government expressly ruled out the relocation of its whole population to the land as it does not possess sovereignty over the land which remains within the hands of Fiji.[240] Therefore, whilst the purchase of freehold land is the most straightforward mechanism for SIDS to relocate, Rayfuse notes that practically, it is unlikely that a State will cede sovereignty to another State. [241] There are few benefits to the ceding State in these instances.[242] Additionally, in most instances, State land has culture, resources and personal ties to people who originally inhabited the land.[243] Merging of States is possible, but the State allowing the relocation of the State at risk would be the 'host' State and represent all the SIDS interests in international law without statehood existing for the State at risk.

For this reason, this study focuses on legal remedies to ensure the continued survival of SIDS, where it is possible to establish an artificial island for this purpose or artificially modify natural maritime features into artificial islands. The Maldives is the first SIDS to take a step toward securing the future of their State via artificial means. Interventions of this nature will undoubtedly reduce the number of climate refugees that require relocation. This study proposes the creation of a new negotiating text to enable States to consider the creation of a convention to regulate the unique position of SIDS facing the effects of rising sea levels. A new convention, or *de lege ferenda,* is proposed instead of amending existing conventions as there are inherent difficulties in amending existing conventions on contentious areas.

For example, the UNCLOS is the existing framework that currently regulates the creation of artificial islands. An amendment to UNCLOS requires at least two-thirds of the States Parties, or 60 States Parties, to accede or ratify such amendments.[244] Gaining such a high majority of votes for a modification of this nature would be challenging and a rarity. Other existing instruments do not do enough to remedy the defect in international law that rising sea levels

[240] E Hermann W Kempf 'Climate Change and the Imagining of Migration: Emerging Discourses on Kiribati's Land Purchase in Fiji' 29 (2) (2017) *The Contemporary Pacific* 239.
[241] R Rayfuse 'International Law and Disappearing States: Utilising Maritime Entitlements to Overcome the statehood Dilemma' 2010 *UNSW Law Research Paper No 2010-52* 9.
[242] *Ibid*.
[243] *Ibid*.
[244] Article 315, UNCLOS.

have created. For instance, the United Nations Framework on Climate Change[245] (UNFCCC), the leading Convention on climate change, primarily aims to prevent climate change rather than provide mitigation measures for States affected by climate change.[246] As such, the objective of the UNFCCC is not aligned to protect SIDS; instead, it aims to ensure all parties to the Convention take measures to prevent the adverse effects of climate change.[247] Although the Convention highlights the unique needs of SIDS, it aims to promote cooperation for a common purpose amongst States: the prevention of global warming.[248]

The creation of a new convention is preferred over other remedies, including (i) cession, assignment, or lease of segments of territory to other States; (ii) association with other States; (iii) merger; (iv) condominiums, confederations or federations; (v) and hybrid schemes. This is because all of these remedies require the involvement of other States, existing land territory, the willingness of other States to absorb a population, or the agreement of another State to part with the land territory that they currently control. For example, the merger would involve the unification of a SIDS with another State wherein the population is incorporated into the receiving State.[249] The fundamental weakness of this proposal is that States have shown an unwillingness to absorb the populations of SIDS. The governments of Australia and New Zealand have limited climate migrants that they may take from Pacific Island States annually.[250]

A new convention is also preferred over regional agreements due to the global nature of the issue, with SIDS scattered worldwide and the need to provide a uniform mechanism to clarify uncertainties. While creating a new convention would result in the fragmentation of international law, there are many positive effects that may flow from this fragmentation; the most important of them all is certainty. It is important to highlight that the fragmentation of international law has resulted in the creation of many important areas of international law that are fundamental to the international legal system today, including environmental law and humanitarian law.[251] Establishing an entirely new convention allows for the negotiation of law

[245] United Nations Framework on Climate Change, Date of Adoption 9 May 1992, UNTS 1771, (entered into force 21 March 1994).
[246] Article 3, UNFCCC.
[247] Article 3, UNFCCC.
[248] Article 3, UNFCCC.
[249] UNGA, ILC, Seventy-third session, Sea-level rise in relation to international law, Second issues paper (note 213 above) 52.
[250] E Higuchi 'Climate Change Policies and Migration Issues of New Zealand and Australia' (2019) 2 *OPRI Perspectives* 2.
[251] H van Asselt M Mehling F Sindico 'Global Climate Change and the Fragmentation of International Law' 30 (4) (2008) *Law & Policy* 416.

that better represents the diverse views of States, which may make States more amenable to complying with such a convention. Negotiating a draft convention would allow for attention to be drawn to the issue of sea level and for the voices of SIDS to come to the fore. It may allow for diverse views on how to mitigate the issue of State extinction and preserve maritime entitlements where there is a possibility of relocating a State's population to an artificial island or alternative freehold land. The new negotiating text proposed within this study will allow for discussions and debate on the fundamental difficulties faced by SIDS. It will also enable parties to debate the exception to permit SIDS to maintain their current statehood and maritime zones despite the possible submergence of their natural territory and relocation of their population.

The proposal to negotiate a new draft convention that would allow for: the establishment of artificial islands to circumvent the effects of climate change; or the use freehold land purchased for this purpose. A new draft convention would allow for artificial islands constructed to house a population of a SIDS to be viewed as 'substitute artificial islands', attracting similar rights to the naturally formed territory currently controlled by SIDS. This proposal is novel as it is not currently permitted under international law. Additionally, proposals for the maintenance of statehood and maritime zones despite rising sea levels are put forward. It is essential to consider these reforms immediately to ensure that States facing possible State extinction within the next decade can plan for a future where they may continue to exist. While the first step for these States would be the maintenance of statehood, it would also be essential for these States to maintain the same fundamental maritime rights as claimed when their land territory, in its natural form, was above sea level. It is a common cause that some States are more susceptible to the effects of rising sea levels and climate-related changes, and it would not be fair for the international community to refrain from taking action. To do so would be to sign the 'death warrant' for not just the Maldives but all SIDS globally.

The proposal to create a new draft convention for negotiation altering the current position to allow for artificial islands as substitute artificial islands would have far-reaching effects that require regulation. Therefore, it is proposed in this thesis that a new convention is created to provide the criteria that States would need to prove to claim the artificial territory as 'substitute' territory. Claiming artificial islands as substitute in nature would require the State to establish, amongst other criteria, that there is a clear actual or imminent climate-related threat. Providing specific criteria for claims to substitute islands would provide sufficient safeguards to ensure that States that do not face imminent or actual threats from climate change would not be able to utilise this exceptional remedy.

5.2 Secondary Aim

The secondary objective of this study is to suggest recommendations for an alternative method of reform in the form of a recommendation to the General Assembly by the ILC of a report to be adopted by resolution. Examining an alternative means to remedy the insufficiencies within the current framework is essential. Such a recommendation by the ILC would propose the maintenance of maritime zones and statehood despite climate-related changes. It would also suggest a distinction between artificial islands created to expand existing territory as against synthetic measures taken solely due to climate change. Criteria should be outlined within a report by the ILC recommended for adoption that provides certainty on when the artificial island is capable of status as 'substitute artificial island(s)'.

6. Limitations and Methodology

6.1 Parameters of the Study

The narrow focus of this study is that of the partial and total submergence of SIDS and the difficulties this presents within international law. Whilst the thesis focuses on these areas, it transverses two aspects of international law: statehood within customary international law and the law of the sea. The discussion highlights the various international conventions applicable within these areas and analyses the critical, relevant international judicial precedent. The study also examines emerging State practice in statehood and within the law of the sea. It is impossible to view the partial and total submerging of a SIDS solely in respect of the law of the sea, as there are more significant issues for these States who stand to lose their statehood. Therefore, an in-depth analysis of both areas of law shall be undertaken.

It is crucial to outline that the study focuses on SIDS as these States are considered the smallest and most remote States in the world.[252] Whilst it is clear that other low-lying and island States worldwide may also bear some risk in light of rising sea levels and climate change, none have the same vulnerabilities as SIDS. SIDS are a group of low-lying islands responsible for less than 1% of the global greenhouse gas emissions but are exceptionally vulnerable to climate change.[253] There are some differences among SIDS as 11 States within this group are high-income, half of the States are middle-income, and eight are considered LDCs.[254] However, they also have commonalities in that they face environmental, social and economic challenges.

[252] 'Small Island Developing States – SIDS' *OECD* available at *https://www.oecd.org/dac/financing-sustainable-development/development-finance-topics/small-island-developing-States.htm* (accessed 21 January 2023).
[253] K Keo Y Jo 'The State of Climate Ambition' *UNDP* 2022 available at *https://www.undp.org/publications/State-climate-ambition-snapshots-least-developed-countries-ldcs-and-small-island-developing-States-sids* (accessed 21 January 2023) 3.
[254] *Ibid* 3.

Some examples of these challenges include limited resource bases, economies that are very dependent on the environment, all are remote in location, all rely on imports of fossil fuels, and all have economies with limited capabilities.[255] These characteristics make it difficult for these States to adapt to changes in the climate and increase their susceptibility to loss of biodiversity.[256] Climate Change requires them to implement urgent mitigation and adaptation strategies with limited resources. As such, this study aims to highlight the plight of these States and suggest legal mechanisms to complement the physical tools these States may take due to the acute consequences of climate change.

6.2 Research Methodology

The method of research utilised in this study is doctrinal in nature. Doctrinal research ordinarily includes, as explained by Hutchinson, 'a critical conceptual analysis of all relevant legislation and case law to reveal a statement of the law relevant to the matter under investigation'.[257] As such, this study aims to present all the relevant laws surrounding the core themes and provide findings on the study to present legal solutions to gaps within the law. The sources cited in support of this thesis have originated from published documents of both primary and secondary nature. The study draws on primary sources such as international conventions, resolutions by the UN, regional agreements, reports by UN organisations, the judicial precedent of international courts, and foreign judicial precedent. The documents accessed are publicly available and have been cited where appropriate. Secondary resources such as academic textbooks, journal articles, books, scientific studies and media reports have been consulted. The primary sources have been cited where possible, and the next best authoritative secondary source was utilised when the original source was unavailable.

The study will use the Third World Approach to International Law (TWAIL) methodology to champion the rights of SIDS in international law in each of the central topics of study, namely statehood, maritime zones, and artificial islands as substitute territories. The use of the TWAIL theory attempts to bring through the unique Third World experience of international law that many SIDS have experienced. The TWAIL theory criticises international law as well as the universal status of international law and has done so for generations.[258] Amongst other aspects, TWAIL scholars assert that colonialism established patterns of dominance over former

[255] *Ibid* 3.
[256] *Ibid* 3.
[257] T Hutchinson 'Valé Bunny Watson? Law Librarians, Law Libraries and Legal Research in the Post-Internet Era' (2014) 106(4) *Law Library Journal* 584.
[258] JT Gathii 'Twenty-Second Annual Grotius Lecture: The Promise of International Law: A Third World View' (2020) 114 *AM. SOC'Y INT'L L. PROC.* 379.

colonies to benefit States that were former colonial powers, for example, Europe and the USA.[259] This is evidenced by the lasting legacy of colonial powers over other States; for instance, many colonised States still adopt the official languages of their previous colonial powers, and many colonised States still adopt a legal system that stems from former colonial powers.[260]

Most importantly, TWAIL scholars observe that international law has not yet engaged with its complicated history, which includes colonialism and slavery. The legacies of these events and their effect on international law have yet to be addressed.[261] International law is often viewed from a set of ideals and standards, many of which were developed throughout times in international law, where the Third World was marginalised. Therefore, this research considers the Third World experience as part of international law as an essential step toward embracing the history from which international law finds its basis. Understanding international law and its role in difficult historical aspects allows us to consider the legacy and inequalities present therein.[262] It is important to highlight that the TWAIL view point is not to assert that Third World States have no guilt or dominance as it has always been necessary for TWAIL scholars to be critical of many Third World governments; however, it is the drive for international law to be more sensitive to Third World States which is the essence of this study.[263] Contemporary TWAIL scholars put forward the notion that rather than getting rid of international law norms in exchange for different international norms, it is better suited for international law to take former colonial countries more seriously within existing international structures.[264] Therefore, it is an attempt to accept that we cannot rewrite the whole system of international law, but we can acknowledge that the system is subject to imbalance.

Some TWAIL scholars also challenge the idea that international law has an entirely Western history.[265] Antony Anghie is one such TWAILer who challenges this conception of TWAIL.[266] Some of the most notable history of international law was created after the major wars, namely The Peace of Westphalia in 1648, the Congress of Vienna in 1815, the League of Nations in

[259] JT Gathii 'TWAIL: A Brief History of Its Origins, Its Decentralized Network, and a Tentative Bibliography' 26 (2011) *Trade Law and Development* 38.
[260] *Ibid* 38.
[261] JT Gathii (note 263 above) 379.
[262] *Ibid* 379.
[263] JT Gathii (note 264 above) 39.
[264] *Ibid* 39.
[265] A Anghie 'Rethinking International Law: A TWAIL Retrospective' (2023) XX (XX) *European Journal of International Law* 7.
[266] *Ibid* 7.

1919, the creation of the United Nations in 1945 and the fall of the Berlin Wall in 1989.[267] Anghie States that the 'liberal order' was created with the UN, which can be seen as the new world order.[268] However, the New International Economic Order (NIEO) campaign during the 1960s and 1970s is considered by Anghie to be the most important effort of the Third World, specifically in reforming international law and is of important value within international law.[269] Omotayo Olaniyan notes that the NIEO came after the end of the Second World War.[270] It resulted in the creation of a multitude of Charters and many scholars known as the TWAIL I[271] who aimed to provide an outline of an international legal system that could be fairer in the context of a post-imperial world.[272] The independence of Third World countries was threatened by ethnic conflicts, racist politics, anti-colonial nationalism, corruption, and authoritarian regimes, which put a damper on the belief of a new order.[273] There appeared to be an abandonment of NIEO by TWAIL scholars, with many pursuing other legal avenues such as human rights and more neo-liberal international law.[274] However, this does not mean that it has not impacted international law. Additionally, the role of the Third World in the history of many doctrines, for example, sovereignty, cannot be underestimated.[275]

In the context of SIDS specifically, many of these States struggled for independence and were decolonised much later than other States.[276] It is argued that this is a contributing factor to these States' current situation. Furthermore, the concepts, such as the sovereignty of States and statehood, have colonial and Western roots.[277] These concepts directly affect SIDS in their quest for survival. TWAIL scholars argue that the structure of international law favours the Western powers over the Third World,[278] and the issue of rising sea levels and its effect on

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[267] *Ibid* 7.
[268] *Ibid* 7.
[269] *Ibid* 7.
[270] R Omotayo Olaniyan 'The New International Economic Order (NIEO): A Review' (1987) *Nigerian Forum, March-April 1987, Nos 3 &4* 1.
[271] RP Anand, *New States and International Law* (1972); M Bedjaoui, *Towards a New International Economic Order* (1979); GM Abi-Saab, 'The Newly Independent States and the Rules of International Law: An Outline', 8 *Howard Law Journal* (1962) 95; GM Abi-Saab, 'The Third World and the Future of the International Legal Order', 29 *Revue Egyptienne de Droit International* (1973) 27; J Castañeda, 'The Underdeveloped Nations and the Development of International Law' (1961) 15(1) *International Organization* (*IO*) 38; JJG Syatauw, *Some Newly Established Asian States and the Development of International Law* (1961); and K Mbaye, *Les droits de l'homme en Afrique* (1992).
[272] A Anghie (note 270 above) 12.
[273] *Ibid* 13.
[274] *Ibid* 14.
[275] *Ibid* 23.
[276] 'Small, So Simple? Complexity in Small Island Developing States' *GSPSE* available at *http://pubs.iied.org/pdfs/7755IIED.pdf* (accessed 1 December 2021) 12.
[277] M Mutu A Anghie 'What is TWAIL' 94 (2000) *Proceedings of the Annual Meeting (American Society of International Law)* 33.
[278] *Ibid* 37.

SIDS is no different. The dilemma of SIDS is that they contribute the least to the problem of climate change in that they produce the lowest emissions;[279] however, they bear the brunt of the consequences and lack the necessary resources to remedy the situation.

7. Structure of the Thesis

The thesis provides an analysis of the legal instruments that regulate the areas outlined within this chapter and aims to discuss these issues in the following sequence:

7.1 Chapter One Synopsis

As outlined above, the introductory chapter briefly overviews the research area, namely, sea-level rise and the complications that exist for SIDS. It provides a synopsis of the three main issues: statehood, maritime zones, and artificial islands as substitute territories. It also provides motivation for the study as well as the parameters.

7.2 Chapter Two Synopsis

The second chapter provides an overview of sea-level rise. Firstly, this chapter describes how the phenomenon of rising sea levels is affecting SIDS worldwide. The chapter also offers a scale of the problem to set the foundation for the study.

7.3 Chapter Three Synopsis

Chapter Three tackles the first of the three main areas of contention. An in-depth analysis is undertaken on how sea-level rise threatens the statehood of SIDS currently and in the near future. An examination of the existing international law on the issue of statehood will be provided, as well as an analysis of how State extinction may occur. This chapter outlines that territory, and the presence of a population are fundamental requirements of statehood and addresses whether sea-level rise threatens the existence of statehood. In essence, the chapter outlines that specific requirements of statehood cannot be absent for State continuity. Historically, we have seen the temporary absence of particular conditions of statehood, primarily the lack of a government, and in these instances, statehood has continued. However, the situation of rising sea levels and State extinction is distinct due to the permanency of the problem. Where a government falls, an effective government can be recovered; the same cannot be said for the loss of territory as it is permanent. It is unlikely that if an island is submerged and an entire population relocates, this position is temporary. As such, the permanent absence of territory may result in State extinction, as the requirement of possessing territory can never

[279] 'This Interactive Chart Shows Changes in the World's Top 10 Emitters' *World Resources Institute* available at *https://www.wri.org/insights/interactive-chart-shows-changes-worlds-top-10-emitters* (accessed 13 January 2022).

be reduced to an abstract right. Similarly, the permanent loss of territory would also result in State extinction because the essence of statehood is essentially control over a population and territory.

7.4 Chapter Four Synopsis

The fourth chapter will examine the second of the three main areas of contention: maritime zones. This chapter will examine the various issues that sea-level rise presents for preserving maritime zones around SIDS. Topics discussed include defining the island in terms of international law, the maritime entitlements in terms of UNCLOS, and the effects of rising sea levels on these entitlements.

7.5 Chapter Five Synopsis

The fifth chapter discusses the last of the three main issues: artificial islands. This chapter opines that artificial islands are viewed as a viable mechanism for SIDS to continue to survive long-term in the face of the devastating effects of sea-level rise. Consequently, the current international framework in the form of UNCLOS limits the rights of these States concerning this artificial territory. An overview of these legal limitations will be provided, as well as an analysis of why the provisions should be re-examined regarding States facing the effects of rising sea levels. The chapter distinguishes between artificial islands established to house a population of a State as a result of diminishing SIDS territory and other artificial islands. This chapter focuses on the research objective to examine the status of artificial islands under international law, where they are established to mitigate the effects of rising sea levels.

7.6 Chapter Six Synopsis

Chapter Six provides an overview of the creation of a new negotiating text that seeks to provide a new means to view artificial islands built as a result of climate change. In doing so, it addresses the study's last and final research objective to provide a viable solution to SIDS to maintain their statehood and maritime zones where they have elected to relocate to artificial islands due to the effects of sea-level rise. The chapter will also provide an alternative recommendation if a new negotiating text is unsuccessful in producing a convention. The alternative recommendation opinions that the ILC should submit a report wherein it is recommended that the General Assembly take a resolution to ensure the long-term survival of island States. The chapter also concludes the study by providing a synopsis of the fundamental findings of the previous chapters.

CHAPTER TWO

Climate Change and Sea-level Rise

1. Preface

Sea levels have risen and declined moderately, with little cause for concern over the past 3000 years until roughly a century ago.[1] Over the last 100 years, global temperatures have increased in the region of one degree Celsius.[2] This slight warming of the Earth's temperatures has gravely affected sea levels. Much of the increase in ocean levels since 1993 has taken place over 28 years.[3] The 'unprecedented' rate at which the ocean is rising can be attributed to glacier mass loss in the Antarctic, ice mass loss in Greenland, and thermal expansion due to heightened global temperatures, as highlighted in Chapter One.[4] The melting of ice sheets and mountain glaciers is also causing freshwater to flow into the ocean, further aggravating the existing complications.[5] Changes to land water storage also contribute to this wide-scale problem.[6] Whilst it is believed that eliminating greenhouse gases may result in positive change, it is unlikely that differences in average global temperatures will prevent an increase in GMSL.[7]

[1] 'How long have sea levels been rising? How does recent sea-level rise compare to that over the previous centuries?' *NASA Sea-level Change Observations from Space* available at *https://sealevel.nasa.gov/faq/13/how-long-have-sea levels-been-rising-how-does-recent-sea level-rise-compare-to-that-over-the-previous/,* (accessed on 13 January 2021).
[2] *Ibid*.
[3] *Ibid.*
[4] D Chen, M. Rojas, B.H. Samset, K. Cobb, A. Diongue Niang, P. Edwards, S. Emori, S.H. Faria, E. Hawkins, P. Hope, P. Huybrechts, M. Meinshausen, S.K. Mustafa, G.-K. Plattner, and A.-M. Tréguier, 2021: Framing, Context, and Methods. In Climate Change 2021: The Physical Science Basis. Contribution of Working Group I to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change [Masson-Delmotte, V., P. Zhai, A. Pirani, S.L. Connors, C. Péan, S. Berger, N. Caud, Y. Chen, L. Goldfarb, M.I. Gomis, M. Huang, K. Leitzell, E. Lonnoy, J.B.R. Matthews, T.K. Maycock, T. Waterfield, O. Yelekçi, R. Yu, and B. Zhou (eds.)]. Cambridge University Press, Cambridge, United Kingdom and New York, NY, USA, 158.
[5] 'Global Mean Sea level' *NASA Understanding Sea-level* available at *https://sealevel.nasa.gov/understanding-sea level/global-sea level/overview*, (accessed 12 February 2021).
[6] Fox-Kemper, B., H.T. Hewitt, C. Xiao, G. Aðalgeirsdóttir, S.S. Drijfhout, T.L. Edwards, N.R. Golledge, M. Hemer, R.E. Kopp, G. Krinner, A. Mix, D. Notz, S. Nowicki, I.S. Nurhati, L. Ruiz, J.-B. Sallée, A.B.A. Slangen, and Y. Yu, 2021: Ocean, Cryosphere and Sea Level Change. In Climate Change 2021: The Physical Science Basis. Contribution of Working Group I to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change [Masson-Delmotte, V., P. Zhai, A. Pirani, S.L. Connors, C. Péan, S. Berger, N. Caud, Y. Chen, L. Goldfarb, M.I. Gomis, M. Huang, K. Leitzell, E. Lonnoy, J.B.R. Matthews, T.K. Maycock, T. Waterfield, O. Yelekçi, R. Yu, and B. Zhou (eds.)]. Cambridge University Press, Cambridge, United Kingdom and New York, NY, USA,, 1216
[7] D Freestone, D Vidas AT Camprubi 'Sea-level rise and Impacts on Maritime Zones and Limits: The Work on the ILA Committee on International Law and Sea-level rise' (2017) 5(1) *The Korean Journal of International and Comparative Law* 2.

Sea levels will continue to rise even if net zero emissions are reached.[8] The latter assertion is based upon the understanding that oceans will continue to warm, and ice sheets will continue to melt because it takes time to catch up to past and present emissions.[9] Therefore, the effects of the emissions are not felt immediately, so changes may not be present until some time has passed. NASA has been documenting the rise in global sea levels via satellite data from 1 January 1993 until the present, with current data suggesting a 3.4-millimetre surge per annum.[10]

It is asserted that sea-level rise is 'one of the most obvious manifestations of the radical changes to the Earth's system that *Homo Sapiens* has brought'.[11] Geologists and scientists often measure time according to changes in the state of the Earth, known as epochs.[12] In this regard, recent environmental changes have led scientists to believe that we have entered a new epoch, namely the Anthropocene.[13] It is estimated that humans' impact on the Earth will be observed in 'geological stratigraphic records' for millions of years.[14] The IPCC has stated with high confidence that anthropogenic climate change has caused many consequences, including increased rain, winds, extreme events, extreme sea level events and tropical cyclones.[15] The IPCC has further noted with moderate confidence that other changes, such as increased precipitation, have also occurred due to anthropogenic changes.[16] It is, therefore, not just sea-level rise but a combination of climate changes that affect the ocean and the States adjacent to the coast. What, then, are the effects specifically on SIDS?

The IPCC, in its most recent report on the mitigation of the effect of climate change, considered the impact of sea-level rise and climate change on SIDS. We will consider some of the findings below on the following issues: tropical cyclones, coral bleaching, flooding, freshwater

[8] IPCC. 2021: Chapter 9 Ocean, Cryosphere and Sea Level Change. In IPCC, 2021: Climate Change 2021: The Physical Science Basis. Contribution of Working Group I to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change [Masson-Delmotte, V., P. Zhai, A. Pirani, S.L. Connors, C. Péan, S. Berger, N. Caud, Y. Chen, L. Goldfarb, M.I. Gomis, M. Huang, K. Leitzell, E. Lonnoy, J.B.R. Matthews, T.K. Maycock, T. Waterfield, O. Yelekçi, R. Yu, and B. Zhou (eds.)]. Cambridge University Press, Cambridge, United Kingdom and New York, NY, USA1318.
[9] *Ibid* 1318.
[10] 'Sea level' *NASA* available at *https://climate.nasa.gov/vital-signs/sea level/*, accessed 27 January 2022.
[11] D Freestone D Vidas AT Camprubi (note 7 above) 3.
[12] SL Lewis MA Maslin 'Defining the Anthropocene' (2015) 519 *Research Perspectives* 171.
[13] *Ibid*.
[14] *Ibid*.
[15] IPCC, 2019: Technical Summary [H.-O. Pörtner, D.C. Roberts, V. Masson-Delmotte, P. Zhai, E. Poloczanska, K. Mintenbeck, M. Tignor, A. Alegría, M. Nicolai, A. Okem, J. Petzold, B. Rama, N.M. Weyer (eds.)]. In: IPCC Special Report on the Ocean and Cryosphere in a Changing Climate [H.- O. Pörtner, D.C. Roberts, V. Masson-Delmotte, P. Zhai, M. Tignor, E. Poloczanska, K. Mintenbeck, A. Alegría, M. Nicolai, A. Okem, J. Petzold, B. Rama, N.M. Weyer (eds.)]. Cambridge University Press, Cambridge, UK and New York, NY, USA, 67.
[16] *Ibid* 67.

insecurity, and rising ocean temperatures. Aside from climate change's effects on sea-level rise, heavy rains, tropical cyclones, and storm surges, it also affects settlements, infrastructure, health, well-being, food security, economies, and culture.[17] Tropical cyclones, in particular, impact small islands severely because they intensify and threaten human life and infrastructure.[18] Tropical cyclones drive flooding in the Caribbean Sea and the Southern Tropical Pacific.[19] Despite the propensity for tropical cyclone flooding, Pacific atoll States may likely experience annual flooding over their entire land surface due to waves from roughly the 2060s and 2070s to 2090s.[20] Due to rising temperatures in the ocean, coral bleaching is also occurring, and coral abundance is declining, particularly in the Pacific and Indian Oceans.[21] It is estimated that at a rate of one and a half degrees Celsius warming of the Earth, 70 – 90% of coral life will be lost, and at a rate of two degrees Celsius warming of the Earth, an estimated 99% of coral life will be lost.[22] It is essential to highlight that coral also provides protection for the coastline and contributes many benefits to island communities due to the ecosystems they service.[23] The impact that coral bleaching may have on fisheries in conjunction with cyclone damage should also be noted. It is estimated that in the small island States of Cook Islands, Federated States of Micronesia, Guam, Kiribati, Marshall Islands, Niue, Papua New Guinea, Solomon Islands, and Tuvalu, we will see a 50% decline in their maximum catch potential by 2100, with the IPCC highlighting that small islands are the most vulnerable to the fishing sector impacts of climate change than any other States noting that even LDCs are not as vulnerable.[24] Additionally, the IPCC report highlights that there is increased vulnerability to sea-level rise expected for island States that rely on coral reef systems, as it is estimated that these States will reach limits of adaptation well before the turn of the century.[25]

An essential consequence of the rise in sea level for SIDS is the limited availability of fresh water. For instance, there is already an estimated 11 – 36% reduction in freshwater resources

[17] M. Mycoo, M. Wairiu, D. Campbell, V. Duvat, Y. Golbuu, S. Maharaj, J. Nalau, P. Nunn, J. Pinnegar, and O. Warrick, 2022: Small Islands. In: Climate Change 2022: Impacts, Adaptation and Vulnerability. Contribution of Working Group II to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change [H.-O. Pörtner, D.C. Roberts, M. Tignor, E.S. Poloczanska, K. Mintenbeck, A. Alegría, M. Craig, S. Langsdorf, S. Löschke, V. Möller, A. Okem, B. Rama (eds.)]. Cambridge University Press, Cambridge, UK and New York, NY, USA, 2046.
[18] *Ibid* 2064.
[19] *Ibid* 2046.
[20] *Ibid* 2046.
[21] *Ibid* 2045.
[22] *Ibid* 2046.
[23] *Ibid* 2058.
[24] *Ibid* 2066.
[25] *Ibid* 2046.

from the ground in the Maldives due to rising sea levels.[26] Another significant consequence of sea-level rise is flooding, the IPCC highlights that a mere five-to-ten-centimetre increase in sea-level rise will result in the frequency of flooding doubling within the Pacific and Indian Ocean region.[27]

The States most affected by sea-level rise are SIDS in multiple locations worldwide. The IPCC Special Report on the Oceans and Cryosphere observes:

> 'Sea level rise is not globally uniform and varies regionally. Regional differences, within +-30% of the global mean sea level rise, result from land ice loss and variations in ocean warming circulation. Differences from the global mean can be greater in areas of rapid vertical land movement including from local human activities (e.g., extraction of groundwater).'[28]

Although the rise in mean ocean level alone already resulted in numerous coastal communities considering adaption and migration strategies, extreme sea-level events are of significant concern.[29] It has been highlighted in the latest IPCC report that many small island adaptation actions do not match the structural and system levels needed to ensure these States' long-term survival.[30] Many SIDS are already experiencing sea level events annually that ordinarily only occur once per century.[31] Consequently, some SIDS must prepare themselves for eventual relocation as adaptation and mitigation measures are becoming unsuccessful on a small scale.

SIDS, as low-lying, small island States, have warned against sea-level rise and its effects as early as 1989 when the Malé Declaration on Global Warming and Sea Level Rise (Malé Declaration)[32] was signed.[33] In the opening text of the Malé Declaration, it is expressly stated:

> 'Although the entire world would be adversely affected by these processes, low-lying, small, coastal and island States will face a decidedly greater predicament. Sea-level rise would cause extensive damage to the land and infrastructure of those countries and even threaten the very

[26] *Ibid* 2058.
[27] *Ibid* 2045.
[28] IPCC, 2019: Summary for Policymakers. In: IPCC Special Report on the Ocean and Cryosphere in a Changing Climate [H.-O. Pörtner, D.C. Roberts, V. Masson-Delmotte, P. Zhai, M. Tignor, E. Poloczanska, K. Mintenbeck, A. Alegría, M. Nicolai, A. Okem, J. Petzold, B. Rama, N.M. Weyer (eds.)]. Cambridge University Press, Cambridge, UK and New York, NY, USA, 10.
[29] *Ibid* 23
[30] IPCC, 2022: Small Islands (note 17 above) 2047.
[31] IPCC, 2019: Summary for Policymakers (note 28 above) 23.
[32] Male' Declaration on Global Warming and Sea-level rise, Date of Adoption 18 November 1989, UN Doc A/C.2/44/7.
[33] VP Cogliati-Bantz 'Sea-level rise and Coastal States' Maritime Entitlements: A Cautious Approach' (2020) 7 (1) *Journal of Territorial and Maritime Studies* 88.

survival of some island States. The possibility also exists of an increase in the frequency and/or intensity of natural disasters related to climate change, global warming and sea level rise.'

In 1992, there were further collective calls for States to assist environmentally vulnerable countries at the UN Conference on Environment and Development in Rio de Janeiro, Brazil.[34] The AOSIS was created in 1990 to ensure that small island States are advocated for in international environmental policies.[35] The AOSIS is linked with the UNFCCC and remains a permanent fixture in the UN.[36] The issue of rising sea levels and the international legal consequences have started gaining the international community's attention, including the ILC, as previously highlighted in chapter one.[37] The issue of 'sea-level rise in relation to international law' has been included in the long-term mandate of the ILC.[38]

Whilst this is an important step forward for SIDS, it is often argued that progress is taking place too slowly.[39] For this reason, many States have enquired about the possibility of litigation based on climate change[40] with the possibility of being awarded damages claims from some of the world's biggest emissions producers. In 2002, Tuvalu threatened to pursue both the USA and Australia over their emissions and the effects on the sea-level rise; unfortunately, they abandoned their claims in 2006 as it was essential to prove a causal link between the consequences of climate change within Tuvalu, specifically and the States concerned.[41] The intricacies involved in attempting to hold the world's largest emissions producers liable at the ICJ for the effects of climate change are considered complex.

Recently, Vanuatu has approached the UNGA to adopt a resolution requesting the ICJ to consider whether countries are required to protect people against climate change and, as mentioned earlier, were successful in their mission.[42] The adopted draft resolution has the support of one industrialized State, namely Germany and more than 100 other States, but it

[34] UNGA, Report of the United Nations Conference on Environment and Development' UN Doc A/CONF.151/26 (Vol. I), Rio de Janeiro, June 3 – 14, 1992, Principle 6.
[35] 'Bureau of the AOSIS' available at *https://www.un.org/ohrlls/content/bureau-aosis#:~:text=The%20Alliance%20of%20Small%20Island,and%20influencing%20international%20environmental%20policy* (accessed 26 January 2022).
[36] *Ibid*.
[37] VP Congliati-Bantz (note 33 above) 88; The International Law Commission is elected by the UNGA.
[38] UNGA, Seventy-third session, Resolution adopted by the General Assembly on 22 December 2018, 14 January 2019 UN Doc A/RES/73/265 3.
[39] VP Cogliati-Bantz (note 33 above) 88.
[40] *Ibid* 89.
[41] *Ibid* 89.
[42] UNGA, Seventy-seventh session, Request for an advisory opinion of the International Court of Justice on the obligations of States in respect of climate change, 1 March 2023, UN Doc A/77/L.58; UNGA, Seventy-seventh session, Resolution adopted by the General Assembly on 29 March 2023, UN Doc A/RES/77/276.

does not have the backing of the USA and China.[43] The adoption of the resolution has resulted in the triggering of two critical processes: first, the advisory opinion, and second, the wider social process surrounding the procedure.[44] Regarding the advisory opinion process, the wheels are already in motion. The following steps will now take place: certified true copies of the resolution are to be sent to the ICJ; next, the Secretariat will provide a bundle of documents to the Court; the Registrar of the Court then gives notice to all States to appear before the court; and the court will then also issue a procedural order which invites States, and intergovernmental organisations to provide written statements on the issue at hand as asked by the UNGA.[45] It is also possible for intergovernmental organisations that were not explicitly requested to provide information on the issue at hand to submit a request to do so to the ICJ.[46] The Court will then allocate time to each State or intergovernmental organisation to conduct oral hearings.[47] The advisory opinion may then be provided within 6 – 12 months from the conclusion of oral hearings.[48] The second trigger event is that the wider social process may encourage States, international organisations, academics, and other parties to clarify their positions on the issue.[49] Whilst this may result in conflicting submissions on the issue, it is to encourage awareness and thinking on this important topic. The ICJ is considered to be in the best position to have the international community weigh in on the issue and then determine the legal position.

It is essential to highlight that a previous move from Palau to invite the ICJ to provide an advisory opinion on this issue gained opposition from the USA.[50] Burkett asserts that the USA has a special relationship with many SIDS.[51] This relationship with SIDS may lead to marginalisation due to power imbalance. The pressure on Palau to drop their quest for an advisory opinion is one such way in which this inequity of positions may play out. It is also noteworthy to mention that Vanuatu may experience some opposition from powerful States, just like Palau experienced. Vanuatu has diplomatic influence from different partners, namely China, and the government has significant trading partnerships with Australia and New

[43]UNGA, Seventy-seventh session, Request for an advisory opinion of the International Court of Justice on the obligations of States in respect of climate change, 1 March 2023, UN Doc A/77/L.58 1.
[44] Vanuatu ICJ Initiative 'Briefing on the International Court of Justice process for an Advisory Opinion on Climate Change Obligations' available at *https://docs.google.com/document/d/17nk7SJFVkANfXYyX5HGxiPAYfVnBwlBc/edit* (accessed 18 June 2023).
[45] *Ibid*.
[46] *Ibid.*
[47] *Ibid*.
[48] *Ibid*.
[49] *Ibid*.
[50] M Burkett 'A Justice Paradox: On Climate Change, Small Island Developing States, and the Quest for Effective Legal Remedy' 35 (2013) *University of Hawai'I Law Review* 643.
[51] *Ibid* fn. 58.

Zealand.[52] The spokesperson for Vanuatu, who has championed this cause, has remarked that he is not concerned about pressure from other States and will not abandon the request for a legal opinion.[53]

Amongst ongoing campaigns for justice and the difficulties that present along the way, SIDS are also experiencing enduring sea-level rise complications and adaptation difficulties. Below, we will briefly consider the SIDS of Tuvalu, Kiribati, Seychelles, Marshall Islands, and Maldives to provide context on the daily status quo within these territories as they face the effects of rising sea levels.

2. SIDS and Sea-Level Rise – Case Studies

2.1 Tuvalu

Low-lying islands are considered to be at the forefront of adversity when it comes to rising seas. Many SIDS within the Pacific Ocean and the Caribbean are already suffering the tangible effects of climate change. The South Pacific Island of Tuvalu is an archipelago comprising nine coral islands.[54] Tuvalu has an average elevation of one meter above sea level, making it one of the world's most vulnerable States to sea-level rise.[55] The State is the eighth smallest country in the world, housing just over 11,000 people on the largest island, Fongafale, where the local inhabitants share a land area of less than 26 square kilometres.[56] The people of Tuvalu experience the impact of rising sea levels and climate change daily. It is estimated that Tuvalu may become uninhabitable with a sea-level rise in the 'tens of centimetres' region.[57] It is further projected that by 2050, 50% of the land area will be flooded by daily tidal waters, and by 2100, 95% of the land area may be flooded by routine high tides.[58]

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[52] 'Vanuatu country brief' *Australian Government Department pf Foreign Affairs and Trade* available at *https://www.dfat.gov.au/geo/vanuatu/vanuatu-country-brief* (accessed 20 June 2023); 'Vanuatu' *New Zealand Foreign Affairs & Trade* available at *https://www.mfat.govt.nz/en/countries-and-regions/australia-and-pacific/vanuatu/* (accessed 20 June 2023); 'Embassy of the People's Republic of China in the Republic of Vanuatu' available at *http://vu.china-embassy.gov.cn/eng/zwgx_0/sbwl/* (accessed 20 June 2023).

[53] S Sengupta 'Tiny Vanuatu Uses Its 'Unimportance' to Launch Big Climate Ideas' The New York Times 8 December 2022 available at *https://www.nytimes.com/2022/12/08/climate/vanuatu-president-nonproliferation-hague.html* (accessed 21 January 2023).

[54] A Powers 'Sea-level rise and Its Impact on Vulnerable States: Four Examples' (2012) 73 (1) *Louisiana Law Review* 155.

[55] *Ibid* 155.

[56] World Bank Group 'Country Risk Profile: Tuvalu' available at *https://climateknowledgeportal.worldbank.org/sites/default/files/country-profiles/15824-WB_Tuvalu%20Country%20Profile-WEB.pdf* (accessed 20 June 2023)

[57] C Armstrong J Corbette 'Climate Change, Sea-level rise and Maritime Baselines: Responding to the Plight of Low-Lying Atoll States' (2021) *Global Environmental Politics* 93.

[58] '*Te Lafiga o Tuvalu* – Tuvalu's Long Term Adaptation Plan (2022)' UNDP Climate available at *https://www.youtube.com/watch?v=Gp14MhdaSTs* (accessed 20 June 2023).

The State's population also experiences other climate-related challenges. Currently, the people of Tuvalu are experiencing storm surges, king tides, and floods, which have also become more intense.[59] The ocean is rising so significantly within this region that it is causing contamination of underground water supplies.[60] As a result, the population is relying on rainwater, which is made more complicated by a lack of rainwater storage capacity and the risk of changing rainfall patterns.[61] The government of Tuvalu is trying to ensure adaptation and survival with limited access to resources.

The Tuvalu government has recently established the Long Term Adaptation Plan (L-TAP). The L-TAP aims to ensure the long-term survival of the State by creating 3.6 kilometres of raised land as a safe haven aiming to protect its people and facilities.[62] This will also include a harbour, housing, hospitals, schools, and civic centres, amongst other vital services necessary for community longevity.[63] The L-TAP plan will also ensure safety for the State and its people beyond 2100.[64] The country also has other legislation that provides for the efficiency of energy use and creates a climate survival fund to provide services to the people of Tuvalu in view of the future impacts of climate change.[65] The State of Tuvalu has also recently passed amendments to their Constitution, allowing for a progressive definition of statehood, namely:

> 'The State of Tuvalu within its historical, cultural and legal framework shall remain in perpetuity in the future, notwithstanding the impacts of climate change or other causes resulting in loss to the physical territory of Tuvalu.'[66]

2.2 Kiribati

The Republic of Kiribati is another SIDS that is one of the most vulnerable to the effects of climate change.[67] The location of Kiribati poses some challenges as there is a general lack of 'arable soil', making agricultural development difficult in this area.[68] This is combined with the reality that the island is isolated from countries within the same region, making it

[59] UNFCCC 'Government of Tuvalu Updated Nationally Determined Contribution (NDC) November 2022' available at *https://gggi.org/wp-content/uploads/2023/02/Tuvalus-Updated-NDC-for-UNFCCC-Submission.pdf* (accessed 20 June 2023).
[60] *Ibid.*
[61] *Ibid*.
[62] '*Te Lafiga o Tuvalu* – Tuvalu's Long Term Adaptation Plan (2022)' (note 58 above)
[63] *Ibid*.
[64] *Ibid*.
[65] Energy Efficiency Act 2016; Climate Change and Disaster Survival Fund Act 2015 No. 11 of 2016.
[66] The Constitution of Tuvalu Bill 2022 available at https://dfa.gov.tv/wp-content/uploads/2022/12/Tuvalu-Constitutional-Bill-.pdf (accessed 26 September 2023).
[67] L Allgood KE McNamara 'Climate-induced migration: Exploring local perspectives in Kiribati' (2017) 38 (1) *Singapore Journal of Tropical Geography* 371.
[68] D Storey S Hunter 'Kiribati: an environmental 'perfect storm'' (2010) 41(2) *Australian Geographer* 170.

challenging to trade regionally and globally.[69] The Kiribati nation comprises 32 low-lying atolls and reef islands and one island composed of limestone – 12 of these islets are inhabitable.[70] Many islets that make up the Republic of Kiribati are unfit to sustain human life due to limited access to essential resources such as drinking water.[71] Although the reality of submergence is constantly at the fore for the people of Kiribati, the most worrying of all the effects of sea-level rise is the lack of fresh water and food resources due to saltwater contamination.[72] Whilst inundation may result in 55% of Kiribati becoming uninhabitable by 2050, researchers have noted that the lack of access to drinking water and food may result in the migration of the population before the territory is submerged.[73] The availability of freshwater depends on rainfall, much like the State of Tuvalu, and where rainfall is unpredictable, it creates vulnerability for the entire population.[74]

Adapting to these changes is of the utmost importance to ensure continued survival for Kiribati. The government of Kiribati is primarily constructing sea walls built from coral rock, sandbags, and concrete blocks as deterrents to the rising sea.[75] However, sea walls are considered a controversial adaptation method as they cause beach erosion without additional measures to prevent such destruction.[76] Breakwaters should accompany the installation of sea walls to slow the rate at which waves crash upon the shore.[77] Limited capital available to States like Kiribati often results in sea walls being constructed as a quick and affordable mechanism to protect the land.[78]

On the ground, the people of Kiribati (otherwise known as i-Kiribati)[79] have become innovative in creating measures to help their State survive the effects of sea-level rise and climate change. Amongst these efforts are projects aimed at planting mangroves to help prevent further coastal erosion.[80] Numerous programs also aim to educate people about how to reduce their impact on

[69] *Ibid* 168.
[70] SD Donner S Webber 'Obstacles to climate change adaptation decisions: a case study of sea-level rise and coastal protection measures in Kiribati' 2014 *Springer Japan* 333.
[71] D Story S Hunter (note 68 above) 168.
[72] *Ibid* 170.
[73] L Allgood KE McNamara (note 67 above) 371.
[74] D Story S Hunter (note 68 above) 170.
[75] SD Donner S Webber (note 70 above) 337.
[76] *Ibid* 337.
[77] *Ibid* 337.
[78] *Ibid* 337.
[79] *Ibid* 333.
[80] 'Kiribati: Battling for Survival (Rising Sea levels)' *United Nations Office for Disaster Risk Reduction* 7 November 2020 available at *https://www.youtube.com/watch?v=hW9EAkqu6aY&t=1s,* (accessed 23 February 2021).

the climate.[81] There is a significant drive toward i-Kiribati growing their food, traditionally, to ensure food security for the future.[82] In addition, with China's help, Kiribati plans to create a farm on land purchased in Fiji, as the State currently imports nearly all of its vegetables at extremely high prices.[83] The initiative would aim to employ i-Kiribati to work on the farm where possible.[84]

The government of Kiribati has adopted the Kiribati Climate Change Policy with the vision for the country to remain 'resilient and viable' despite the effects of climate change.[85] This policy has the following key themes: coastal protection and infrastructure, security of water and food resources, health, environment, disaster risk management, capacity building, education, finance for climate-related measures, and the unavoidable impacts of climate change.[86] The policy does highlight that climate finance is vital to its plan as the country does not have the resources it needs to address these aspects on its own.[87] The government also has a Parliament Selection Committee on Climate Change that advises the cabinet to allow them to make informed decisions.[88]

2.3 Seychelles

Seychelles is a SIDS that comprises more than 100 small islands, with most of the population residing on only three of these islands.[89] Seychelles are highly vulnerable to land loss resulting from sea-level rise, as an increase in the range of one metre would result in the submergence of 70% of the State's total land area.[90] Development within Seychelles has traditionally occurred in coastal regions that remain vulnerable to flooding.[91] Amongst the vulnerabilities of necessary infrastructure, four other threats remain for Seychelles: sea-level rise, rainfall pattern changes, flooding, and extreme weather events.[92] Most recently, changes in rainfall

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[81] *Ibid.*
[82] *Ibid.*
[83] C Pala 'Kiribati and China to develop former climate-refuge land in Fiji' 23 February 2021 *The Guardian* available at *https://www.theguardian.com/world/2021/feb/24/kiribati-and-china-to-develop-former-climate-refuge-land-in-fiji* (accessed 21 January 2023).
[84] *Ibid*.
[85] 'Kiribati Climate Change Policy' available at *president.gov.ki/presidentgovki/wp-content/uploads/2019/04/Kiribati-Climate-Change-Policy.pdf* (accessed 8 February 2023) 4.
[86] *Ibid* 10.
[87] *Ibid* 21.
[88] *Ibid* 22.
[89] R Payet W Agricole 'Climate Change in the Seychelles: Implications for Water and Coral Reefs' (2006) 35 (4) *The Royal Colloquium: Arctic under Stress: A Thawing Tundra* 182.
[90] A Powers (note 54 above) 157.
[91] D Etongo 'Climate Change Adaption in Seychelles: Actors, Actions, Barriers and Strategies for Improvement' (2019) 1 (2) *Seychelles Res J* 45.
[92] *Ibid* 46.

patterns have been problematic for Seychelles.[93] In 2019, there was a series of flash floods that affected the island of Mahe.[94] The indication is that the dry seasons are getting drier and the wet seasons are getting wetter; this is considered to be a clear indication of climate change.[95] There has also been a decline in coral reef growth and incidents of coral bleaching leading to erosion amidst rising sea levels.[96] Much of the Seychelles economy is derived from tourism and fisheries;[97] these changes to the oceans make the State vulnerable.

Additionally, coral and mangrove ecosystems provide additional protection within Seychelles against erosion and natural protection in the event of sea-level rise.[98] Rising sea temperatures have caused coral reef mortality. In 1998, a bleaching event resulted in a catastrophe that caused coral reef mortality of 97% in certain areas, with many of the reefs collapsing.[99] It took 20 years to restore the coral reefs to the same levels as before 1998, and in 2016, a second major bleaching event took place, resulting in a reduction of 30% of coral cover.[100]

In addition to coral bleaching, there have been notable natural disasters in Seychelles over the last few decades; in 1997, the Seychelles International Airport was flooded, damaging surfaces and lifting the asphalt from the sub-base.[101] High tides in 2007 caused widespread flooding of 50 metres inland, damaging roads and other infrastructure.[102] While the damages did not mean the end for Seychelles, they indicate that climate change can strain the infrastructure within the vulnerable State.[103]

Despite these challenges, mechanisms are in place to ensure the adaption of Seychelles, such as the Seychelles National Climate Change Committee. The Committee aims to enforce collaboration on climate change across private, non-governmental organisations and the public sector.[104] The State has also updated its Climate Change Policy in 2020 and submitted an

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[93] D Etongo *et al* 'Identifying and Overcoming Barriers to Climate Change Adaptation in the Seychelles' 2020) *African Handbook of Climate Change Adaptation* 4.
[94] *Ibid* 4.
[95] *Ibid* 4.
[96] *Ibid* 4.
[97] P Payet W Agricole Climate Change in the Seychelles: Implications for Water and Coral Reefs' (2006) 35 (4) *The Royal Colloquium: Arctic under Stress: A Thawing Tundra* 182.
[98] A Powers (note 54 above) 157.
[99] 'Seychelles – Coral Restoration' *Reef Resilience Network* available at *https://reefresilience.org/case-studies/seychelles-coral-restoration/#:~:text=The%201998%20bleaching%20catastrophe%20decreased,inner%20granitic%20islands%20of%20Seychelles* (accessed 21 January 2023).
[100] *Ibid*.
[101] D Etongo (note 91 above) 46.
[102] *Ibid* 46.
[103] *Ibid* 46.
[104] D Etongo *et al* (note 93 above) 15.

updated nationally determined contribution for submission under the Paris Agreement.[105] Seychelles ensures sustainable resource management and investment in sustainable development to ensure the continued existence of the island State.[106] Seychelles also has a series of policy and legislative mechanisms that govern climate change, including the Seychelles Climate Change Policy passed in 2020, which aims to make the country climate resilient.[107] The policy of Seychelles ensures adaptation; this is done by improving water management, monitoring and forecasting droughts and floods, a climate-resilient development, and ensuring natural habitats and natural ecosystems, including coral reefs, are climate resilient, amongst other aspects.[108]

2.4 Marshall Islands

The Marshall Islands comprises 29 low-lying atoll islands within the Pacific.[109] The islands are prone to sea-level rise, high waves, extreme weather conditions and droughts.[110] In addition, there is a general lack of access to fresh water, mainly in the northern islands, as these islands face widespread water insecurity.[111] The United States National Climate Assessment has indicated that sea-level rise in the Pacific region is higher than the global sea-level rise averages.[112] This increased rise in sea levels causes threats to structures on the coast, groundwater reserves, and operations in the harbours and airports; coral reefs may be at risk, as well as other associated side effects.[113] There are also threats to food security as a result of changes to ocean fisheries.[114] Furthermore, bleached coral, coral disease outbreaks and limited fisheries negatively impact tourism, which is a significant contributor to the GDP of these States.[115] These difficulties may lead to the migration of populations within this region, a crucial issue for the Marshall Islands as there are cultural, legal and practical difficulties.[116]

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[105] Republic of Seychelles 'Seychelles' Updated Nationally Determined Contribution' *Submission under the Paris Agreement* July 2021 available at *https://unfccc.int/sites/default/files/NDC/2022-06/Seychelles%20-%20NDC_Jul30th%202021%20_Final.pdf* (accessed 24 January 2023).
[106] *Ibid* 7.
[107] Government of Seychelles 'Seychelles' National Climate Change Policy, Ministry of Environment, Energy and Climate Change, Seychelles' (2020) available at *http://www.macce.gov.sc/wp-content/uploads/2019/10/seychelles-national-climate-change-policy-may-2020.pdf* (accessed 8 February 2023).
[108] *Ibid*.
[109] I Ahlgren S Yamada A Wong 'Rising Oceans, Climate Change, Food Aid, and Human Rights in the Marshall Islands' (2014) 16 (1) *Health and Human Rights Journal* 70.
[110] *Ibid* 70.
[111] *Ibid* 70.
[112] 'Hawai'i and the U.S Affiliated Pacific Islands' *Third National Climate Assessment* available at *https://nca2014.globalchange.gov/report/regions/hawaii-and-pacific-islands*, (accessed 28 January 2022).
[113] *Ibid*.
[114] *Ibid*.
[115] *Ibid*.
[116] *Ibid*.

While international aid is provided by States such as the USA to ensure food security, these measures have other unintended consequences, such as declining food production and preference for imported food instead of growing food resilient to the changing climate.[117] Other projects have aimed at fostering sustainable practices within the region; for example, the Taiwanese have funded a farm in Majuro, Marshall Islands, that produces eggplants, cucumbers, tomatoes and squash that are sent to local stores, along with seeds being distributed to individuals for home growth.[118] Whilst this is a novel project aimed at sustainable development, growing seeds at home is a practice dependent on resources such as fresh water.[119] Furthermore, individuals will need to fund their home gardens, which is usually only feasible in higher-income areas.[120] Generally, the Marshallese people seem to favour crops that require little maintenance, such as coconut, pandanus and breadfruit.[121]

The government of the Marshall Islands has been involved in efforts to bring attention to climate change issues, with the State hosting the 44th Pacific Islands Forum Summit, where the Majuro Declaration was discussed.[122] The Majuro Declaration was a drive to ensure that the Pacific States take steps toward using renewable energy and reducing their carbon emissions to curb climate change.[123] The government of the Marshall Islands has also been vocal in its position to stay on the island regardless of changes to the climate. The government have also urged the international community to act against climate change before it is too late, with former Marshallese President Chris Loeak in 2013 declaring:

> 'For the Marshallese, in ways the English language cannot fully convey, our island is who we are. It is not just our culture but our personal identity. In 1954 and 1956 we petitioned the UN to stop nuclear testing, we warned of the harm and were met with empty sympathies. Unlike the cold war, global nuclear risk today is very different, but it is without a very heavy burden carried by the Marshallese people. The Marshall Islands must never again become the global collateral damage of global inaction. Again, today the international community is still not listening, in the long term the 60 000 Marshallese people of my country stand to lose our homes, our livelihoods, our history, our security and our culture. I cannot put it any more snugly than that. These are the very same risks

[117] I Ahlgren S Yamada A Wong (note 109 above) 76.
[118] *Ibid* 76.
[119] *Ibid* 76.
[120] *Ibid* 76.
[121] *Ibid* 76.
[122] *Ibid* 77.
[123] *Ibid* 77.

the Marshall Islands and other small islands raised over 25 years ago. If only the world had listened then.'[124]

The country also has a *Tile Til Eo* 2050 Climate Strategy[125] to achieve net zero emissions and complete renewable energy by 2050 and climate adaptation.[126] The first hurdle to adaptation for the Marshall Islands is climate finance.[127]

2.5 Maldives

The Maldives is another low-lying island State located outside of the South Pacific, in a similar position to other SIDS. Most of the land mass in the Maldives is less than one meter above sea level, and its highest island has an elevation of three metres.[128] The Maldives is also no stranger to climate-related effects. The Maldives experienced major flooding in 1987 and 2007 due to distant-source swells, high spring tides and the settlement of low-lying areas.[129] Additionally, an El Niño-Southern Oscillation (ENSO) event in 1997-1998 reduced the coral cover to less than 10%.[130] After that, in 2004, whilst the coral was still recovering, a Tsunami occurred, which caused severe damage to the State and its infrastructure, resulting in the Maldives being downgraded to an LDC, caused migration within the State, and had lasting effects on the economy, health and well-being and livelihoods of its people.[131]

The Maldives has arguably had more access to resources than the formerly mentioned States. The Maldives government has been incredibly vocal in the drive toward reducing global carbon emissions. In 2008, the former president, President Nasheed, and his Cabinet undertook a meeting thirteen feet underwater wearing scuba diving gear, where a declaration to prevent further increases in global temperatures was signed.[132] The display intended to highlight the real fear that the Maldives may become uninhabitable by the turn of the century.[133] Fast forward 13 years later, and Maldives is considered a State at the forefront of addressing the impacts of

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[124] 'World Leaders Forum: Christopher Jorebon Loeak, President of the Republic of the Marshall Islands' available at *https://www.youtube.com/watch?v=dU_hVpduok4*, (accessed 28 January 2022).
[125] '*Tile Til Eo* 2050 Climate Strategy "Lighting the way" The Republic of the Marshall Islands' September 2018 available at *https://www.climate-laws.org/legislation_and_policies?from_geography_page=Marshall+Islands&geography%5B%5D=111&type%5B%5D=executive* (accessed 8 February 2023).
[126] *Ibid* 4.
[127] *Ibid* 15.
[128] A Powers (note 54 above) 159.
[129] IPCC, 2022: Small Islands (note 17 above) 2053.
[130] *Ibid* 2071.
[131]
[132] M Gagain 'Climate Change, Sea-level rise, and Artificial Islands: Saving the Maldives' statehood and Maritime Claims Through the 'Constitution of the Oceans' (2012) 23 (1) *Colo. J. Int'l Envtl L. & Pol'y* 79.
[133] *Ibid*.

climate change.[134] The State has undertaken numerous land reclamation projects and constructed an artificial island called Hulhumalé.[135] The island of Hulhumalé is expected to accommodate 100,000 people by 2030.[136]

Nevertheless, this artificial structure is not the only adaptation measure constructed by the Maldives government. There have been widespread land reclamation activities on numerous islands, including Malé, which has had 41% of its land reclaimed.[137] While the land reclamation efforts in the Maldives are admirable, the artificial island of Hulhumalé is being considered their 'Noah's Ark' should the island State's atolls meet their demise by submergence.[138] The only concern with viewing this artificial island as the saving grace for the Maldives is that international law presents many hurdles. The UNCLOS requires that islands are 'naturally formed' to be considered as such under international law.[139]

For the Maldives, Marshall Islands, Tuvalu, Seychelles, Kiribati and other SIDS, it is not just the land territories that these States stand to lose; it is also access to the economic potential that their maritime zones yield.[140] The EEZ of these States currently provides much-needed income by fishing and the sale of fishing rights, which may be sold to other territories. The ability of these States to exploit their EEZ and continental shelf will provide them with future income. For example, it would be possible for these States to consider harvesting minerals in the untapped seabed in the future.[141] Therefore, where a country must move its population to artificial land, reclaimed land or even freehold land purchased for relocation, maintaining maritime zones is fundamental to its success. As an illustration, 98% of the country's physical export commodities in the Maldives comprise fisheries.

Similarly, Kiribati relies heavily on marine resources to survive, with 116 million USD brought into the country in fishing license revenue.[142] It is easy to see how vitally critical maritime zones are for the SIDS that claim them. We need to consider how States that seek to survive artificially can also survive economically, with required changes to international law.

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[134] R Stobjanov *et al* 'Local perceptions of climate change impacts and migration patterns in Male Maldives' (2017) *The Geographical Journal* 370.
[135] *Ibid* 374.
[136] *Ibid* 374.
[137] *Ibid* 374.
[138] M Gagain (note 132 above) 82.
[139] Article 121, UNCLOS
[140] C Armstrong J Corbette (note 57 above) 5.
[141] *Ibid*.
[142] 'Fishery and Aquaculture Country Profiles The Republic of Kiribati' *FAO* (2018) available at *https://www.fao.org/fishery/en/facp/kir?lang=en* (accessed 20 April 2021).

3. Conclusion

The IPCC has stated that the 'choices made today influence how coastal ecosystems and communities can respond to sea level rise'.[143] This is true for many States and communities experiencing the devastating effects of climate change. From the discussion above, it is clear that the situation is dire for many SIDS. Rising sea levels are endangering the very existence of these States. These vulnerabilities are real and may present difficulties for State survival for SIDS before the turn of the century. Many legal and practical issues may occur due to changes to the Earth's climate, specifically for those States that lie on the coast.[144] Although the issue of vulnerability and adaption are essential, certain international legal complications require a more in-depth study in the chapters that follow.

This chapter has outlined that rising sea levels are already presenting daily challenges for SIDS. The difficulties being faced by SIDS are only set to increase with escalating global temperatures. Therefore, examining the legal ramifications for States facing submergence and habitability-related challenges is significant. It is crucial to analyse how international law may be modified to keep up with rising sea levels.

The following chapters will examine the possibility of State extinction due to climate change, the effect of rising sea levels on maritime entitlements of SIDS, and the legal complexities that arise from adaptation measures such as artificial islands as substitute territory for SIDS.

[143] Oppenheimer, M., B.C. Glavovic, J. Hinkel, R. van de Wal, A.K. Magnan, A. Abd-Elgawad, R. Cai, M. Cifuentes-Jara, R.M. DeConto, T. Ghosh, J. Hay, F. Isla, B. Marzeion, B. Meyssignac, and Z. Sebesvari, 2019: Sea Level Rise and Implications for Low-Lying Islands, Coasts and Communities. In: IPCC Special Report on the Ocean and Cryosphere in a Changing Climate [H.-O. Pörtner, D.C. Roberts, V. Masson-Delmotte, P. Zhai, M. Tignor, E. Poloczanska, K. Mintenbeck, A. Alegría, M. Nicolai, A. Okem, J. Petzold, B. Rama, N.M. Weyer (eds.)]. Cambridge University Press, Cambridge, UK and New York, NY, USA, 411.

[144] S Oliver 'A New Challenge to International Law: The Disappearance of the Entire Territory of a State' (2009) 16 *International Journal on Minority and Group Rights* 209.

CHAPTER THREE

Statehood, State Continuity and State Extinction

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1. Preface

The international law of statehood regulates how States come into existence and, arguably, how they dissolve.[1] The issue of statehood and State extinction is essential to international law, but exactly how a State is created and dissolved has remained under-researched.[2] State extinction is not a unique concept, but it enters a unique realm with sea-level rise. The world has yet to see State extinction due to changes in the Earth's climate.[3] However, it is possible that by 2100, rising sea levels and climate change may result in the extinction of many SIDS. Whilst State extinction is essentially the dissolution of a State, to understand the point at which a State becomes extinct, we first must consider what makes a State in international law, the thresholds of State continuity, and State extinction. The Oxford Dictionary defines 'statehood' as 'the fact of being an independent country and having the rights and powers of a country'.[4] Conversely, in practice, statehood is a lot more complex.

There is scholarship for the premise that a State becomes a State by fulfilment of specific conditions and the idea that a State is conditional upon recognition from other States. Regardless of the conflicting ideologies, locating the point at which a State attains legal personality is necessary.[5] The birth of a State is often considered to be when the elements of becoming a State are verified.[6] These elements are considered conditional upon a State attaining international legal personality.[7] The widely accepted elements or criteria of statehood are articulated in the Montevideo Convention which was created in 1933.[8] However, the

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[1] S Besson 'International courts and the jurisprudence of statehood' (2019) 10 (1) *Transnational Legal Theory* 33.
[2] J Dugard *Dugard's International Law: A South African Perspective* 5 ed (2018) 126.
[3] Existing examples of State dissolution, namely Yugoslavia and Czechoslovakia will be discussed in point 4.2 and 4.2.1 below.
[4] Statehood' *Oxford Learners Dictionary* available at *https://www.oxfordlearnersdictionaries.com/definition/english/statehood* (accessed 9 December 2021).
[5] P Moscoso de la Cuba 'The Statehood of 'collapsed' States in Public International Law' (2011) 29 *Agenda Internacional* 122.
[6] *Ibid*.
[7] *Ibid*.
[8] Convention on the Rights and Duties of States, adopted by the Seventh International Conference of American States, Date of Adoption 26 December 1933, LNTS 165, (entered into force 26 December 1934).

Montevideo Convention is not considered the origin of statehood as the concept of statehood was influenced much earlier in history.

Consequently, it is essential to consider below exactly when statehood and its elements were introduced into international law.

2. The History of Statehood

Statehood, as a concept, was only created recently. Until the twentieth century, there were no set rules in international law regarding when a State would be considered as such.[9] Previously, in the Middle Ages, the 'city State' and independent leagues were considered the main form of political organisation.[10] Only thereafter did the State overtake as the dominant form of political organisation, as the idea of complete sovereignty in perpetuity was one that the city-State and other independent leagues could not provide.[11]

Whilst the concept of statehood may be reasonably new, the elements of statehood that persist in modern international law have existed within various societies worldwide for centuries. As a vital element of statehood, the territory was known to ancient Greek and Roman civilisations.[12] The post-Roman era, however, centred around political and social aspects of society where tribal allegiance was given to a sovereign and the church.[13] Although sovereign States existed during this time, there was no recognition of the sovereignty of other States as power flowed from God to one authority that existed on Earth.[14] It is important to note, however, that sovereignty may be considered the starting point of statehood, as recognising the independence of other States is essential to the understanding of statehood as we know it today. Sovereignty is 'the right to exercise supreme, independent authority or jurisdiction over a piece of territory.'[15] Therefore, it is vital to determine when the concept of sovereignty was introduced into international law.

Hershey argues that international law is a product of theories, principles, State practice, and custom.[16] State practices and traditions amongst States are subject to change, informed by

[9] NL Wallace-Bruce 'Africa and International Law – the Emergence to Statehood' (1985) 23(4) *The Journal of Modern African Studies* 575.
[10] J Klabbers *International Law* 3 ed (2021) 76.
[11] *Ibid* 76.
[12] JG Stoutenburg *Disappearing Island States* (2015) 239.
[13] *Ibid*.
[14] D Croxton 'The Peace of Westphalia of 1648 and the Origins of Sovereignty' (1999) 21 (3) *The International History Review* 571.
[15] RG Rayfuse E Crawford 'Climate Change, Sovereignty and statehood' (2012) *International Law in the Era of Climate Change* 2.
[16] AS Hershey 'History of International Law Since the Peace of Westphalia' (1912) 6 (1) *American Journal of International Law* 30.

societal changes. Considering the many origins of international law, it is not easy to quantify how much influence these factors have had over international law today.

Some scholars assert that the concepts of statehood, as we understand them in a modern-day scenario, arguably originated from the 'Westphalian System' of territory-based States.[17] The Peace of Westphalia was a conference aimed at bringing peace after decades of war and conflict.[18] While each State had its own goals during the Conference, such as the Dutch striving for independence from Spain, the countries compromised, and two treaties, namely Munster and Osnabrück, were created.[19] The Treaties of Munster and Osnabrück ended three decades of war within Europe, which was a war between States and different religions.[20] Whilst the immediate achievements of the Peace of Westphalia comprised a shift in power and land ownership, the long-term effects are still influencing international law today.[21] The Peace of Westphalia was founded on 'self-determination in identity and government',[22] and the results are considered monumental.[23] The conference is viewed as the first attempt at the idea of world unity whereby States maintain sovereignty over territory with no subordination to a central authority.[24] The notion of ministers and Statesmen from different nations coming together to discuss political interests was also unheard of before the Peace of Westphalia.[25] This is arguably where the concept of diplomatic relations began.

Before the shift that the Peace of Westphalia provided, rights were held by Emperors who could decide individually to levy taxes, declare war, and unilaterally ratify treaties on behalf of the persons they ruled over.[26] Throughout the 17th century, during the Thirty Years' War, the system of centralised authority was beginning to be questioned.[27] However, the Peace of Westphalia was the catalyst for the decentralisation of power.[28] With the Peace of Westphalia

[17] *Ibid*.
[18] S Patton 'The Peace of Westphalia and it Affects on International Relations, Diplomacy and Foreign Policy' (2019) 10(1) *The Histories* 93.
[19] *Ibid* 93.
[20] 'Münster and Osnabrück – Sites of the Peace of Westphalia, Germany' *European Commission* available at *https://ec.europa.eu/culture/cultural-heritage/initiatives-and-success-stories/european-heritage-label/european-heritage-label-sites/munster-and-osnabruck-sites-of-the-peace-of-westphalia-germany* (accessed 12 January 2022).
[21] S Patton (note 18 above) 15.
[22] AS Hershey (note 16 above) 30.
[23] S Patton (note 18 above) 93.
[24] L Gross 'The Peace of Westphalia, 1648 – 1948' (1948) 42(1) *American Journal of International Law* 20.
[25] S Patton (note 18 above) 93.
[26] *Ibid* 95.
[27] *Ibid* 95.
[28] *Ibid* 96.

came a shift toward the recognition of the sovereignty of States rather than a more political medieval system of central hierarchy.[29]

Leo Gross has argued that the Peace of Westphalia was, to a certain extent, the precedent for some of the articles in the Covenant of the League of Nations[30], namely Articles 10, 12 and 16.[31] The Treaty of Versailles,[32] ended World War I and contained provisions for establishing the League of Nations. All States that ratified the Treaty were obliged to adhere to the requirements of the Covenant of the League of Nations.[33] Article 10 of the Covenant provided as follows:

> 'The Members of the League undertake to respect and preserve as against external aggression the territorial integrity and existing political independence of all Members of the League. In case of any such aggression or in case of any threat or danger of such aggression the Council shall advise upon the means by which this obligation shall be fulfilled'.[34]

This Article emphasised territorial sovereignty, which is considered one of the most important consequences of the Peace of Westphalia.[35] Territorial sovereignty is often thought to be the basis of international law.[36] Croxton notes that the workings of a sovereign system could be viewed at the Peace of Westphalia, but it was only until much later that this became formally part of international law.[37] Croxton asserts that:

> '…rather than being an idea that was historically constructed and then applied, sovereignty emerges as a historical fact that was gradually recognised by Statesman and eventually acknowledged as reality.'[38]

The Covenant expressly provided that territorial sovereignty and political independence were essential to the States that were considered Members of the League. Even in modern international law, territorial sovereignty, and political independence are crucial aspects of statehood.

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[29] *Ibid* 97.
[30] Covenant of the League of Nations, Date of Adoption 28 April 1919, (entered into force 10 January 1920). Including Amendments adopted to December 1924.
[31] L Gross (note 24 above) 91.
[32] Treaty of Peace With Germany (Treaty of Versailles), Date of Adoption 28 June 1919, UNTS 999 p. 171, (entered into force 10 January 1920).
[33] RS Sobel 'The League of Nations Covenant and the United Nations Charter: An Analysis of Two International Constitutions' 5(2) (1994) *Constitutional Political Economy* 176.
[34] Article 10, The Covenant of the League of Nations, December 1924.
[35] L Gross (note 24 above) 95.
[36] S Schmidt 'To Order the Minds of Scholars: The Discourse of the Peace of Westphalia in International Relations Literature' 55 (2011) *International Studies Quarterly* 609.
[37] D Croxton (note 14 above) 570.
[38] *Ibid* 571.

Article 12 of the Covenant is related to resolving disputes by way of arbitration or judicial settlement.[39] The Article also discouraged war, along with Article 16 of the Covenant. Article 16 of the Covenant specified that in the event of an act of war, member States were to stop trade and financial relations with the offending State.[40] Furthermore, violating a Covenant of the League of Nations would have resulted in that State no longer being considered a Member of the League.[41] The League of Nations was essentially aimed at promoting 'international cooperation' and achieving peace internationally rather than resorting to war, which is similar to the objectives of the Peace of Westphalia.[42] Ultimately, respecting the sovereignty of other States was vital in keeping peace and preventing war, which was essential to both the Peace of Westphalia and the Covenant of the League of Nations.

Effectively, the League of Nations could not prevent infringement on sovereignty via its ICJ and the imposition of sanctions and ultimately met its demise in 1930.[43] Despite its downfall, the League of Nations did inspire international law and statehood as we observe it today. Sovereignty and political independence became two elements of the Montevideo Convention, which is still the latest codified authority on statehood in the twenty-first century.

In analysing international law generally, and statehood in particular, in the twentieth century, it is essential to consider the massive growth in the number of States acknowledged worldwide.[44] At the start of the twentieth century, a total of 50 States existed, and by 2005, 192 States were in existence.[45] The major increase in the number of States is attributed to the political developments that took place due to conflict in the twentieth century.[46] The emergence of multiple States during the twentieth century also shifted international law as what was considered a 'State' was not fully settled, requiring development in the law and within international organisations.[47] Some of the new States that emerged over this time resulted from secession following a conflict.[48] Two other secession movements attempted to attain statehood for every new State created during this time.[49] Even in a modern-day scenario, many

[39] Article 12, League of Nations, Including Amendments adopted to December 1924.
[40] Article 16, Covenant of League of Nations, Including Amendments adopted to December 1924.
[41] *Ibid*.
[42] Covenant of the League of Nations, Date of Adoption 10 January 1920, (enter into force 28 June 1919).
[43] RS Sobel (note 33 above) 177.
[44] J Crawford *The Creation of States* 2 ed (2006) 4.
[45] *Ibid* 4.
[46] *Ibid* 4.
[47] *Ibid* 4.
[48] B Coggins *Power Politics and State Formation in the Twentieth Century: The Dynamics of Recognition* (2014) 15.
[49] *Ibid* 15.

movements trying to achieve statehood do not obtain sovereignty; this was also true during the twentieth century.[50] The number of States that have declared independence has slowed in the twenty-first century, with only a few States, such as South Sudan, declaring independence and admission to the UN as early as a decade ago.[51] All these important developments globally and within international law have profoundly affected statehood as we know it today.

Another critical element of statehood that deserves attention is the emergence of the different theories of statehood throughout history. The emergence of sovereignty, statehood, and the requirements of a State are a combination of State practice, international conventions, and the theories of statehood. The theories of statehood are arguably the most significant development on the issue of statehood in modern international law.

3. Theories of Statehood

Statehood is based on two different theories: the first of which is the constitutive theory, and the second is the declaratory theory.[52] The constitutive theory of statehood is premised on the idea that a State's existence depends on whether other States recognise it as such.[53] Therefore, if a State were to have all the requirements for statehood objectively, without recognition, it can never attain the status of a State.[54] Whereas the declaratory theory of statehood focuses on the ability of States to satisfy the objective criteria for statehood, should a State meet these criteria, it does not require recognition to be considered a State.[55] The latter theory of statehood is considered self-determination because a State may declare independence unilaterally. Although recognition in the declaratory theory can confirm statehood, statehood is already in existence.[56]

3.1 Constitutive Theory

The constitutive theory of statehood was born out of the increased support for legal positivism in the 19th century.[57] Hegel is considered one of the fathers of positivism and the idea of the

[50] *Ibid* 15.
[51] UNGA, Sixty-fifth session, Admission of the Republic of South Sudan to membership in the United Nations: resolution / adopted by the General Assembly, UN Doc A/RES/65/308.
[52] J van der Vyver 'Statehood in International Law' (1991) 5 *Emory Int'L Rev*. 12.
[53] JG Stoutenburg (note 12 above) 240.
[54] *Ibid* 240.
[55] S Talmon 'The constitutive versus the declaratory theory of recognition: *Tertium non datur*' (2005) 75(1) *The British Year Book of International Law* 106.
[56] E Erman 'The recognitive practices of declaring and constituting statehood' (2013) 5(1) *International Theory* 129.
[57] JG Stoutenburg (note 12 above) 240.

international State as a sovereign power.[58] Lauterpacht describes the constitutive theory as twofold:

> '…the first is that, before recognition, the community in question possesses neither the rights nor the obligations which international law associates with full statehood; the second is that recognition is a matter of absolute political discretion as distinguished from a legal duty owed to the community concerned.'[59]

In essence, regardless of whether a State has all the characteristics of a State, it must be recognised as a State by other States for it to attract full statehood. Talmon considers this theory outdated and a consensual system of international relations with consent as the main driver.[60] The legal positivist influence can be seen from the idea that consent is the basis for the validity of a State.[61] The recognition under this theory is purely subjective and at the discretion of the State concerned.[62] For this reason, the approach is susceptible to criticism as it allows for arbitrary power of States without criteria for statehood.[63] The main criticism of the constitutive theory of international law is that the concept of other States deciding on the ability of another State to be considered a subject of international law is contrary to the principle of sovereign equality in international law.

Furthermore, some States in international law are not recognised as such by other States; however, they have been held legally responsible in international law for transgressions of international obligations.[64] It stands to reason that a State that can be held legally accountable for violations of international law should, in some respect, be considered a State.[65] An example of this is Rhodesia, which was never formally recognised as a State and that, by way of a Security Council Resolution, was required to pay compensation to the Republic of Zambia for damaging property and life as a result of an act of aggression.[66] The vital element of the constitutive theory, which is also its downfall, is that there is no obligation on other States to recognise the statehood of another State.[67]

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[58] H Lautepacht *Recognition in International Law* Re-published 1 ed (2012) 38.
[59] *Ibid* 2.
[60] S Talmon (note 55 above) 102.
[61] E Erman (note 56 above) 132.
[62] S Talmon (note 55 above) 102.
[63] E Erman (note 56 above) 133.
[64] *Ibid* 103.
[65] *Ibid* 103.
[66] See United Nations, Security Council 'Resolution 455 (1979) [on Southern Rhodesia's policies towards Zambia] *S/RES/455* (1979) available at *https://digitallibrary.un.org/record/5824?ln=en* (accessed 7 February 2023) in S Talmon (note 55 above) 103.
[67] S Talmon (note 55 above) 103.

Scholars have well documented the difficulties with the constitutive theory. Some writers have attempted to find ways to mitigate the shortcomings of the constitutive theory. One such method was found during the Cold War, where the term '*de facto*' States was provided to explain the phenomenon of States that were not recognised by the West but were States self-determined.[68] The *de facto* State exercised control over territory but was not recognised by other States.[69] This *de facto* status, Talmon explains, was used to clarify the position of the German Democratic Republic (GDR) and other States, such as the People's Republic of Korea (North Korea) and the Democratic Republic of Vietnam (North Vietnam).[70]

Despite the criticisms of this theory, there is evidence of the constitutive theory in international practice in the form of Guinea-Bissau. The General Assembly of the UN accepted the independence of Guinea-Bissau, and the Security Council recommended that the nation be admitted into the membership of the UN.[71] Consequently, the State of Guinea-Bissau was established and still exists today. Other nations at the time were not afforded the same recognition by the UN, such as Biafra, which was recognised by other States such as Tanzania and Zambia, but could not get the UN Security Council to recommend their admission to the UN.[72] The nation of Biafra may have been considered a State according to the declaratory criteria of statehood;[73] however, it only existed for two and a half years without widespread international recognition.[74]

While recognition is a vital element of statehood in that it confirms statehood in international law today, most scholars assert that the declaratory theory is the prevailing theory of statehood in modern international law as it is considered a more objective means to confirm statehood.[75]

3.2 Declaratory Theory of Statehood

The declaratory theory of statehood finds its origins in natural law with the idea that international law is considered objective rather than subjective.[76] According to the declaratory theory of statehood, a State must fulfil the objective criterion for statehood.[77] Once the State meets the requirements for statehood, it is said to automatically become a State without other

[68] *Ibid* 104.
[69] *Ibid* 104.
[70] *Ibid* 104.
[71] NL Wallace-Bruce (note 9 above) 595.
[72] *Ibid* 595.
[73] *Ibid* 595.
[74] *Ibid* 595.
[75] S Talmon (note 55 above) 104.
[76] *Ibid* 106.
[77] E Erman (note 56 above) 134.

States' recognition.[78] Whilst the declaratory theory of statehood is not without difficulties, it is considered a more objective form of attaining statehood.

Declaratory theory finds support in legal treaties, conventions, and declarations by States.[79] During the conference on Yugoslavia Arbitration Commission: Opinions on Questions Arising from the Dissolution of Yugoslavia in 1992, it was noted that recognition of a State is not a condition of statehood and that statehood is purely declaratory, with recognition being a discretionary act.[80] Within the opinion of the Arbitration Commission, recognition was not a condition for the creation of a State but may reinforce statehood at the discretion of other States.[81] Brownlie asserts that:

> 'Recognition as a public act of State, is an optional and political act and there is no legal duty in this regard. However, in a deeper sense, if any entity bears the marks of statehood, other States put themselves at risk legally if they ignore the basic obligations of State relations.'[82]

3.3 A Middle Ground

Shaw asserts that there is a middle ground between the constitutive and declaratory theories of international law.[83] This is because there is precedent for the fact that when other States recognise a State, it often means that they believe that there is confirmation of the criteria for statehood.[84] However, Erman notes that it would be important for those who follow the declaratory theory to keep in mind that accepting statehood based on factual criteria means that we must understand that recognition as a system is based upon acceptance of the legal system as a whole and the legal norms it is based upon.[85] Similarly, Erman notes that the constitutive theorists would have to accept that States recognised as such would have some elements of statehood prior to acceptance, such as property or some autonomy manifested as self-determination.[86]

The problem with recognition is that it is not simply based on the ability of a State to fulfil the criteria for statehood, and it is wholly subjective. Shaw notes that the most significant difficulty is that recognition is political.[87] The USA is a State that often uses recognition in a highly

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[78] *Ibid* 134.
[79] S Talmon (note 55 above) 106.
[80] M Ragazzi 'Conference on Yugoslavia Arbitration Commission: Opinions on Questions Arising from the Dissolution of Yugoslavia' (1992) 31 (6) *International Legal Materials* 1526 para 4.
[81] *Ibid* para 4.
[82] I Brownlie *Principles of Public International Law* 7 ed (2008) 89 – 90.
[83] M Shaw *International Law* 9 ed (2021) 329.
[84] *Ibid*.
[85] E Erman (note 56 above) 142.
[86] *Ibid* 142-143.
[87] M Shaw (note 83 above) 329.

political manner.[88] Although political incentives are considered necessary for the USA, the UK has a different stance.[89] The UK grants recognition to a State only if the State complies with the requirements for statehood in international law but also once they are satisfied that there is control over a country by the authorities in charge and that this control is likely to extend long-term.[90]

Although recognition is often considered to be constitutive, Shaw argues it is not purely constitutive as, in practice, the act of recognition does not give the State in question the obligations and rights under international law.[91] Therefore, he also asserts that the declaratory theory is the approach we should adopt as the favourite of the two theories in terms of international law.[92] This means that a State may attain statehood by self-determination or declaration, separate from the recognition it may or may not achieve from other States. Furthermore, failure to recognise a State does not mean that a State has no rights and obligations under international law.[93] Vidmar notes that we should caution against the argument that a State may be created through recognition. This is because, within international law, recognition is generally believed to be declaratory rather than constitutive.[94] Vidmar, however, highlights that where statehood is not disputed, the issue of recognition may not have an effect on statehood.[95] Where statehood is disputed, the act of recognition may provide evidence to the effect that the status of an entity in question is that of a State.[96] Where recognition is extended collectively (by many States), it may be problematic to determine whether it is collective recognition or the collective creation of a State.[97]

It is argued that statehood is not purely declaratory in that a State is not an international legal person 'because it satisfied the criteria for statehood' but rather as a result of international law attributing full international legal personality to the factual situation the entity found itself in.[98] Therefore, Raic argues that statehood is a matter of both law and of fact.[99] It must be

[88] *Ibid*.
[89] *Ibid*.
[90] *Ibid*.
[91] *Ibid*.
[92] *Ibid*.
[93] *Ibid*.
[94] J Vidmar 'Remedial Secession in International Law: Theory and (Lack of) Practice' (2010 6 (1) *St Antony's International Review* 41.
[95] *Ibid* 41.
[96] *Ibid* 41.
[97] *Ibid* 41.
[98] D Raic 'The State as an International Legal Person' in D Raic *Statehood and the Law of Self-Determination* (2002) 38.
[99] *Ibid* 38.

emphasized that the criteria of statehood are not the only considerations in the acquisition of statehood.[100] Raic outlines that an entity may satisfy all the criteria for statehood, but if it was realised in violation of fundamental international legal rules, this would prevent the acquisition of statehood due to the fact that to allow the creation of a State would be against the normative standards and principles.[101]

It asserted that statehood is a fact which comes into existence when there is alignment with the law of statehood; this may be either when a State meets the criteria for statehood in terms of international law and, or where (even in the absence of one or more of the criteria for statehood) a State is widely recognised as such in addition to meeting some of the fundamental criteria for statehood. While not determinative of statehood, recognition can be a powerful confirmation or rejection of statehood. It is important to highlight that recognition is powerful but not always determinative. However, statehood can exist and result in rights and responsibilities in international law in the absence of recognition. Additionally, widespread recognition does not guarantee statehood. Crawford notes that if recognition were determinative, Kosovo and Palestine would be considered States in the international community with 97 and 132 recognitions, respectively and in both instances, there are questions about statehood.[102] Similarly, if recognition did not contribute to statehood, Somaliland and Taiwan would also be States; the standard view is that they are not.[103]

The Montevideo Convention is considered to be the most widely accepted objective criterion for statehood and is declaratory in nature.[104] However, it is important to note that the Montevideo Convention and the general acceptance thereof does not invalidate the practice of recognition. Recognition is often thought to be a political act that is independent of statehood; however, when States are satisfied that the criteria of statehood are met, it follows that it is then best practice to recognise a State as such.[105] States, however, can recognise an entity that does not meet the requirements of statehood in terms of international law. In practice, recognition is closely linked to the requirement of an entity's capacity to enter into international relations, as provided for in the Montevideo Convention, which will be discussed below.

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[100] *Ibid* 38.
[101] *Ibid* 38.
[102] J Crawford *Chance, Order, Change: The Course of International Law, General Course on Public International Law* (2014) 194-195.
[103] *Ibid* 194.
[104] JG Stoutenburg (note 12 above) 250.
[105] M Sterio 'Self-determination and other theories' in M Sterio *The Right to Self-Determination under International Law: Selfistans, Secession, and the Rule of the Great Powers* (2012) 49.

4. The Montevideo Convention and the Prerequisites for Statehood

The Montevideo Convention 1933 was adopted in Montevideo, Uruguay, at the Seventh of the Pan American Conferences.[106] The Convention codified the declaration theory of statehood based on customary international law. The convention was registered on the 8th of January 1936 in the League of Nations Treaty Series and was originally a Pan-American Union Convention.[107] It was signed initially by Honduras, the USA, El Salvador, the Dominican Republic, Haiti, Argentina, Venezuela, Uruguay, Paraguay, Mexico, Panama, Brazil, Ecuador, Nicaragua, Colombia, Chile, Peru, Cuba, and Guatemala.[108] The only State that declined to sign the convention that was present at the Conference was Bolivia.[109] Dugard notes that even though the convention was only regional – in that 15 Latin American States as well as the USA signed the convention – it was later widely accepted as the international criteria for statehood.[110] The convention itself does not describe the basis for its requirements or how they were chosen.[111] However, it is thought that the origins of the criteria were State practice at the time and required no further motivation.[112]

In the 1930s, Georg Jellinek proposed the 'doctrine of three elements' for a State, including territory, population and government.[113] These elements were also the basis for the Montevideo Convention.[114] Grant notes that William Hall had the most accurate definition of a State before the creation of the Montevideo Convention.[115] Hall describes statehood, or the creation of a State, as follows:

> 'States being the persons governed by international law, communities are subjected to law, with a certain exception which will be dealt with presently, from the moment, and from the moment only, at which they acquire the marks of a state. So soon, therefore, as a society can point to the necessary marks, and indicates its intention of conforming to law, it enters of right into the family of states, and must be treated in conformity with the law. The simple facts that a community in its collective capacity exercises undisputed and exclusive control over all persons

[106] JB Scott 'The Seventh International Conference of American States' (1934) 28(2) *The American Journal of International Law* 219.
[107] *Ibid*.
[108] 'Convention on Rights and Duties of States' *Department of International Law, OAS* available at *http://www.oas.org/juridico/english/sigs/a-40.html* (accessed 1 August 2021).
[109] *Ibid.*
[110] J Dugard (note 2 above) 129.
[111] TD Grant 'Defining Statehood: The Montevideo Convention and its Discontents' (1999) 37(2) *Columbia Journal of Transnational Law* 414.
[112] *Ibid* 416.
[113] JFI Recht *German Yearbook of International Law* 50 (2007) 252.
[114] TD Grant (note 111 above) 417.
[115] *Ibid*.

> and things within the territory occupied by it, that it regulates its external conduct independently of the will of any other community, and in conformity with the dictates of international law, and finally that it gives reason to expect that its existence will be permanent, are sufficient to render it a person in law.'[116]

It stands to reason that much of the literature during the time of the creation of the Montevideo Convention confirms many of the requirements provided within Article 1. Article 1 of the Montevideo Convention provides as follows:

> 'The state as a person of international law should possess the following qualifications:
>
> a. Permanent population;
> b. A defined territory;
> c. Government; and
> d. Capacity to enter into relations with the other states.'[117]

Grant observes that whilst the Montevideo Convention may have some insufficiencies in terms of not taking into account how international legal personality has evolved, at the time the Convention was created, the codification of the elements of statehood was a 'progressive project'.[118] Furthermore, there has been a reluctance to create an updated codification of statehood since then, and, as such, no multilateral instrument has yet replaced it.[119] In the case of the Montevideo Convention, its main purpose was to codify the legal normative standards within international law on statehood at the time of its drafting; the very reason for its creation suggests that its elements are considered customary law. However, more is needed to make such a determination. The ILC, via its sea-level rise study group, notes the following on the nature of the Montevideo Convention:

> '…it should be noted that the criteria of the Convention on the Rights and Duties of States are applicable when considering a state constituted as such, i.e. when determining whether a state has been established as a subject of international law and, more generally, its status thereafter. However, there are exceptional situations where, for example, the territory may be totally occupied by another state or a group of states without entailing the disappearance of the state…'[120]

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[116] WE Hall *A Treatise on International Law* 3 ed (1890) 21.
[117] Article 1, Montevideo Convention on the Rights and Duties of States, 1933.
[118] TD Grant (note 111 above) 448.
[119] *Ibid* 447-449.
[120] UNGA, ILC, Seventy-third session, 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, Geneva, 18 April-3 June and 4 July-5 August 20222 UN Doc. A/CN.4/752 para 192.

This statement indicates that the Montevideo Convention is the criteria for statehood before it exists and a benchmark for what elements must be in place for statehood to continue. It is essential then to consider each element or criteria of statehood in more detail.

The requirements in Article 1 of the Montevideo Convention have been mentioned to have been integrated into customary international law by the Judges of the International Criminal Tribunal for the former Yugoslavia as established by the Security Council Resolution 827 (1993).[121] However, the Montevideo Convention is by its nature a multilateral treaty and in order to analyse the elements of the Convention, it would be important to consider the criteria for the interpretation of treaties. The Vienna Convention on the Law of Treaties, 1969 (Vienna Convention)[122] provides us with some guidance on how to interpret treaties. Article 31 of the Treaty provides us with the general rule of interpretation requiring that treaties should be interpreted with good faith considering the 'ordinary meaning' in terms of their context and the object and purpose of the treaty.[123] Article 31 (2) speaks to the interpretation of the treaty in line with the preamble and annexes to the treaty and the agreements that the parties may have concluded. In addition, in terms of Article 31 (3) (a) – (c), it is also important to take into account subsequent agreements between the parties in terms of interpreting the treaty, subsequent practice in applying the treaty, and any other rules of international law that are relevant in terms of the relations between the parties. This general rule of interpretation is also supplemented in Article 32 with a provision that provides that where there is ambiguity, obscurity or a meaning that is absurd or unreasonable, one should look to the preparatory work of the treaty and the circumstances surrounding the conclusion.[124]

Therefore, before we consider the elements of the Montevideo Convention, we would need to look at its preamble and annexures in line with Article 31 (1) – (2) of the Vienna Convention. The Montevideo Convention does not provide a preamble; however, it has a reservation section at the end of the convention written by the Delegation of the USA. The USA delegation provides within this reservation that there was no time during the Conference to give interpretations and definitions of the terms within the treaty. This was unfortunate as it would have provided uniformity in interpreting the treaty. Despite the lack of clarity on the terms of

[121] *Prosecutor v. Slobodan Milosevic* Case No. IT-02-54-T, 16 June 2004 para 86; United Nations Security Council Resolution 827 (1993), Adopted by the Security Council at its 3217 meeting on 25 May 199, UN Doc S/RES/827 (1993).
[122] Vienna Convention on the Law of Treaties, Date of Adoption 22 May 1969, UNTS vol. 1155 p. 331, (entered into force 27 January 1980).
[123] Article 31 (1), Vienna Convention on the Law of Treaties.
[124] Article 32, Vienna Convention on the Law of Treaties.

the Convention when it was drafted, there is precedent comprising 90 years of implementation of the provisions of the Convention, which may provide some guidance in line with Article 31(3) of the Vienna Convention. Therefore, each criterion for statehood, as articulated in the Montevideo Convention will be analysed in more detail below to determine how the treaty has been applied in practice in line with Article 31 (3)(b) of the Vienna Convention.

4.1 Permanent Population

The Montevideo Convention's population requirement is considered one of the more straightforward requirements of statehood and is an essential requirement for this study. However, the requirement is crucial as it is arguably the element upon which statehood may first hinge for SIDS.

It is asserted by Stoutenburg that the addition of this criterion into the Convention was to make a differentiation between populations that are permanent and nomadic.[125] However, Raic notes that a nomadic population that moves in and out of the territory may still be considered a population.[126] In the ICJ opinion on *Western Sahara,* it was noted that the 'population' of the Western Sahara at the time it was colonised included nomadic tribes that 'traversed the desert on more or less regular routes dictated by the seasons and the wells and water-holes available to them.'[127] Notably, the court observed that the people were 'socially and politically organised in tribes and under chiefs competent to represent them'.[128] This element may be essential for SIDS, as there may be instances wherein the territory may become uninhabitable at different times of the year, which may encourage sporadic occupation of SIDS territories. It is important to highlight here that a nomadic population does not negate the element of permanency; a nomadic population that permanently transverses an area in and out of the territory may still meet this requirement.[129]

Nomadic or permanent populations aside, it would not matter what ethnicity or cultural ties such a population comprises; it just matters that the population resides within a particular territory.[130] Raic notes that a population is distinct from a 'people' in that a population comprises many different 'peoples' in that a 'people' is often considered an ethnic sub-group

[125] JG Stoutenburg (note 12 above) 266.
[126] D Raic 'The Traditional Criteria for Statehood and Effectiveness' in D Raic *Statehood and the Law of Self-Determination* (2002)
[127] *Western Sahara,* Advisory Opinion, I.C.J. Reports 1975, p.12 para 87.
[128] *Ibid* para 81.
[129] D Raic 'The Traditional Criteria for Statehood and Effectiveness' (note 126 above) 59.
[130] JG Stoutenburg (note 12 above) 268.

with a particular State.[131] This latter point perhaps emphasises that a population is typically diverse in nature, comprising people from many different ethnicities and cultures.

It has not traditionally been mandatory for the population residing in a State to comprise a minimum number of people.[132] This population element is considered vitally important for this study since many SIDS that may be affected by rising sea levels may experience shrinking populations. A population may be small and still be considered a population, provided it has certain key characteristics. The primary prerequisite is that the population is stable and permanently resides within the area.[133] Permanency has two separate criteria: that the population intends to inhabit the territory and that the territory is habitable for a population.[134] Often, the permanency of the population may be illustrated by issuing inhabitants with nationality.[135] Providing the inhabitants of a State with nationality enhances the legal link between the State and its people.[136] There is precedent for States that exist today with as little as 10,000 to 12,000 inhabitants in the form of Tuvalu and Nauru.[137] Although States with fewer than one million inhabitants are 'Micro States', they are considered States and have the same voting rights as other States within organisations such as the UN.[138]

4.2 Territory

A defined territory is often considered the essential element of statehood, and it is required that a State has a 'defined area'.[139] The word territory is traditionally rooted in the Latin word *terra*, meaning land or earth.[140] This is one of the central areas for consideration in relation to sea-level rise and SIDS, as these States stand to lose their territory as a result of sea-level rise.

Territory and territorial sovereignty are two concepts that are closely related for the purposes of understanding the requirement of territory under the Montevideo Convention. Territory can exist without territorial sovereignty or *terra nullius*; however, territorial sovereignty cannot be exercised without territory.[141] Territorial sovereignty is the ability of a State to display the activities related to that of a State in a particular area geographically.[142] Therefore, a group of

[131] D Raic 'The Traditional Criteria for Statehood and Effectiveness' (note 129 above) 57.
[132] R Lapidoth 'When is an entity entitled to statehood?' (2012) VI (3) *Israel Journal of Foreign Affairs* 78.
[133] *Ibid* 78.
[134] D Raic 'The Traditional Criteria for Statehood and Effectiveness' (note 126 above) 58-59.
[135] P Moscoso de la Cuba (note 5 above) 137.
[136] *Ibid*.
[137] R Lapidoth (note 132 above) 78.
[138] J Dugard (note 2 above) 129.
[139] R Lapidoth (note 132 above) 78.
[140] I Saunders 'Artificial Islands and Territory in International Law' 52 (3) 2019 *Vanderbilt Journal of Transnational Law* 652.
[141] D Raic 'The Traditional Criteria for Statehood and Effectiveness' (note 126 above) 59.
[142] *Island of Palmas* case (Netherlands/USA) 4 April 1928, Volume II 838.

people may not establish a State in the absence of territory.[143] It is important to highlight that territorial sovereignty is a right that only States may exercise.[144] In the *Corfu Channel* case, it was highlighted that territorial sovereignty is 'an essential foundation of international relations'.[145]

A designated area of territory must be a 'natural segment of the Earth's surface' and, historically, has been understood in this manner.[146] Territory traditionally could not be artificial and must be naturally formed.[147] In the *Island of Palmas* case, the Arbitrator noted that territory and sovereignty therein must be 'a portion of the surface of the globe'.[148] However, the territory does not only comprise the land territory of those States on the coast. According to the co-chairs of the sea-level rise study group in their second issues paper, territory is defined as follows:

> 'Territory is the concrete physical scope – whatever its size – over which the State exercises its sovereignty and jurisdiction, and comprises continental and insular areas, the sea adjacent to its coast including its internal waters, generated using straight baselines its archipelagic waters, if any, and its territory sea, as well as the airspace over them.'[149]

The latter definition highlights that the territorial sea and continental and insular areas are included in the definition of territory. It must be emphasised that these are features wherein a State can exercise territorial sovereignty. However, it is important to highlight that the coast, the coastal frontiers, and the territorial sovereignty exercised thereon is the basis upon which a State exercises sovereignty over the territorial sea and insular areas.[150] This is entrenched in the land dominates the sea principle, which permeates the UNCLOS, as highlighted in Chapter One. Therefore, to maintain the internal waters, territorial sea, archipelagic waters, and other maritime territories, it would be necessary for SIDS to maintain a coastline despite rising sea levels.

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[143] *Ibid* 60.
[144] J Stoutenburg (note 12 above) 257.
[145] *Corfu Channel case*, Judgment of April 9th, 1949: I.C. J. Reports 1949, P. 4 35.
[146] D Wong 'Sovereignty Sunk? The Position of 'Sinking States' at International Law' (2013) 14 *Melbourne Journal of International Law* 10.
[147] *Ibid* 10.
[148] *Island of Palmas* case (note 142 above) 838.
[149] UNGA, ILC, Seventy-third session, Sea-level rise in relation to international law, Second issues paper (note 120 above) para 88.
[150] UNGA, ILC, Seventy-fourth session, Sea-level rise in relation to international law, Additional paper to the first issues paper (2020), by Bogdan Aurescu and Nilüfer Oral, *Co-Chairs of the Study Group on sea-level rise in relation to international law, Geneva, 24 April-2 June and 3 July-4 August, UN Doc A/CN.4/761 para 148.

Additionally, in the *Corfu Channel* case,[151] within the separate opinion by Judge Alcarez, it was noted that States have sovereign rights which impose obligations on them in respect of four different traditional spheres, which include 'terrestrial, maritime, fluvial and lacustrine' but also adds three additional spheres namely 'aerial, polar and floating'.[152] However, Judge Alcarez notes that the sovereignty and the protection thereof are not equal in respect of these different spheres.[153] In this assertion, he highlights that a State would not be expected to exercise the same vigilance in the terrestrial part of their territory that they do in their maritime, aerial or other parts of their territory.[154] Whilst this does not affect the ability of these traditional spheres of territory to be considered territory, it recognises the difference amongst these forms of territory.

Klabber notes that a State without territory would be problematic to consider under international law regarding the formal requirements for a State.[155] The International Court of Arbitration has indicated in the *Island of Palmas* case that territorial sovereignty can never be reduced to 'an abstract right, without concrete manifestations' as territorial sovereignty is the basis for all international relations.[156] The importance of territory for statehood cannot be over-emphasised as to exercise territorial sovereignty; a State has to exercise control over a defined area where they may show a 'continuous and peaceful display of the functions of State'.[157] Conversely, it is not a requirement that the State has settled borders or boundaries.[158] Shaw asserts that whilst accurate borders are not a requirement, the State has to control a 'consistent band of territory' to fulfil this requirement of statehood.[159] For State existence, there must be territory, but there doesn't need to be control over the whole region.[160] Many States occupy more than one territory. Alaska, for example, is separate from the USA despite the State being the territory of the USA.[161]

The importance of territory and the continuous exercise of sovereignty over territory is envisaged by customary international law. Therefore, in the absence of territory above sea

[151] *Corfu Channel case*, Judgment of April 9th, 1949: I.C. J. Reports 1949, P. 4.
[152] *Individual Opinion by Judge Alvarez* in *Corfu Channel case*, Judgment of April 9th, 1949: I.C. J. Reports 1949 43.
[153] *Ibid* 43.
[154] *Ibid* 44.
[155] J Klabbers (note 10 above) 77.
[156] *Island of Palmas* case (note 142 above) 829 – 871.
[157] *Ibid*.
[158] J Klabbers (note 10 above) 77.
[159] M Shaw (note 83 above) 183.
[160] C Kukathas 'A definition of the State' (2014) 33(2) *University of Queensland Law Journal* 361.
[161] J Dugard (note 2 above) 130.

level, how can a SIDS exercise title over territory? As such, it is also important to examine title to territory in any discussion on territory for the purposes of statehood. The title to territory relates to the factual and legal conditions with which territory may be considered to belong to a particular authority.[162] Shaw refers to five modes of acquisition that a State may use to acquire territory: Occupation of *terra nullis*, prescription, cession, accretion, and subjugation.[163] These five modes of acquisition are also further divided into original and derivative modes.[164] These methods will be considered below as it is important to consider whether territory in the context of SIDS can be acquired in addition to or in place of existing territory.

4.2.1 Occupation

Occupation is a traditional method of acquisition of territory that may be undertaken by a State only and not by private individuals on their own.[165] Occupation may take place in the instance of *terra nullius*, that is, territory that does not belong to anyone.[166] The State must exercise effective control over the area to acquire the territory. It is impossible to claim any portion of the high seas in this manner, but if the land is vacant, a State may exercise sovereignty over this area and claim it as its own.[167] It would be important that the land had no inhabitants upon it for it to be considered *terra nullis* capable of occupation by a State. Shaw notes that occupation often came after discovery, which is effectively the realisation of land territory.[168] After discovery, effective occupation of the territory would be required to secure title to the territory.[169] The difficulty with occupation of *terra nullis* for SID as a means to acquire territory is that there is unlikely to be readily available territory in absence of existing inhabitants.

4.2.2 Accretion

Accretion is another mode of territory acquisition and is considered the formation of new land that is attached to existing land.[170] This may take place naturally, for example, where a river that once flowed dries up, leaving land.[171] Another example would be when a volcano under the water erupts and becomes an island within a State's territorial sea.[172] The newly formed

[162] M Shaw (note 83 above) 419.
[163] *Ibid* 420.
[164] *Ibid* 420.
[165] *Ibid* 426.
[166] *Ibid* 426.
[167] *Ibid* 426.
[168] *Ibid* 428.
[169] *Ibid* 428.
[170] *Ibid* 422.
[171] *Ibid* 422.
[172] *Ibid* 422.

island would be considered the territory of the State concerned.[173] Accretion is described as changing the land's shape as a result of natural processes.[174] Essentially, where a State has existing sovereignty over the area wherein new land is established as a result of natural accretion, it would also have title over the new territory that forms.[175]

4.2.3 Cession

Cession of territory involves the transfer of territory. The territory may be transferred from one sovereign State to another as long as it was the intention of the State to pass sovereignty.[176] Cession involves replacing a sovereign with another sovereign in respect of territory.[177] As with ordinary cession, the sovereign cannot transfer more rights over a territory than it currently has.[178] Whatever rights the cessionary sovereign had would be passed to the new sovereign; if, for example, a third State had a right of passage over a portion of the territory, this same limitation on the territory would be transferred during cession.[179] Cession historically followed conflict, but it is not required for it to occur; territory may be ceded for any particular reason in international law.[180]

4.2.4 Prescription

Prescription is the act of acquiring territory by way of continued undisturbed possession of territory.[181] There is no rule that governs the time that is needed for prescription claims.[182] In the case of *Kasikili Island (Botswana/Namibia),*[183] Namibia contended that prescriptive title has four requirements, namely:

> ' 1. The possession of the . . . state must be exercised *á titre de souverain*.
>
> 2. The possession must be peaceful and uninterrupted.
>
> 3. The possession must be public.
>
> 4. The possession must endure for a certain length of time.'[184]

[173] *Ibid* 422.
[174] I Saunders (note 140 above) 660.
[175] *Ibid* 660.
[176] M Shaw (note 83 above) 423.
[177] *Ibid* 423.
[178] *Ibid* 423.
[179] *Ibid* 423.
[180] *Ibid* 424.
[181] S Lee 'Continuing Relevance of Traditional Mode of Territorial Acquisition in International Law and Modest Proposal' (2000) 16 *Connecticut Journal of International Law* 13.
[182] *Ibid* 13.
[183] *Kasikilil Sedudu Island (Botswana/ Namibia), Judgment, I.C.J. Reports 1999,* p. 1045 1103.
[184] *Ibid* 1103.

Shaw notes that the key difference between occupation and prescription is that in prescription, the territory was previously under the sovereignty of another State.[185] These two methods of acquisition do have similarities. This is because it is possible for a territory that was once acquired to be abandoned, which would potentially render the territory *terra nullius*.[186] This eventuality is one that SIDS would wish to avoid regarding their natural island territory if it were to be abandoned by the entire population.

Shaw notes that most instances of territory acquisition do not fall within specific categories such as occupation or prescription.[187] It is important to highlight that under international law, acquiring territory by force (otherwise known as subjugation) is illegal as per Article 2(4) of the UN Charter.[188]

4.3 Government

This element of statehood requires that there is governmental control over the population that resides within the territory.[189] What is important here is that the government is effective in its functions.[190] Klabber asserts that the government also has to be contactable and be able to hold its citizens accountable should there be a need to do so.[191] A State has to be independent in its functions; however, it is not necessary that the State has to be completely financially secure. Financial insecurity does not affect the ability of a State to be independent.[192] A government may receive financial aid from another State and maintain its independence.[193]

Whilst essential to statehood, the requirement of an effective government has not always been strictly enforced. This requirement of statehood was initially relaxed to enable State recognition for previously colonised States, including many SIDS such as Kiribati, Tuvalu, Micronesia, Marshall Islands and Maldives, to name a few.[194] During this transition time for previously colonised states, the newly formed independent States entirely relied on colony States to provide support.[195] The relaxation of this criteria was essential to enable self-determination.[196] Shaw asserts that the requirement of an effective government stems from the outdated view

[185] M Shaw (note 83 above) 429.
[186] *Ibid* 429.
[187] *Ibid* 429.
[188] *Ibid* 425
[189] R Lapidoth (note 132 above) 78.
[190] *Ibid*.
[191] J Klabbers (note 10 above) 77.
[192] J Dugard (note 2 above) 130.
[193] *Ibid.*
[194] *Ibid*.
[195] *Ibid*.
[196] JG Stoutenburg (note 12 above) 242.

that a State must be a civilised State to be considered worthy of recognition.[197] The idea of an effective government is regarded as a Western ideal that does not consider the diverse nature of the States scattered across the world. Essential to TWAIL scholarship is the observation that the world comprises diverse cultures, including groups that have historically been marginalised.[198] According to TWAIL scholars, international law has not evolved to take into account the diverse nature of the subjects of international law.[199] In a modern-day scenario, sovereignty for non-independent persons, regardless of any administrative burdens, is now considered an influential agenda.[200] The UN has been outspoken on protecting the rights of indigenous peoples who historically suffered injustices due to colonisation and dispossession of land and resources.[201] The protection of indigenous persons was not always on the UN's agenda. Despite these apparent steps forward, the fundamentals of statehood have not seen much development and remain rooted in pre-colonial ideals of what a State should encompass. This is particularly apparent in identifying the understanding of an 'effective government'. Therefore, whilst this remains a requirement of statehood, precedent shows that a newly self-determined State may still attain statehood without an effective government.

It is important to note that any States or the governments of States that actively follow or implement illegal policies as judged by the general standards of international law will not be able to attain statehood even if they are independent; an example of this is the apartheid regime that occurred in South Africa.[202] The international community rejected the establishment of independent 'homelands' within South Africa that attempted to gain independence based on the illegality and immorality of the policies which forced these areas to try to gain independence.[203] Statehood would inevitably fail based on the criterion of government in such an instance that any illegal policies would stem from the government itself.[204]

4.4 Capacity to Enter into Relations

The last requirement of the Montevideo Convention is the capacity to enter into relations with other States. Although this is a requirement of the Convention, it is considered a consequence of statehood as international law attributes capacity to States once they have attained

[197] M Shaw (note 83 above) 183.
[198] M Khosla 'The TWAIL Discourse: The Emergence of a New Phase' (2007) 9 *International Community Law Review* 292.
[199] *Ibid*.
[200] M Shaw (note 83 above) 183.
[201] United Nations, General Assembly, Sixty-first session, Agenda item 68, United Nations Declaration on the Rights of Indigenous Peoples, 13 September 2007, UN Doc. A/RES/61/295.
[202] M Shaw (note 83 above) 186.
[203] *Ibid* 186.
[204] *Ibid* 186.

statehood.[205] Whilst recognition by other States is not a requirement for statehood, it may illustrate that a State can enter into relations with other States.[206] Entering into diplomatic relations with other States would indicate that the State meets this requirement. However, it is essential to highlight that other States, such as the USA, have not widely used this requirement.[207] Most States instead assess the ability of a State to exercise independence in that another State does not control them.[208]

Stoutenburg notes that many authors require that autonomy or independence must be both factual (*de facto*) and legal (*de jure*); still, it is not settled at precisely what point dependence would affect the ability of a State to achieve statehood.[209] *De facto* is defined as the 'existing in fact, although perhaps not intended, legal, or accepted'.[210] In the context of the independence of a State, this refers to the situation where, on the ground, a government is autonomous in a day-to-day sense. This may manifest in a government's ability to make its own decisions and freely negotiate with other governments. An example of a *de facto* State would be Somaliland, which is able to conduct foreign relations and may be legally responsible but is not officially designated as a sovereign State.[211] *De facto* autonomy is, however, distinct from *de jure* autonomy. *De jure* may be defined as 'having a right or existence as stated by law'.[212] Therefore, *de jure* autonomy refers to the legal recognition of autonomy or independence, a government may be factually autonomous and have the ability to act independently but lack the official recognition that comes along with *de jure* recognition. Another example of *de facto* autonomy is Taiwan, which is administered by a special local government.[213] However, Taiwan is under the distinct and separate administration of the People's Republic of China and is not officially recognised as a State on its own separate from China.[214]

Similarly, in the case of Somaliland, the *de jure* government is that of the Federal Government of Somalia in that it has legal international recognition to administer the State of Somalia as a

[205] JG Stoutenburg (note 12 above) 291.
[206] R Lapidoth (note 132 above) 78.
[207] JG Stoutenburg (note 12 above) 291.
[208] AE Eckert 'Constructing States: The Role of the International Community in the Creation of New States' (2002) 13 *Journal of Public and International Affairs* 23.
[209] JG Stoutenburg (note 12 above) 292, 294.
[210] '*De facto*' Cambridge Dictionary available at *https://dictionary.cambridge.org/dictionary/english/de-facto* (accessed 2 July 2023).
[211] A Arieff 'De facto statehood – The Strange Case of Somaliland' (2008) 3 (2) *Yale Journal of International Affairs* 75.
[212] '*De jure*' Cambridge Dictionary available at *https://dictionary.cambridge.org/dictionary/english/de-jure* (accessed 2 July 2023).
[213] J Shen 'Sovereignty, Statehood, Self-Determination, and the Issue of Taiwan' (2000) 15 (5) *American University of International Law Review* 1118
[214] *Ibid* 1118.

whole despite the government of Somaliland factually taking control of the Somaliland area.[215] Nevertheless, many countries rely factually on other States; it is often emphasised that legal or *de jure* independence is more important than *de facto* independence.[216] This means that if a State is legally not subject to the order of another State, this criterion would be satisfied.[217] This sentiment is echoed in the *Island of Palmas* case, where arbitrator Max Huber noted that sovereignty is an indication of independence within a particular territory and that 'territorial sovereignty belongs always to one, or in exceptional circumstances to several States, to the exclusion of all others'.[218]

Eckert notes that a State may cede its ability or power to another State, which would not affect its ability to attain statehood.[219] However, the essential element is that the State is independent and can control its relations by unilaterally determining who (or what entities) may exercise which functions of a State.[220] Although independence is vitally important for these criteria of statehood, some States have previously fulfilled this requirement, whilst some of their governmental functions were performed by outside parties.[221] Shaw observes that Bosnia and Herzegovina are examples where a 'High Representative' was appointed in terms of the Dayton Peace Agreement of 1995 as the final authority on the agreement's implementation to provide for an impartial third party.[222] This High Representative proceeded to remove some individuals from public office without active decision-making stemming from the government of Bosnia or Herzegovina itself.[223] This act was not considered to impede statehood despite an external third party having some decision-making capabilities within the government.[224] This is perhaps due to the fact that legally, the State had the power to control the appointment of the external third party, which was an exercise of sovereignty.

4.5 Application of the Montevideo Convention

The Montevideo Convention has been criticised for many reasons. Among these criticisms is that the policies of the government and how the government is established are not reviewed.[225]

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[215] A Arieff (note 211 above) 69.
[216] JG Stoutenburg (note 12 above) 295.
[217] *Ibid* 295.
[218] *Island of Palmas* case (note 142 above) 838.
[219] AE Eckert (note 208 above) 23.
[220] *Ibid* 23.
[221] M Shaw (note 83 above) 186.
[222] *Ibid*.
[223] *Ibid*.
[224] *Ibid*.
[225] G Ersamus 'Criteria for Determining statehood: John Dugard's Recognition and the United Nations' (1988) 4 *South African Journal on Human Rights* 215.

Due to the nature of attaining statehood, it does tend to be a contentious subject.[226] Despite any limitations of the convention, it has been consistently applied by some States, such as the USA.[227] In the case of *nat'l Petrochemical Co. of Iran v. M/T Stolt Sheaf*[228] and *Klinghoffer v. S.N.C Achille Lauro,* where it was noted in *Klinghoffer* specifically that a 'State' is defined as:

> '.an entity that has a defined territory and a permanent population, under the control of its government, and that engages in, or can engage in, formal relations with other such entities'.[229]

Such a description is in line with the requirements provided in the Montevideo Convention.

Furthermore, in the Report of the Committee on the Admission of New Members concerning the application of Palestine for admission to membership of the United Nations, a committee of the Security Council deliberated on the application of Palestine to be admitted as a member of the UN.[230] In the deliberations of the Commission on Admission of New Members, it was noted as follows:

> 'On the criterion of statehood, reference was made to the 1933 Montevideo Convention on the Rights and Duties of States, which declares that a State as a person of international law should possess a permanent population, a defined territory, a government and the capacity to enter into relations with other States.'[231]

The Committee then went on to make observations on Palestine's ability to fulfil each criterion of statehood, further cementing these criteria as essential for the question of statehood.[232] In addition to the Montevideo criteria, the Committee also discussed the requirements of the UN Charter and was mindful of the broader political context. Therefore, whilst the Montevideo Convention criteria is a useful determination of statehood, it is not always the only determinative factor.

There is also precedent from the International Criminal Court (ICC) that the Montevideo Convention is the leading criterion for statehood. The Pre-Trial Chamber stated in its decision on the jurisdiction of the ICC over the State of Palestine in terms of the Rome Statute of the

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[226] *Ibid*.
[227] AK Eggers 'When is a State a State – The Case for Recognition of Somaliland' (2007) 30 *Boston College International and Comparative Law Review* 214.
[228] *National Petrochemical Co. of Iran v. M/T Stolt Sheaf* 860 F.2d 551,1989 A.M.C 9.
[229] *Klinghoffer v. SNC Achille Lauro*, 739 F. Supp. 854 - Dist. Court, SD New York 1990 858.
[230] United Nations, Security Council, Report of the Committee on the Admission of New Members concerning the application of Palestine for admission to membership I the United Nations, 11 November 2011, S/2911/705 para 1.
[231] *Ibid* para 9.
[232] *Ibid* para 9 – 14.

International Criminal Court (Rome Statute)[233] that it did not have to determine whether Palestine meets the prerequisites of statehood in terms of general international law noting that previously the Montevideo criteria were not deliberated on by the Committee on Elimination of Racial Discrimination when considering the ability of Palestine to be a 'State party' to a Convention.[234] This reference to the Montevideo Convention concerning the prerequisites of statehood in general international law solidifies the importance of the requirements for statehood within international law. Instead of deliberating on the prerequisites of statehood, the Pre-Trial Chamber looked to the UNGA resolution on the admission of Palestine as a non-observer member State.[235] In the UNGA Resolution 67/19, it was stated that the people of Palestine have a right to self-determination, including 'the right to their independent State of Palestine', and further decided to allow Palestine permanent observer status.[236] It stands to reason, however, that if the ICC needed to make a determination on the statehood of Palestine, the requirements of the Montevideo Convention and their applicability to the situation would have been reviewed. Notably, in the submission of the Prosecutor as a request for prosecution[237] and the submission of Professor Malcolm Shaw as *amicus curae,* the Montevideo criteria were referred to as the mechanism for statehood determination.[238] Professor Malcolm Shaw noted that Article 1 of the Montevideo Convention is considered 'widely accepted as binding' in providing the criteria of a State.[239] The Prosecutor referred to Article 1 of the Montevideo Convention as 'the most accepted formulation of statehood criteria in international law.'[240] Furthermore, in the case of *Prosecutor v Slobodan Milosevic,* it was stated that the 'best known' definition of a State is provided for in Article 1 of the Montevideo Convention.[241]

[233] Rome Statute of the International Criminal Court, Date of Adoption 17 July 1998, 2187 UNTS 90, (entered into force 1 July 2002).
[234] ICC 'Situation in the State of Palestine, Public with Public Annex A, Prosecution request pursuant to article 19(3) for a ruling on the court's territorial jurisdiction in Palestine' ICC-01/18 (22 January 2020) 75/112, 76/112.
[235] *Ibid* para 97.
[236] UNGA, Sixty-seventh session, Agenda item 37, Resolution adopted by the General Assembly on 29 November 2012, UN Doc A/RES/67/19.
[237] ICC, Pre-Trial Chamber I, Situation in the State of Palestine, Prosecution request pursuant to article 19(3) for a ruling on the Court's territorial jurisdiction in Palestine, Office of the Prosecutor, 22 January 2020, No. ICC-01-18.
[238] ICC, Pre-Trial Chamber I, Situation in the State of Palestine, Submission of Observations to the Pre-Trial Chamber Pursuant to Rule 103, Professor Malcom N Shaw QC, 16 March 2020, No. ICC-01/18.
[239] *Ibid 8*.
[240] ICC, Pre-Trial Chamber I, Prosecution request pursuant to article 19(3) for a ruling on the Court's territorial jurisdiction in Palestine (note 234 above) 61.
[241] *Prosecutor v. Slobodan Milosevic* (note 121 above) para 85.

There are criticisms of the view that the Montevideo Convention includes the leading criteria for statehood. Professor John Quigley states that the criteria of the Montevideo Convention are not to be considered internationally accepted and do not guide States in the question of statehood.[242] In support of these assertions, Professor Quigley notes that statehood does not typically hinge on the criteria of statehood; for instance, the Turkish Republic of Northern Cyprus is not considered an accepted State despite it fulfilling the criteria for statehood in terms of the Montevideo Convention.[243] Similarly, in the case of Palestine, Professor Quigley asserts that other entities with the same characteristics have been accepted as States; however, Palestine has not been officially accepted as a State and allowed admission to the UN as a member State.[244]

Despite the criticisms against the Montevideo Convention, it still provides the basis for statehood determination. It is accepted that an entity's statehood may be determined not only by the Montevideo Convention but also by political considerations, recognition, or lack thereof. However, it is asserted that the requirements of the Montevideo Convention provide a foundation for statehood and are entrenched in customary international law regardless of the difficulties with the criteria in practice.[245] Therefore, these requirements should be seen as a basis for the establishment and continuity of statehood.

5. State Continuity and Thresholds of State Extinction

While we have discussed the requirements for statehood to exist and continue, it would be essential to consider further when a State would continue and cease to exist. Stoutenburg asserts that the Montevideo Convention was primarily designed to provide a set of criteria for statehood; however, it is often argued that the continued maintenance of the requirements for statehood is essential for State continuity.[246] In practice, State continuity is an essential consequence of statehood as States often continue despite changes to the elements that make up a State.[247] Wong asserts that State continuity is vital in providing stability despite specific

[242] ICC, Pre-Trial Chamber I, Situation in the State of Palestine, Public with Public Annex, Submissions Pursuant to Rule 103 (John Quigley), 3 March 2020, No. ICC-01/18 23.
[243] *Ibid* 24.
[244] *Ibid* 25.
[245] J McAdam ‘’Disappearing States’, Statelessness and the Boundaries of International Law’ (2010) *University of New South Wales Law Research Paper No. 2* 6; *Prosecutor v. Slobodan Milosevic* (note 121 above) para 86; M Rouleau-Dick ‘Competing Continuities: What Role for the Presumption of Continuity in the Claim to Continued Statehood of Small Islands’ (2021) 22(2) *Melbourne Journal of International Law* 19.
[246] JG Stoutenburg (note 12 above) 250, 251. This view is also shared by other authors namely: MCR Craven ‘The Problem of State Succession and the Identity of States under International Law’ (1998) 9 *European Journal of International Law* 159.
[247] P Moscoso de la Cuba (note 5 above) 132.

changes to the State.[248] This is perhaps why the so-called 'failed States' have maintained statehood in the face of an evident lack of effective government and the inability to represent themselves internationally.[249] State continuity is to be presumed, and State extinction should be considered the exception to the rule.[250]

Rouleau-Dick asserts that State continuity can be analysed through two competing understandings of continuity: the rachet effect and the sameness assessment.[251] The rachet effect understanding is that once statehood has been achieved, it is difficult to lose; it is further argued by Rouleau-Dick that this understanding of State continuity is entrenched in scholarship and widely accepted.[252] The rachet effect considers the presumption of State continuity as a means to delay the loss of statehood with the idea that the State may maintain their statehood longer than the Montevideo Convention would allow.[253] The rachet effect may be summarised as understanding statehood as quasi-irreversible once attained.[254] However, much of the support for the rachet doctrine hinges on the argument of failed States and the State practice on the element of government in the existence of governments in exile.[255] The sameness assessment notes that the continuity of statehood is 'by default', and the rationale for this is certainty and stability.[256] Essentially, the sameness assessment requires that changes to statehood are substantial so as to trigger the law on State succession and that we should presume against State succession.[257] It requires the assessment of the State in question and requires a determination on whether the legal entity that was a State before any changes in its elements of statehood is still the same entity that it was.[258] While it is understood that there is no definitive answer on exactly which understanding of the presumption of State continuity is correct in international law, Rouleau-Dick asserts that the presumption of State continuity should not be considered 'an immortality pill overriding the loss of territory and population.'[259]

[248] D Wong (note 146 above) 17.
[249] *Ibid* 18.
[250] P Moscoso de la Cuba (note 5 above) 142.
[251] M Rouleau-Dick (note 245 above) 7.
[252] *Ibid* 4. See also RG Rayfuse E Crawford 'Climate Change, Sovereignty and statehood' (2012) *International Law in the Era of Climate Change;* J Crawford *The Creation of States in International Law* 2 ed (2007), L Yamamoto M Esteban *Atoll Island States and International Law: Climate Change Displacement and Sovereignty* (2014) 176, 212.
[253] M Rouleau-Dick (note 245 above) 6, 7.
[254] *Ibid* 7.
[255] *Ibid* 26.
[256] *Ibid* 7.
[257] *Ibid* 7.
[258] *Ibid* 26.
[259] *Ibid* 21.

It is important to highlight that the presumption of State continuity in the context of SIDS and their quest for survival would need to play out in international law to allow us an understanding of State practice. What must be emphasised is that the presumed 'flexibility' surrounding the government criteria of statehood is different from the idea of a State in the absence of a territory or population as in the former instance, it is understood that a government will be put in place at some point in time.[260] However, in the latter instance, as Wong summarises:

> '...territory will not 'reappear'. Fundamentally, there must be limits to the presumption and a line between a mere defect and a matter which affects the continuity of a State. The concept of the State is premised on control over territory and the purpose of statehood is to 'ensure that activities within its borders are not regulated by any other State', hence, territorial control is said to be the 'essence' of a State. Just as territory is required for the creation of States, some territory must exist for its survival. Thus, in principle, a permanent loss of territory will fall outside of the scope of a mere 'defect' and result in the loss of statehood.'[261]

Where there is no State continuity, then one would have to consider State succession or State extinction.[262] Although State extinction is often regarded as exceptional, this does not mean it can never occur. The maintenance of statehood, even in the context of State continuity, may hinge on what factors are in place when a State is said to continue rather than go extinct.[263] What, then, is the benchmark for this?

It is to be argued that statehood may hinge on the elements of territory and population. Against this backdrop, it will be further argued that these specific statehood requirements are often considered more important for the continuity of statehood than others. There are many examples in history of territorial changes and changes to governments that have not affected the statehood of various States.[264] Some of these examples will be discussed below.

Many examples of States that continue to exist today have suffered the temporary lack of statehood factually but not legally. Many of these examples rest on the requirement of an effective government rather than territory or population. Rouleau-Dick emphasises that the absence of an effective government may not cause State extinction where territory and population remain.[265] The reason for this is that if the loss of an effective government resulted in State extinction, it would leave the territory and the people residing therein upon *terra*

[260] D Wong (note 146 above) 21.
[261] *Ibid* 21-22.
[262] M Rouleau-Dick (note 245 above) 8.
[263] *Ibid* 9.
[264] P Moscoso de la Cuba (note 5 above) 132.
[265] M Rouleau-Dick (note 245 above) 10.

nullius, resulting in a sovereignty vacuum.[266] The absence of an effective government is also temporary in nature, and it would be possible for the State to have a government established at a later date.[267] It would not create stability and certainty if the absence of an effective government resulted in State extinction. However, the same does not apply to other requirements of statehood. As highlighted by Rouleau-Dick:

> 'The physical elements of statehood are key to setting tentative boundaries to the scope of the concept of continuity, at least if conceptualised as a sameness assessment. Implicit to the notion of 'sameness' is the existence (or not) of a common core upon which that sameness can be assessed, an extra-legal anchor that exists beyond the legal obligations and relationships of the state, a unique identity. It is inherent to cases where questions of continuity arise that this core has gone through various changes or faced different challenges, but this core of population and territory seems to be an implicit requirement to apply continuity (or succession, for that matter).'[268]

We will consider each element of Article 1 of the Montevideo Convention and how these elements, and the possible absence thereof, may affect the statehood of SIDS. It will be concluded that the elements of territory and population are fundamental for statehood and a State may not exist in absence thereof.

5.1 Government

It was established earlier in this chapter that the government requirement of statehood focuses on the stability and effectiveness of the government.[269] Oppenheim notes that a State remains despite changes to 'its headship, in its dynasty, in its form, in its rank and title'.[270] Ordinarily, changes to a government will not affect the State's status in international law.[271] Governments have changed through illegitimate means such as revolutions and *coups d'Etat,* and even in these instances, the countries concerned have not had their statehood questioned.[272] Furthermore, changes to a State's political organisation may occur, such as a State becoming a federal State or a monarchy turning into a Republic; these are all viewed as natural transformations of a State rather than impediments to statehood.[273] Furthermore, the process of decolonisation changed the necessity for this criterion. Many previously colonised States

[266] *Ibid* 10.
[267] *Ibid* 11.
[268] *Ibid* 18.
[269] JG Stoutenburg (note 12 above) 275.
[270] L Oppenheim *International Law. A Treatise* 8 ed (1911) para 77.
[271] *Ibid* para 77.
[272] P Moscoso de la Cuba (note 5 above)132.
[273] *Ibid* 132.

gained independence and statehood without an effective government, such as the Republic of the Congo, Rwanda, and Burundi.[274]

Whilst the requirement of an effective government is essential for statehood, it is asserted that this requirement can be absent, and recognition may persist. This assertion is based upon the very important observation that where there is a temporary incapacity of a government of a State, the population and territory of the State remain. This is illustrated by the examples set by failed or collapsed States where State continuity remains despite fundamental changes to one of the criteria of statehood. Although the concept of a failed State is taunted in neo-colonialism,[275] it is the best-known means to describe a State that has disintegrated, particularly with a failed government that no longer exists.[276] Whilst there is no definition of a failed State, these States are generally considered incapable of self-preservation without external help.[277] It is often assumed that failed States are a result of decolonisation, as Thurer points out:

> 'The heritage of colonial regimes which lasted for so long but did not establish effective constitutional structures or the identity of States by the time of decolonisation was a major factor in the origin of this phenomenon.'[278]

When we consider failed States, a unique example comes in the form of Somalia.[279] The government of Somalia fell when President Mohammed Siad Barre was overthrown in January 1991, which resulted in a civil war that effectively disintegrated all structures required to run the State.[280] The knock-on effect of this was that there was a humanitarian crisis that required assistance from the international community.[281] The instability within the country also led to an increase in the global crime of piracy, which made it difficult to deliver food aid and other supplies to the State through their dedicated ports. While the fall of the Somalian government only occurred some 31 years after its independence in 1960, it has been argued from as early as 1978 that there would be long-term consequences for the external influence of Western

[274] JG Stoutenburg (note 12 above) 276. See also R Gordon 'Saving Failed States: Sometimes a Neocolonist Notion'(1997) 12 (6) *American University of International Law Review* wherein Gordan argues at pg. 973 that the Western States effectively impose their view of the world States rather than considering 'other ways of organizing mankind beyond the nation-State may exist, and new forms of reference are needed.'
[275] See R Gordon 'Saving Failed States: Sometimes a Neocolonialist Notion' (1997) 12 (6) *American University International Law Review* 970.
[276] P Moscoso de la Cuba (note 5 above) 149, 150.
[277] *Ibid* 143.
[278] *Ibid* fn. 85.
[279] *Ibid* 150.
[280] *Ibid* 150.
[281] *Ibid* 150.

powers in Somalia.[282] Abdi, in an essay presented at the UNESCO Seminar on 'The History of Decolonisation in Southern Africa and The Horn of Africa', advised that prolonged external power involvement in Somalia, which is effectively a legacy of colonialism and the influence of colonial projects in the 1800s, would 'intensify domestic conflicts in individual states, exacerbate regional tensions and heighten the chances of direct great power involvement.'[283] As such, it is crucial to understand that Somalis had a unique language, culture, and way of life before the intervention of colonial powers, including a political system that was decentralised with city States based on the 'assembly of clan members'.[284] Effectively, the clan and dia were important social institutions with critical political functions.[285] As such, the imposition of colonialism and the influence of external power from the West disrupted the natural political system that once unified Somalia. As such, the eventual civil war that broke out in Somalia finds some roots in the persistent influence of the West in what was once a country ruled by clan lineage.

Despite the severe consequences of the fall of the Somalian government and the civil war, the country of Somalia has maintained its statehood, and UN missions have been aimed at establishing a federal government within Somalia.[286] During the early days of the State collapse, the Somalian people had no access to education, healthcare facilities, and minimal access to food, and no effective government.[287] The State split into 'Somaliland' in the northwest of the country and 'Puntland' in the northeast.[288] Within Somaliland and Puntland, administrations started to provide essential services to the people of Somalia, such as police work.[289] Even though Somaliland and Puntland are mainly self-sufficient, there has been a reluctance to recognise these nations as sovereign or secession States of the Republic of Somalia.[290] Wallace-Bruce asserts:

[282] SY Abdi 'Decolonization in the Horn and the Outcome of Somali Aspirations for Self-Determination' (1981 (2/3) 3/1 *Northeast African Studies* 157-158.
[283] *Ibid* 157-158.
[284] *Ibid* 153.
[285] *Ibid* 153.
[286] 'Mandate' United Nations Assistance Mission in Somalia available at *https://unsom.unmissions.org/mandate* (accessed 3 January 2022).
[287] United Nations, Security Council 'Report of the Secretary-General on the Situation of Somalia' 16 August 1999 available at *https://digitallibrary.un.org/record/277948?ln=en* (accessed 29 January 2023) para 63.
[288] *Ibid* para 63.
[289] *Ibid* para 63.
[290] P Moscoso de la Cuba (note 5 above) 154.

> '…Somalia appears to be in a category of its own in that the collapse of basic institutions have continued over a prolonged period, thus bringing into serious doubt the very survival of the existence of the State which was in existence prior to the current state of affairs.'[291]

Somalia presents the best example of a collapsed State as there was a 'complete and sustained collapse of the central government in Somalia'.[292] This is because, when the government fell in 1991, there were many unsuccessful attempts to re-establish a new central government.[293] Menkhaus describes a failed State as one that has lost a significant portion of its territory in the form of territorial collapse or one that has lost a presence in its country physically, which is the collapse of the government; a failed State may have one of these or both.[294] Somalia is an anomaly in that in most instances of failed States; there remains some form of central government that maintains some form of sovereignty; this was not the case with Somalia in that there was an entire collapse of this structure.[295] Despite the absence of a government and the inability of that government to enter into relations with other States, as provided for in the Montevideo Convention, Somalia did not lose its statehood and continued to reap the benefits of statehood.

This requires us to answer the question of why the international community has long recognised the sovereignty of Somalia despite this factual lapse in statehood. Furthermore, the international community has refused to accept the independence of Somaliland and Puntland, which are considered independent secession States of the State of Somalia. The act of secessionism, the establishment of independent States within a larger territory, is not considered to be against international law.[296] Professor Roth asserts that the example of Kosovo brought this issue to the fore.[297] Within international law, there are no laws against secessionism, although, within the domestic law of the territory itself, secession would be considered treasonous.[298] The inability of the international community to accept secessionist States in place of the Republic of Somalia is perhaps due to the State's colonial roots and the

[291] NL Wallace-Bruce 'Of Collapsed, Dysfunctional and Disoriented States: Challenges to International Law' (2000) *Netherlands International Law Review* 67.
[292] K Menkhaus 'State collapse in Somalia: second thoughts' (2003) 30(97) *Review of African Political Economy* 407.
[293] *Ibid* 407.
[294] *Ibid* 407.
[295] *Ibid* 407.
[296] BR Roth 'Speech New Developments in Public International Law: Statehood, Self-determination and secession' (2011) 6 (2) *National Taiwan University Law Review* 648.
[297] *Ibid* 648.
[298] *Ibid* 648.

international community's will to see Somalia succeed.[299] Despite international will, the Republic of Somalia is a State with less stability than Somaliland, which declared independence in 1991, and has successfully set up institutions to provide governmental services to the people residing within this territory and beyond this area.[300] The international community has previously accepted the secession of other States that emerged from previous States, such as those that once formed part of Yugoslavia.[301] In the face of State collapse, Somalia's statehood continues, and Somaliland and Puntland's emergence remains an area of contention.

It stands to reason that where a State faces the collapse of governmental services, the conclusion is not that the State ceases to exist, but rather, the default understanding is that the State continues to exist.[302] This presumption of State continuity is arguably the reason for the continued existence of Somalia as a State. As highlighted by Tomuschat, the difficulties with failed States may be expressed as follows:

> 'For the international community, it is much simpler to carry a man half-dead with it, contending that he is well and alive, instead of issuing a death certificate, which inevitably gives rise to struggles about inheritance.'[303]

The idea of State extinction should be avoided where the reason for State extinction may be overcome. This undoubtedly remains true of governmental collapse as a government may be re-established within a State, and the situation is not always permanent. For example, Bosnia, Lebanon, Afghanistan, Nigeria, and Sierra Leone have all experienced a collapse of governmental structures.[304]

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[299] The UN has been engaged in a peacekeeping mission within Somalia since the fall of the government in 1991. The peace and reconciliation efforts to harness stability in the country are led by the UN system in Somalia. The UN has also reaffirmed the support of the international community for Somalia. See 'Political and Peacebuilding Affairs' *UNSOM* available at *https://dppa.un.org/en/mission/unsom* (accessed 9 February 2023).
[300] NL Wallace-Bruce (note 291 above) 67.
[301] UNGA, Forty-sixth session, Agenda item 20, Resolution Adopted by the General Assembly, Admission of the Republic of Slovenia to membership in the United Nations, UN Doc A/RES/46/236; UNGA, Sixtieth session, Agenda Item 114, Resolution adopted by the General Assembly on 28 June 2006, Admission of the Republic of Montenegro to membership in the United Nations, UN Doc A/Res/60/264; UNGA, Forty-sixth Session, Agenda Item 20, Resolution Adopted by the General Assembly, Admission of the Republic of Croatia to membership in the United Nations, UN Doc A/RES/46/238; UNGA, 86th Plenary Meeting, Admission of the Republic of Bosnia and Herzegovina, to membership in the United Nations, UN Doc A/RES/46/237; and UNGA, Forty-seventh session, Agenda Item 19, Resolution Adopted by the General Assembly, Admission of the State whose application is contained in document A/47/876-S/25147 to membership in the United Nations, UN Doc A/RES/47/225, note this relates to the admission of Macedonia.
[302] JG Stoutenburg (note 12 above) 251.
[303] C Tomuschat 'International Law: Ensuring the Survival of Mankind on the Eve of a New Century General Course on Public International Law (Volume 281)', in: *Collected Courses of the Hague Academy of International Law* 111.
[304] RI Rotberg *State Failure and State Weakness in a Time of Terror* (2003) 6.

Another element that should be considered as a reason for the continued existence of Somalia despite a lack of government is that widespread recognition by the international community persisted. There is precedent for the recognition of a State standing in place of an effective government, as seen during the independence of many colonial States'. Based on State practice, it is safe to conclude that the absence of an effective government is insufficient for the extinction of a State on its own. This is primarily because a lapse of effective government is not always permanent. Therefore, it would be possible for a State to regain an effective government, and it would be unnecessary to relinquish statehood. Wong asserts that 'if States were to become extinct each time there was a revolution or difficult regime change, questions of extinction would frequently arise'.[305] Furthermore, Wong highlights that the State and the government are separate, and this implies that the State continues in absence of a government.[306]

Furthermore, the idea of a government in exile supports the idea that there may be a loose link between the government and the territory it governs.[307] The governments of SIDS may remain in place even where they cannot remain on the territory that is governed. Instances of governments in exile will be considered later on in this chapter.

5.2 Territory

The condition of a State possessing a territory requires that there is territorial sovereignty whereby the State asserts authority.[308] This is often considered the fundamental criterion of statehood in international law. In the absence of a land territory where a government, on behalf of a State, exercises authority, statehood should cease to exist. This assertion is because the loss of territory in the event of sea-level rise or submergence of a coastline would be permanent,[309] unlike the temporary loss or collapse of government. In the latter situation, the re-establishment of a government is still possible for the State in years to come. There is much literature that speaks to the importance of territory as a requirement of statehood; Oppenheim has opinioned that a State cannot exist without territory:

> 'A State without a territory is not possible, although the necessary territory may be very small, as in the case of the Free Town of Hamburg, the Principality of Monaco, the Republic of San

[305] D Wong (note 146 above) 18.
[306] *Ibid* 18.
[307] *Ibid* 19.
[308] RI Rotberg (note 304 above) 6.
[309] See point 4.2 above within this chapter. See also D Wong (note 146 above) 21.

> Marino, or the Principality of Lichtenstein. A wandering tribe, although it has a Government and is otherwise organised, is not a State before it has settled down on a territory of its own.'[310]

The criterion of the territory is also linked with the other criteria of statehood, including population, government, and independence.[311] This element is crucial when considering the context of SIDS facing possible submergence or the possibility of being rendered uninhabitable due to sea-level rise and climate change. By 2100, some SIDS may have to abandon their land territory. There are currently no States in international law that maintain statehood without a defined territory. The only examples of territories that operate without territorial sovereignty are the Sovereign Order of Malta and the Holy See.[312]

The Sovereign Order of Malta has managed to maintain their international personality despite never having territorial sovereignty.[313] While the Sovereign Order of Malta and the Holy See maintain diplomatic relations and sit as observers within the UN, they are not considered States and, therefore, cannot be used as a precedent for statehood without territory. Still, they may be considered an alternative means to exist with international legal personality.[314]

For SIDS, where sea-level rise results in territory becoming uninhabitable or reduced to a rock that cannot sustain human life, Stoutenburg asserts that the territory may still qualify as land territory for statehood.[315] The situation would be different if the territory turned into a low-tide elevation (LTE) or, in the worst-case scenario, it was completely submerged.[316] In the latter situation, the criterion of territory would be absent. With the current sea-level rise predictions, it is well within the realm of possibility that islands (previously able to sustain human habitation) may become uninhabitable or even submerged when the tide is high.[317]

Without land territory, the maritime zones that persist around the uninhabitable or submerged territory would not suffice as 'territory' as required by the Montevideo Convention. In terms of the UNCLOS, the maritime entitlements provided to coastal States are conditional upon the land territory that the State possesses.[318] This is illustrated by the wording of the UNCLOS wherein it expressly states that:

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[310] L Oppenheim (note 270 above) para 168.
[311] D Wong (note 146 above) 21.
[312] *Ibid* 12.
[313] *Ibid* 12.
[314] *Ibid* 12-13.
[315] JG Stoutenburg (note 12 above) 252.
[316] *Ibid* 252.
[317] *Ibid* 152.
[318] *Ibid* 187.

> 'The sovereignty of a coastal State extends, *beyond its land territory* and internal waters and, in the case of an archipelagic State, its archipelagic waters, to an adjacent belt of sea, described as the territory sea' [my own emphasis added].[319]

Stoutenburg illustrates the important link between coastal land territory and maritime zones by observing that a State's territorial sea cannot be ceded unless the coastal area adjacent to that territorial sea is also ceded.[320] Archipelagic waters are similarly very closely linked with the land territory; they are interdependent rather than independent.[321] As highlighted earlier, the coast is the mechanism that crystallises the maritime territory that a coastal State possesses.[322] For this reason, in the absence of any coastline, a coastal State would lose claim to its maritime zones. Similarly, it would not fulfil the territory requirement of statehood without adjacent land territory. Therefore, it would be important for a State to maintain its land territory and coastline in some form in order to maintain its statehood.

Many scholars assert that a State cannot exist without a defined territory,[323] and it is asserted that this position is correct. The territory requirement of statehood may persist so long as the State possesses some natural island territory; this may be in the form of a rock, so long as the island territory (*sensu lato*) is above water at high tide.

It has been established that the loss of the natural island territory by permanent submergence or habitability would likely result in the extinction of a State. However, this is not the only criterion of statehood to which State extinction may fall.

5.3 Population

The population requirement is the next criterion of the Montevideo Convention which requires analysis. Wong asserts that the demise of SIDS will not be sudden by total inundation but rather due to the territory becoming uninhabitable by way of extreme weather events and scarcity of food and water, which will happen long before the island 'sinks'.[324] He uses the example of Lohachara Island, where, in 2006, the population had to completely relocate.[325] The relocations

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[319] Article 2 (1), UNCLOS.
[320] *Ibid* 253.
[321] *Ibid* 253.
[322] UNGA, ILC, Seventy-fourth session, Sea-level rise in relation to international law, Additional paper to the first issues paper (2020), by Bogdan Aurescu and Nilüfer Oral,* Co-Chairs of the Study Group on sea-level rise in relation to international law, Geneva, 24 April-2 June and 3 July-4 August, UN Doc A/CN.4/761 para 148; and *Maritime Delimitation in the Area between Greenland and Jan Mayen*, Judgment, I.C.J. Reports 1993, p. 38, para 80.
[323] JG Stoutenburg (note 12 above) 254; M Shaw *Title to Territory in Africa: International Legal Issues* (1986) 2; J Crawford *The Creation of States in International Law* 2 ed (2006) 2 8.
[324] D Wong (note 146 above) 13.
[325] *Ibid* 14.

that have taken place previously have usually taken place within the borders of the same State. However, due to the situation facing SIDS, internal displacement is not a viable option for future migration.[326] Therefore, the reality remains that many of the populations residing in SIDS will have to relocate to another territory within the next century, which may not happen uniformly.[327] The people may relocate to many different territories scattered all over the world.[328]

For the State concerned to satisfy the population criterion for statehood, a permanent population is necessary to reside in the territory.[329] In addition, there should also be a connection between the people and the territory. This is because the population has to be under the authority of the State within a particular territory. When the population abandons their territory to look for safe refuge elsewhere, Rayfuse notes that statehood will no longer exist from the 'time of evacuation' and will result in the State no longer existing in international law.[330] Stoutenburg has provided that populations cannot exist in exile and that statehood would be lost by leaving one's territory.[331] This is particularly relevant for SIDS as extreme weather events or other factors can make remaining to an island State impossible. Therefore, it must be emphasised that statehood for many island States could hinge on the requirement of a population, which conversely will result in the eventual surrender of any remaining territory.[332]

While solutions have been introduced to remedy this injustice for SIDS somewhat, none have successfully suggested the maintenance of the State as it stands within international law. One of the remedies put forward is acquiring new territory to relocate an entire population by purchase or a cession treaty.[333] Unfortunately, none of the SIDS have employed this solution.[334] This is because even if SIDS could afford to purchase land for this purpose, there are specific ramifications for this sort of action that span political, social and economic sectors.[335] These ramifications include asking whether a State would be willing to cede territory first and in what instances it may consider doing so.

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[326] *Ibid* 14.
[327] *Ibid* 14.
[328] *Ibid* 14.
[329] R Lapidoth (note 132 above) 78.
[330] R Rayfuse 'W(h)ither Tuvalu? International Law and Disappearing States' (2009) *UNSW Law Research Paper* 7.
[331] JG Stoutenburg (note 12 above) 268.
[332] D Wong (note 146 above) 13.
[333] *Ibid* 13.
[334] R Rayfuse (note 330 above) 8.
[335] *Ibid* 8.

This dimension of cession as a solution is complicated mainly by political considerations, chief amongst them difficulties in negotiating agreements of this nature. Rayfuse notes that it would be unlikely for the cession to occur regardless of the fee offered as for a State to agree to cede a piece of its territory, it would have to be uninhabited, uninhabitable, not subject to claims of property, not subject to personal claims, not subject to cultural or other claims, and there would have to be no potential economic gains available within that territory for the ceding State.[336] Additionally, negotiating the cession of land territory for the housing of the population of a State would be very difficult for many SIDS as, in many instances, there is unequal bargaining power. The former President of the Maldives President Nasheed attempted to create a Sovereign Wealth Fund, which was to be funded by tourist revenue to purchase land abroad for the eventual relocation of the population of the Maldives.[337] There were talks with the governments of Australia and New Zealand, and the countries of India and Sri Lanka were also considered as locations where land may be purchased for relocation of the State.[338] However, the fund was never fully established, and the Australian government suggested that no informal agreements had been made on the topic.[339] The Maldives eventually abandoned the move to purchase land abroad and created a new strategy to become carbon-neutral.[340] Whilst the reason why this project failed has never been publicised, it stands to reason that it may be due to the difficulties surrounding the agreement of cession illustrated by the difficulties faced with negotiating migration patterns for the existing populations of many SIDS.

For instance, the governments of Australia and New Zealand have only agreed to house climate refugees from Pacific Islands with limits on the amount of climate migrants that they may take annually. Under their Pacific Access Category (PAC) program, New Zealand places a quota on migrants from the Pacific Island States of Fiji, Tonga, and Kiribati to a maximum of 650 per annum.[341] There are age restrictions imposed, namely that migrants must be between the ages of 18 and 45 and possess language proficiency skills, income, and other criteria.[342] Under the Samoan Quota Resident Visa (SQRV) program, 1100 migrants from Samoa are allowed into New Zealand per annum.[343] Due to the restrictions on eligibility in place, in practice, less

[336] *Ibid* 8.
[337] AT Camprubí *Statehood under Water: Challenges of Sea-Level Rise to the Continuity of Pacific Island States* (2016) 107.
[338] *Ibid* 107.
[339] *Ibid* 107.
[340] *Ibid* 107.
[341] E Higuchi 'Climate Change Policies and Migration Issues of New Zealand and Australia' (2019) 2 *OPRI Perspectives* 2.
[342] *Ibid* 2.
[343] *Ibid* 2.

migrants than the quota are allowed to migrate every year from the Pacific Islands to New Zealand.[344] In Australia, under the new Pacific Engagement Visa, 3000 visas will be available to Pacific island citizens annually through a ballot process to increase permanent migration to Australia for Pacific islanders.[345] The Pacific Engagement Visa is available to States that have limited permanent migration opportunities with Australia or citizenship agreements with New Zealand, France and the USA.[346] The citizens that are eligible to apply for the Pacific Engagement Visa include nationals from the Federated States of Micronesia, Fiji, Kiribati, Nauru, Palau, Papua New Guinea, Republic of Marshal Islands, Samoa, Solomon Islands, Timor-Leste, Tonga, Tuvalu and Vanuatu.[347] This new ballot process aims to complement the Pacific Australia Labour Mobility Scheme (PALM) that allows Pacific and Timor-Leste workers to gain temporary (or seasonal) placements of nine months or longer (up to four years) in regional and rural areas within the agriculture sector.[348] The drive to allow Pacific islanders access to visas for permanent migration to Australia did not take place quickly, as it has been a long, complex process. There has been a history of reluctance by Australia to allow migration to their territory for Pacific islanders, and this is evidenced by the reservation that Australia had against the move by Kiribati to allow Migration with Dignity, which aimed to drive support for migration.[349] Therefore, the move by Australia to allow 3000 Pacific Island migrants per annum can be considered monumental.

The complexities involved in migration highlight the political difficulties that come about with negotiating access to territory for migrants who may become victims of sea-level rise and climate change more generally. These difficulties would be multiplied in negotiations for the cession of territory due to the additional complexities of the rights that are ceded on the territory. For the governments of Pacific Island States particularly, securing access to territory may be more difficult owing to their isolated location. Within the Pacific region, New Zealand, Australia and America are key targets for migration due to proximity.[350] The sea-level rise study group has noted ceding territory both with and without sovereignty as possible alternative pathways for the survival of SIDS; however, it concedes that the cession of territory with

[344] *Ibid* 2.
[345] Australian Government, Department of Foreign Affairs and Trade 'Pacific Engagement Visa' available at *https://www.dfat.gov.au/pacific-engagement-visa* (accessed 15 July 2023).
[346] *Ibid.*
[347] *Ibid*.
[348] Australian Government, Department of Foreign Affairs and Trade 'Pacific Labour Mobility' available at *https://www.dfat.gov.au/geo/pacific/engagement/pacific-labour-mobility* (accessed 15 July 2023).
[349] J Ash J Campbell 'Climate change and migration: the case of the Pacific Islands and Australia' (2016) 35 (3) *The Journal of Pacific Studies* 5.
[350] *Ibid* 2.

sovereignty would be challenging to achieve in practice.[351] Rayfuse argues that States are usually unwilling to cede land unless the land will remain uninhabited or the resources and anything of value within that territory are surrendered to the host State.[352] This assertion is backed up by the agreement by Kiribati (acting as a sovereign State) to purchase land in Fiji, as discussed in Chapter One. It is important to highlight that the land was not purchased directly from the State of Fiji but rather from the Church of England acting as a private personality.[353] The purchase of private land circumvents any difficulties associated with cession but also means that sovereign rights to the land are not passed. Camprubí argues that the cession of land with sovereign rights is particularly unlikely in post-colonial States that have access to limited territory and have only recently gained independence.[354]

The cession of land also brings up social complications, some deeply rooted in colonialism and others founded upon culture and identity. Kiribati's recent purchase of land from the Church of England of 2000 hectares of land also provides an example of this.[355] The land was initially purchased for agricultural purposes, as highlighted in Chapter One, and Kiribati does not have sovereignty over the territory.[356] While this more recent purchase of land has not led to much social uproar (perhaps because it was a private purchase), the sensitives around the colonial scars of both States should not be underestimated. Both Kiribati and Fiji were subjected to colonialism, and the populations residing therein were, in some instances, previously displaced. Any attempt to move or displace a population or disrupt a social community to accommodate new sovereignty or sovereign rights to the other States, including Kiribati, may bring about social tensions. An example of the colonial scars in these two Pacific Island States comes in the form of the Fijian island of Rabi, which was purchased in 1941 to house the inhabitants of Banaba, who were being moved due to phosphate resource discovery on the island of Banaba previously part of Ocean Island which is today part of Kiribati.[357] After the inhabitants were settled in Rabi, they did not have access to adequate shelter; they were undernourished and after the independence of both Fiji and Kiribati, the status of Banabans as a people was unclear in both countries, resulting in them being *de facto* statelessness.[358] The Banabans in Fiji

[351] UNGA, ILC, Seventy-third session, Sea-level rise in relation to international law, Second issues paper (note 120 above) 49.
[352] R Rayfuse (note 330 above) 8.
[353] AT Camprubí (note 337 above) 108.
[354] *Ibid* 108-109.
[355] *Ibid* 107.
[356] *Ibid* 107.
[357] *Ibid* 105.
[358] *Ibid* 105.

relocated to Taveuni in Fiji in the mid-19th century, but the descendants of the Banabans wanted to return to their island from where they were previously displaced.[359] Social sensitivities may stem from colonialism, such as in the case of the Banabans people, but they may also derive from the ties that citizens of a country may have to their homeland.

In its 2022 committee report, the ILA notes that Pacific Island communities have a concept of *whenua/banua,* which translates to place or land.[360] This concept is very closely connected to the identity of the Pacific people and may even influence their decisions on whether to stay or move from the territory they call home.[361] In the context of the purchase or cession of land, governments would have to be sensitive to the land's history and the context surrounding that land. As highlighted by Rayfuse, there would have to be no official or unofficial claims to the territory being provided in the cession. Additionally, the providing State that cedes land with sovereignty over an area would create a mini-State of that nation within its own State. This would effectively create complications for the inhabitants of the surrounding areas. Would the ceding State allow citizenship of both territories to the inhabitants? These aspects have social ramifications on the ground for the people living in these areas that would need to be considered.

Another alternative SIDS have considered is a merger into another territory.[362] It has been noted that a merger presents some advantages to the host States, as where the SIDS remains as a federation, the maritime entitlements that they once claimed would fall to the State that is hosting them.[363] Rayfuse notes that the maritime entitlements would stay regardless of proximity, allowing the host State access to these resources after a merger.[364] In theory, this seems like a novel solution; however, Tuvalu has attempted a solution with Australia and New Zealand, the most prominent States close to the island State.[365] Both countries have been reluctant to proceed with such an arrangement. New Zealand is only willing to accept up to a maximum of 75 Tuvaluan people per annum with additional conditions, such as the candidates being required to have basic English skills, be of good health and character, and be under the age of 45.[366] Therefore, in the case of Tuvalu, it seems extremely unlikely that the population

[359] *Ibid* 105.
[360] ILA, International Law and Sea Level Rise 'Lisbon Conference 2022' available at *https://www.ila-hq.org/en_GB/documents/2022-report-ila-committee-june-2022* (accessed 14 September 2023) 33.
[361] *Ibid* 33.
[362] R Rayfuse (note 330 above) 8.
[363] *Ibid* 8.
[364] *Ibid* 8.
[365] *Ibid* 8.
[366] *Ibid* 8.

will relocate to one specified State, and the population will likely end up scattered across the world.

It stands to reason that where there is a mass relocation of a population, there will be a point reached where there are too few citizens remaining to be considered a population capable of maintaining statehood.[367] The State of Pitcairn, which houses a population of 50 permanent residents, is the smallest State population that has ever been recognised.[368] While the idea of a minimum threshold of a State population has gained some attention from scholars, Stoutenburg notes that the smallest population of 50 people should be seen as a guideline, provided such a population can be considered permanent.[369] Precisely what a permanent population should comprise can only be determined from past precedent. However, it is asserted that the population must be diverse in nature, comprise a variety of people from different ethnic groups,[370] and must be permanent in nature.[371] The example of the Holy See may be useful to illustrate this point. The Holy See has international personality but cannot be considered a State; this arguably hinges on, amongst other issues, the lack of permanency of the population. The population of the Holy See comprises only members who are sequestered in the Vatican City for a specific period.[372] Without a population that remains within the territory indefinitely, statehood would fail on this requirement. Additionally, in the case of *In re Duchy of Sealand,* the German Administrative Court of Cologne held that to satisfy the 'essential attributes for statehood' a population had to 'form a cohesive vibrant community' and a common purpose was necessary *in casu* the degree of common interest was insufficient as the advantages of tax, and commercial reasons were not enough to establish this common interest.[373]

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[367] JG Stoutenburg (note 12 above) 269.
[368] *Ibid* 269.
[369] *Ibid* 269.
[370] D Raic 'The Traditional Criteria for statehood and Effectiveness' (note 129 above) 57.
[371] R Lapidoth 'When is an entity entitled to statehood?' (2012) VI (3) *Israel Journal of Foreign Affairs* 78.
[372] MH Mendelson 'Diminutive States in the United States' (1972) 21 *International and Comparative Law Quarterly* 611.
[373] *In re Duchy of Sealand, International Law Reports, 80*, 683-688. doi:10.1017/CBO9781316152089.028. The case of *In re Duty of Sealand* whilst a municipal case can be used in the international sense. Domestic judicial decisions facilitate the reception of international law within the domestic legal system and allow States a platform to respect their international obligations, see O Ammann 'The Legal Effect of Domestic Rulings in International Law' in O Ammann *Domestic Courts and the Interpretation of International Law* (2020) 137. Additionally, international law is a check over domestic law in that international law holds a State responsible for wrongdoing to other States and its nationals and therefore many States adhere to the principles of international law as a result. As such, it is important to highlight that international law has some influence over domestic law even if this is indirect in nature, see E Borchard 'The relation between international law and municipal law' (1940) 27 (2) *Virgina Law Review* 139. International legal rules and institutions also have the ability to enhance the capacity and effectiveness of domestic institutions but also may require or compel action at a national level, see A Slaughter W Burke-White 'The Future of International Law is Domestic (or, The European Way of Law)' (2006) *Faculty Scholarship at Penn Carey Law* 333.

It cannot be denied that the community of most SIDS is still very much intact. The people of Tuvalu and Kiribati specifically have deep-rooted ties to their land and are proud of their nationality.[374] Therefore, it stands to reason that until the island can no longer sustain any form of human life, even a tiny population still resident on the remaining low-lying island territory would be sufficient to maintain this requirement of statehood.[375] However, it may not remain this way for years to come; eventually, in the absence of drastic mitigation or adaptation, the population of these SIDS will have to relocate due to rising sea levels. It is important to emphasise, however, that a governmental convoy of people remaining on the SIDS would be insufficient to maintain statehood, as the essential remnants of what constitutes a population and a community would be absent from such a situation.

5.4 Capacity to Enter into Relations with Other States

As discussed earlier in this chapter, this requirement focuses instead on the ability of a State to be independent.[376] A State's reliance on economic aid would not result in it being considered dependent if the State can choose between various sources of aid and is not being provided support consistently from one State only.[377] If the SIDS were to experience wide-spread submergence of its territory or the territory becomes uninhabitable, it may result in the relocation of its population. In this instance, the government may still be considered independent and exist in exile, provided a small population remains on the island.[378] This requirement of statehood would be likely to stay intact for so long as there is a small population (which may even be as small as 50 people), that remains in the territory over which the government retains control.[379]

Where there is an absence of a territory with a population, and the government exists in exile, the requirements of territory, population, government, and capacity to enter into relations would fall away as the population would be entirely subject to the State that bears host to them.[380] Whilst this would present limitations on the government, there is one functioning example of a 'government' in exile that still exists today.

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[374] E Hermann and W Kempf 'Climate Change and the Imagining of Migration: Emerging Discourses on Kiribati's Land Purchase in Fiji' (2017) 29(2) *The Contemporary Pacific* 232.
[375] JG Stoutenburg (note 12 above) 273.
[376] *Ibid* 292.
[377] *Ibid* fn. 228.
[378] *Ibid* 295.
[379] *Ibid* 295.
[380] *Ibid* 295.

The Government of Tibet and the people of Tibet have been exiled to India and Nepal.[381] Despite this factual relocation, the government has a taxation system that is voluntary; they issue passports, have quasi-embassies in multiple States, and have even held elections.[382] This government stands as a legal or *de jure* representation of the Tibetan people but does not fulfil all traditional government functions.[383] The Tibetan government is also not recognised internationally, presumably because the territory it previously controlled has been under the control of China since 1949, the government does not control a police or military, and it cannot defend or punish its citizens.[384] McConnell asserts that the case of Tibet is a combination of statehood and statelessness.[385] Whilst the Tibetan government does have ties with its people, it functions in the absence of territory, without international recognition, and in the absence of the common characteristics of statehood. However, despite these challenges, the government remains a functional democracy. It provides an example of a unique situation where Stateless and territoryless people can exist internationally and maintain ties with their culture.

Therefore, it stands to reason that a State which has to relocate to the territory of another State completely will lack independence in the traditional sense. Whilst this does mean international recognition may fail, and statehood may be absent, it does not signal the end of the international personality of that entity. It would just result in a new path to be forged for SIDS and their political communities outside of traditional statehood in the absence of changes to international law as we see it today.

Next, we will consider UN Membership and the role that it plays in statehood and the continued recognition of States.

6. UN Membership

UN membership is open to 'peace-loving States' in terms of Article 4 (1) of the UN Charter. Article 4 (1) contains five different requirements: First, the State has to be peace-loving, and second, the State has to be considered a State under international law.[386] In terms of the peace-loving criterion, it is crucial to determine whether the country has shown a willingness to respect the principles of the UN.[387] This includes non-intervention with other States and the

[381] F McConnell 'Democracy-in-Exile: The 'Uniqueness' and Limitations of Exile Tibetan Democracy' (2009) 58(1) *Sociological Bulletin* 116.
[382] *Ibid* 116.
[383] *Ibid* 116.
[384] *Ibid* 116, fn. 1.
[385] *Ibid* 116.
[386] Article 4 (1), UN Charter.
[387] A Imseis 'On membership of the United Nations and the State of Palestine: A critical account' (2021) 34 *Leiden Journal of International Law* 862.

ability to enter into dispute resolution should this be required.[388] However, historically, the threshold for peace-loving has been viewed as low, taking into account that Israel was allowed admission into the UN even whilst it was in the midst of a war with other States such as Egypt, Lebanon and Syria.[389] Another example of this is the Democratic Republic of Congo, which was involved in a civil war with a UN peacekeeping mission present in the country, and despite this fact, the UN allowed the State to become a member.[390] While there is precedent for a traditionally low threshold of the peace-loving criterion, this is not always the case. One of the impediments to UN membership for Palestine, as provided by the membership committee, is the presence of Hamas, a militant group, in Palestinian territory as this has been said to indicate that Palestine is not 'peace-loving' and does not fulfil the criteria in Article 4(1).[391]

The second requirement of Article 4 (1) requires the State to be a State, and the applicant should fulfil the criteria of statehood. As discussed above, the traditional criteria for statehood are accounted for in the Montevideo convention. Should a State meet the requirements of permanent population, defined territory, government, and capacity to enter into relations with other States, they would be eligible for UN membership provided they meet the additional criteria in Article 4 (1) of the UN Charter.

Independent States who wish to attain UN membership also have to consent to the obligations in the UN charter in terms of the third requirement of membership.[392] The State must additionally be able and willing to carry out the commitments in the charter as the last two requirements for membership.[393] The General Assembly must take the decision after the Security Council has made its recommendations to confirm UN membership.[394] Members of the UN must be able to act in line with their obligations under the UN Charter; this is determined within the judgment of the organisation.[395]

The requirements for Article 4(1) of the UN Charter have been held to be exhaustive by the ICJ.[396] The decision of the UNGA or Security Council to admit or deny a State to its

[388] *Ibid*.
[389] *Ibid*.
[390] *Ibid*.
[391] United Nations, Security Council, Report of the Committee on the Admission of New Members concerning the application of Palestine for admission to membership in the United Nations, 11 November 2011, UN Doc. S/2011/705 para 16.
[392] Article 4 (1), UN Charter.
[393] *Ibid*.
[394] Article 4 (2), UN Charter.
[395] *Ibid*.
[396] International Court of Justice 'Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter)' Advisory Opinion of 28 May 1948 available at *https://www.icj-cij.org/public/files/case-related/3/003-19480528-ADV-01-00-EN.pdf* (accessed 24 January 2023) 62.

membership must be based upon the requirements within Article 4 and not any additional considerations outside of these provisions.[397] Perhaps this is to ensure that political considerations do not cloud the ability of some States to attain membership and that the process is somewhat objective.

Whilst membership to the UN is not a prerequisite for statehood, it is often considered an essential hurdle toward maintaining statehood due to the benefits membership provides. The UN assists new States that may require access to resources.[398] An important example of the resources available to new States is the International Monetary Fund (IMF), which provides economic benefits.[399] Whilst membership to the IMF is separate from the UN as it is an independent organisation, most of the IMF member countries are members of the UN, or the territories are administered by UN members, with Kosovo as an exception, as discussed below.[400] The IMF offers both concessional and non-concessional loans to States.[401] Concessional loans are provided to States based on poverty, whereas non-concessional loans are provided based on an existing credit rating that the State has with the IMF.[402] When a new State attains membership within the UN, they have full access to the benefits provided to existing States, and there is no distinction made between States that are long-standing members of the UN versus new members.[403] Therefore, new States would benefit from IMF loans like any other State would. This is important as the economies of new States may be fragile without additional financial help. New entities including secessionist States, such as the Republic of Kosovo, have found these benefits significant for economic growth.[404] Whilst Kosovo is not a member of the UN, in 2008, it applied for IMF membership and its membership request was approved in June 2009.[405]

Another vital benefit of UN membership is access to UN aid.[406] According to Fazal and Griffiths, most new UN members have received in the range of one to six million dollars of aid

[397] *Ibid* 65.
[398] TM Fazal RD Griffiths 'Membership Has Its Privileges: The Changing Benefits of statehood' (2014) 16(1) *International Studies Review* 92.
[399] *Ibid*.
[400] 'Countries' *IMF* available at *https://www.imf.org/en/Countries* (accessed 22 January 2023).
[401] TM Fazal RD Griffiths (note 398 above) 92.
[402] *Ibid*.
[403] *Ibid*.
[404] *Ibid* 93.
[405] IMF 'Press Release: Kosovo Becomes the International Monetary Fund's 186th Member' Press Release No. 09/240 available at *https://www.imf.org/en/News/Articles/2015/09/14/01/49/pr09240#:~:text=Press%20Release%3A%20Kosovo%20Becomes%20the%20International%20Monetary%20Fund's%20186%20th%20Member&text=The%20Republic%20of%20Kosovo%20became,a%20ceremony%20in%20Washington%20D.C.* (accessed 20 October 2023).
[406] TM Fazal RD Griffiths (note 398 above) 80.

in the year directly after their UN membership was confirmed.[407] Perhaps a knock-on effect of UN membership is access to economic partnerships for new States, which may prove valuable for the prosperity of the State going forward.[408] It cannot be denied that UN membership benefits States, new and old, and the resources available through the UN may help establish a State's economy, which is vitally important to a State's success. This is perhaps why States that establish independence seek UN membership; this has been the case with the nation of Palestine. Membership to the UN is a valuable confirmation of statehood to establish recognition but also provides many benefits to the States who attain membership. Whilst the mechanisms to become a UN member are outlined, the dissolution of States or removal of States from the UN is not a easy to explain.

6.1 Yugoslavia and Czechoslovakia as Case Studies for Removal of a State from UN Membership

Whilst there is no precedent from the UN on the involuntary dissolution of a State and removal from the UN on the basis of a State losing its territory or population as a result of sea-level rise, we may be able to look to the involuntary dissolution and removal of Socialist Federation of Yugoslavia (SFRY) and the Federal Republic of Yugoslavia (FRY) for some assistance. Historically, SFRY was the first official member of the UN that was dissolved without agreement between the State itself and its possible successor State(s), meaning the dissolution was without State succession directly.[409] Previously, dissolutions such as the Soviet Union and British India were based upon an agreement with the successor States.[410] In most instances, the successor States would take over the rights and responsibilities of the predecessor State. The importance of the removal of any State from the UN cannot be underestimated, as where a State is not a member of the UN, it is unlikely that it will be able to enter into treaties and negotiations with other States. It will also be unable to partake in the organisations and assembly bodies of the UN. Furthermore, removal from the membership of the UN may result in other States withdrawing recognition. Whilst the latter consequence is not guaranteed, it is worth noting.

The SFRY was composed of the Republics of Bosnia and Herzegovina, Croatia, Macedonia, Montenegro, Slovenia, and Serbia and arguably ceased to be a State in 1992. This was asserted in Opinion 8 of the Conference on Yugoslavia Arbitration that SFRY was no longer a State as

[407] *Ibid* 93.
[408] *Ibid* 93.
[409] M Scharf 'Musical Chairs: The Dissolution of States and Membership in the United Nations' (1995) 28 *Cornell International Law Journal* 58.
[410] *Ibid* 58.

the composition of its functioning of essential bodies of the Federation was unable to satisfy the requirements of a State in terms of its representation and participation.[411] It was further highlighted that: 'the existence or disappearance of a State is, in any case, a matter of fact.'[412] The dissolution of SFRY hinged on the territory and population as it was found that the greater part of the territory and population making up SFRY was no longer under the federal authority of SFRY in that the succeeding States constituted themselves as independent under its own sovereign control.[413] It was found that the dissolution of SFRY was complete on the 4th of July 1992,[414] and thereafter, in Resolution 777 (1992), the Security Council noted that 'the State formerly known as the Socialist Federal Republic of Yugoslavia has ceased to exist'.[415] In the Security Council Resolution 777 (1992) it was affirmed that the Federal Republic of Yugoslavia (FRY), made up of Serbia and Montenegro, was not generally accepted as automatically taking over the membership of SFRY, requiring them to apply for membership to the UN and banning them from participating in the work of the General Assembly.[416] This resolution was initially tabulated by the USA, wherein it was recommended that the General Assembly affirm that SFRY's membership had been extinguished and that FRY could not continue SFRY's membership.[417] Resolution 777 (1992) also prevented FRY from continuing SFRY's membership primarily because if SFRY was found to have dissolved with no successor State, there was no membership for FRY to step into, and FRY would need to reapply to become a member State of the UN.

Whilst the Security Council passed resolution 777 (1992), it was not without contention, as the resolutions removing SFRY and preventing FRY from participating in the UN were considered to be ambiguous.[418] The resolutions by the Assembly bodies were understood by many to mean that FRY could not partake, or importantly could not vote, in the activities of the UN Assembly bodies only but may still occur in other UN organisations.[419] The latter assertion was based upon the idea that its membership was not entirely extinguished. The ICJ echoed the sentiment that the resolutions which resulted in the removal of FRY from UN membership were legally

[411] Conference for Peace in Yugoslavia, Arbitration Commission, Opinion No 8, Paris 4 July 1992.
[412] *Ibid*.
[413] *Ibid*.
[414] *Ibid*.
[415] United Nations Security Council, Resolution 777 (1992), Adopted by the Security Council at its 3116th meeting on 19 September 1992, UN Doc S/RES/777.
[416] *Ibid*.
[417] M Scharf (note 409 above) 57.
[418] *Ibid* 58.
[419] *Ibid* 61.

problematic.[420] However, as time went on, other UN organisations adopted resolutions resembling resolution 47/1 of the General Assembly, which prevented FRY from being involved in the work of the General Assembly[421] to prevent FRY from being involved in their organisations, including the International Maritime Organisation and the World Health Organisation, amongst others.[422]

The removal of SFRY and FRY may be distinguished from the dissolution of Czechoslovakia. With the dissolution of Czechoslovakia into two new independent States, the UN's response was swift. The UN Legal Counsel provided an opinion that Czechoslovakia was to cease to exist and would not continue as another entity; from the date of the opinion, the membership of the UN was reduced by one.[423] This rapid action by the UN was because the Czechoslovakian Foreign Ministry had advised the UN two weeks before the division of the State that Czechoslovakia would cease to exist as of 10 December 1992.[424] Therefore, this can be seen as a voluntary extinction of statehood; however, the importance of the opinion of the Legal Counsel cannot be overemphasised.

It is within the mandate of the UN through their assembly bodies to decide that a member of the UN cease to be a member since the State ceases to be considered a State. Whilst this has only happened through dissolution, uniting, or merger of States to date, it is submitted that it may not be limited to these instances. At the Sixth Committee, the UN adopted the following principles as a guide for State extinction:

> '1. That, as a general rule, it is in conformity with legal principles to presume that a State which is a Member of the Organization of the United Nations does not cease to be a Member simply because its Constitution or its frontier have been subjected to changes, and that extinction of the State as a legal personality recognized in the international order must be shown before its rights and obligations can be considered thereby to have ceased to exist.
>
> 2. That when a new State is created, whatever may be the territory and the populations which it comprises and whether or not they formed part of a state Member of the United Nations,

[420] *Ibid* 63.
[421]UNGA, Forty-seventh session, Recommendation of Security Council of 19 September 1992, UN Doc A/Res/47/1 (1992).
[422] M Scharf (note 409 above) 63.
[423] *Ibid* 66.
[424] UNGA, Forty-seventh session, Agenda item 19, Admission of New Members to the United Nations, Letter dated 10 December 1992 from the Permanent Representative of Czechoslovakia to the United Nations addressed to the Secretary-General, 10 December 1992, UN Doc A/47/774.

it cannot under the system of the Charter claim the status of a Member of the United Nations unless it has been formally admitted as such in conformity with the provisions of the Charter.

3. Beyond that, each case must be judged according to its merits.'[425]

Since the above guidelines were created, there has been much deliberation on issues of State succession. It resulted in the Draft Articles on Succession of States in respect of Treaties with Commentaries 1974, which the ILC adopted at its twenty-sixth session, thereafter, the Vienna Convention on Succession of States in respect of Treaties, 1978 and the Draft articles on Succession of States in respect of State Property, Archives and Debts with commentaries, 1981.[426] The Draft Articles and the Vienna Convention on Succession of States in respect of Treaties deal only with the succession of treaties and not with the general international rights and obligations of a State after succession. The articles also do not deal with situations where another State does not succeed a State. This area of international law has primarily remained undeveloped with no precedent from the international courts.[427] The ICJ has jurisdiction to settle contentious disputes and 'give an authoritative ruling on questions of international law';[428] unfortunately, the extinction of statehood without any successor State has not yet been brought before the ICJ for deliberation.

Without any determination from the ICJ or any other international tribunals, it is difficult to determine what would happen in an instance where a State ceases to be a State without any successor State, such as in the instance of climate change-induced migration. Notably, in such an instance, the State involved may cease to exist voluntarily as maintaining statehood has

[425] UNGA, Official Records, Second Session, First Committee, UN Doc A/C.1/212; reproduced in *The succession of States in relation to membership in the United Nations: memorandum prepared by the Secretariat* YILC (1962) Vol.II 103, 104, para 16.

[426] 'Draft articles on Succession of States in respect of Treaties with commentaries 1974' *United Nations* available at https://legal.un.org/docs/?path=../ilc/texts/instruments/english/commentaries/3_2_1974.pdf&lang=EF (accessed on 30 December 2021); Vienna Convention on Succession of States in Respect of Treaties, Date of Adoption 22 August 1978, UNTS 1946 p. 3, (entered into force 6 November 1996); 'Draft articles on Succession of States in respect of State Property, Archives and Debts with commentaries 1981' *United Nations* available at *https://legal.un.org/ilc/texts/instruments/english/commentaries/3_3_1981.pdf* (accessed 4 February 2023).

[427] K Marek *Identity and Continuity of States in Public International Law* 1 ed (1968) 9; J Ker-Lindsay 'Climate Change and State Death' (2016) 58(4) *Survival* 2. Many sources deal with creation of a State and State succession, as an example the following journals are focussed in this area: H Bokor-Szego 'Creation and cessation of States and contemporary international law' (1998) 20(2) *Society and Economy in Central and Eastern Europe*; PR Williams 'What makes a State? Territory' (2012) 106 *Proceedings of the Annual Meeting American Society of International Law*; G Erasmus 'Criteria for determining statehood: John Dugard's recognition and the United Nations' (1988) 4(2) *South African Journal on Human Rights*; TD Grant 'Defining statehood: The Montevideo Convention and its Discontents' (1999) 37(2) *Columbia Journal of Transnational Law*; WT Worster 'Functional statehood in Contemporary International Law' (2020) 46 (1) *Brooklyn Journal of International Law*.

[428] The United Nations, General Assembly, Sixty-eighth session, Agenda Item 85 'Handbook on accepting the jurisdiction of the International Court of Justice: model clauses and templates' available at https://www.un.org/en/ga/search/view_doc.asp?symbol=A/68/963&referer=/english/&Lang=E (accessed on 30 December 2021) 8/39.

certain obligations that come along with the rights it provides, such as the duty to fulfil obligations within various treaties. If a State were to cease to exist voluntarily, it cannot be doubted that statehood ceases to exist.[429] If a State were to cease to exist, it would be a matter of fact and law, but it may become apparent to the international community by a lack of recognition by one or more States or by an organisation such as the UN by the clear indication by the Security Council that the State has ceased to exist such as in the case of SFRY and Czechoslovakia.

There are States that exist today in the absence of uniform worldwide recognition and in some instances, without UN membership. This is because these aspects are not essential to statehood. We will explore some of these entities below to illustrate that they may exist without recognition and UN Membership. This is relevant to the SIDS to illustrate that in the absence of one or more of the aspects they may still remain a State in some form, however, numerous challenges are involved therein. Therefore, it will be argued that certainty is important for SIDS due to the difficulties that may arise in the absence of recognition, UN membership and traditional 'statehood'.

7. Independent States Without Worldwide Recognition & UN Membership

7.1 Palestine

Palestine is one of the best examples of a nation that has arguably met the requirements of the Montevideo Convention and declared independence but has been unable to attain recognition from some of the world's most powerful States and, as a result, has not been able to gain UN membership. The Palestine National Council (PNC), the legislative body of the Palestine Liberation Organisation (PLO), announced the State of Palestine on the 15th of November 1988.[430] The Palestine Declaration of Independence States that the Palestinian people have historically been subjected to 'historical injustice' and have been deprived of their 'right to self-determination'.[431] Therefore, the PLO sought independence from Israel for the Palestinian people. The State of Israel has conversely rejected the liberation of Palestine and has contested the West Bank and Gaza Strip area for centuries.

[429] P Moscoso de la Cuba (note 5 above) 142.
[430] J Quigley 'Palestine's declaration of independence: Self-determination and the right of the Palestinians to statehood' 7(1) (1989) *Boston University of International Law Journal* 1.
[431] 'About Palestine' *Permanent Observer Mission of The State of Palestine to the United Nations New York* available at *http://palestineun.org/about-palestine/* (accessed 20 December 2021).

Palestine is recognised by 139 States worldwide, including Turkey, South Africa, Brazil, Sweden, the Russian Federation and China.[432] However, the nation has yet to receive official recognition from many more powerful States, such as the UK, the USA, Germany, and Japan, which are notably absent from the list of States that recognise the nation.[433] The non-recognition by the UK is unsurprising owing to its history with Palestine. The UK colonised the nation and was mandated to administer Palestine by the League of Nations.[434] Whilst France recognises itself as a friend of Palestine, they only consider that Palestine will become a 'future State of Palestine' and do not recognise the pre-existing independence of the nation.[435] This is perhaps because France is both a friend of Israel and Palestine.[436] Despite this, in 2012, Palestine achieved UN observer State status by a vote of the General Assembly, with Palestine's flag being unveiled on the floor of the General Assembly shortly after the vote.[437] The vote was momentous for Palestine as the nation had previously been a 'non-member observer entity' that did not recognise its statehood.[438]

The State of Palestine has been argued to fit the requirements of the Montevideo Convention, namely: There is an existing territory with which Palestine exercises some control comprising the West Bank, East Jerusalem, and Gaza, which the International Court of Justice has confirmed; there is a population within this territory, and they have shown a capacity to conduct themselves internationally as they do sit as observers on the UN.[439] Whilst Palestine does not exercise exclusive control over the territory it is said to encompass, this is not considered an impediment to statehood in the eyes of the International Criminal Court.[440] Regardless of possible claims, Palestine's statehood has remained undetermined by the ICJ and many other States.[441] The ICJ has refused to exercise jurisdiction in a case that Palestine brought against the USA to ensure the relocation of the USA Embassy from Jerusalem in adherence with the UN Security Council Resolution to withdraw diplomatic missions from the city.[442]

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[432] 'Diplomatic Relations' *Permanent Observer Mission of The State of Palestine to the United Nations New York* available at *http://palestineun.org/about-palestine/* (accessed 20 December 2021).
[433] *Ibid*.
[434] J Quigley (note 430 above) 4.
[435] 'Palestinian Territories' *France Diplomacy* available at https://www.diplomatie.gouv.fr/en/country-files/israel-palestinian-territories/palestinian-territories/ (accessed 20 December 2021).
[436] *Ibid*.
[437] UNGA, Sixty-seventh session, Resolution adopted by the General Assembly on 29 November 2012, UN Doc. A/RES/67/19.
[438] *Ibid*.
[439] ICC 'Situation in the State of Palestine' (note 237 above) 74/112 75/112.
[440] *Ibid*.
[441] *Palestine v. United States of America* ICJ Reports 2018, p. 710.
[442] *Relocation of the United States Embassy to Jerusalem* (*Palestine v. United States of America)* Order of `5 November 2018, I.C.J Reports 2018, p.708.

In 2011, Palestine applied for membership to the UN and has yet to be confirmed as a member; the nation sits only as an Observer State.[443] Whilst the report from the Committee on the Admission of New Members to the UN indicated that the requirements of the Montevideo Convention had, in principle, been met, there were concerns over the government of Palestine in that Hamas, and not the official governmental authority, controls 40% of Palestinian territory.[444] Whilst it was asserted that the official governmental authority is the Palestine Liberation Organisation, which represents the Palestinian people, the presence of Hamas is considered a factor of concern for the committee.[445] The World Bank, the International Monetary Fund and the Ad Hoc Liaison Committee have all confirmed that Palestine could effectively function as a State.[446] Despite this, the committee could not agree unanimously on the admission of Palestine as a member of the UN.[447]

7.2 Kosovo

Kosovo declared independence from Serbia on the 17th of February 2008.[448] Kosovo was recognised by many Western States as a new nation, even though the Serbian government protested its new independence.[449] Kosovo is the home of the medieval Serbian empire and has symbolic value to the Serbian people as it is considered the birthplace of their culture.[450] The residents of Kosovo largely adhere to a traditional lifestyle.[451]

The secession of Kosovo was backed by numerous States that are considered to be influential, such as the UK and the USA, who voted for it to become independent.[452] These States also recognised the nation as an entirely new State from the date of independence.[453] Shaw asserts that Kosovo does not have effective central control but has widespread recognition, which may stand in its place.[454] On the 22nd of July 2010, the ICJ found that Kosovo's declaration of independence did not violate international law, confirming that there are no barriers to the

[443] United Nations Security Council UN Doc. S/2011/705 (note 391 above).
[444] *Ibid* 2.
[445] *Ibid 2*.
[446] *Ibid 2*.
[447] *Ibid* 2 & 3.
[448] M Sterio 'Creating and Building a "State" International Law and Kosovo, The Case of Kosovo: Self-Determination, Secession, and Statehood Under International Law' (2010) *ASIL Proceedings* 361.
[449] *Ibid*.
[450] *Ibid*.
[451] *Ibid*.
[452] *Ibid* 363.
[453] *Ibid* 363.
[454] M Shaw (note 83 above) 185.

freedom of Kosovo as a State.[455] In its advisory opinion, the court noted that many participants in the proceedings claimed that:

> '… the population of Kosovo has the right to create an independent State as a manifestation of a right to self-determination or pursuant to what they described as a right of "remedial secession" in the face of the situation in Kosovo.'[456]

While some participants disagreed on whether the right to secession was present within Kosovo, the court focused on Kosovo's right to declare independence as requested by the General Assembly rather than whether Kosovo had a right to separate from a State.[457] Secession is the unilateral separation of one State from another and does not often create a new State, but it may do so.[458] The act of secession is not legal or illegal but is neutral in terms of international law.[459]

Since it declared independence, legislative elections have been held in the nation, and the government has secured a majority of Parliament.[460] Despite these crucial steps, some States have refused to accept Kosovo as an independent State.[461] This is perhaps based on the fact that the independence of Kosovo could set a precedent for the autonomy of other separatist groups in nations such as Moldova, Georgia, Northern Ireland, Tibet, Chechnya, Quebec, Bosnia and Macedonia.[462] During the written submissions, Spain urged the ICJ to allow the Security Council to determine the future of Kosovo rather than determine the question of Kosovo's right to independence by way of an advisory opinion.[463] This may be due to the precedent of Kosovo's independence and its effect on Catalonia, a region in Spain that has long sought independence. It is essential to highlight that despite the ICJ advisory opinion validating Kosovo's independence, Kosovo has not yet become a UN member State.[464]

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[455] *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010*, p. 403 454.
[456] *Ibid* para 82.
[457] *Ibid* para 82.
[458] J Vidmar 'Remedial Secession in International Law: Theory and (Lack of) Practice' (2010 6 (1) *St Antony's International Review* 41.
[459] *Ibid* 41.
[460] United Nations, Security Council 'United Nations Interim Administration Mission in Kosovo Report of the Secretary-General' UN Doc. S/2021/861, 8 October 2021.
[461] M Sterio (note 448 above) 365.
[462] *Ibid* 365, fn 19.
[463] *Accordance With International Law of The Unilateral Declaration of Independence By The Provisional Institutions of Self-Government Of Kosovo (Request for Advisory Opinion),* Written Comments of the Kingdom of Spain, July 2009 available at *https://www.icj-cij.org/sites/default/files/case-related/141/15706.pdf* (accessed 29 June 2023).
[464] 'Member States' *United Nations* available at https://www.un.org/en/about-us/member-States (accessed 24 December 2021).

Additionally, the United Nations Educational, Scientific and Cultural Organisation (UNESCO) rejected Kosovo for membership of the agency due to a lack of a two-thirds majority, regardless of the recommendation by the Executive Board that the nation should be admitted into membership.[465] The decision went in favour of Serbia and Russia, who supported Serbia's effort to reject the independence of Kosovo as the draft resolution did not obtain a two-thirds majority of members voting in the General Conference of UNESCO.[466]

Despite this step back, Kosovo has successfully gained membership with the World Bank and the International Monetary Fund.[467] The admission of membership to both the IMF and the World Bank is an important step forward for a new State in the absence of UN membership. It is arguably more critical than UNESCO membership as it provides economic stability. The Research Institute of Development and European Affairs has stated that the need for self-determination in Kosovo was necessary owing to the history dictated by oppression with the significant loss of lives and the removal of citizens from their homes on a large scale.[468] Therefore, it was a natural next step for Kosovo to seek independence and freedom.[469]

7.3 South African Homelands

Another example of the UN's rejection of independent States was the attempt by the 'Homelands' of South Africa to gain statehood. The UNGA rejected these nations' independence, which called on States worldwide to refrain from providing recognition to the Transkei, Bophuthatswana, Venda and Ciskei.[470] The primary reason for this was that African citizens in South Africa were stripped of their voting rights when the Bantu Homelands Citizenship Act (No 26) of 1970 came into effect.[471] Therefore, the creation of new nations to house part of South Africa's population ran contrary to the international norms that have

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[465] United Nations Educational, Scientific and Cultural Organization, General Conference, 38th Session, Draft Resolution, Request for the Admission of the Republic of Kosovo to UNESCO, UN Doc 38/C/PLEN/DR.1.
[466] United Nations Educational, Scientific and Cultural Organization, General Conference, Records of the General Conference, 38th Session, Resolutions, Volume 1, Pais 3 – 18 November 2015 57.
[467] International Monetary Fund, External Relations Department 'IMF Offers Membership to Republic of Kosovo' Press Release No. 09/518 8 May 2009 available at *https://archivescatalog.imf.org/Details/ArchiveExecutive/125166391 (*accessed 31 July 2023); and International Development Association Board of Governors, 'Resolution No. 221, Membership of the Republic of Kosovo' available at *https://documents1.worldbank.org/curated/en/209961470982156085/pdf/107830-BR-Box396272B-PUBLIC-IDA221-MembershipoftheRepublicofKosovo.pdf* (accessed 31 July 2023)
[468] RIDEA 'The Eventual Accession of Kosovo to the United Nations Specialised Agencies Procedures and Prospects' November 2019 available at *https://www.ridea-ks.org/uploads/INPUT%20-%20THE%20EVENTUAL%20MEMBERSHIP%20OF%20KOSOVO%20TO%20THE%20UN%20-%20PROCEDURES%20AND%20PROSPECTS.pdf* (accessed 26 January 2023) 2.
[469] *Ibid* 2.
[470] UNGA, 42nd Plenary Session, The so-called independent Transkei and other Bantustans, 26 October 1976, UN Doc. A/RES/31/6.
[471] NL Wallace-Bruce (note 9 above) 599.

become customary due to the systemic oppression of the apartheid regime in South Africa that resulted in the establishment of these nations.[472] In its resolution, the General Assembly condemned the establishment of Bantustans since, by their very nature, they were a result of the inhuman policies of apartheid, aimed to devastate the territorial integrity of the country and dispossess African people of the inalienable rights that they had within the country of South Africa.[473] Therefore, in the opinion of the General Assembly, the Bantustans' declaration of independence was declared invalid.[474] As such, the General Assembly called on all Governments to refrain from recognising Transkei and other Bantustans.[475] The idea that South Africa comprises multiple different countries due to the presence of other racial groups would mean that States such as Australia, Canada, and Kenya would also be comprised of different nations due to a diverse culture comprising people from various tribal origins.[476] The rejection of the Homelands of South Africa is an example of the UNGA rejecting the recognition of member States, as to do so would go against international normative standards despite any possible adherence to the criteria for statehood.[477] While the example of the South African Homelands appeared to illustrate self-determination, there is an argument that this is not the actual State of affairs, as the legislation that deprived African citizens of their voting rights forced the attempt for independence.[478] The attempt for self-determination then was not owing to the desire of the people residing within these areas for freedom but because the government of South Africa was forcing this segregation, and the majority of black South African citizens who were affected had no opinion on the matter.[479] Therefore, the discriminatory imposition of such a policy based on race, colour or language was illegal and could not be considered the basis for self-determination.[480] Accepting the independence of these nations in the face of apartheid would have been akin to accepting the unlawful policies of the South African government.

All of the above instances of States in the absence of widespread recognition and lack of UN membership in the traditional sense are all movements based on the right of self-determination. Let's explore this right to understand what the right to self-determination means, whether

[472] *Ibid* 600.
[473] UNGA, The so-called independent Transkei and other Bantustans (note 470 above) para 1.
[474] *Ibid* para 2.
[475] *Ibid* para 3.
[476] NL Wallace-Bruce (note 9 above) 599.
[477] *Ibid* 600.
[478] *Ibid* 600.
[479] *Ibid* 601.
[480] *Ibid* 601.

statehood should follow directly thereafter, and why self-determination movements do not consistently achieve statehood. The right of self-determination is relevant to the study at hand as it has been suggested that the right may be used to aid the continued existence of SIDS using the right of self-determination to merge with another State if their traditional statehood were to lapse.[481]

7.4 The Right of Self-Determination

The right to self-determination has been referred to as 'the right of people to decide on its international status (access to independence, association, secession, union, etc.)'.[482] Saul asserts that the right to self-determination includes the following:

> '(a) the right to exist – demographically and territorially – as a people; (b) the right to territorial integrity; (c) the right to permanent sovereignty over natural resources; (d) the right to cultural integrity and development; and (e) the right to economic and social development.'[483]

Whilst there is no exact definition of the right, it has been confirmed to encompass social, cultural, political and economic consequences.[484] The ICJ's advisory opinion on the *Western Sahara*[485] noted that the right to self-determination as a right of peoples' aimed to bring colonialism to an end.[486] The advisory opinion highlights that the right to self-determination must encompass the 'free and genuine expression of the will of the peoples concerned'.[487] In 1981, the UN released a report on their study of the right to self-determination. The report aimed to determine the historical basis of the right and the development of the right to self-determination.[488] From the outset, the UN Charter provides in Article 1 that the purpose of the United Nations is, amongst other vital mandates:

> '2. To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace.'[489]

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[481] JG Stoutenburg (note 12 above) 337.
[482] A Cristescu 'The right to self-determination, Historical and current development on the basis of united nations instruments' 1981 *United Nations Submission on Prevent of Discrimination and Protection of Minorities Special Rapporteur on the Right to Self-Determination* available at *https://digitallibrary.un.org/record/25252?ln=en* (accessed 22 January 2023) 8.
[483] M Saul 'The Normative Status of Self-Determination in International Law: A Formula for Uncertainty in the Scope and Content of the Right' (2011) 11 (4) *Human Rights Law* 613.
[484] A Cristescu (note 482 above) 8.
[485] *Western Sahara,* Advisory Opinion, I.C.J. Reports 1975, p.12.
[486] *Ibid* para 55.
[487] *Ibid* para 55.
[488] A Cristescu (note 482 above) 8.
[489] Charter of the United Nations, Date of adoption 26 June 1945, 1 UNTS XVI, (entered into force 24 October 1945), Article 1 (2).

The ICJ also highlighted the addition of this aspect into the UN Charter in decisions that are relevant to the right to self-determination, including the ICJ advisory opinion of *The Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*.[490] In the latter case, the ICJ stated that the right of self-determination was enshrined in the UN Charter and made the principle applicable to all non-self-governing territories.[491] Despite the addition of the right in the UN Charter, it is important to highlight that there was a lot of debate while drafting the purpose provided in the UN Charter, particularly around the use of the words 'peoples' and 'nations'.[492] It was provided that the word 'nations' was preferred over 'States' since it would account for those entities who may have become members of the UN but had yet to attain statehood.[493] The Rapporteur of Committee One Commission One from the 13th of June provided that equal rights and self-determination were, in effect, two complementary parts of the same standard of conduct.[494]

Based on the importance of the right to self-determination, the significance of adding an article on self-determination was stressed when the Commission on Human Rights set out to create an International Covenant on Human Rights.[495] The right to self-determination was seen as so vitally essential that it was included as part of the edifice of all human rights.[496] Consequently, the right was added as a principle to the International Covenant on Human Rights, inclusive of the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights ICCPR) in the first article.[497] The addition of this right into these Covenants dealing with fundamental human rights was confirmation that the right to self-determination affects all individuals globally even though it is by its very nature a collective right.[498]

The anti-colonial struggle also highlighted the importance of this right, as the need for independence of previously colonised States was the exercise of the right to self-

[490] *The Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, I.C.J. Reports 1971, p.31.
[491] *Ibid* para 52.
[492] A Cristescu (note 482 above) 2.
[493] *Ibid* 3.
[494] *Ibid* 2.
[495] *Ibid* 4.
[496] *Ibid* 4.
[497] International Covenant on Civil and Political Rights, Date of Adoption 16 December 1966, UNTS 999, p. 171, (entered into force 23 March 1976); International Covenant on Economic, Social and Cultural Rights, Date of Adoption 16 December 1966, UNTS 993, p. 3, (entered into force 3 January 1976).
[498] A Cristescu (note 482 above) 8.

determination.[499] During the programme of action for the full implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples, the anti-colonial thesis was developed by the General Assembly.[500] The thesis provided that colonial peoples had the right to struggle for 'freedom and independence'.[501] It also highlighted the need for member States to assist colonial territories in enabling these communities to attain freedom and independence.[502] In the Declaration on the Occasion of the Twenty-fifth Anniversary of the UN, the General Assembly reaffirmed the organisation's commitment to liberate people subjected to colonialism.[503] While in 1970, many States were freed, many African countries were still struggling with liberation despite the right to self-determination being part of the UN Charter since 1945.[504] Saul asserts that whilst the right to self-determination was first affirmed in the UN Charter, the right was only really established once there was an undertaking to work toward decolonisation throughout the 1960s.[505]

It is essential to highlight that the right to self-determination should never be used to cover up the violation of independence, as was seen in the conquest of many States that were consequently colonised.[506] Instead, the basis of self-determination is for people to live free of colonial rule, imperialism, aggression, occupation by foreign persons, discrimination, apartheid or any acts which attempt to prevent sovereignty and encroach on the territory.[507] In addition, the end of neo-colonialism and the democratisation of international relations is another critical step in realising the right to self-determination.[508] Therefore, self-determination should be seen as a means to liberate those historically and even currently oppressed rather than a means to disrupt the status *quo*. The maintenance of equal rights and self-determination is considered to be of vital importance for international order.[509] Whilst the right to self-determination is not expressly divided into internal and external self-determination, some literature emphasises the two different forms of self-determination. This is primarily in relation to the discussion of self-

[499] *Ibid* 9.
[500] *Ibid* 9.
[501] *Ibid* 9.
[502] *Ibid* 9.
[503] United Nations, General Assembly, 1883rd Plenary Meeting 'Resolution 2626 (XXV) Declaration on the Occasion of the Twenty-fifth Anniversary of the United Nations' 24 October 1970 4.
[504] *Ibid*.
[505] M Saul (note 483 above) 613.
[506] A Cristescu (note 482 above) 118.
[507] *Ibid* 118.
[508] *Ibid* 118.
[509] *Ibid* 119.

determination in a post-colonial sense.[510] We will consider both the internal and the external dimensions of the right.

7.4.1 Internal and External Self-determination

The right to self-determine in an internal and external sense merely refers to the different implementations of the same right.[511] Summers states that self-determination includes the relationship between 'peoples and a number of different entities: peoples, States, empires, governments.'[512] Secondly, self-determination also concerns relationships between people and the State or government.[513] The right to self-determination, whilst attributable to peoples' also has an additional dimension. The right to self-determination involves States and their institutional structures and the ability of peoples' to determine their economic, social, and cultural development as well as their political status.[514] The right to self-determination, however, has many internal and external aspects.[515]

7.4.1.1 Internal Self-determination

The internal dimension of self-determination is the emphasis on the relationship between the State and its people, and it involves the people having a say in the decision-making of a State.[516] The internal self-determination dimension focuses on 'all peoples', including not just 'colonial' or 'oppressed peoples'. [517] The implication of this is that the right is universal in nature and is also continuous.[518] The right to self-determination is mentioned in the following instruments: ICCPR, the Friendly Relations Declaration,[519] the OSCE Helsinki Final Act,[520] the African Charter on Human and Peoples' Rights' and the Vienna Declaration and Programme of Action adopted by the World Conference on Human Rights.[521] As per the Friendly Relations

[510] D Raic 'The Post-Colonial Era: Internal and External Self-Determination' in D Raic *Statehood and the Law of Self-Determination* (2002) 227.
[511] *Ibid* 227.
[512] J Summers 'The internal and external aspects of self-determination reconsidered' in D French *Statehood and Self-Determination* (2013) 232.
[513] *Ibid* 232.
[514] *Ibid* 232.
[515] *Ibid* 232.
[516] D Raic 'The Post-Colonial Era: Internal and External Self-Determination' (note 510 above) 237.
[517] *Ibid* 228.
[518] *Ibid* 243.
[519] Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in accordance with the Charter of the United Nations, 24 October 1970, UN Doc. A/RES/2625 (XXV).
[520] Organization for Security and Co-operation in Europe (OSCE), Conference on Security and Co-operation in Europe (CSCE): Final Act of Helsinki, 1 August 1975., ILM Vol. 14 p. 1292.
[521] African Charter on Human and Peoples' Rights, Organization of African Unity, Date of Adoption 9 July 1996, CAB/LEG/67/3 rev. 5, ILM, Vol. 58, 1982, p. 21. (entered into force on 21 October 1986).

Declaration, which is often thought to be the leading authority on the 'basic principles of today's international legal order' the following is observed on self-determination[522]:

> 'By virtue of the principle of equal rights and self-determination of peoples enshrined in the Charter of the United Nations, all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development, and every State has the duty to respect this right in accordance with the provisions of the Charter.
>
> Every State has the duty to promote, through joint and separate action, realization of the principle of equal rights and self-determination of peoples, in accordance with the provisions of the Charter, and to render assistance to the United Nations in carrying out the responsibilities entrusted to it by the Charter regarding the implementation of the principle…'[523]

The African Charter prescribes in Article 20 that all peoples have 'the unquestionable and inalienable right to self-determination'. This includes the ability to choose their political status and the ability to pursue economic and social development according to policy that has been chosen in a manner that is free.[524]

In terms of Article 1 (1) of the ICCPR:

> 'All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.'

Additionally, Article 1 (3) of the ICCPR includes the following:

> 'The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.'

Raic suggests that the use of the word 'including' in the above extract provides for an obligation on some of the States Parties in terms of specific territories to realise the right to self-determination but also obliges all parties to the Covenant to respect and promote the right of self-determination in terms of its population.[525] The nature of the right to self-determination has also been discussed by the Human Rights Committee, which notes that there is an

[522] D Raic 'The Post-Colonial Era: Internal and External Self-Determination' (note 510 above) 235.
[523] Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States (note 519 above) 8.
[524] Article 20 (1), African Charter.
[525] D Raic 'The Post-Colonial Era: Internal and External Self-Determination' (note 510 above) 229.

obligation on States parties to respect this right in terms of their population[526]. Still, the right to self-determination extends to peoples' who have been unable to exercise their rights or have been prevented from exercising this right.[527] Therefore, these obligations exist regardless of whether the State is a party to the ICCPR or not.[528]

In addition to the instruments that provide for the right of self-determination, other important sources exist. One such source is *Legal Consequences of the Separation of the Chagos Archipelago From Mauritius in 1965.*[529] The ICJ highlighted that the right to self-determination is a customary normative standard of international law primarily due to the declaratory character of resolution 1514 (XV),[530] which aimed to declare the granting of independence to colonial countries and peoples'.[531] Resolution 1514 (XV) explicitly provided for the 'self-determination of all peoples', emphasising equal rights and the universal respect for human rights.[532] The normative character of the right to self-determination was also entrenched in Resolution 2625 (XXV) on the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations wherein self-determination it was highlighted as a principle essential within international law.

7.4.1.2 External Self-determination

The external character of self-determination manifests itself in creating an independent State or the possible integration or association with a third State.[533] Sterio notes that the right to external self-determination only exists in limited and exceptional circumstances.[534] Internal self-determination is distinct from external self-determination in that the frontiers of the State where the people reside may be modified in external self-determination.[535] Sterio notes that an example of an instance where external self-determination may take place is where a State

[526] United Nations, International Human Rights Instruments, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, Note by Secretariat, General Comment 12, Adopted at the 21st Session of the Human Rights Committee, on 13 March 1984, UN Doc. HRI/GEN/1/Rev.1, 1994, para 6.
[527] *Ibid.*
[528] *Ibid*.
[529] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion, I.C.J. Reports 2019, p. 95.
[530] UNGA, Declaration on the Granting of Independence to Colonial Counties and Peoples, UN Doc A/RES/1514(XV), Adopted at the 947th Plenary Meeting, 14 December 1960.
[531] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* (note 570 above) 132.
[532] UNGA, UN Doc. A/RES/1514(XV) (note 564 above).
[533] D Raic 'The Post-Colonial Era: Internal and External Self-Determination' (note 510 above) 289.
[534] M Sterio 'The notion of self-determination' in M Sterio *The Right to Self-Determination under International Law: Selfistans, Secession, and the Rule of the Great Powers* (2012) 21.
[535] D Raic 'The Post-Colonial Era: Internal and External Self-Determination' (note 510 above) 289.

referred to as the 'mother State' oppresses a people in a reprehensible manner or where peoples' that form part of an existing State is not able to participate within a central government's structures.[536] The idea of some extenuating circumstances required for external self-determination found some authority in the African Union in the quest for independence of the Katangese Peoples' Congress, who were a part of the population of Zaire. In the case of *Katangese Peoples' Congress v. Zaire.* the commission noted:

> 'In the absence of concrete evidence of violations of human rights to the point that the territorial integrity of Zaire should be called to question and in the absence of evidence that the people of Katanga are denied the right to participate in government as guaranteed by Article 13(1) of the African Charter, the Commission holds the view that Katanga is obliged to exercise a variant of self-determination that is compatible with the sovereignty and territorial integrity of Zaire.'[537]

Therefore, external self-determination is not exercised lightly and is considered an exception to the general rule, which affirms the territorial integrity of all States worldwide.[538]

There are four different considerations for self-determination: People, sovereign States, distinct political units within a sovereign State, and political units distinct from a sovereign State.[539] In the second opinion on the Conference on Yugoslavia Arbitration Commission: Opinions on Questions Arising from the Dissolution of Yugoslavia, it was stated as follows:

> 'However, it is well established that, whatever the circumstances, the right to self-determination must not involve changes to existing frontiers at the time of independence (*uti possidetis juris*) except where the States concerned agree otherwise.'[540]

With the right to self-determination, it is essential to understand that independence can be declared unilaterally. Adherence to the requirements of statehood would be a huge step forward for the recognition of a State. However, it is not the determinative factor. A nation may declare independence, adhere to statehood requirements, and be functionally considered a State; where the country is founded upon immoral or illegal policies, it would not achieve widespread recognition. Consequently, such a nation would be unable to gain UN membership. In some instances, a country may exercise the right of self-determination and attempt to attain statehood

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[536] M Sterio (note 534 above) 21.
[537] *Katangese Peoples' Congress vs. Zaire, African Comm. On Human and Peoples' Rights, Comm. No.* 75/92, 1995, para. 6.
[538] M Sterio (note 534 above) 22.
[539] D Raic 'The Post-Colonial Era: Internal and External Self-Determination' (note 5558 above) 233-243.
[540] Conference on Yugoslavia Arbitration Commission: Opinions on Questions Arising from the Dissolution of Yugoslavia (1992) 31 *I.L.M.* 1488, 1498.

without some of the requirements for statehood, such as an effective government. In such an instance, widespread recognition can stand in for the absence of some criteria for statehood. In reality, this is a case-by-case situation. Shaw asserts that the criteria for statehood are interlinked with the issue of recognition, as in some cases, recognition may be seen as an addition to the standard criteria for statehood.[541] Furthermore, Shaw notes that where recognition is absent on a broader scale, more emphasis will be placed on the requirements for statehood; in contrast, in the presence of resounding recognition, the criteria for statehood will not be overemphasised.[542]

7.4.3 Self-determination and its Role in Modern Statehood

The cases of Palestine and Kosovo are examples of the exercise of external self-determination, and this is why these instances have experienced some opposition to statehood and widespread recognition. As highlighted above, in many instances of self-determination, such as in the instances of colonial States, the absence of an independent government was not an impediment to statehood as widespread recognition stood in place of this requirement. In the latter instance, the colonial powers often agreed to allow the colonised State's independence. Therefore, it was a more concrete example of the exercise of self-determination. In the instance of Kosovo and Palestine, there is major opposition from the 'parent States', namely Serbia and Israel, respectively. Therefore, the right to self-determination is ready and available and must be respected by other States. However, in instances of external self-determination, entities may experience more opposition, and it may not mean full statehood for the entities that exercise this right as it is dependent upon the acceptance of the 'parent State'.

7.4.4 The Right of Self-determination as a Remedy for Submerged States

The study group on sea-level rise has asserted that it is important to preserve the right to self-determination of populations that come from SIDS or whose land territory becomes uninhabitable or later becomes submerged.[543] The right to self-determination could be at risk if an entire population has to relocate and will likely be unable to remain in a collective together.[544] When an island State becomes inundated and an entire population has to relocate,

[541] M Shaw (note 83 above)189.
[542] *Ibid* 189.
[543] UNGA, ILC, Seventy-third session, Sea-level rise in relation to international law, Second issues paper (note 120 above) 55.
[544] *Ibid* 64.

there may be a risk of loss of culture, livelihood, and territorial integrity of persons who are indigenous to a particular area.[545]

Upholding this right may allow either the maintenance of statehood or other approaches to allow the will of the populations residing in these States to contain decisions that may affect their identity and the maintenance thereof and protection of their rights. However, it is noted by the sea-level rise study group that the assessment of whether the right to self-determination is relevant to a circumstance will be completed on a case-by-case basis.[546] Additionally, sea level may be thought of as an extreme circumstance allowing for the derogation from human rights, and therefore, the enjoyment of the rights inclusive of the right to self-determination may not apply equally in every circumstance.[547] Therefore, whilst self-determination may provide a remedy for the populations of States that may have to resort to migration to alternative territory, however, this study attempts to mitigate the complete migration of a population. It further aims to provide the certainty that would be lacking in the case of the complete migration of a population necessitating the use of the right to self-determination.

8. Sui Generis International Legal Personality

If there are no options available for the maintenance of statehood of SIDS by the reformation of the law, these States may consider *sui generis* international legal personality as a remedy. A few instances of 'special cases' of statehood are notable to illustrate that statehood is not the only option available for entities aiming for international legal personality. The Sovereign Order of Malta is one example; the Order originated in 1113 and was a religious order formed by the Catholic Church.[548] In 1310, the order was established as a State.[549] It is a medical, social and humanitarian mission working to maintain human dignity for people across the world who live in conflict areas and have been hit by natural disasters.[550] The Sovereign Order acts as an observer to the UN and many of its specialised agencies, such as the World Health Organisation.[551] It also has representatives from the African Union and the Council of Europe,

[545] *Ibid* 64.
[546] *Ibid* 64.
[547] *Ibid* 64.
[548] 'Mission' *Sovereign Order of Malta* available at h*ttps://www.orderofmalta.int/sovereign-order-of-malta/mission/* (accessed 30 December 2021).
[549] K Karski 'The International Legal Status of the Sovereign Military Hospitaller Order of St. John of Jerusalem of Rhodes and of Malta' (2012) 14 (1) *International Community Law Review* 20.
[550] *Ibid*.
[551] UNGA, Forty-eight session, Agenda item 180, Resolution Adopted by the General Assembly, Observer status for the Sovereign Military Order of Malta in the General Assembly, UN Doc. A/RES/48/265, 30 August 1994.

amongst other international organisations.[552] The Order is not considered sovereign, as it is not independent of external power, as it was established under the Roman Catholic Church, with the Pope having the authority to maintain or dissolve the Order.[553] The Order is also housed in Rome and has been, since 1834, in the base of another State's territory.[554] Despite the limitations of the Order, it still maintains relations with 120 countries.[555] This is a significant entity in the absence of sovereignty and statehood.

The Holy See is another example of a special case worth mentioning, as it is effectively an international legal personality with capabilities within international law. The Holy See and the Vatican City were established in 1929 by the Lateran Treaty,[556] signed on the 11th of February 1929 by Italy. The treaty recognised the sovereignty of the Vatican City and the Holy See and became effective on the 7th of June 1929.[557] It is important to note that the Holy See acts as the government of the Vatican City.[558] Mendelson asserts that Vatican City is not a State as it does not satisfy the main criteria for statehood in the form of territory, population and effective government.[559] The Lateran Treaty provided the Pope exclusive jurisdiction over the Vatican City.[560] This area extends 0.44 square kilometres, with an estimated population of fewer than 1000 people.[561] The population of the Holy See is one of the more contentious areas in discussing the international legal personality of the Holy See. The population of the Vatican is not permanent, as its nationality only attaches to people for the time when they have been summoned to reside.[562] The Vatican is said to lack an effective government as many of the governmental functions in this area are not for the city itself.[563] The statehood of Vatican City has been called into contention, as whilst it conducts itself like a State by entering into treaties, Morss asserts that it has yet to take on the responsibilities of the State.[564] Regardless of whether

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[552] 'Multilateral Relations' *Sovereign Order of Malta* available at *https://www.orderofmalta.int/diplomatic-activities/multilateral-relations/* (accessed 30 December 2021).
[553] K Karski (note 549 above) 26.
[554] '1048 to the present' Sovereign Order of Malta available at *https://www.orderofmalta.int/history/1048-to-the-present/* (accessed 30 December 2021).
[555] Sovereign Order of Malta (note 586 above).
[556] The Lateran Treaty, Date of adoption 11 February 1929, (entered into force 7 June 1929).
[557] Article 4, The Lateran Treaty.
[558] M Shaw (note 83 above) 225.
[559] MH Mendelson 'Diminutive States in the United States' (1972) 21 *International and Comparative Law Quarterly* 611.
[560] *Ibid* 611.
[561] 'Vatican City' *Britannica* available at *https://www.britannica.com/place/Vatican-City* (accessed 30 December 2021).
[562] MH Mendelson (note 559 above) 612.
[563] *Ibid* 612.
[564] JR Morss 'The International Legal Status of the Vatican/ Holy See Complex' (2016) 26 (4) *The European Journal of International Law* 946.

or not the requirements for statehood are adhered to, the Holy See remains a permanent observer state of the UN.[565] The Holy See also has membership in numerous subsidiary bodies, specialised agencies, and international intergovernmental organisations.[566]

The existence of the Sovereign Order of Malta, the Holy See, and Vatican City illustrates unique entities that resemble States without a traditional State setup. However, these special cases do not possess true statehood, and whilst it is important to consider alternatives, the preferable way forward is for States to attempt to maintain their statehood so that they do not face the uncertainty of securing a future at the behest of other States.

9. Possible Unique Remedies for the Statehood Concerns that Sea-Level Rise Creates

It is important to consider mechanisms available to remedy the insufficiencies of international law in order to account for the consequences of sea-level rise on the statehood of SIDS.

9.1 Ceding, Assignment or Lease of Segments or Portions of Territory to Other States

It has been concluded that a State without territory is impossible. Therefore, it has been proposed that a remedy for the survival of a SIDS includes the cession of territory that can substitute submerged territory in an alternative location, as put forward by the ILC's sea-level rise study group. The cession of territory from one State to another may be completed with sovereignty and without sovereignty.[567] The transfer of territory with sovereignty would be a mechanism for SIDS to survive upon the submergence of territory. It is a legal remedy that comes with practical difficulties.[568]

The transfer of property without sovereignty includes the cession of a portion of territory with the State concerned maintaining sovereign rights thereon to exercise the ordinary duties. The agreement may include that the citizens on the territory maintain their nationality of origin but also gain the nationality of the State who has ceded the land.[569] The idea would also be to allow national, cultural and group identities of the origin State to thrive in the territory.[570] On the ceded territory, upon agreement with the ceding State for the origin State, it would be possible to establish governmental facilities, including regulating issues relating to immunities, privileges, and the exercise of rights.[571] The sea-level rise study group notes that the Holy See

[565] UNGA, Fifty-eighth session, Agenda item 59, Resolution adopted by the General Assembly, Participation of the Holy See in the work of the United Nations, UN Doc. A/RES/58/314, 16 July 2004 2.
[566] *Ibid* 1.
[567] UNGA, ILC, Seventy-third session, Sea-level rise in relation to international law, Second issues paper (note 120 above) 49.
[568] *Ibid* 49.
[569] *Ibid* 49.
[570] *Ibid* 49.
[571] *Ibid* 49.

is an example of this in the Lateran Treaty of 1929 between the Holy See and Italy for the ownership and sovereignty over the Vatican City.[572] The territory remains that of Italy, and despite the sovereignty of the Holy See, the laws of Italy are still applicable in the territory.[573]

The SLRC of the ILA discussed the issue of leasing territory under international law. It is asserted that the lease of property causes complicated issues as the rights over the land are temporary.[574] Leases of territory in terms of international would be established by way of a treaty, which would be concluded by way of consent by both States. The lease of territory of international law should have two characteristics: (i) the establishment of rights for the display of sovereign authority in a particular part of the territory wherein the other State still maintains *de jure* sovereignty over the territory; (ii) a relationship is similar to a lessor and a lessee in private law; and (iii) the elements are similar to the private-law of lease.[575] States have leased territory previously but for other reasons unrelated to housing a population, including economic and military reasons such as the establishment of bases, and strategic reasons, including exerting power abroad.[576] Another possible mechanism for a State to gain access to property is to lease territory abroad from a company or non-State party.[577] However, the lease or sale of land would be a private transaction, and any State that may lease such territory would be subject to the laws of the State where it is located.[578]

The difficulties surrounding this remedy relate to the fact that it is still a matter of mutual agreement between States. It is not certain that other States would agree to such an arrangement. The SLRC noted the following on this remedy:

> 'Cession of a territory might also support a State affected by sea level rise in retaining its statehood, provided the host State ceding part of its own territory is ready to also cede the accompanying sovereignty over the area to the State affected by sea level rise. In this case, the granting State would have to recognize an autonomous exercise of power to the 'resettled' entity, by granting land in perpetuity. As in the case of purchases, this is hardly a realistic option because there is little incentive for the host State to give up its sovereignty over parts of its own territory.'[579]

[572] *Ibid* 49.
[573] Article 9, Lateran Treaty of 1929.
[574]ILA, International Law and Sea Level Rise 'Lisbon Conference 2022' (note 360 above) 30.
[575] *Ibid* 30.
[576] *Ibid* 30.
[577] *Ibid* 31.
[578] *Ibid* 31.
[579] ILA, Lisbon Conference 2022 (note 360 above) 31.

The primary difficulty observed within this research for SIDS is their inherent vulnerability to other more powerful States. This remedy does not account for the scenario's social, economic, and political aspects. As the ILC sea-level rise study group notes, 'This is a very sensitive issue that should be addressed with caution...' and this applies to other remedies that require direct cooperation from other States such as association, merger, and hybrid schemes.[580]

9.2 Association With Other State (s)

The chairs of the sea-level rise study group suggest the association with other States as one possible remedy. This would involve SIDS associating with other States, although not formally as a merged State. The sea-level rise study group assert that the case of the Cook Islands and New Zealand is an example.[581] The Joint Centenary Declaration of the Principles of the Relationship Between the Cook Islands and New Zealand establishes a partnership between these two States.[582] Additionally, the people of the Cook Islands also retain New Zealand citizenship in terms of Clause 2 of the Joint Centenary Declaration, noting that 'Cook Islands and New Zealand share a mutually acceptable standard of values in their laws and policies'. Similarly, the Cook Islands affords New Zealand citizens preferential consideration with respect to entry into and residence in the Cook Islands. In terms of clause 4, the Cook Islands remains a sovereign and independent State and New Zealand's action taken in terms of its constitutional responsibilities toward the Cook Islands will only be at the request of the Cook Islands.

The USA has agreements with Palau, the Federated States of Micronesia, and the Marshall Islands. The agreement between Palau and the USA is in the form of an Agreement Between the Government of the United States of America and the Government of the Republic of Palau Following the Compact of Free Association Section 432 Review, which allows economic assistance, amongst other forms of association, with the USA but does not provide USA citizenship to Palau citizens.[583] The USA, the Federated States of Micronesia, and the Marshall Islands have a joint agreement called the Compact of Free Association Amendments Act of

[580] UNGA, ILC, Seventy-third session, Sea-level rise in relation to international law, Second issues paper (note 120 above) 102.
[581] *Ibid* 50.
[582] Joint Centenary Declaration of the Principles of the Relationship between the Cook Islands and New Zealand (Rarotonga, 11 June 2001), available at *https://www.mfat.govt.nz/assets/Countries-and-Regions/Pacific/Cook-Islands/Cook-Islands-2001-Joint-Centenary-Declaration-signed.pdf* (accessed on 13 September 2022).
[583] 'Agreement Between The Government of the United States of America and the Government of the Republic of Palau Following the Compact of Free Association Section 432 Review' available at *https://www.doi.gov/sites/doi.gov/files/uploads/us-palau-compact-review-agreement-9-3-2010.pdf* (accessed 13 September 2023).

2003, which governs the relationship between these States and the USA, including financial assistance.[584]

These examples of association, whilst illustrating the ability of other States to provide assistance to SIDS, do not assist States that may possibly become submerged completely and may stand to lose their statehood. This is because statehood would have to remain intact for the association, which is not guaranteed in the absence of a more progressive remedy. This proposed remedy also leaves SIDS at the hands of other States when, in many instances, they have fought hard for their independence.

9.3 Merger

The merger of one State with another is effectively the unification of one or more SIDS.[585] In order for this to occur, the population of the State concerned would be incorporated into the population of the other State.[586] Ordinarily, in a merger, there is an integration wherein the State at risk is consumed by the other State and ceases to be its former independent State.[587] It is possible for the State to agree to incorporate the State concerned into their population to allow some preservation of cultural heritage and identity.[588]

Rayfuse notes that a merger causes problems in that it is a legally sound solution, but it would require that the 'host' State agree to merge, absorb and relocate the entire population of the State concerned that is becoming submerged.[589] As discussed earlier in this thesis, there has been an unwillingness on the part of other States to consider the total absorption of an entire population. As Rayfuse explains previously, Tuvalu approached Australia and New Zealand about absorbing their population, and Australia refused to accept the population, and New Zealand agreed to a migration plan.[590] Whilst the migration plans have been amended over recent years to increase migration pathways, these States have not shown any willingness to merge to allow the entire population of a State to resettle in their territory.[591]

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[584] Compact of Free Association Amendments Act of 2003 available at *https://www.doi.gov/sites/doi.gov/files/uploads/public-law-108-188-December-17-2003.pdf* (accessed 13 September 2023).
[585] UNGA, ILC, Seventy-third session, Sea-level rise in relation to international law, Second issues paper (note 120 above) 52.
[586] *Ibid* 52.
[587] AT Camprubí (note 337 above) 110.
[588] *Ibid* 52.
[589] R Rayfuse 'W(h)ither Tuvalu? International Law and Disappearing States' (2009) *University of New South Wales Faculty of Law Research Series* 9.
[590] *Ibid* 9.
[591] See paragraph 5.3 and J Ash J Campbell 'Climate change and migration: the case of the Pacific Islands and Australia' (2016) 35 (3) *The Journal of Pacific Studies* 5.

9.4 Condominiums, Confederations, or Federations

Condominiums comprise multiple States that are separate but exercise authority over a single piece of territory collectively.[592] However, the SLRC notes that the original use of condominiums occurs wherein a condominium of States exercises this authority over areas that extend beyond their traditional territories.[593] Therefore, this presents difficulties for States that may experience changes to their territory due to sea-level rise. Additionally, more recent uses of condominiums include transitional arrangements rather than permanent solutions for States.[594]

Confederations involve the retention of statehood by the unit members who will remain as sovereign States legally recognised within the international community. An international treaty would establish the confederation.[595] It is essential to highlight that, unlike a federation, a confederation has no territory of its own and no sovereign territory, as each member State of the confederation has its own authority over the citizens within its territory.[596]

A federation is essentially a union of States wherein the federation and the member States have the elements of a State.[597] The federation would incorporate existing States into a new type of entity that may acquire statehood. By joining the federation, the States that join would lose their separate statehood, and they would be a member of a federation which is a subject of international law in its own right.[598] An example of a federation is Yugoslavia, which comprised a federation composed of six republics at the time, including Croatia, Montenegro, Serbia, Slovenia, Bosnia and Herzegovina, and Macedonia.[599] It is important to note, however, that the citizens of a federation retain the nationality of the State they are associated with but may freely move within the territory with which the federation is associated.[600]

The SLRC has asserted that arrangements of this nature would be temporary as they require territory; in summary, all of these options 'presuppose the existence of territory'.[601] Camprubí

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[592] ILA, International Law and Sea Level Rise 'Lisbon Conference 2022' (note 360 above) 32.
[593] *Ibid* 32.
[594] *Ibid* 32.
[595] *Ibid* 32.
[596] *Ibid* 32.
[597] W Rudolf 'Federal States' in R. Wolfrum *et al.* (eds), *Max Planck Encyclopedia of International Law* (2011).
[598] ILA, International Law and Sea Level Rise 'Lisbon Conference 2022' (note 360 above) 32.
[599] United States of America, Department of State, Office of the Historian 'A Guide to the United States' History of Recognition, Diplomatic, and Consular Relations, by Country, since 1776: Kingdom of Serbia/Yugoslavia' available at *https://history.state.gov/countries/kingdom-of-yugoslavia#:~:text=In%201946%2C%20Yugoslavia%20became%20a,Republic%20of%20Yugoslavia%20(SFRY).* (accessed 14 September 2023).
[600] ILA, International Law and Sea Level Rise 'Lisbon Conference 2022' (note 360 above) 32.
[601] *Ibid* 32.

notes that the success of a remedy such as federations would hinge on the State at risk of remaining 'partly deterritorialised', and it would be difficult to sustain these arrangements in the event of total submergence of the remaining territory.[602] It is argued that the difficulties mentioned by Camprubí in respect of federations are equally relevant for condominiums and confederations as both of these remedies suppose the existence of States, whether independently over a collective piece of territory or as sovereigns over a unit of members. Stoutenburg notes that should a State at risk decide to merge or alternatively enter into a federation with a receiving State; it would then allow the at-risk State to exercise the right of self-determination thereafter.[603] Whilst championing the rights of States at risk before and after possible State extinction is within the interests of international law, it is argued that it would be challenging for States at risk to find receiving States willing to accept such an eventuality. It has been difficult for SIDS, particularly within the Pacific, to find States willing to accept the migration of nationals from other Pacific States. Therefore, it is unlikely that there may be receiving States willing to accept an at-risk State with the potential for a movement of self-determination. It is asserted that the success or failure of the exercise of the right to self-determination in such a setting depends on the State and the government therein that exercises sovereignty over the group of peoples' looking to exercise such right.

9.5 Hybrid Schemes

Lastly, the sea-level rise study group suggests a hybrid scheme that attempts to combine many modalities to create an arrangement that allows for the further survival of the State that is becoming submerged. One of these hybrid schemes may be a joint sovereignty model.[604] For example, Bosnia and Herzegovina was established by way of the Dayton Agreement, which allowed the States to have territorial integrity of both States in the form of Bosnia and Herzegovina.[605] In this respect, the citizenship that the population possesses is that of the constituent entity of the State, as well as the citizenship of the State as a whole.[606] Another example presented by the sea-level rise study group is that of special administrative regions in Hong Kong and Macao, which China administers.[607] The special administrative regions are

[602] AT Camprubí (note 337 above) 109.
[603] JG Stoutenburg (note 12 above) 337.
[604] UNGA, ILC, Seventy-third session, Sea-level rise in relation to international law, Second issues paper (note 120 above) 53.
[605] General Framework Agreement for Peace in Bosnia and Herzegovina with Annexes (Dayton Agreement), Date of Adoption 21 November 1995, 35 I.L.M 75.
[606] UNGA, ILC, Seventy-third session, Sea-level rise in relation to international law, Second issues paper (note 120 above) 54.
[607] *Ibid* 54.

separate customs territories, and due to this, they are members of the World Trade Organisation and may enter into treaties surrounding trade and investment.[608] Additionally, Hong Kong and Macao also have their own languages that are used by their people alongside Chinese.[609]

Hybrid schemes relating to citizenship include the possibility that both States join to form a citizenship of the union or hybrid scheme, an example of this could be, for example, 'citizenship of the European Union'.[610] In the instance of the specific context we are looking at an example may be 'citizenship of the Pacific Island States'. This would allow Pacific Island State citizens to freely resettle in other island States across the Pacific region. While this is more of a viable option than relying on other, more powerful States, it has drawbacks.

The difficulties associated with hybrid schemes, including joining two States or creating a union of States, once again, are at the behest of an agreement between many States. It is important to remember that when providing remedies for maintaining maritime zones and preserving statehood for SIDS, not all states may have uniform ideas about how to remedy the situation. Taking into account the sentiments of the sea-level rise study group, these are sensitive issues. There is unlikely to be uniform agreement on such a merger in the midst of submerging land. The primary reason for this assertion is that many regions highly concentrated with islands experience high population density. For instance, the population density of SIDS is 361 people per square kilometre of land available; this is compared to the 58 people per square kilometre average globally as of 2020.[611] With the pace at which sea levels are rising, population density in island State regions will continue to rise, and island States, including SIDS, have a duty to look out for the interests of their own citizens before taking on additional responsibilities.

10. Statehood From a TWAIL Theoretical Perspective

Before we consider statehood from a TWAIL perspective, it is important to highlight the legal positivist understanding of statehood to juxtapose this against the TWAIL perspective. Legal positivism is often considered the dominant legal theory in international law.[612] With the displacement of natural law by legal positivism, the question of statehood becames more

[608] *Ibid* 54.
[609] *Ibid* 54.
[610] *Ibid* 54.
[611] UN 'About Small Island Developing States (SIDS) available at *https://sdgs.un.org/smallislands/about-small-island-developing-states#:~:text=The%20average%20population%20density%20in,extreme%20weather%20and%20natural%20disasters.* (accessed 24 September 2023).
[612] D Hovell 'The Elements of International Legal Positivism' (2022) 75 *Current Legal Problems* 81.

significant in international law.[613] Essentially, legal positivism requires us to ask what international law is, and this will be rooted in the practices that occur within the international society, including its customs, agreements, and rules.[614] Therefore, legal positivism in international law should be understood so as to bind members of the international community to obligations therein.[615] This, too, is the idea of statehood in that it brings rights and obligations with it. As Nardin observes: 'Statehood is a role defined by the rules that constitute international society'.[616] Therefore, as a legal theory, positivism does not question the basis of law or the morality of law and does not try to ascertain how to remedy the insufficiencies of law. Rather, it seeks to determine the law and accepts it as it is despite any insufficiencies or questions of morality. As Paulus and Simma note:

> 'Law is regarded as a unified system of rules that … emanate from state will. This system of rules is an 'objective' reality and needs to be distinguished from law 'as it should be.' Classic positivism demands rigorous tests for legal validity. Extralegal arguments, e.g. arguments that have no textual, systemic or historical basis, are deemed irrelevant to legal analysis … For international law, this implies that all norms derive their pedigree from one of the traditional sources of international law, custom and treaty.'[617]

In summary, from a legal positivist perspective, it would not matter that the customary international law, despite being constructed upon the will of States, unfairly prejudices SIDS in its current form; it is the law as provided.

From a Third World Approach to International Law, the historical and systemic basis of international law and the moral implications of international law must be questioned. This perspective is important as sea-level rise and climate change affecting statehood is an issue specific to SIDS, many of whom suffered colonialism and struggled for independence historically. When the UN was established in 1946, one-third of the world's population resided in territories that were colonised.[618] Many of these States included SIDS, such as Seychelles, Maldives, Papua New Guinea, Solomon Islands, Fiji, Samoa, Tonga, Nauru, Micronesia,

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[613] A Eckert 'Constructing States: The Role of the International Community in the Creation of New States' (2002) *Journal of Public and International Affairs* 21

[614] T Nardin 'Legal Positivism a Theory of International Society' (1998) *International Society: Diverse Ethical Perspectives* 2.

[615] *Ibid* 4.

[616] *Ibid* 6.

[617] A Paulus B Simma, 'The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: A Positivist View' (1999) 93 AJIL 304–305.

[618] 'Decolonization' *United Nations* available at *https://www.un.org/en/global-issues/decolonization* (accessed 11 January 2021).

Marshall Islands, Kiribati and Tuvalu, among other island States.[619] The issue of colonisation is linked with statehood and sovereignty and has been the subject of criticism from TWAIL scholars.[620] These criticisms are based on how colonial states achieved independence and the domination of big, powerful States over Third World states in international law generally.

Mutu and Anghie argue that sovereignty or self-determination was the basis for colonialism as it gave a legitimate mechanism to sovereign States, enabling them to assert their authority over those States that were not yet considered sovereign.[621] This notion is rooted in the legal positivist theory, which asserts that 'what the law is, is a matter of fact'.[622] Regardless of morality, the conquest of colonial states could be considered legitimate as sovereign States effectively could assert their power over those States with no basis to oppose.[623] Whilst this was immoral, with a legal basis for their action, there was not much that people and communities could do to prevent the conquest by stronger sovereign States. The concepts of 'self-determination', 'statehood', 'sovereignty' and 'nation-State' are noted by Eslava and Pahuja as European concepts that were considered a benchmark to assess colonial subjects.[624] From their perspective, European imperial powers used sovereign statehood to determine whether a society or community of people had declared independence and were sovereign or whether they were free to conquer.[625] Despite the origins of these concepts, they remain the basis of international law.[626] Therefore, international law and statehood by association have been criticised by TWAIL scholars as neo-colonial.[627] Theoretically, Third World States are free; there are many examples of these States being linked to Western States in a political, legal, and economic sense.[628]

Parfitt notes that TWAIL scholars have been alert to the lack of true independence of colonial States providing:

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[619] 'The World in 1945' *United Nations* available at *https://www.un.org/Depts/Cartographic/map/profile/world45.pdf* (accessed 11 January 2021).
[620] M Mutu A Anghie 'What is TWAIL?' 2000 *Proceedings of the Annual Meeting (American Society of International Law);* L Eslava S Pahuja 'Beyond the (Post)Colonial: TWAIL and the Everyday Life of International Law' (2012) 45(2) *Law and Politics in Africa, Asia and Latin America.*
[621] M Mutu A Anghie (note 620 above) 33.
[622] D Weinstock 'Legal Positivism' (2020) 66 (1) *McGill Law Journal – Revue De Droit De McGill* 115.
[623] M Mutu A Anghie (note 620 above) 33, 34.
[624] L Eslava S Pahuja 'Beyond the (Post)Colonial: TWAIL and the Everyday Life of International Law' (2012) 45(2) *Law and Politics in Africa, Asia and Latin America* 196.
[625] M Mutu A Anghie (note 620 above) 33.
[626] L Eslava S Pahuja *supra* 406.
[627] *Ibid* 196; M Mutu A Anghie (note 620 above).
[628] M Mutu A Anghie (note 620 above) 34.

> '…both the process through which international personality has been transferred to the 'Third World' and the "racialised" form it has tended to take there have repeatedly belied the promise of liberation which "independence" held out.'[629]

While the creation of the UN led to the realisation of the vital right to self-determination of States previously under colonial rule, in reality, the UN enabled European domination over international affairs.[630] The more powerful States such as the USA, China, the UK, France, and the Soviet Union took over permanent seats in the Security Council from the beginning of its establishment, considered the UN's most vital organ.[631] Mutu and Anghie assert that the composition of the Security Council illustrates that whilst we aspire to equality of States, this does not happen in practice.[632] For this reason, it may be asserted that international law is shrouded in neo-colonialism as Third World States are often dependent on the West, which is illustrated by the continued dependence of Third World States on the World Bank and IMF, among other corporations.[633]

SIDS, whilst independent, often depend on external funding sources. For example, Tuvalu, previously a British colony, gained independence in 1978 and is an LDC.[634] While Tuvalu has been considered to have graduated from LDC, they have requested to remain an LDC due to its economic exposure and the impending threat of sea-level rise.[635] LDC States have access to additional support measures in trade, financial and technical cooperation.[636] Another example of a SIDS that was previously colonised is Kiribati, an LDC.[637] The State has high levels of poverty, a small economy taking immense strain, and is very reliant on assistance.[638] Stoutenburg notes that when an island State becomes too dependent on foreign aid, it loses its ability to remain independent.[639]

The climate-related difficulties faced by SIDS and the threats of State extinction affect developing States disproportionately, many of whom are post-colonial States. These States are

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[629] R Parfitt 'Theorizing Recognition and International Personality' In: A Oxford F Hoffmann M Clark *The Oxford Handbook of the Theory of International Law* (2016) 8.
[630] M Mutu A Anghie (note 620 above) 34.
[631] *Ibid* 34.
[632] *Ibid* 34.
[633] *Ibid* 34.
[634] 'The United Nations in Tuvalu' *UN Action* available at *https://unsdg.un.org/un-in-action/tuvalu* (accessed 11 January 2022).
[635] *Ibid*.
[636] *Ibid*.
[637] 'UN Sustainable Development Group' *UNSDG* available at *https://unsdg.un.org/un-in-action/kiribati* (accessed 11 January 2022).
[638] *Ibid*.
[639] JG Stoutenburg (note 12 above) 294.

also under-resourced and, in most instances, have struggling economies, as illustrated by the examples of Tuvalu and Kiribati. The system of international law, including statehood, has failed to protect States of this nature, producing significantly fewer emissions but suffering the consequences of the actions of more powerful States. This is the backdrop from which TWAIL scholars assert that a change is required in the structure of international law to provide for the inclusivity of States that remain powerless and silenced.[640] Mutu and Anghie note that Western States historically have controlled the global economy and have access to more resources by comparison.[641] Despite this, the issue of climate change primarily falls to SIDS to combat, even though these States are not considered major climate polluters.[642] TWAIL scholars believe in the call for equal representation of Third World States, Mutu and Anghie observe:

> 'The project of TWAIL advocates the full representativity of all voices, particularly those non-state, nongovernmental, rural and urban poor who constitute the majority in the Third World. Here, TWAIL opposes the complicity of Third World states in the international legal and economic order with a view to silencing the voices of the powerless. TWAIL calls for the full democratization of the structures of both national and international governance so that all voices can be heard.'[643]

The oppression against Third World States in international law is not absent within statehood. The criteria of statehood have remained unchanged despite other changes in international law, such as the decolonisation movements and the call to protect indigenous persons. TWAIL scholars have long called for a change in international law, and the issue of statehood is no different. International law should take into account the need for statehood to evolve with the changing climate, both physically and politically. The need for change is vital for Third World States, inclusive of SIDS. This change is a matter of survival for SIDS States in the long term.

It cannot be denied that Third World States suffer greater injustice in international law than their First World counterparts. The nations of Palestine and Kosovo provide excellent examples of how this can play out in the issue of statehood.

11. Conclusion

It has been established that statehood finds its origins in the Peace of Westphalia, where the concept of sovereignty emerged. Whilst these concepts were first seen in the Peace of Westphalia, they were arguably only entrenched into international law much later. With the

[640] M Mutu A Anghie (note 620 above) 37.
[641] *Ibid*.
[642] V Ortega 'Which countries are the world's biggest carbon polluters' *Climate Trade* 17 May 2021 available at *https://climatetrade.com/which-countries-are-the-worlds-biggest-carbon-polluters/* (accessed 11 January 2022).
[643] M Mutu A Anghie (note 620 above) 37.

establishment of the Covenant of the League of Nations and the UN came the gradual move toward the acceptance of the right of States worldwide to territorial sovereignty.

Statehood finds a middle ground between the constitutive and declaratory theories. While the Montevideo Convention confirms the declaratory theory of statehood, we cannot say that State recognition plays no role in statehood. International recognition is said to reaffirm statehood, even though statehood exists without international recognition. Similarly, membership to the UN has no bearing on the factual or legal establishment of statehood; however, UN membership provides many benefits for States, particularly new States, that may assist in establishing an economy.

The requirements of statehood are provided for within the Montevideo Convention, which has been argued to be part of customary international law. Whilst State continuity is always presumed, a State can lose its statehood where there is a clear and obvious case of State extinction. It is argued that the rise in sea level may render many SIDS extinct due to the potential loss of natural land territory and the complete migration of the population that resides thereon. Where an island State's population completely abandons their land territory, it would be difficult to argue against State extinction under the current regime of statehood. This is because the State would be without a territory or population and would no longer exercise sovereignty over a defined area. Territory is a foundational component of statehood, and there is precedent for the idea that a State can never viably exist without a defined territory whereby the State exercises control. Despite the importance of territory for statehood, the presence of a population is undeniably linked with the territory requirement. In the absence of a population, a State would have to abandon its territory, resulting in State extinction.

For SIDS, the criteria of population and territory are fundamental for survival. The presence of even a small thriving population with a sense of community within a defined territory can be the difference between State extinction and State continuity. Therefore, it has been argued that the population criterion of the Montevideo Convention is the requirement on which statehood hinges. Should an island State that can no longer fulfil its obligations in international law wish to accept State extinction voluntarily, there would be no need for a dispute. However, involuntary State extinction is more complex. In the absence of State continuity, State extinction will take place. The loss of statehood is a fact in that when the fundamental criteria of statehood are absent, and State continuity is not present, State extinction will occur. However, the lack of international recognition may signal the absence of statehood. Whilst UN membership is not a requirement of statehood, the removal of a State from the membership of

the UN could illustrate to States worldwide that the nation concerned is no longer considered a State.

The loss of statehood for SIDS does not mean that a nation facing State extinction would be void of all international legal personality. The Sovereign Order of Malta and the Holy See are examples of entities that possess international legal personality without an independent territory. However, these examples do not show clear cases of territory-less statehood; instead, they are considered unique examples of how international legal personality may persist in the absence of traditional statehood. It is consequently important to consider remedies to account for the continued statehood of SIDS despite complications arising from the rise in sea level. Therefore, recommendations of this nature will be considered in Chapter Six.

CHAPTER FOUR

Analysing the Maritime Zones of SIDS

1. Preface

SIDS claim vast maritime zones across the globe. The importance and value of these maritime zones cannot be underestimated for all SIDS scattered across the world. Stoutenburg notes that before the independence of SIDS, there were concerns about the economic success of these States.[1] These fears were largely relieved by the creation of UNCLOS and the maritime zones that were granted to island States and States located on the coast due to the economic potential of these areas.[2] Some SIDS, such as Tuvalu and Kiribati, have set out to permanently delineate the outer limits of the vast maritime zones around the islands that make up their territory with continental shelves in excess of 200 nautical miles, ensuring access to the economic potential of these zones despite sea-level rise and threats to their territory.[3] The EEZ territory of the following Pacific SIDS equates to more than 10 million square meters: Fiji, Kiribati, Tuvalu, Tonga, Marshall Islands, the Federated States of Micronesia, Nauru, Samoa, and Vanuatu.[4] As such, the economic value of these maritime zones for SIDS is essential as many of these States depend to a large extent on profits from the ocean economy. Kiribati relies on fisheries; the government submits that 81% of the State's revenue is based upon fisheries, a substantial portion of their total GDP.[5] On average, the maritime territory that SIDS controls is 28 times

[1] JG Stoutenburg *Disappearing Island States in International Law* (2015) 73.
[2] *Ibid* 73.
[3] See Tuvalu 'Submission in Compliance with the Deposit Obligations Pursuant to the United Nations Convention on the Law of the Sea (UNCLOS)' available at *https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/STATEFILES/TUV.htm* (accessed 23 October 2023); Kiribati 'Submission in Compliance with the Deposit Obligations To the United Nations Convention on the Law of the Sea (UNCLOS)' available at *https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/STATEFILES/KIR.htm* (accessed 23 October 2023).
[4] Pacific Data Hub 'Pacific Maritime Boundaries Dashboard' available at *https://pacificdata.org/dashboard/maritime-boundaries/* (accessed 23 October 2023).
[5] 'Agriculture, forestry and fishing, value added (% of GDP) – Kiribati' *World Bank* available at *https://data.worldbank.org/indicator/NV.AGR.TOTL.ZS?locations=KI*, (accessed 10 February 2022); Kiribati Climate Change Policy available at *https://www.climate-laws.org/geographies/kiribati/policies/kiribati-climate-change-policy* (accessed 8 February 2023) 9.

the size of their land territory.[6] This means that the ability to access natural resources largely rests upon what can be found within the ocean surrounding the State.[7]

The threat of sea-level rise to the land territory of SIDS not only affects the statehood of the State and the physical existence of the land territory but also affects the continued existence of their maritime zones. This is primarily because the 'land dominates the sea' which means that a State exercises control over maritime territory due to the continued control exercised over the land territory adjacent to the coast.[8] As mentioned in Chapter One, the principle that land dominates the sea is entrenched in international law. The chairs of the sea-level rise study group note that the principle was famously mentioned in the *North Sea Continental Shelf* case.[9] *In casu* the ICJ noted:

> 'The contiguous zone and the continental shelf are in this respect concepts of the same kind. In both instances the principle is applied that the land dominates the sea; it is consequently necessary to examine closely the geographical configuration of the coastlines of the countries whose continental shelves are to be delimited. This is one of the reasons why the Court does not consider that markedly pronounced configurations can be ignored; for, *since the land is the legal source of the power which a State may exercise over territorial extensions to seaward* [my own emphasis], it must first be clearly established what features do in fact constitute such extensions. Above all is this the case when what is involved is no longer areas of sea, such as the contiguous zone, but stretches of submerged land; for the legal régime of the continental shelf is that of a soil and a subsoil, two words evocative of the land and not of the sea.'[10]

Furthermore, the ICJ noted in the case of *Continental Shelf (Libyan Arab Jamahiriya/ Malta)*:

> 'What distinguishes a coastal State with [maritime] rights from a landlocked State which has none, is certainly not the landmass, which both possess, but the existence of a maritime front in one State and its absence in the other. The juridical link between the State's territorial sovereignty and its rights to certain adjacent maritime expanses is established by means of its coast.'[11]

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[6] 'Office of the High Representative for the Least Developed Countries, Landlocked Developing Countries and Small Island Developing States' *United Nations* available at *https://www.un.org/ohrlls/content/about-small-island-developing-states* (accessed 10 March 2022).
[7] *Ibid.*
[8] ILA, Committee on Baselines under the International Law 'Sofia Conference (2012)' available at *https://www.ila-hq.org/images/ILA/DraftReports/DraftReport_SeaLevelRise.pdf* (accessed 8 March 2022) 4.
[9] *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969,* p. 3.
[10] *Ibid* para 96.
[11] *Continental Shelf (Libyan Arab Jamahiriya/ Malta)* 1985 ICJ 13 para 49.

The ILA has also highlighted the above extract in the first report by the Committee on Baselines under the International Law of the Sea (Baselines Committee) in 2012.[12] The critical aspect to highlight in the above passages is that maritime rights are established through a coast, and this essentially is an articulation of the land dominates the sea principle. The chairs of the study group on sea level rise in relation to international law have also stated explicitly that 'the land is the source of maritime entitlements', which is established by way of the coast on coastal territories and islands.[13] The coast '…and the baseline to the extent that it represents the coast, is foundational to the very concept of maritime jurisdiction'.[14]

Additionally, the uncertainty on the maintenance of maritime zones also stems from the variability of baselines as a result of rising sea levels. Baselines are a means to draw the low water line across the coastline of coastal and island States wherein maritime zones will be measured. Normal baselines have traditionally been ambulatory.[15] When sea levels rise, the baseline changes and accordingly, the outer limits measured therefrom also move. As such, it has led the ILA to suggest the maintenance of baselines in the interests of certainty and stability.[16]

The sea-level rise study group and scholars have considered the suggestion to fix baselines and the consequences thereof to determine if fixing baselines is in conformity with international law, including the land dominates the sea principle.[17] The sea-level rise study group has concluded that the land dominates the sea principle does not go against the maintenance of maritime baselines and limits that already exist.[18] However, State practice in this area varies.[19] It will be argued within this chapter that more certainty is needed on baselines but also on continued claims to maritime zones for SIDS in the midst of submerging coastlines.

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[12] ILA 'Sofia Conference (2012)' (note 8 above) 4.
[13] UNGA, ILC, Seventy-fourth session, Sea-level rise in relation to international law, Additional paper to the first issues paper (2020), by Bogdan Aurescu and Nilüfer Oral, Co-Chairs of the Study Group on sea-level rise in relation to international law, Geneva, 24 April-2 June and 3 July-4 August, UN Doc A/CN.4/761 para 149.
[14] ILA 'Sofia Report (2012)' (note 8 above) 4.
[15] ILA, Committee on Baselines under International Law of the Sea, 'Sydney Conference (2018)' available at *https://www.ila-hq.org/en_GB/documents/conference-report-sydney-2018-5* (accessed 16 August 2023) 31. See also UNGA, ILC, Seventy-second session, 'Sea-level rise in relation to international law, First issues paper by Bogdan Aurescu and Nilüfer Oral, Co-Chairs of the Study Group on sea-level rise in relation to international law' Geneva, 27 April – 5 June and 6 – 7 August 2020, UN Doc. A/CN.4/740 para 81.
[16] ILA, Committee on International Law and Sea-level rise, 78th Conference of the International Law Association, 'Resolution 5/2018' 19-24 August 2018 available at *https://www.ila-hq.org/en_GB/documents/conference-resolution-sydney-2018-english-2* (accessed 26 January 2023).
[17] UNGA, ILC, Seventy-fourth session, Additional paper to the first issues paper (note 13 above) para 149.
[18] *Ibid* para 153.
[19] For instance, the State practice in the Pacific region strongly suggests the fixing of baselines. Whereas State practice in the UK, USA, and Netherlands suggests that baselines have traditionally been ambulatory. See fn. 242, 243, and 260.

Current international law supports the position that some portion of the coastline of a State must remain intact for the maintenance of maritime territory despite any possible State practice emerging on the freezing of baselines. The SLRC of the ILA, has also highlighted this important fact in the 2022 report, wherein the special consequences of sea-level rise for archipelagic States were considered:

> '…it does seem clear *de lege lata* that the key concept under the LOSC is that rights over maritime areas emanate not from the territory in general but, more specifically, from the 'land territory' of a coastal State. Article 2 LOSC on the "Legal status of the territorial sea, of the air space over the territorial sea and of its bed and subsoil" highlights the importance of land territory. It provides that the sovereignty of a coastal State extends "beyond its *land territory* and internal water, and in the case of an archipelagic State, its archipelagic waters". Moreover, in the definition of the continental shelf of a coastal State under Article 76, the seabed and subsoil of the submarine areas that extend beyond its territorial sea are those "throughout the natural prolongation of its *land territory"* to the outer edge of the continental margin, or to a distance of 200nm from the baselines. Regarding the territorial sea, the contiguous zone, the EEZ and the continental shelf of an island (or indeed the mainland territory – although islands are the case in point for the issue under discussion by the Committee in this report) – these maritime zones are "determined in accordance with the provisions of [LOSC] applicable to other *land territory*". Finally, Article 298, concerning declarations on optional exceptions to Section 2 (compulsory procedures entailing binding decisions) of Part XV LOSC, on the settlement of disputes, makes a reference to "any unsettled dispute concerning sovereignty or other rights over *continental or insular land territory*". While the repetition of the two words "land territory" could suggest there are, or might be, other forms of territory, for an area to be considered as the "land territory" of a coastal State it must for these purposes be found not under the sea but at the edge or margin of land next to the sea. This is recognized by the use of the low-water line for baseline purposes and for the determination of low-tide elevations (that are of course, in accordance with Article 13 LOSC, above water at low tide even if submerged at high tide). The only category of States that the LOSC recognizes that have no seacoast are those defined as "land-locked States". So, to date there is no *lex lata* definition, in the LOSC or in customary international law/law of the sea more generally, of a "sea-submerged State".'[20]

[20] ILA, International Law and Sea Level Rise 'Lisbon Conference 2022' available at *https://www.ila-hq.org/en_GB/documents/2022-report-ila-committee-june-2022* (accessed 14 September 2023) 27-28.

The provisions of UNCLOS are predominantly based upon the land dominates the sea principle. Thao asserts that almost all of the provisions of UNCLOS are in line with the principle that land dominates the sea.[21] Importantly, as highlighted above Article 2 of UNCLOS provides that the territorial sea of coastal States extends 'beyond its land territory and internal waters' to the adjacent sea to be termed the territorial sea. This is a depiction of the land dominating the sea principle. Additionally, there is a further manifestation of the land dominating the sea principle as the mere existence of an island fulfilling the criteria in terms of Article 121 (1) of UNCLOS results in maritime territory.[22]

The principle that the land dominates the sea is applicable to maritime zones; however, the continental shelf is distinct as the principle of natural promulgation is applicable thereto. Thao asserts that the continental margin is a natural prolongation of its land territory, and the implication of this is that they have existed since the moment the State was formed.[23] The position is different regarding the territorial sea, the EEZ, and the continental shelf up to 200 nautical miles, as these are all measured from the baseline.[24] Thao notes as follows:

> 'Legally speaking, the moment when the land dominates the sea is when the declaration of the baseline for the measurement of the breadth of territorial sea was generally recognised by the international community'[25]

A coastal State has the entitlement to extend its competence from its existing land to its sea, and further, its entitlement is fixed when it delimits its maritime zones. [26] The position that the land dominates the sea only really affects the issue of sea-level rise when a coastline is fully submerged, and no part of the coastline remains intact in the absence of any flexible interpretation of the principle. Where sea-level rise affects only a portion of the sovereign land from which the outer limits of the maritime zones are delineated, the land dominates the sea principle will not affect the maintenance of maritime zones but will instead enforce the position.

In terms of international law, islands may be used as a basis for a State to claim various maritime zones like any other coastal territory. While an island State has the same entitlement to maritime zones as coastal territory, not all maritime features are considered islands.

[21] UNGA, ILC, Seventy-fourth session, Additional paper to the first issues paper (note 13 above) para 136.
[22] Article 121 (2), UNCLOS.
[23] NH Thao 'Sea-Level Rise and the Law of the Sea in the Western Pacific Region' (2020) 13 (1) *Journal of East Asia and International Law* 138.
[24] *Ibid* 138.
[25] *Ibid* 138.
[26] *Ibid* 138.

Similarly, not all islands have the same entitlement to maritime zones in terms of UNCLOS. Therefore, it is important to outline first what an island is, as provided for in terms of UNCLOS, and the consequence of island territory for the maritime zones of SIDS.

2. Defining The Island in Terms of International Law

The history of islands starts primarily with the League of Nations. It was in 1930 at the Hague Codification Conference that it was determined that islands were considered to be 'high-tide elevations'.[27] During the negotiations, some States, including the UK, suggested the terms 'surrounded by water', 'permanently above high water', 'in normal circumstances' as well as 'capable of occupation and use' as a way to define an island.[28] Whereas, the USA and other States suggested the following as the most appropriate way to define an island: 'any naturally formed part of the earth's surface', 'projecting above the sea level at low tide' and 'surrounded by water at low tide'.[29] The regime of islands in terms of the Final Act of the 1930 Conference concluded with the following definition: 'Every island has its own territorial sea. An island is an area of land, which is permanently above high-water mark.'[30]

Following the above definition of an island, over the years, there has been much scholarship surrounding the issue of defining an island. Scholars provided alternative suggestions that assisted in the development of the definition of an island that we see today.[31] Gilbert Gidel, a scholar from France who wrote in 1934, suggested that the definition of an island should include an element requiring humans to inhabit the island as well as a requirement that the island be in a 'natural condition'.[32] The suggestion provided by Gidel included 'natural conditions which permit the stable residence of organised groups of human beings'.[33] Alfred Soons writes the following on the submissions of Gidel:

> 'He assimilated to natural islands artificial islands which met the same conditions and the creation of which, by the action of natural phenomena, was provoked or accelerated by means of works. But this assimilation would only have the legal effect of conferring on the artificial

[27] Y Arai 'The interpretation of the regime of islands: application to Okinotorishima' (2019) *World Maritime University Dissertations* 1193 11.
[28] *Ibid* 11.
[29] *Ibid* 11.
[30] *Ibid* 11.
[31] *Ibid* 11.
[32] AHA Soons 'Artificial Islands and Installations in International Law' 1974 *Occasional Paper Series Law of the Sea Institute University of Rhode Island* 18. See also G Gidel, *Le Droit International Public de la Mer* Impr. par les Établissements Mellottée, 1932-34, Chateauroux 1932.
[33] Y Arai (note 27 above) 12. G Gidel, *Le Droit International Public de la Mer* Impr. par les Établissements Mellottée, 1932-34, Chateauroux 1932.

island its own territorial sea in the case that the island was at least partially situated with the territorial sea.'[34]

As provided for in the assertions of Soons above, it is submitted that Gidel's statements on defining an island in the 1930s were progressive in nature, considering that the proposals provided that artificial islands should be included in the definition of an island. Furthermore, the idea that humans did not need to live on the 'island' but that the island should be capable of habitation stemmed from Gidel's assertions.[35] The use of the word stable also suggested a permanency of the habitation.[36] The ideas that Gidel wrote about as early as 1934 positively impacted the progression of the definition of an island that came much later.

During the 1958 UN Conference on the Law of the Sea at Geneva, an alternative definition for the island was agreed upon and provided for in Article 10(1) of the 1958 Convention on the Territorial Sea and Contiguous Zone.[37] The definition agreed upon provided was that an island is 'a naturally-formed area of land, surrounded by water, which is above water at high tide.'

In addition, this definition was provided in Article 1 of the 1958 Convention on the Continental Shelf. The Convention on the Territorial Sea and the Contiguous Zone, as well as the Convention on the Continental Shelf,[38] considered islands to be those which are naturally formed and above high tide.[39] The importance of the addition of the 'naturally-formed' criterion cannot be underestimated. During the discussions in 1954 at the ILC, there were objections raised, particularly on the issue of artificial islands potentially possessing a territorial sea.[40] The objections were more decisive for small artificial islands such as rocks rather than larger artificial islands that required land reclamation efforts, had the appearance of natural islands, and were permanent in nature.[41] This is presumably because tiny artificial islands may be used by a State to lay claim to vast maritime zones. The concern was that small artificial islands may not be capable of sustaining a population or providing any positive impact for a nearby population. However, they would still have access to vast maritime zones with economic potential regardless of this fact. Therefore, during the negotiations in Geneva, the

[34] AHA Soons *supra* 32.
[35] Y Arai (note 27 above) 12.
[36] *Ibid* 12.
[37] Convention on the Territorial Sea and the Contiguous Zone, Date of Adoption, 29 April 1958, UNTS 516, p. 205, (entered into force 10 September 1964).
[38] Convention on the Continental Shelf, Date of Adoption 29 April 1958, UNTS 499, p. 311, (entered into force 10 June 1964).
[39] Y Arai (note 27 above) 13.
[40] AHA Soons (note 32 above) 18.
[41] *Ibid* 18.

USA proposed the addition of a 'naturally formed area of land' to the definition of an island.[42] This was to prevent artificial islands from being included within the definition of an island.[43] The proposal by the USA was accepted and became the definition of islands within the Convention on the Territorial Sea.[44] It is noteworthy that there was also a submission by the delegate to France and the UK that all islands should not be entitled to a continental shelf.[45] The UK suggested that the submission was based on the fact that islands are not ranked by size, position or their importance politically.[46] The UK asserted that islands should be categorised before distinguishing between islands with maritime zones and those without.[47]

Regardless of the concerns over the provision of extensive maritime zones to islands, the regime of islands in UNCLOS provides the same maritime zones that may be delineated around coastal territory may be delineated around island territory as defined within the convention. There are safeguards within UNCLOS that answer some of the concerns raised earlier during negotiations. UNCLOS provides in Part VIII the regime of islands:

> '1. An island is a naturally formed area of land, surrounded by water, which is above water at high tide.
>
> 2. Except as provided for in paragraph 3, the territorial sea, the contiguous zone, the exclusive economic zone and the continental shelf of an island are determined in accordance with the provisions of this Convention applicable to other land territory.
>
> 3. Rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf.'[48]

This definition of an island provided for in Article 121 (1) was not altered from the 1958 Convention on the Territorial Sea and the Contiguous Zone.[49] Similarly, Article 121 (2) provides no new thinking on the issue of islands being used to delineate the outer limits of maritime territory. It provides that islands may demarcate the same maritime zones as provided to other coastal territories of States. Importantly, Article 121 (2) notes that those maritime entitlements, as defined within Article 121 (3), do not possess an EEZ or continental shelf. Article 121 stipulates expressly when a maritime entitlement will be considered a rock and not

[42] *Ibid* 18.
[43] *Ibid* 18.
[44] *Ibid* 18.
[45] Y Arai (note 27 above) 13.
[46] *Ibid* 13.
[47] *Ibid* 13.
[48] Article 121, UNCLOS.
[49] *The Republic of the Philippines v The People's Republic of China* PCA case no 2013-19 (Award of 12 July 2016). Article 121(1), UNCLOS.

a fully established island.[50] The addition of Article 121 (3) to the UNCLOS is noteworthy and as such, was the subject of deliberation in the *South China Sea Arbitration*, where the Tribunal noted:

> 'Treating naturally formed islands the same as other land territory was not a new concept, for purposes of generating a territorial sea. Additionally, all islands had previously been treated the same with respect to entitlements to the continental shelf. However, the need to distinguish categories of islands became apparent after the emergence in the early 1970s of substantially expanded maritime resource zones beyond the territorial sea, in combination with a new regime for the mineral resources of the seabed beyond the territorial sea, in combination with a new regime for mineral resources of the seabed beyond natural jurisdiction as the "common heritage of mankind". Thus, during the Third UN Conference, an exception to the rule that all natural islands have the same entitlements was accepted and incorporated into paragraph (3).'[51]

Stoutenburg refers to Article 121 (3) as a 'disagreement in writing' as no definition of what constituted a rock could be settled upon.[52] Therefore, what constitutes a rock is considered a contentious issue; historically, rocks can be composed of any geological structure and do not have to consist of rocks in the literal sense.[53] The Tribunal asserted that interpreting Article 121[54] to mean that one would have to consider the geological criteria of a 'rock' would 'lead to an absurd result'.[55] Essentially, requiring a geological qualification of a 'rock' in terms of Article 121 would result in many maritime entitlements that should not be able to generate maritime zones, being able to demarcate vast maritime zones in the absence of an ability to maintain human habitation or economic life.[56] This was never the intention whilst drafting the UNCLOS.[57] It also stands to reason that the Vienna Convention would require us to interpret the text in a manner that does not lead to an absurd result.

Article 121[58] of UNCLOS was extensively analysed in the *South China Sea Arbitration,* and the judgment provides valuable insight. The Tribunal, in this case, noted that 'high-tide features' include both rocks and islands.[59] In essence, this means that both rocks and islands are high-tide features, and as such, rocks are a form of island without the entitlements of fully-

[50] Article 121(3), UNCLOS.
[51] *South China Sea Arbitration* (note 49 above) 175, 176.
[52] JG Stoutenburg (note 1 above) 86.
[53] *South China Sea Arbitration* (note 49 above) 205.
[54] Article 121(3), UNCLOS.
[55] *Ibid* 206.
[56] *Ibid* 206.
[57] *Ibid* 206.
[58] With specific reference to Article 121 (3), UNCLOS.
[59] *South China Sea Arbitration* (note 49 above) 119.

fledged islands. Hamid notes that rocks fulfil all three elements of an island in terms of Article 121 (1) of UNCLOS, namely that they are a naturally formed area of land surrounded by water and above water at high tide as defined.[60] Rocks are islands in the broad sense (or *sensu lato*), but Article 121 (3) limits the entitlements that flow from rocks. The importance of the difference between rocks and full islands in terms of UNCLOS is the vastly different entitlements flowing from possession of these features in respect of maritime zones.[61] Whilst Article 121 provides the disqualifying criteria for rocks, it provides the requirements that must be in place for a high-tide feature to be considered an island.[62]

Article 121 has been regarded as forming part of customary international law by the ICJ in the *Territorial and Maritime Dispute* (*Nicaragua v. Colombia*) case.[63] Therefore, in terms of Article 121 of UNCLOS[64] and customary international law, an island must be: (1) Naturally formed; (2) above the water at high tide; (3) capable of human habitation; and/ or (4) capable of sustaining economic life. These elements will be considered in more detail below.

2.1 Naturally-Formed

The first and perhaps one of the most essential criteria of an island provided for within UNCLOS is that an island has to be 'naturally formed'. The exact composition of the island, geologically, is irrelevant, but it is important that it must be naturally formed. In the dispute of *Nicaragua v. Colombia,* the ICJ noted that it is irrelevant whether an island is composed of coral reef or coral debris as this form of geological composition would not prevent the island from being considered 'naturally formed'.[65] Perhaps more critical than geological composition in the natural-formed enquiry is whether the island is artificial in nature or has been artificially modified. When an island has been artificially altered, it would be necessary for a court or Tribunal to consider whether the island – in its natural State before artificial intervention would be above high tide.[66] The Tribunal in the *South China Sea Arbitration* noted that the drafters of UNCLOS specifically included 'naturally-formed' in the text of Article 121 to prevent States from creating artificial islands or artificially altering natural entitlements to obtain additional maritime territory that they otherwise would not be entitled to.[67] Where an island is artificially

[60] AG Hamid 'The Principle That the Land Dominates the Sea in the Context of South China Sea Disputes: A Critical Appraisal' (2022) 30 (2) *IIUM Law Journal* 68.
[61] *South China Sea Arbitration* (note 49 above)119.
[62] See Article 121(3), UNCLOS.
[63] *Territorial and Maritime Dispute* (*Nicaragua v. Colombia*), Judgment, I.C.J. Reports 2012, p. 624, para 139.
[64] Article 121(1) and Article 121(3), UNCLOS.
[65] *Nicaragua v. Colombia* (note 63 above) 645.
[66] *South China Sea Arbitration* (note 49 above) 227.
[67] *Ibid* 220.

constructed, it is not governed by Article 121. As such, a State cannot use it to claim the same maritime zones offered to naturally formed islands. In essence, the ability to claim extensive maritime zones around an island rest on that island being above water with the capability to sustain either human habitation or economic life in its natural state. Artificial islands, installations and structures that are constructed within an EEZ are governed by Article 60 of UNCLOS rather than Article 121. The distinction between naturally formed and artificial islands is important as artificial islands may only claim a safety zone of 500 metres, vastly different from the maritime zones afforded to naturally formed islands and naturally formed rocks above high tide.[68] The *South China Sea Arbitration* provides an excellent example of the declassification of a maritime feature from an island to a rock, which will be discussed in more detail within this chapter.

2.2 High Tide

The second requirement is that the island must be above the water at high tide. Where the island is not above high tide, it is considered an LTE. An LTE is 'a naturally formed area of land which is surrounded by and above water at low tide but submerged at high tide.'[69] It has a special significance as when the LTE is within 12 nautical miles of the coast of a State, a State may use the low-water line on the LTE as a basis to draw the baseline.[70] Therefore, the LTE enables a State to claim a larger territorial sea than it may claim from an ordinary baseline. The LTE must be above the water at low tide to be considered a low tide elevation; furthermore, the element of naturally formed is considered important in terms of this requirement. Suppose baselines are to be understood as ambulatory. In that case, a rise in sea level may result in the possibility that an LTE may no longer meet the requirements in terms of Article 13(1) of UNCLOS for use in the drawing of a baseline. If an LTE were to become submerged at low tide, it would become a submerged basepoint and affect an existing baseline as drawn. The LTE must be assessed in its natural condition, much like islands as provided for in the *South China Sea Arbitration* by the Permanent Court of Arbitration, '…an island indicates that the status of a feature is to be evaluated on the basis of its natural condition.'[71] Similarly, should an ambulatory baseline move landward, an LTE used for drawing baselines may also fall outside of the 12 nautical mile threshold provided in Article 13 of UNCLOS. As such, rising sea levels may affect the LTE's role in drawing baselines.

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[68] Article 60(5), UNCLOS.
[69] Article 13 (1), UNCLOS.
[70] Article 13 (1), UNCLOS.
[71] *South China Sea Arbitration* (note 49 above) para 305.

The understanding of high tide was provided in the *South China Sea Arbitration*, wherein the Tribunal noted that high tide is not intended to be a technical term but may yield a multitude of interpretations.[72] Many datums may be used to measure high tide, including the Mean High Water, the Mean Higher Water, and the Mean High Water Springs.[73] The Mean High Waters calculates high tide by taking the height average over 19 years of all high waters, whereas the Mean Higher Water measures the average height of the waters during spring tide.[74] The Mean High Water Springs measure high tide by determining the average of the high-water spring tides.[75] Whilst these are all common methods to measure 'high tide', the International Hydrographic Organization (IHO) notes that the Highest Astronomic Tide is preferable to determine the high-water datum for vertical clearances, including bridges, cables, and pipes.[76] The Highest Astronomic Tide (HAT) is 'the highest tidal level which can be predicted to occur under average meteorological conditions and under any combination of astronomical conditions'.[77] In areas that are considered oceanic tidal areas, the IHO recommends that the Highest Water (HW) datum should be used.[78] Where the geographical tidal range is minor in a particular area in that it is less than 0.30 metres or where there are non-tidal area depths, the Mean Sea Level (MSL) should be used to measure high tide.[79] Whilst the Highest Astronomic Tide is considered the preferable way to measure high tide, the South China Sea Arbitration Tribunal did not provide a specific method to determine high tide.[80]

Regarding the UNCLOS, States can claim a high-tide feature upon datum that correlates to the basis of an ordinary understanding of the term 'high tide'.[81] It is also vital that the feature is assessed in its natural State to determine whether it is above the water at high tide. Whilst utilising different methods of determining high tide may lead to different vertical datum, the differences are not ordinarily determinative in terms of the status of the feature. This was the view of the Tribunal in the *South China Sea Arbitration*; whilst both the Philippines and China *in casu* had different methods to determine high tide, it was unlikely that the diverse methods

[72] *Ibid* 133.
[73] *Ibid* 133.
[74] *Ibid* 133.
[75] *Ibid* 133.
[76] *Ibid* 133. See also International Hydrographic Organization 'Regulations of the IHO for Internationals (INT) Charts and Chart Specifications of the IHO' November 2018 available at *https://iho.int/iho_pubs/standard/S-4/S4_V4-8-0_Oct_2018_EN.pdf* (accessed 7 August 2023) B – 300 4.
[77] *South China Sea Arbitration* (note 49 above) 133.
[78] International Hydrographic Organization (note 76 above) B – 300 4.
[79] *Ibid* B – 300 4.
[80] Y Lyons *et al* 'Determining high-tide features (or islands) in the South China Sea under Article 121(1): a legal and oceanography perspective' (2018) *The South China Sea Arbitration*. Edward Elgar Publishing 130. See also *South China Sea Arbitration* (note 49 above) 133.
[81] *South China Sea Arbitration* (note 49 above) 130.

would not significantly affect the feature's status.[82] However, where the feature is close enough to the high water level that the method of vertical datum may lead to a different result, a court or Tribunal would have to consider the issue in more detail.[83] In instances such as these, the use of the specific method of measurement would likely be necessary. It submitted that it would be helpful in these cases to consider the features according to the most preferable method of measuring high tide, and this may vary according to the IHO guidelines in different circumstances.

2.3 Capable of Human Habitation

The third element that is crucial in classifying an island is that it must be capable of human habitation. In the *South China Sea Arbitration,* the Tribunal noted that 'human habitation' should be understood as:

> '…the inhabitation of the feature by a stable community of people for whom the feature constitutes a home and on which they can remain. Such a community need not necessarily be large, and in remote atolls a few individuals and family groups could well suffice. Periodic or habitual residence on a feature by a nomadic people could also constitute habitation.'[84]

Importantly, it is not required in terms of the language of Article 121 that the maritime feature currently has humans inhabiting the land; instead, it requires that the feature is capable of human habitation in its natural State.[85] The Tribunal in the *South China Sea Arbitration* noted that the addition of 'cannot' in the phrase 'rocks which cannot sustain human habitation or economic life' is the indicator that the island simply needs to be capable of human habitation rather than currently having humans inhabiting the island.[86] It is important to note that an objective test will be applied to determine whether a maritime feature lends itself to human habitation.[87] However, the presence of settlement previously by humans on a high-tide feature would assist in proving the capacity of a feature to sustain human life.[88] Similarly, where a feature was never inhabited and was closely situated near other areas which are inhabited, it would lead to a conclusion that a feature is uninhabitable.[89]

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[82] *Ibid* 227.
[83] *Ibid* 134.
[84] *Ibid* 227, 228.
[85] *Ibid* 207.
[86] *Ibid* 206.
[87] *Ibid* 206.
[88] *Ibid* 206.
[89] *Ibid* 207.

Including the term 'sustain' in 'sustain human habitation' requires the provision of support and essentials to the population over a prolonged period of time.[90] The supply of essentials to the human population cannot be a once-off but an ongoing occurrence.[91] The provision of essentials has to be sufficient to keep humans alive and in good health over a period of time.[92] Therefore, the element of human habitation requires more than just the presence of humans, but rather an ability to sustain the people who live there for an extended period of time with resources that are accessible on the island.

2.4 Economic Life

Lastly, the requirement of an 'economic life of their own' provided for in UNCLOS is another key feature which differentiates an island from a rock. Whilst it is not necessary to have both human habitation and an economic life of its own, the island must have one or the other. The addition of the term 'or' in Article 121(3) in the phrase 'Rocks which cannot sustain human habitation or economic life' indicates that either human habitation or economic life would be sufficient.[93] However, the Tribunal in the *South China Sea Arbitration* noted the requirement of economic life is linked to the former requirement of human habitation as the people that live on the island must be able to sustain themselves economically and make a living on the island.[94] The Tribunal asserted that the economic life with which the island possesses cannot be focussed only on the waters adjacent to the island. Still, livelihoods must be created on the island feature itself.[95] Where the economic income of the population is entirely external to the feature, it would fall short of what is required to be considered an island in terms of Article 121 of UNCLOS.[96] Economic activity that benefits an external population by extracting natural resources from land or maritime territory is also not considered sufficient to meet this criterion. Whilst mineral extraction by other States in an island's land or water territory does create the potential for economic gain, the State concerned is not directly involved in this process. Therefore, such a process would be inadequate to meet the criteria of economic activity on the island itself.[97]

[90] *Ibid* 208.
[91] *Ibid* 208.
[92] *Ibid* 208.
[93] *Ibid* 209.
[94] *Ibid* 228.
[95] *Ibid* 228.
[96] *Ibid* 228.
[97] *Ibid* 228.

Therefore, a maritime feature would only be incapable of being used as a basis for maritime zones delineated around it where it cannot sustain human habitation and an economic life.[98] However, the Tribunal in the *South China Sea Arbitration* notes that it is likely that with human habitation, it would naturally follow that economic life would result.[99] The Tribunal believed an island would only have an economic life if it had a stable population or community.[100] There is an exception for those islands where there is a series of maritime features or islands from which they sustain themselves, even where a human community does not inhabit a portion of the islands.[101]

Stoutenburg notes that Article 121[102] of UNCLOS has been subject to a multitude of interpretations:

> 'Nevertheless, the open wording allows for almost any interpretation of the two requirements. It is for instance disputed whether human habitation must be permanent or can be seasonal, whether it requires the presence of an organised group of people or whether for example a manner lighthouse suffices, and whether necessities of life such as portable water must be present on the rock or can be imported from outside. Likewise, there is no agreement on whether economic life must be of a commercial nature, whether marginal activities such as the establishment of a lighthouse or a radio station, or the harvesting of guano or bird and turtle eggs fulfil the requirement, and whether the notion of an economic life "of their own" implies complete self-sufficiency and excludes dependence on external support.'[103]

In addition, the essence of Article 121 (3) was to prevent excessive claims to maritime zones; however, it has not achieved this purpose.[104] Kwiatkowska and Soons have emphasised that due to the fact that States has not followed Article 121 (3), it should not be considered binding in nature.[105] Stoutenburg emphasises that international courts have been reluctant to clarify any ambiguities in the provision of UNCLOS that deals with rocks.[106] It is true that courts have been reluctant to extensively deal with Article 121 (3) as in the cases that have come before numerous international courts and tribunals, inclusive of the ICJ, there has been a general reluctance by courts to resolve many areas of contention. As an example, in the dispute between

[98] *Ibid* 210.
[99] *Ibid* 228.
[100] *Ibid* 228.
[101] *Ibid* 228.
[102] Article 121(3), UNCLOS.
[103] JG Stoutenburg (note 1 above) 87.
[104] *Ibid* 88.
[105] B Kwaitkowska AHA Soons 'Entitlement to Maritime Area of Rocks Which Cannot Sustain Human Habitation or Economic Life of Their Own' (1990) 21 *Netherlands Yearbook of International Law* 174 – 180.
[106] JG Stoutenburg (note 1 above) 90.

Nicaragua v. Colombia the ICJ declined to consider whether features of a negligible size fit within the criteria of Article 121 (3).[107]

It has been alleged that State practice conforms with the general idea that Article 121 (3) is not strictly adhered to.[108] Charney maintains that upon the entering into force of UNCLOS, Article 121 (3) became 'dispositive' and can only be disregarded in the event that an alternative international rule was created to supersede the provisions.[109] Rockall in the UK is an example which illustrates the adherence to Article 121 (3) in that there was a change of policy in the maritime zones claimed around this high-tide elevation.[110] However, many examples of States disregarding Article 121 will be discussed in turn in this chapter. Whilst Article 121 (3) is explicit and may present difficulties for many SIDS, it has not always been followed in a rigid fashion. The most pertinent example of this is the People's Republic of China, as illustrated in the *South China Sea Arbitration*. China claimed extensive maritime zones inclusive of a territorial sea, a contiguous one and an EEZ on numerous maritime features that were not considered capable of such appropriation.[111] However, China is not the only State that claims extensive maritime zones where these are not necessarily warranted due to the provisions of Article 121 (3).

Song outlines that Australia, France, Japan, New Zealand and the USA have claims to extensive maritime zones where the maritime features they use for such delineation may fall within Article 121 (3) of UNCLOS.[112] Around the Heard Island and McDonald Islands, Australia claim a 200 nautical mile EEZ.[113] No humans are living on these islands, and consequently, there is no economic activity on the islands.[114] The only economic activity that takes place in this region is limited fishing activities in the waters surrounding the islands.[115] In addition to the EEZ delineated by Australia, Australia claims a continental shelf in excess of 200 nautical miles around these islands.[116] France, Germany, India, Japan, the Netherlands, the Russian

[107] See *Nicaragua v. Colombia* (note 63 above) 692, 715.
[108] *Ibid* 90.
[109] JI Charney 'Rocks that Cannot Sustain Human Habitation' (1999) 93 (4) *The American Journal of International Law* 872.
[110] *Ibid* 872, fn 37.
[111] *South China Sea Arbitration* (note 49 above) 474.
[112] YH Song 'The July 2016 Arbitral Award, Interpretation of Article 121 (3) of UNCLOS, and Selecting Examples of Inconsistent State Practices' (2018) 49 (3) *Ocean Development & International Law* 248.
[113] *Ibid* 251.
[114] *Ibid* 251.
[115] *Ibid* 251.
[116] 'Summary of the recommendations of the commission on the limits of the continental shelf (CLCS) in regard to the submission made by Australia on 15 November 2004' *CLCS* available at *https://www.un.org/depts/los/clcs_new/submissions_files/aus04/aus_summary_of_recommendations.pdf* (accessed 6 June 2022).

Federation, the Democratic Republic of Timor-Leste and the USA submitted communication requesting the Commission on the Limits of the Continental Shelf (CLCS) to deny Australia's claims to the continental shelf.[117] However, when accepting Australia's submissions, the CLCS did not send notifications to any country that challenged Australia's claims.[118]

In the case of *"Volga" (Russian Federation* v. *Australia), Prompt Release, Judgment, ITLOS Reports 2002,* Vice-President Vukas remarked as follows:

> 'All these economic interests and concerns do not exist in respect of uninhabited islands such as Head Island and the McDonald Islands. There can be no "coastal fishing communities" as "[t]here is no permanent habitation". According to the same source (UNEP – Protected Areas Programme), "Heard Island is visited infrequently, and the McDonald Islands very rarely." According to *Encyclopaedia Britannica* "[m]uch of its [Heard Island's] surface is covered with snow and ice…. The McDonalds are a group of uninhabited rocky islets 25 miles (40 km) west of Heard Island." Taking into account all this data, one should not ignore Article 121, paragraph 3, of the LOS Convention, where we find many of the elements obviously present in this group of Australian islands/isles/islets/rocks: "Rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf."'[119]

France claims an extensive EEZ over Clipperton Island within the Eastern Pacific Ocean.[120] People do not inhabit the island and there is no direct economic activity taking place.[121] The only economic activity in this area is fisheries within the ocean that sits adjacent to Clipperton Island.[122] There is abundant marine life surrounding this island, with a large shark population and an ecosystem of fisheries.[123] National Geographic notes that Clipperton Island is an atoll which is 'inhospitable'; it was proved to be uninhabitable during guano mining operations when there were attempts to settle on this atoll.[124] France also submitted the outer limits of their continental shelf to the CLCS and then abruptly withdrew the application.[125] Thereafter, they deposited the coordinates delineating the outer limits of the EEZ of Clipperton Island with the UN Secretary-General.[126] This illustrates France's intention for Clipperton Island to be

[117] YH Song (note 112 above) fn 46.
[118] *Ibid* 251.
[119] Declaration of Vice-President Vukas in *"Volga" (Russian Federation* v. *Australia), Prompt Release, Judgment, ITLOS Reports 2002,* p. 10 44.
[120] YH Song (note 112 above) 252.
[121] *Ibid* 252.
[122] *Ibid* 252.
[123] 'Clipperton Atoll' *National Geographic* available at *https://www.nationalgeographic.org/projects/pristine-seas/expeditions/clipperton-atoll/* (accessed 7 June 2022).
[124] *Ibid.*
[125] YH Song (note 112 above) 252.
[126] *Ibid* 252.

considered an island and not a rock, although the atoll has many characteristics in line with Article 121 (3) of UNCLOS.[127] Without the capability to sustain a population or economic activity, Clipperton Island is not an island but a rock incapable of claiming an EEZ or a continental shelf.

Another example comes from Japan regarding Okinotorishima.[128] Japan has spent large sums of money rebuilding this atoll; in 2016, it was reported that the State would spend over 100 million USD to rebuild the atoll, which stood at 100 square feet before any artificial additions.[129] Concerns have been raised by China and Taiwan about the status of the atoll. Japan claims an extensive EEZ around the atoll.[130] Furthermore, in 2008, Japan submitted a claim for a continental shelf to the CLCS.[131] The CLCS made recommendations on the Continental Shelf claimed by Japan but did not account for the Kyushu-Palau Ridge region.[132] The Okinotorishima is located within the Kyushu-Palau region, and the CLCS declined to make any decisions on this area due to unresolved submissions by China and South Korea.[133] To resolve an issue of this nature, the CLCS would need to determine whether Okinotorishima is considered an island or rock in terms of Article 121 (3) of UNCLOS, which would have notable political significance.[134] Whilst the CLCS does not determine the validity of claims to an EEZ, whether Okinotorishima is an island or a rock would, in effect, determine whether the claims to the existing extensive maritime zones around the atoll are valid.

The USA is another State that claims an EEZ around numerous Pacific Islands, namely Baker Island, Howland Island, Jarvis Island, Johnston Atoll, Kingman Reef, Palmyra Atoll and Wake Island.[135] Song submits that these islands are incapable of sustaining human life and, consequently, cannot sustain economic life.[136] Initially, the USA claimed a 50 nautical mile marine protection area around these islands. However, this was extended to a 200 nautical mile

[127] *Ibid* 252.
[128] YH Song (note 112 above) 252.
[129] N Jenkins 'Japan is Spending $107 Million to Rebuild a Tiny Pacific Island' *Time* available at *https://time.com/4205570/okinotorishima-japan-maritime-claims/* (accessed 7 June 2022).
[130] YH Song (note 112) 253.
[131] D Roughton P Leung, A Cannon 'A rock or an island? The significance of Okinotorishima and its status under the international law of the sea' available at *https://hsfnotes.com/asiadisputes/2012/07/04/a-rock-or-an-island-the-significance-of-okinotorishima-and-its-status-under-the-international-law-of-the-sea/* (accessed 8 June 2022).
[132] YH Song (note 112 above) 253.
[133] 'Summary of Recommendations of the Commission on the Limits of the Continental Shelf in Regard to the Submission Made by Japan on 12 November 2008' *CLCS* available at *https://www.un.org/depts/los/clcs_new/submissions_files/jpn08/com_sumrec_jpn_fin.pdf* (accessed 7 June 2022) 5.
[134] D Roughton, P Leung, A Connon (note 131 above).
[135] YH Song (note 112 above) 253.
[136] *Ibid* 253.

EEZ for all but Wake Island through a USA Department of State notice in August 1995.[137] Each of the islands has maritime zones delineated around them, which differ according to the nature of the islands – for example, portions of Howland Island on the southern-east region of the island have an EEZ of 200 nautical miles delineated around it.[138] Howland Island is described on the Pacific Islands Benthic Habitat Mapping Centre as follows:

> '…a very small, low-lying island (1.84 sq. km) with 6.4 km of coastline lying just 89 km (48 nautical miles) north of the Equator, it has little rainfall, constant wind and high temperature. The land is mostly sand with low brush, and remnants of previous buildings are still visible. The island has no fresh water and is primarily a nestling, roosting and foraging habitat for seabirds, shorebirds, and marine wildlife.'[139]

Baker Island is also described as uninhabited by the Pacific Remote Island Area.[140] Despite this, the USA also claims extensive maritime zones around this island except in the southeast.[141] According to Song, the USA claims a 200 nautical mile maritime zone from the baseline located on the Johnston Atoll.[142] The Johnston Atoll is made up of four islands and a lagoon within the Pacific Ocean. The atoll does not appear to be inhabited by a population; the island is a National Wildlife Refuge, and humans are allowed to access it with permits usually reserved for scientists and educators alike.[143] Whilst there may be visitors to the Johnston Atoll, it does not appear to meet the criteria set out in Article 121 (3) of UNCLOS.

Similarly, Kingman Reef is also a National Wildlife Refuge, which allows access for persons in their scientific and educational capacity.[144] No animals or plants live on the atoll itself, but a large amount of marine life, including green sea turtles, surrounds the island.[145] Whilst there is 'life' on this island, this life does not come in the form of human habitation, and consequently, there is a lack of economic activity on the island itself.

Whilst it is clear that Baker Island, Howland Island, Jarvis Island, Johnston Atoll, Kingman Reef, Palmyra Atoll and Wake Island fall short of the criteria provided for in UNCLOS required to be used to claim an EEZ, the USA persists with claims of this nature. In addition, Kiribati

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[137] *Ibid* 253.
[138] *Ibid* 254.
[139] 'Pacific Remote Island Area' *Pacific Islands Benthic Habitat Mapping Centre* available at *http://www.soest.hawaii.edu/pibhmc/cms/data-by-location/pacific-remote-island-area/* (accessed 14 June 2022)
[140] *Ibid*.
[141] YH Song (note 112 above) 254.
[142] *Ibid* 254.
[143] *Ibid* 254.
[144] Pacific Islands Benthic Habitat Mapping Centre (note 139 above).
[145] *Ibid*.

has recognised the claims of the USA to the 200 nautical mile limit surrounding Palmyra Atoll, Kingman Reef, Jarvis Island, and Baker Island.[146] The position of the USA may not be surprising considering that the State has not yet ratified the UNCLOS.[147] Schrepferman submits that the 'United States failure to join UNCLOS is representative of the broader foreign policy trend to reject multilateral engagement of unilateral interests'.[148]

Despite the many instances of States disregarding Article 121, it will be argued that the threat still exists for declassification of SIDS to rocks where such an issue was challenged in an international court or tribunal. The example of the *South China Arbitration* will be used to illustrate this. However, it is crucial to understand the significance of maritime zones. It is essential to outline the maritime entitlements that States may claim wherein they possess island territory in terms of UNCLOS.

3. Maritime Entitlements in Terms of UNCLOS

UNCLOS provides that every coastal State can draw baselines for delineating the outer limits of maritime zones, including the territorial sea, the contiguous zone, the EEZ, and the continental shelf. Where these baselines are measured as normal baselines, there is no need to delineate the coordinates on charts and deposit them with the Secretary-General of the UN. However, to delineate baselines in terms of the straight baseline provisions in Article 7 of UNCLOS, the mouths of rivers provision in Article 9 of UNCLOS, or the bays provision in Article 10 of UNCLOS, a State would need to map the coordinates of these zones on charts measured from the baseline of the coast and deposit the charts with the Secretary-General of the UN. Therefore, the starting point in the quest to delineate maritime zones is to draw a baseline on a State's coast. UNCLOS provides numerous methods to draw baselines along a coastline of a State as each State has a unique coastline. The preliminary action by a coastal or island State is always the drawing of a baseline in the method most appropriate for the nature of the State's coastline. The baseline is the point at which all maritime zones will be measured. The most common form of baseline delineation is the normal baseline.

[146] YH Song (note 112) 254.
[147] W Schrepferman 'Hypocri-sea: The United States' Failure to Join the UN Convention on the Law of the Sea' *Harvard International Law Review* available at *https://hir.harvard.edu/hypocri-sea-the-united-States-failure-to-join-the-un-convention-on-the-law-of-the-sea-2/* (accessed 14 June 2022).
[148] *Ibid*.

3.1 Baselines

3.1.1 Normal baseline

In terms of Article 5, the normal baseline is measured from the 'low-water line' which spans the coast. The low-water line is defined as 'the intersection of the plane of low water with the shore.'[149] Whilst the low-water line may be freshly drawn by States according to its own requirements, in practice, States utilise the existing low-water line already depicted on charts as there is a large expense with surveying a coast to reassess the low-water mark.[150] In addition, the amount the low-water line moves is often negligible, and the difference it would make in drawing one's maritime zone is not significant enough to justify the expense.[151] Usually, baselines may be resurveyed when there is an appreciable deviation from the low-water line as previously drawn.

Schofield asserts that the low-water line was not defined by UNCLOS itself, which allows the coastal State to determine the low-water line as they wish.[152] The general trend has been for States to use the lowest astronomical tide (LAT) to draw their normal baselines.[153] The IHO has approved the LAT as the favoured drawing method.[154] The use of the LAT has its advantages as it allows States the best possible claims to their maritime zones as it expands the land territory of a State. The normal baseline is the default means to delineate maritime zones; it does not need to be formally declared publicly.[155]

Regardless of any representation on maritime charts, the low-water line is considered a fact.[156] As such, the low water line is as it lies on the coast rather than as it is depicted on charts. Consequently, Stoutenburg asserts that baselines are ambulatory under the current international regime; as sea levels rise, it leads to the reduction of maritime zones.[157] This is particularly problematic for SIDS, which will be discussed below in paragraph 3.1.5.

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[149] United Nations Office for Ocean Affairs and the Law of the Sea 'The Law of the Sea Baselines: An Examination of the Relevant Provisions of the United Nations Convention on the Law of the Sea' *United Nations Publication Sales NO. E.88.V.5* 3.
[150] *Ibid* 3.
[151] *Ibid* 3.
[152] C Schofield 'Departures from the Coast: Trends in the Application of Territorial Sea Baselines under the Law of the Sea Convention' (2012) 27 *The International Journal of Marine and Coastal Law* 724.
[153] *Ibid* 724.
[154] *Ibid* 725.
[155] *Ibid* 724.
[156] *Ibid* 3.
[157] JG Stoutenburg (note 1 above) 126.

3.1.2 Straight baseline

In Article 7 of UNCLOS, when the coastline of a State is 'deeply indented and cut into, or if there is a fringe of islands along the coast in its immediate vicinity', it is best to draw straight baselines instead of normal baselines.[158] Straight baselines should follow the direction of the coast and should not depart from the coast to any appreciable extent.[159] The waters that lie landward of the straight baseline would then be considered the internal waters of a State but should be closely linked to the land domain to be considered as such.[160] The straight baselines should not be drawn 'to and from low tide elevations' except in instances where a maritime feature is permanently above sea level, and these features are also recognised internationally.[161]

For straight baselines, it would be essential to consider how a deeply indented coast can be defined. Applying the straight baselines article is envisaged for those coastlines where a normal baseline would result in 'a complex pattern of territorial seas' where some parts of the coastline would not fall into the territorial sea.[162] There is not a generally accepted test to determine whether a coastline should be measured with straight baselines; however, one assertion is that if the coastline has several indentations resulting in juridical bays as per Article 10 of UNCLOS, this would indicate that straight baselines should be used.[163] Article 10 provides that a bay is:

> 'a well-marked indentation whose penetration is in such proportion to the width of its mouth as to contain land-locked waters and constitute more than a mere curvature of the coast. An indentation shall not, however, be regarded as a bay unless its area is as large as, or larger than, that of the semi-circle whose diameter is a line drawn across the mouth of that indentation.'

The nature of Article 7 has allowed for excessive claims to baselines, with States adopting straight baselines in a manner that provides more advantages to them.[164] The ICJ has expressly noted in the *Maritime Delimitation and Territorial Questions between Qatar v Bahrain, Merits, Judgment* (*Qatar v Bahrain)* case that straight baselines should 'be applied restrictively'.[165] Therefore, straight baselines should only be used where the coastline warrants such an

[158] Article 7, UNCLOS.
[159] Article 7, UNCLOS.
[160] Article 7, UNCLOS.
[161] Article 7, UNCLOS.
[162] United Nations Office for Ocean Affairs (note 149 above) 18.
[163] *Ibid* 18.
[164] *Ibid* 727.
[165] *Maritime Delimitation and Territorial Questions between Qatar v Bahrain, Merits, Judgment,* I.C.J. Reports 2001, p. 40 103.

interpretation. Excessive claims to straight baselines may result in maritime disputes between coastal States.

The difficulty with straight baselines concerning sea-level rise is that the geographical features used to draw straight baselines may be under threat due to rising sea levels.[166] Whether coastal or island territory, States use base points to draw straight baselines.[167] As such, where the basepoints that are used to draw straight baselines become submerged, this may bring into contention the baselines.[168] As mentioned above, excessive claims to maritime zones may result in maritime disputes, and this may be the case in instances of straight baselines drawn on submerged basepoints. Therefore, certainty would also provide clarity in the case of straight baselines.

3.1.3 Archipelagic baselines

Archipelagic baselines are reserved explicitly for archipelagic States as defined in terms of Article 46 of UNCLOS. An archipelagic State is 'a State constituted wholly by one or more archipelagos and may include other islands.'[169] SLRC has stated that archipelagic States face unique risks due to rising sea levels.[170] This is due to the fact that the loss of small maritime features may affect archipelagic baselines and the status of the archipelagic State.[171]

The archipelago is further defined in terms of Article 46 as follows:

> 'a group of islands, including parts of islands, interconnecting waters and other natural features which are so closely interrelated that such islands, waters and other natural features form an intrinsic geographical, economic and political entity, or which historically have been regarded as such.'

The archipelagic baseline is similar to a straight baseline. Article 47 of UNCLOS provides that the straight archipelagic baseline is to be drawn, 'joining the outermost points of the outermost islands and drying reefs of the archipelago'. The enclosed sea area must be at least as big as the land territory but cannot be over nine times the size of the land area.[172] The latter requirement must determine what will be considered land instead of water.[173] Where there is

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[166] ILA, Committee on International Law and Sea Level Rise 'Sydney Conference (2018)' available at *https://www.ila-hq.org/en_GB/documents/conference-report-sydney-2018cteeversion* (accessed 12 August 2023) 10.
[167] *Ibid* 10.
[168] *Ibid* 10.
[169] Article 46 (a), UNCLOS.
[170] ILA Committee on International Law and Sea Level Rise 'Lisbon Conference (2022)' (note 20 above) 5.
[171] *Ibid* 5.
[172] Article 47 (2), UNCLOS.
[173] United Nations Office for Ocean Affairs (note 149 above) 37.

water within reefs or islands that are fringed, this may be considered part of the land.[174] As with straight baselines, the archipelagic baseline cannot drift from the coast considerably.[175] The archipelagic baseline may be drawn across LTEs where they are not more than 12 nautical miles from the baseline and where lighthouses or similar structures are built on top of the LTE.[176] The nature of archipelagic States is that there is a possibility that these States may lie between 'two parts of an immediately adjacent neighbouring State'.[177] In such an instance, the baselines cannot affect any rights the neighbouring State traditionally held regarding their waters.[178] There is no limit to the number of segments that can be drawn on the baseline; however, no segment of the baseline may exceed 125 nautical miles.[179] It is important to note that the more segments are drawn, the more likely the baseline will be as accurate as possible.[180] The archipelagic baseline may not separate a neighbouring State's high seas or EEZ from the territorial sea.[181] Where the baseline in contention does not meet any of the conditions mentioned above and within Article 47, the baseline should be drawn through straight baselines rather than archipelagic baselines.[182] It is also possible for a State to delineate maritime territory around various islands with different archipelagic baselines, but each of the delineated baselines must meet the criteria of Article 47 (1) – (5).[183] An archipelagic State may also use archipelagic baselines for those areas eligible and straight baselines for the remainder of the baselines across the remainder of the islands.[184]

Many SIDS are archipelagic States and claim archipelagic baselines, including Bahamas, Cape Verde, Comoros, Maldives, Fiji, Grenada, Seychelles, Trinidad and Tobago, St Vincent and the Grenadines, Sao Tomé and Principe, Kiribati, Solomon Islands, Tuvalu, and Vanuatu.[185]

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[174] *Ibid* 37.
[175] Article 47 (3), UNCLOS.
[176] Article 47 (4), UNCLOS.
[177] Article 47 (6), UNCLOS.
[178] Article 47 (6), UNCLOS.
[179] United Nations Office for Ocean Affairs (note 149 above) 36.
[180] *Ibid* 37.
[181] Article 47 (5), UNCLOS.
[182] United Nations Office for Ocean Affairs (note 149 above) 38
[183] *Ibid* 38.
[184] *Ibid* 38.
[185] See Bahamas 'List of geographical coordinates' available at *https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/DEPOSIT/bhs_mzn65_2008.pdf* (accessed 4 August 2023); Grenada 'List of geographical coordinates of points' available at *https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/DEPOSIT/grd_mzn75_2009.pdf* (accessed 4 August 2023); Solomon Islands 'Legal Notice No. 41 of 1979: Declaration of Archipelagic Baselines (The Delimitation of Marine Waters Act (No. 32 of 1978)' available at *https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/SLB_1979_Notice.pdf* (accessed 4 August 2023); Kiribati 'Marine Zones (Declaration) Act, 1983 No. 7 of 16 May 1983 An Act to make provision in respect of the Internal Waters, the Archipelagic Waters, the Territorial Sea and the Exclusive Economic Zone of Kiribati' available at

The ability to claim archipelagic baselines is the major benefit of archipelagic States, and this advantage is important to many SIDS. This is because when archipelagic baselines are drawn, the waters within those baselines are considered archipelagic waters wherein the State concerned exercises sovereignty over the waters, the seabed, subsoil and the resources therein.[186] This effectively allows the State concerned to claim sovereignty over additional resources in the archipelagic waters in between the archipelago islands. In addition, the further out from the islands that the baseline is drawn, the more maritime territory the State concerned can claim. It cannot be denied that the ability to utilise archipelagic baselines is a benefit to archipelagic States, including many SIDS.

The risk for SIDS in respect of archipelagic baselines is that the outermost points that delineate these baselines may become vulnerable due to rising sea levels. The SLRC noted that at least seven archipelagic States had used small low-elevation islands when delineating the outer points of their archipelagic baselines, including some SIDS such as Cabo Verde, Sao Tomé and Principe, Comoros, and Trinidad and Tobago.[187] These are features in imminent threat of sea-level rise. Additionally, the SLRC considers that many States that claim archipelagic baselines have points in their baseline system that are located on reefs.[188] Some archipelagic States are 'entirely or predominantly composed of low elevation coral atolls and related reef islands'.[189] It has been observed that sea-level rise seriously impairs the ability of coral reefs to respond to these changing circumstances.[190]

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https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/KIR_1983_Act.pdf (accessed 4 August 2023); Fiji 'List of geographical coordinates' available at *https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/DEPOSIT/fji_mzn60_2007.pdf* (accessed 4 August 2023); Tuvalu 'Declaration of Archipelagic Baselines 2012' available at *https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/tuv_declaration_archipelagic_baselines2012_1.pdf* (accessed 4 August 2023); Vanuatu 'List of geographical coordinates of points' available at *https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/DEPOSIT/vut_mzn78_2010.pdf* (accessed 4 August 2023); Sao Tome and Principle 'List of geographical coordinates of points' available at *https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/DEPOSIT/stp_mzn17_1998.pdf* (accessed 8 August 2023); Seychelles 'List of geographical coordinates of points' available at *https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/syc_2008_order88.pdf* (accessed 8 August 2023);.Trinidad and Tobago 'Geographical coordinates of points used for determining the archipelagic baselines of Trinidad and Tobago Transformed to WGS84 Datum' available at *https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/tto_baselines2004.pdf* (accessed 8 August 2023); Cabo Verde 'Law No. 60/IV/92 of 21 December 1992' available at *https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/CPV_1992_Law.pdf* (accessed 8 August 2023); and Maldives 'Maritime Zones of Maldives Act No. 6/96' available at *https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/MDV_1996_Act.pdf* (accessed 8 August 2023).

[186] Article 49, UNCLOS.

[187] ILA 'Lisbon Conference (2022)' (note 20 above) 6.

[188] *Ibid* 6.

[189] *Ibid* 6.

[190] *Ibid* 6.

Similarly, Comoros uses a submerged basepoint in the outer delineation of its baseline, and Seychelles has used 'open water' basepoints in the outer delineation of its archipelagic baselines.[191] Therefore, as identified by the SLRC, the difficulty is that there are doubts over low-elevation islands and coral reef basepoints being able to remain despite rising sea levels, which may affect claims to archipelagic baselines.[192] The SLRC also notes that the most significant difficulty is the inability of archipelagic States to meet the water-to-land ratios required in terms of UNCLOS for archipelagic baselines.[193] As such, the SLRC the fixing of baselines in the interests of legal certainty and stability should also be applied to archipelagic baselines.[194]

3.1.4 Mouths of rivers

In Article 9 of the UNCLOS, where a river flows directly into the sea, a baseline should be drawn as a straight line directly across the river mouth at the low-water line on the riverbanks. The phrase 'directly' is not considered to be clear.[195] It is believed that an estuary (or tidal mouth) must flow directly into the sea to be considered the mouth of the river; if the river does not flow into the sea, it should be considered a bay rather than a river mouth.[196] The line is to be drawn across the river mouth where it enters the estuary.[197] Where the river flows directly into the sea in the absence of an estuary, the line may be drawn across the river mouth.[198] This is also true where there is one riparian (land that occurs on the edge of the river) State but is more contentious where there are two riparian States as not all parties accept that Article 9 may be used in the latter instance, including the USA.[199] Ordinarily, however, Article 9 does not produce many issues for the States party to the UNCLOS.

Just like baselines are susceptible to change due to rising sea levels, the mouths of rivers which are fed directly from the sea may also be affected. For example, a river mouth may recede further into the land territory of a State as sea levels rise due to an influx of more water flowing into the river from the sea.

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[191] *Ibid* 7.
[192] *Ibid* 7.
[193] *Ibid* 7.
[194] *Ibid* 7.
[195] R Churchill V Lowe A Sander *The Law of the Sea* 4 ed (2022) 85.
[196] *Ibid* 85.
[197] *Ibid* 85.
[198] *Ibid* 85.
[199] *Ibid* 86.

3.1.5 Baselines and sea-level rise

The regime of baseline employed by a State along the coastline of coastal or island territory is determined based on the conditions of the coastline. In terms of Article 14, the claiming coastal State is free to determine the best method to draw its baselines.[200] The essential condition is that States that do not utilise normal baselines must draw their baselines on large-scale charts that are officially recognised.[201] Alternatively, geographical coordinates that specify the 'geodetic datum' may substitute charts.[202]

Whilst drawing maritime baselines is somewhat of a unilateral act of a coastal State,[203] other States may dispute baselines. This usually occurs where the baselines are considered excessive or impede the maritime boundaries of neighbouring coastal or island States. In the event of a maritime boundary dispute, UNCLOS notes that parties must settle disputes peacefully in terms of Article 279. The parties are free to determine the method of peaceful settlement as provided by Article 280 of UNCLOS. In terms of Article 287, parties to a dispute may choose, by way of a written declaration, to resolve their dispute by use of the following methods: the ITLOS, the ICJ, and an arbitral tribunal or special arbitral Tribunal established in terms of Annex VII in UNCLOS.[204] Maritime boundary disputes are not uncommon and may be instituted for many reasons. Some examples of previous maritime disputes include that of *Nicaragua v. Honduras*,[205] a dispute centring around maritime boundary delineation in the Caribbean Sea and the sovereignty over a multitude of islands, inclusive of Bobel Cay, Port Roy Cay, Savanna Cay and South Cay.[206] Other cases of note include *Bangladesh v Myanmar*[207] concerning the delineation of maritime territory in the Bay of Bengal and *Cameroon v. Nigeria: Equatorial Guinea intervening,*[208] wherein the court considered the question of sovereignty regarding the Bakassi Peninsula.[209] Whilst these examples do not provide an exhaustive list of maritime boundary disputes that have taken place, they seek to illustrate that disputes of this nature occur in various parts of the world. The possibility of maritime territorial disputes is relevant in the

[200] Article 14, UNCLOS.
[201] Article 5 and 16, UNCLOS.
[202] Article 16, UNCLOS.
[203] MD Monjur Hasan *et al* 'Protracted Maritime Boundary Disputes and Maritime Laws' (2019) 2 (2) *Journal of International Maritime Safety, Environmental Affairs, and Shipping*
[204] Article 287 (1) (a) – (d), UNCLOS.
[205] *Nicaragua v. Honduras* 2007 ICJ 659 (Oct. 8).
[206] 'Overview of the case' *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)* available at *https://www.icj-cji.org/en/case/120* (accessed 18 April 2022).
[207] *Bangladesh v Myanmar* ITLOS Case No. 16 (Mar. 14, 2012)
[208] *Cameroon v. Nigeria: Equatorial Guinea intervening* I.C.J Reports 2002
[209] 'Overview of the case' *International Court of Justice, Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)* available at *https://www.icj-cij.org/en/case/94* (accessed 21 April 2022).

context of SIDS; they, too, may be the subject of maritime disputes in the event of uncertainty over ambulatory baselines in the midst of submerging territory.

The Baselines Committee analysed the articles within UNCLOS to determine the law as it exists (*de lege lata*) on baselines to determine if there is a need for development and clarification of the law. It concluded that the normal baselines are ambulatory.[210] The SLRC later concluded that other baselines, including straight baselines and archipelagic baselines, may also be affected by rising sea levels.[211] Consequently, if baselines are vulnerable to sea-level rise, so are the outer limits of maritime zones upon rising sea levels. The latter assertion is the viewpoint of prominent scholars such as Caron, O'Connel, Sohn and Noyes.[212] As asserted by Freestone and Schofield, the waters under national jurisdiction may become part of the high seas if baselines remain ambulatory.[213] Additionally, maritime boundaries between States may similarly be affected where they are located adjacent to or opposite each other.[214]

As a result of the uncertainty surrounding ambulatory baselines, the Baselines Committee recommended the creation of another committee to consider the wide range of concerns that sea-level rise may present.[215] The SLRC then adopted Resolution 5/2018, which aimed to endorse the view that baselines should be fixed based upon State practice emanating mainly from the South Pacific region; the PIF has indicated that SIDS 'intend to maintain the baselines and limits of their current maritime zones' in terms of the UNCLOS despite changes to the coastline as a result of sea-level rise.[216] In the recommendation for fixing maritime baselines the SLRC of the ILA noted that the maintenance of baselines is conditional upon the compliance of the existing maritime baselines in terms of UNCLOS, including publication and notification requirements where necessary.[217] The recommendation to fix baselines was made in the interests of legal certainty and stability as *de lege ferenda* (the law as it ought to be).[218]

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[210] ILA 'Sofia Conference (2012)' (note 8 above) 1.
[211] ILA 'Lisbon Conference (2022) (note 20 above) 7; ILA, Committee on International Law and Sea Level Rise 'Sydney Conference (2018)' available at *https://www.ila-hq.org/en_GB/documents/conference-report-sydney-2018cteeversion* (accessed 12 August 2023) 10.
[212] C Lathrop et al *Baselines under the International Law of the sea: reports of the International Law Association Committee on baselines under the International Law of the Sea* (2019) 22 & 23.
[213] D Freestone C Schofield 'Pacific Island Countries Declare Permanent Maritime Baselines, Limits and Boundaries' (2021) 36 *The International Journal of Marine and Coastal Law* 688.
[214] *Ibid 688.*
[215] ILA 'Sofia Conference (2012)' (note 8 above) 31.
[216] ILA, Committee on International Law and Sea-level rise, 78th Conference of the International Law Association 'Resolution 5/2018' (note 16 above).
[217] ILA, Committee on International Law and Sea-level rise, 78th Conference of the International Law Association 'Resolution 5/2018' (note 16 above).
[218] ILA, Committee on International Law and Sea-level rise, 78th Conference of the International Law Association 'Resolution 5/2018' (note 16 above). See also ILA 'Sydney Conference (2018)' (note 169 above) 12.

Freestone and Schofield assert that Recommendation 5/2018 was welcomed by 120 States in the UN Sixth Committee in 2019 when the topic was raised in connection with the inclusion of sea-level rise in the work of the ILC by creating a sea-level rise study group.[219] The first report of the study group referred to Resolution 5/2018 positively, but the chairs noted that the UNCLOS is not express in providing that new baselines must be drawn when a coastline changes.[220]

However, it is important to note that not all States agree that State practice leans toward fixing baselines. For instance, in submission to the sea-level rise study group, the United Kingdom and the Netherlands asserted that they adhere to the system of ambulatory baselines.[221] Similarly, the USA, in their submission to the sea-level rise study group, noted that they adhere to ambulatory baselines and regularly survey their coast for variations with changes in excess of 500 metres with a Committee that approves changes to their baselines.[222] Therefore, there is State practice with the will to fix baselines and States that currently embrace ambulatory baselines. Therefore, it would be essential to ensure uniformity in international law by expressing stability and certainty in baselines despite rising sea levels.

Criticisms have been levelled against using the ILA Resolution that aims to create certainty and bridge this gap in international law. Cogliati-Bantz notes that the proposal by the ILA Committee does not distinguish between coastline regression, island disappearance where there is a single island or disappearance of all islands in the case of an archipelagic State.[223] The ILA

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[219] D Freestone C Schofield (note 213 above) 690.

[220] *Ibid* 691; In reference to UNGA, ILC, First Issues Paper (note 15 above) 41 wherein the chairs summarise the position as follows: 'An approach responding adequately to these concerns is one based on the preservation of baselines and outer limits of the maritime zones measured therefrom, as well as of the entitlements of the coastal State; the Convention does not prohibit *expressis verbis* such preservation (see paragraph 78 above). In any case, the obligation provided by article 16 to give due publicity to and deposit copies of charts and lists of coordinates about baselines only refers to straight baselines (which are less affected by sea-level rise) and not to normal baselines. Even in the case of straight baselines, the Convention does not indicate an obligation to draw and notify new baselines when coastal conditions change (or, as a consequence, new outer limits of maritime zones measured from the baselines).'

[221] Submission of the United Kingdom of Great Britain and Northern Ireland, forwarded through note verbale No. 007/2020 of 10 January 2020 to the United Nations available at *https://legal.un.org/ilc/guide/8_9.shtml#govcoms* (accessed 30 October 2023) wherein it was noted that the UK legislation provides for ambulatory baselines; Submission of the Netherlands, forwarded through note verbale No. DC2 -0566 of 27 December 2019 3 wherein it is asserted 'Due to a high re-survey frequency and a dynamic seabed, the low water line has a dynamic behaviour. Additionally, low tide elevations within the distance of the 12 NM appear and disappear, causing further changes to the determination of the normal baselines. When such a change occurs at a distance exceeding 0.1 NM, the normal baselines are adjusted accordingly.'
to the United Nations, available at *https://legal.un.org/ilc/guide/8_9.shtml#govcoms* (accessed 30 October 2023).

[222] Submission of the United States, forwarded through note verbale of 18 February 2020 to the
United Nations available at *https://legal.un.org/ilc/guide/8_9.shtml#govcoms* (accessed 30 October 2023) 1-2.

[223] VP Cogliati-Bantz 'Sea-level rise and Coastal States' Maritime Entitlements' (2020) 7 (1) *The Journal of Territorial and Maritime Studies* 95.

Committee did not consider the issue of territory loss due to its sensitivity.[224] Furthermore, Cogliati-Bantz points out that the recommendation by the ILA does not provide a clear date as to when baselines are fixed, nor does it require positive expression on the part of States to fix the baselines, and whether charts are required to ensure publication.[225] The ILA working session 2018 report initially proposed fixing baselines or the outer limits of maritime zones 'at some date in time'.[226] However, when taking the resolution, the ILA took into account the regional practice within the Pacific, which included the unilateral declaration defining maritime jurisdictional baselines and maritime limits that have taken place.[227] It is for this reason that the resolution was phrased in this manner. It stands to reason that the wording of the Resolution aims to encourage States to draw and publicly make available their baselines in an effort to create certainty over the points that anchor the coastlines of coastal and island States. As such, it is essential to ensure that the wording of the Recommendation encourages adherence to this State practice rather than clarity in the absence of State buy-in.

An additional strength of the Recommendation of the ILA is the requirement that baselines and maritime zones must conform with UNCLOS to be eligible for permanent fixture.[228] This requirement attempts to prevent the drawing of baselines contrary to international law that may also be eligible for permanent fixture. The ILA Resolution states as follows:

> 'The Committee's recommendations regarding the maintenance of existing maritime entitlements are conditional upon the coastal State's existing maritime claims having been made in compliance with the requirements of the 1982 Law of the Sea Convention and duly published or notified to the Secretary-General of the United Nations as required by the relevant provisions of the Convention, prior to physical coastline changes brought about by sea-level rise.'[229]

However, it is essential to note that providing the UN with information on baselines and their outer limits does not ensure the legal validity of these claims.[230] Normal baselines, for example, do not need to be drawn on charts. Therefore, it is still possible for the baselines as claimed on charts or by way of geographical coordinates to be disputed.[231] Traditionally, the objective of

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[224] *Ibid* 95.
[225] *Ibid* 95.
[226] ILA, 'Committee on International Law and Sea Level Rise, Minutes of the Open Session' 22 August 2018 available at *https://www.ila-hq.org/en_GB/documents/working-session-report-sydney-2018-12* (accessed 12 August 2023) 3.
[227] *Ibid* 3.
[228] VP Cogliati-Bantz (note 223 above) 95.
[229] ILA Committee on International Law and Sea-level rise, 78th Conference of the International Law Association 'Resolution 5/2018' (note 16 above).
[230] VP Cogliati-Bantz (note 223 above) 96
[231] *Ibid* 96.

the due publicity and deposit obligations under UNCLOS was to ensure that States are transparent about what they consider their maritime entitlements, and it provides those who use the oceans with an indication of the limits of the maritime zones and the portions of the ocean where coastal States exercise sovereignty and other jurisdiction.[232] The Baselines Committee correctly summarises the chart function concerning baselines' providing notice of their location for mariners and interested parties.[233] The functions of the depositary are technical in the sense that they do not provide the coastal State with a determination of the validity of their baselines; when the secretariat receives the deposit charts and makes them publicly available, this is not seen as an opinion on the contents of the baselines and the legal status of the State that claims these boundaries.[234]

The ILA Resolution of the SLRC also did not consider the issue of sea-level rise and the role thereof in permanently fixing baselines. As such, the Recommendation did not specify the instances wherein their recommendations would apply to the 'freeze' baselines and the outer limits in the event of sea-level rise.[235] The omission of such limitation may be because limiting the freezing of baselines strictly to States affected by sea-level rise may lead to less support amongst States. The importance of States embracing the fixing of baselines cannot be underestimated, as the emergence of State practice beyond the Pacific will assist in solidifying this Resolution as an expression of where the law should be going to ensure stability and certainty. This viewpoint has some support as Schofield emphasises that the SLRC Resolution was intended to publicise the committee's work to further the progress of international law.[236] Therefore, the situation requires further consideration and cannot be said to resolve all the issues that sea-level rise presents for coastal and island States and the maritime zones they claim. However, it is important to note that the Resolution should be considered as a contribution to clarify the legal position. This clarity is vital considering that SIDS, as most affected by sea-level rise and ambulatory baselines, have taken this position. While the

[232] United Nations Convention on the Law of the Sea SPLOS30/12 Note by the Secretariat 'Practice of the Secretary-General in respect of the deposit of charts and/ or lists of geographical coordinates of points under the United Nations Convention on the Law of the Sea' available at *https://documents-dds-ny.un.org/doc/UNDOC/GEN/N20/094/52/PDF/N2009452.pdf?OpenElement* (accessed 29 May 2022) 2/9.
[233] ILA 'Sofia Conference (2012)' (note 8 above) 9.
[234] United Nations Convention on the Law of the Sea SPLOS30/12 Note by the Secretariat (note 231 above) 3/9.
[235] VP Cogliati-Bantz (note 223 above) 96.
[236] C Schofield 'A New Frontier in the Law of the Sea? Responding to the Implications of Sea-level rise for Baselines, Limits and Boundaries' in R Barnes R Long *Frontiers in International Environmental Law: Oceans and Climate Challenges* (2021) 188.

Resolution provides a starting point for the development of international law, it requires further development for solidification.

Despite the assertion by some States that their baseline practice has been primarily ambulatory, there was much support for the legal stability and security that the fixing of baselines brings.[237] Schofield notes that there is also judicial support for the stability that preserving baselines would bring in the *Commission of European Communities v United Kingdom of Great Britain and Northern Ireland* case.[238] While the latter case is not based on the provisions of UNCLOS but rather on European Union regulations, it does prove helpful in illustrating practice amongst States. The European Court noted that the rules, according to international law, interpret baselines to be ambulatory.[239] The UK submitted as follows, noting that baselines are ambulatory but further clarified that this does not provide a permanent solution:

> '…the United Kingdom believes that the method of referring to baselines, which are necessarily ambulatory, is totally inadequate for the purposes of determining particular maritime areas on a permanent basis.'[240]

This case dealt with the Council Regulation (EEC) No 170/83 of 25 January 1983, which has now been repealed regarding fishery resources. However, the comments related to the issue of baselines provide important observations on baselines.[241]

Schofield submits that freezing baselines would potentially be allowed under Article 5 of the UNCLOS as baselines may be adopted with their coordinates provided for on official charts and within national legislation.[242] The act of marking baselines on official charts and within national legislation would be sufficient to ensure a sense of permanency. In addition, where the coastline changes and moves landward, baselines would remain stable, with the waters being

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[237] Submission of Maldives, forwarded through note verbale No. 2019/UN/N/50 of 31 December 2019 to the United Nations, available at *https://legal.un.org/ilc/guide/8_9.shtml#govcoms* (accessed 30 October 2023) 9; Australia, Fiji, Kiribati, Marshall Islands, Federated States of Micronesia, Nauru, New Zealand, Palau, Papua New Guinea, Samoa, Solomon Islands, Tonga, Tuvalu and Vanuatu Submission of the Pacific Islands Forum, forwarded through letter of 30 December 2019 of the Permanent Representative of Tuvalu to the United Nations, on behalf of the Pacific Islands Forum members, available at *https://legal.un.org/ilc/guide/8_9.shtml#govcoms* (accessed 30 October 2023) 2; UNGA, Seventy-forth Session, Sixth Committee, Summary Record of the 25th meeting, submissions by Mr Pérez on behalf of Cuba, UN Doc. A/C.6/74/SR.25 3.

[238] *Commission of European Communities v United Kingdom of Great Britain and Northern Ireland* Case C-146/89 1-3576.

[239] *Ibid* para 31.

[240] *Ibid* para 33.

[241] Council Regulation (EEC) No 170/83 of 25 January 1983 establishing a Community system for the conservation and management of fishery resources, date of effect 27 January 1983.

[242] C Schofield (note 236 above) 188.

treated as internal waters in line with the UNCLOS.[243] In this scenario, there would be no additional claims to maritime zones but rather a preservation of existing maritime zones.[244] In such a situation, we would be protecting States that may face some of the most severe impacts due to climate change and rising sea levels. Whilst Article 5 does not contain anything to prevent the freezing of baselines, it does not contain any provisions to ensure the permanency of baselines either.

Stoutenburg discusses numerous mechanisms suggested to rectify the ambulatory nature of baselines, including the historic waters doctrine, artificial coastline protection, masterly inactivity (fixing baselines on maritime charts), and maritime boundary delimitation agreements.[245] However, Stoutenburg concludes that the most desirable option would be to develop a new rule of customary international law to fix maritime zones.[246] Some of the former suggestions have major drawbacks; for example, artificial coastline protection may have both economic and environmental difficulties. Maritime boundary delineation agreements may provide certainty, but they are impractical as global remedies as not all States will conclude agreements to delineate their maritime zones. Where maritime agreements are not concluded, uncertainty will persist.

Historic waters are often considered an important mechanism for asserting title over maritime zones in the long term. Therefore, discussing the historic title of waters in more detail is necessary. According to Ma, the historical rights over maritime territory are considered distinct from those over land territory.[247] In terms of the case of *North Atlantic Fisheries (Great Britain v. United States of America)*,[248] the court of arbitration asserted that to establish historical waters, such as the historical bays in North and South America, the court provided some distinct requirements:

> '…when such country has asserted its sovereignty over them, and particular circumstances such as geographical configuration, immemorial usage and above all, the requirements of self-defence, justify such a pretension.'[249]

[243] *Ibid* 188.
[244] *Ibid* 188.
[245] JG Stoutenburg (note 1 above) 199 – 207.
[246] *Ibid* 207.
[247] X Ma 'Historic Title Over Land and Maritime Territory' (2017) 4(1) *Journal of Territorial and Maritime Studies* 32.
[248] *North Atlantic Coast Fisheries (Great Britain v. United States of America)* (1910) Scott Hague Court Rep 141.
[249] *Ibid* 204.

The Tribunal in the *South China Sea Arbitration* described 'historic title' as 'historic sovereignty to land or maritime areas' whereas 'historic rights' encompasses sovereignty over waters but also all other rights which may be limited in nature, such as fishing rights, which do not equate to the sovereignty of the waters.[250] Historic rights in the waters are considered 'exceptional rights' as they provide a State with rights they would not have otherwise had.[251] In the *South China Sea Arbitration*, the Tribunal held that by acceding to the UNCLOS, China had relinquished its claims to historic rights within the South China Sea and, therefore, could not claim rights beyond the maritime zones that were provided for in the convention.[252] This is because the Convention supersedes any rights that one may have historically claimed in excess of the maritime zones provided.[253] The Tribunal did provide a discussion on what would constitute historic rights. It was noted that the ordinary exercise of freedom on the waters claimed under international law could not give rise to historic rights in such territory.[254] Before the Second World War, international law prescribed only a territorial sea for coastal land and island territory, with the majority of the ocean comprising high seas, which allowed for fishing, use of the seabed beyond the territorial sea, and the exercise of other freedoms.[255] Therefore, in the case of the *South China Sea Arbitration*, the Tribunal held that to establish historic title, a State would have to engage in activities that were outside of what was considered freedom provided for under international law, such as preventing other States from fishing in the waters or exploiting the resources within the waters.[256]

There is a heavy onus of proof on the State claiming historic rights to waters. China was unable to prove such rights in the *South China Sea Arbitration* as the Tribunal found that it was unlikely that the Chinese government could have prevented other States from utilising the waters in the manners allowed for under international law.[257] Using historic rights as a form of historic right to waters that may surround a prospective submerged State would be a difficult case for the SIDS to prove, considering that many of these States are developing with limited financial assets at their disposal. China is a State with an excess of resources at its disposal, and the Tribunal found it unlikely that they could prevent others from exploiting the water in the South China Sea. Therefore, it is doubtful that a SIDS that aims to claim historical rights

[250] *South China Sea Arbitration* (note 49 above) 96.
[251] *Ibid* 113.
[252] *Ibid* 112.
[253] *Ibid* 117.
[254] *Ibid* 113.
[255] *Ibid* 114.
[256] *Ibid* 114.
[257] *Ibid* 115.

over waters surrounding their maritime features would succeed. This assertion is based on the understanding that an international court or Tribunal would require such a State to discharge the heavy onus. This heavy onus would also make it difficult to prove where the State has relocated and is no longer actively present within the area.

States would also be unable to allege that their waters are historic because maritime zones would have existed before sea-level rise affected the coastline of such a State.[258] In addition, claims to historic rights would also be open to dispute by other States.[259] Furthermore, Stoutenburg asserts that the doctrine of historic waters is the exception to the general rule for drawing maritime baselines.[260]

The issue of sea-level rise will affect all coastal States and, therefore, is not considered exceptional to be determined on a case-by-case basis, leading to general uncertainty.[261] Therefore, the most preferable mechanism to create stable baselines is through a new mechanism altogether.[262] In Chapter 6, recommendations will be made for a negotiating text to account for the express fixing of maritime baselines, amongst other aspects.

Despite the nature of maritime zones, whether fixed or ambulatory, we must first consider the maritime zones that SIDS may claim from the baselines drawn on their coastline. The maritime zones delineated from the baselines of SIDS are considered economically valuable and vital to the existence of these States. Just how economically valuable these maritime zones are to SIDS has been highlighted by some Pacific Islands during the Third United Nations Conference on the Law of the Sea in the lead-up to UNCLOS.[263] The representative of Western Samoa indicated during the 25th plenary meeting that the Conference should 'give most sympathetic consideration' to the difficulties experienced in the South Pacific Islands that have minimal access to land resources and 'greater dependence on the sea than other countries'.[264] Similarly, in the 29th plenary meeting, Fiji indicated that the 'sea and the land of Fiji were interdependent', highlighting the very close link between Fijians and their maritime territory as they depend on the sea and sea bed.[265] Furthermore, the representative for Fiji indicated that small island States

[258] JG Stoutenburg (note 1 above) 205.
[259] *Ibid* 205.
[260] *Ibid* 207.
[261] *Ibid* 207.
[262] *Ibid* 207.
[263] Third United Nations Conference on the Law of the Sea (1973-1982) Concluded at Montego Bay, Jamaica on 10 December 1982, Summary Records of Plenary Meetings 25th plenary meeting UN Doc. A/CONF.62/SR.25
[264] *Ibid* para 66.
[265] Third United Nations Conference on the Law of the Sea (1973-1982) Concluded at Montego Bay, Jamaica on 10 December 1982, Summary Records of Plenary Meetings 29th plenary meeting UN Doc. A/CONF.62/SR.29 para 44.

are disadvantaged and should be allowed to enjoy the 'maximum share of marine resources'.[266] Additionally, the representative for New Zealand on behalf of the Cook Islands highlighted that for the people of the Cook Islands, the sea provides the 'only source of protein', much of the food available, and income, although small, from fish and pearl shell.[267] The importance of the sea is particularly relevant as there is little arable soil or vegetation on the islands; the representative for New Zealand noted the possible role that the sea could play in developing the economy of the Cook Islands.[268]

3.2 Maritime Zones

While the baseline is the basis for measuring maritime zones, various maritime zones are available to coastal States and SIDS in terms of UNCLOS. Claiming maritime zones is not compulsory; States that do not wish to assert rights over all maritime zones available to them do not need to do so. However, more recently, it has become common practice for many States to draw baselines from which they claim all the maritime zones provided for in UNCLOS.

3.2.1 Internal waters

A State's internal waters are claimed in terms of Article 8 of UNCLOS. This Article provides that any waters landward to the baseline will be considered internal waters.[269] This would include lakes, rivers, and tidewaters, and the extent of these waters would differ from State to State.[270] Within the internal waters of a State, the State exercises sovereignty.[271] The internal waters are considered an extension of one's land territory, as the State exercises similar control over this water territory as exercised over the land territory. The sovereignty over the internal waters also extends to the 'adjacent belt of sea' referred to as the territorial sea, including its bed and subsoil.[272] UNCLOS does not provide a right of innocent passage for the internal waters; this right only extends to the territorial sea and beyond.[273]

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[266] *Ibid* para 55.
[267] Third United Nations Conference on the Law of the Sea (1973-1982) Concluded at Montego Bay, Jamaica on 10 December1982, Summary Records of Plenary Meetings 46th plenary meeting, UN Doc. A/CONF.62/ SR.46 para 21.
[268] *Ibid* para 21-22.
[269] Article 8, UNCLOS.
[270] 'Law of the Sea A Policy Primer, Chapter 2: Maritime Zones' *TUFTS University* available at *https://sites.tufts.edu/lawofthesea/chapter-two/* (accessed 21 April 2022).
[271] Article 2, UNCLOS.
[272] Article 2 (2), UNCLOS.
[273] Article 17, UNCLOS.

3.2.2 Territorial sea

In terms of Article 3 of UNCLOS, all coastal States can claim a territorial sea of 12 nautical miles from the baseline of the State.[274] Dugard notes that during the first and second conferences of the Law of the Sea, there was a debate on the exact breadth of the territorial sea.[275] The traditional length of the territorial sea was three nautical miles.[276] However, the concern with the original three-nautical mile limit was that many States had already extended their territorial sea claims to 12 nautical miles, with 66 States favouring the more significant limits and over 25 States adhering to the original smaller limit.[277] During these two conferences in Geneva, a territorial sea of six nautical miles was established, with a fishing limit of an additional six nautical miles, with maritime zones spanning a total of 12 nautical miles.[278] This is far from the 12 nautical mile territorial zone now provided for in terms of UNCLOS since 1982. Eventually, as negotiations in the Conference progressed, the limit of 12 nautical miles was widely accepted and agreed upon.[279]

The territorial sea provides a State with sovereignty over the waters, the airspace, the seabed and the subsoil.[280] The sovereignty, however, cannot be considered akin to that provided to the internal waters in terms of UNCLOS. The territorial sea differs from the internal waters in that a right of innocent passage is provided to other States in this maritime zone.[281] This right of innocent passage allows ships registered under any State, whether landlocked or coastal in nature, to pass through the territorial sea in a manner that is 'continuous and expeditious'.[282] This passage may include stopping and dropping anchor for ordinary navigation purposes or where the ship is in distress and requires assistance.[283] However, the ship should not enter the internal waters or a port facility within the internal waters as this would be outside of the ordinary understanding of 'passage'.[284] Innocent passage refers explicitly to passage which

[274] Article 3, UNCLOS.
[275] J Dugard *Dugard's international law: a South African perspective* (2018) 546.
[276] 'The United Nations Convention on the Law of the Sea (A Historical Perspective)' available at *https://www.un.org/depts/los/convention_agreements/convention_historical_perspective.htm* (accessed 16 March 2022).
[277] *Ibid*.
[278] J Dugard (note 275 above) 546.
[279] United Nations Convention on the Law of the Sea (A Historical Perspective) (note 276 above).
[280] Article 2, UNCLOS.
[281] Article 17, UNCLOS.
[282] Article 18 (2), UNCLOS.
[283] Article 18 (2), UNCLOS.
[284] Article 18 (1)(b), UNCLOS.

does not prejudice the 'peace, good order or security of the coastal State', and this includes ensuring that the provisions of UNCLOS are adhered to during the journey.[285]

In addition to States having the right of innocent passage through the territorial sea of another State, there are also limits of civil and criminal jurisdiction on board foreign ships in the territorial sea. As a general rule, the coastal State does not have criminal jurisdiction aboard foreign ships in the territorial sea unless the consequences of the crime involve the coastal State; the crime 'disturbs the peace of the country or the good order of the territorial sea'; the authorities have been requested to help by the master or the State concerned; or if there is a need to suppress the trafficking of narcotic drugs.[286] Civil jurisdiction is limited by Article 28 of UNCLOS. A coastal State may not 'stop or divert a foreign ship passing through the territorial sea for the purpose of exercising civil jurisdiction in relation to a person on board the ship'.[287]

3.2.3 Contiguous zone

In terms of Article 33 of UNCLOS, the contiguous zone may extend 24 nautical miles from the baseline of a State, the same baseline from which the territorial sea is measured.[288] Within the contiguous zone, a State may control and prevent 'infringement of its customs, fiscal, immigration or sanitary laws'.[289] The contiguous zone can be utilised for arresting and detaining drug smugglers and those contravening immigration laws within the jurisdiction of the navy of the coastal State concerned.[290]

3.2.4 Exclusive Economic Zone

The EEZ is described as 'one of the most revolutionary features of the Convention', namely UNCLOS.[291] This is due to the critical impact it has had on the conservation and management of the resources that are located within the oceans.[292] Article 55 of UNCLOS states that the EEZ is located next to the territorial sea and extends beyond this zone. The coastal State has the right to exploit, conserve and manage both the living and non-living resources within the waters of the EEZ and within the seabed and subsoil of this area.[293] The coastal State may utilise these resources for economic gain.

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[285] Article 19, UNCLOS.
[286] Article 27, UNCLOS.
[287] Article 28 (1), UNCLOS.
[288] Article 33 (2), UNCLOS.
[289] Article 33 (1)(a), UNCLOS.
[290] United Nations Convention on the Law of the Sea (A Historical Perspective) (note 276 above).
[291] *Ibid*.
[292] *Ibid*.
[293] Article 56 (1) (a), UNCLOS.

The EEZ was an area of contention in the negotiations leading up to UNCLOS. The first conference took place in New York in 1973, thereafter in Geneva, and three additional sessions took place in New York.[294] Whilst the conference was convened in 1973, it only produced the UNCLOS just under ten years later in 1982.[295] The 200 nautical mile limit was incorporated into the Santiago Declaration of 1952 and the Lima Declarations of 1970; it was first affirmed by Peru, Chile and Ecuador and then reaffirmed by other States upon signing the declarations.[296] The major driver behind this large limit for the EEZ was to protect fishing resources from exploitation by foreign fishermen.[297] Implementing the 200 nautical mile EEZ results in 99% of the world's fisheries falling within the jurisdictional boundaries of various States.[298] Therefore, the rationale for UNCLOS was largely due to concerns about living and non-living resources within the oceans and the potential for exploitation resulting from a shift that occurred in the twentieth century.[299]

There was a significant boom in the middle of the twentieth century when States worldwide explored oil and depleted fish stocks within the ocean.[300] As a result of the additional claims for resources, multiple disputes occurred, such as the dispute between the UK and Iceland, cited as *United Kingdom v. Iceland*.[301] Therefore, it was necessary to create stability and order over the resources within the ocean.[302] UNCLOS provided a comprehensive treaty detailing the rights and responsibilities of States in claiming maritime zones, as well as the use and conservation of the resources within the ocean as a whole.[303]

The EEZ also provides States with additional freedoms, such as the ability to construct artificial islands, installations and structures.[304] Any artificial islands, installations and structures constructed by the coastal State upon the EEZ will be the exclusive jurisdiction of the State concerned.[305] The coastal State can establish a safety zone around the artificial islands, installation or structure. Still, it may not extend in excess of 500 metres from the structure's

[294] JC Phillips 'The Exclusive Economic Zone As a Concept in International Law' (1977) 26 (3) *The International and Comparative Law Quarterly* 585.
[295] United Nations Convention on the Law of the Sea (A Historical Perspective) (note 276 above).
[296] *Ibid.*
[297] *Ibid*.
[298] *Ibid*.
[299] *Ibid.*
[300] *Ibid*.
[301] *United Kingdom v. Iceland* 1972, ICJ Reports 1972, p.12; United Nations Convention on the Law of the Sea (A Historical Perspective) (note 276 above).
[302] *Ibid*.
[303] *Ibid*.
[304] Article 60 (1), UNCLOS.
[305] Article 60 (2), UNCLOS.

outer edge.[306] A State may exercise customs, fiscal, health, safety and immigration laws and regulations within these zones.[307] States may not use the artificial islands, installations and structures to claim a territorial sea and maritime zones as they do not affect the existing maritime zones.[308] This means that these artificial installations and structures cannot be utilised as a means to draw straight baselines or claim archipelagic baselines.

3.2.5 The Continental Shelf

The continental shelf is described in a technical sense by geologists as:

> 'The continental margin which is between the shoreline and the shelf break or, where there is no noticeable slope, between the shoreline and the point where the depth of the superjacent water is approximately between 100 and 200 metres.'[309]

The continental shelf *provisio* is articulated in Article 76 of UNCLOS and is available to all coastal States, but this has not always been the case. Islands were not expressly provided continental shelves prior to the Convention on the Territorial Sea and Contiguous Zone.[310] In 1951 it was established that the continental shelf should include 'submarine areas around islands'.[311] The difficulty with including islands in the continental shelf provisions was the discussion regarding whether mainlands and sub-islands should have their own continental shelf area. The conclusion was that every island, regardless of its locality, size or political status, would have a continental shelf.[312] The original text of Article 1 of the 1958 Convention on the Continental Shelf defined the continental shelf as follows:

> 'For the purpose of these articles, the term "continental shelf " is used as referring (a) to the seabed and subsoil of the submarine areas adjacent to the coast but outside the area of the territorial sea, to a depth of 200 metres or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas; (b) to the seabed and subsoil of similar submarine areas adjacent to the coasts of islands.'

Article 2 of the 1958 Convention on the Continental Shelf provided coastal States with 'sovereign rights' to explore and exploit the natural resources in this area. The sovereign rights

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[306] Article 60 (5), UNCLOS.
[307] Article 60 (2), UNCLOS.
[308] Article 60 (8), UNCLOS.
[309] 'The continental shelf' *United Nations, Commission on the Limits of the Continental Shelf* available at *https://www.un.org/depts/los/clcs_new/continental_shelf_description.htm#:~:text=The%20term%20%22continental%20shelf%22%20is,between%20100%20and%20200%20metres.* (accessed 26 January 2023).
[310] Convention on the Territorial Sea and the Contiguous Zone, Date of Adoption 29 April 1958, UNTS 516 p. 205, (entered into force 10 September 1964). HW Jayewardene *The Regime of Islands in International Law* (2020) 13.
[311] *Ibid* 14.
[312] *Ibid* 14.

within the continental shelf were also stipulated to be exclusive. If the continental shelf is not explored or exploited by the coastal State that possesses it, other coastal States may not take over these rights.[313]

The continental shelf in Article 76 of UNCLOS includes the seabed and the subsoil and extends 200 nautical miles in instances where the edge of the continental margin does not extend beyond that.[314] Suppose the continental margin extends beyond 200 nautical miles. In that case, the coastal State can delineate the continental shelf up to a maximum of 350 nautical miles; however, a continental shelf should not exceed 350 nautical miles in length from the baseline.[315] The maximum limit of 350 nautical miles may be considered for exceptional cases, and Article 76 provides limitations on this. For instance, the continental shelf delineation cannot extend in excess of 100 nautical miles from the isobath at 2500 metres.[316] The isobath is defined as the line connecting the ocean's depth at 2500 metres.[317] Where the straight baseline is used to delineate the continental shelf, the straight lines drawn cannot extend in excess of 60 nautical miles in terms of both latitude and longitude.[318]

Article 77 provides the rights that the State possesses over the continental shelf, including exploring the natural resources within it and exploiting them for their economic potential.[319] The rights of coastal states over the resources within the continental shelf are exclusive, and any other State that may want to explore or exploit these resources may only do so with the permission of the coastal State concerned.[320] The rights that a State maintains over its continental shelf do not extend over the air space of the waters, and a State cannot exercise rights within this maritime zone in a manner that interferes with the rights and freedoms of other States in terms of the convention.[321]

The continental shelf is perhaps one of the most complex maritime zones to consider regarding rising sea levels and climate change. This is because the continental shelf is not only strictly measured from the baseline of a coast, but it requires more complex considerations when it exceeds 200 nautical miles. In order to claim a continental shelf in excess of the upper limit of

[313] Article 2 (2), Convention on the Continental Shelf.
[314] Article 76 (1), UNCLOS.
[315] Article 76 (5), UNCLOS.
[316] Article 76 (5), UNCLOS.
[317] Article 76 (5), UNCLOS.
[318] Article 76 (7), UNCLOS.
[319] Article 77 (1), UNCLOS.
[320] Article 77 (2), UNCLOS.
[321] Article 78 (1), UNCLOS.

200 nautical miles, the State concerned has to make a submission to the CLCS.[322] The CLCS is then tasked with considering the data and material that has been submitted by the coastal State in order to make recommendations to coastal States on the outer limits of their continental shelf.[323] The recommendations are then made by the CLCS, which comprises 21 scientists, and these recommendations are considered final.[324] Due to the final and binding nature of the CLCS recommendations, a finding of this nature would be permanent, resulting in the fixing of the outer limits of the continental shelf.[325] This creates the certainty that is otherwise lacking in terms of the baselines and outer limits of ordinary maritime zones. However, such clarity is only available when the continental shelf exceeds 200 nautical miles, and this is reserved for only this maritime zone.

3.3 The Effect of Sea-Level Rise on Islands

So, what is the effect of rising sea levels on the maritime entitlements of SIDS? The regime of islands and the maritime zones that may be claimed by a State around an island is dependent upon an island being above water at high tide in terms of Article 121 (1) of UNCLOS. Where an island, as a result of rising sea levels, is no longer above the water at high tide, it will be reclassified as a rock in terms of Article 121 (3) of UNCLOS. Similarly, where an island can no longer sustain human habitation or economic life, even where it remains partially above high tide, it may still be reclassified as a rock. Article 121 (3) explicitly provides that rocks cannot claim an exclusive economic zone or a continental shelf. This provision implies that rocks claimed by a State may still have access to a territorial sea and the contiguous zone. However, the territorial sea and continental shelf are less extensive than the EEZ and continental shelf, with much less economic potential. Therefore, the value and the resources that an EEZ and continental shelf may provide to a SIDS living in exile, on freehold territory, or on artificial islands would be greatly reduced.

Whilst there is precedent for the general disregard of provisions of Article 121 of UNCLOS, this does not necessarily mean that the provisions are meaningless. Schofield notes that if State practice has rendered the provisions of Article 121 (3) meaningless, this would most certainly be beneficial for SIDS.[326] However, the *South China Sea Arbitration* provides some opposition

[322] Commission on the Limits of the Continental Shelf (CLCS) Purpose, functions and sessions available at *https://www.un.org/depts/los/clcs_new/commission_purpose.htm#:~:text=The%20purpose%20of%20the%20Commission,nautical%20miles%20(M)%20from%20the* (accessed 31 May 2022).
[323] *Ibid*.
[324] *Ibid*.
[325] C Schofield (note 236 above) 177.
[326] JG Stoutenburg (note 1 above) 90.

to the general idea that these provisions may be disregarded. The award from the Tribunal in the *South China Sea Arbitration* may provide us with some guidance on how the provisions of Article 121 (3) may be applied in practice to maritime entitlements in order to determine whether islands and may be used by States to claim extensive maritime zones.

During the *South China Sea Arbitration*, the Tribunal used Article 121 (3) to reduce many maritime features that China asserted were islands to rocks in the legal sense. In the Tribunal's view, Scarborough Shoal, Johnson Reef, Cuarteron Reef, Fiery Cross Reef, Gaven Reef (North) and McKennan Reef are all rocks in line with the definition of Article 121 (3).[327] There were a multitude of reasons that the Tribunal undertook these reclassifications. We will consider these aspects below to provide an overview of the workings of the Tribunal in coming to these conclusions.

The Tribunal noted on Scarborough Shoal that the maritime high tide feature had only small protrusions above high tide that were insufficient to sustain human habitation in its natural State.[328] Furthermore, the economic activity near the feature in the form of fisheries had no link to the high-tide feature; the shoal could not sustain economic life.[329] On the other hand, Johnson Reef had installations constructed on the previously submerged natural reef.[330] Whilst there is a human presence on the reef, the presence is entirely dependent upon external supplies. Furthermore, before the presence of China upon the reef in 1988, there was no history of human habitation on the maritime feature.[331] Although Johnson Reef is currently above high tide, this is due to artificial construction on the maritime feature. As such, the Tribunal asserted that in its natural form, the feature is a rock and not an island.[332] Similarly, Cuarteron Reef was found to be above high tide and considered a high tide feature. However, China has also conducted reclamation activities by dredging and elevating the feature. In this instance, humans were present. Still, this human activity only began in 1988 when China occupied the territory, and the people who reside thereon are completely dependent on external supplies.[333] Perhaps more significantly, the Tribunal assessed the Spratly Islands (the Islands), where China have stationed military and governmental officials and significantly modified the maritime feature from its original natural condition.[334] The Tribunal assessed not just the evidence provided to

[327] *South China Sea Arbitration* (note 49 above) 232-235.
[328] *Ibid* 232.
[329] *Ibid* 232.
[330] *Ibid* 232.
[331] Ibid 233.
[332] *Ibid* 233.
[333] *Ibid* 233-234.
[334] *Ibid* 237.

it by the parties to the Arbitration but also viewed external sources to ensure it extensively analysed the issue.[335] The Tribunal also reviewed the presence of portable fresh water on the Spratly Islands, the vegetation and biology, the soil and agriculture potential of the Islands, the presence of fishermen, and the commercial operations thereon.[336] First, the Tribunal noted that historically, freshwater resources on the island had shown the ability to support small groups of people.[337] Whether there are still abundant natural water reserves on the island today is unknown, but in its natural condition, the Islands had fresh water.[338] The islands were also previously considered forested, with papaya and banana trees.[339] The Tribunal noted that the islands may have the capacity to cultivate crops but that this capacity would be limited to Itu Aba. The other islands would be unable to yield substantial crops to support any population of sizable proportions.[340] The Tribunal further stated that fishermen have temporarily resided on the islands to conduct fishing activities historically and that there is a trade and supply network in the present day.[341] However, the number of individuals gaining a livelihood within this area has greatly diminished.[342] The Tribunal concluded that none of the Spratly Islands are capable of human habitation and sustaining economic life.[343] Consequently, the Tribunal concluded that the Spratly Islands could not claim an exclusive economic zone or a continental shelf as they are not considered islands in line with the UNCLOS.[344] The Tribunal expressed:

> 'The introduction of the exclusive economic zone was not intended to grant extensive maritime entitlements to small features whose historical contribution to human settlement is as slight as that. Nor was the exclusive economic zone intended to encourage States to establish artificial populations in the hope of making expansive claims, precisely what has now occurred in the South China Sea. On the contrary, Article 121(3) was intended to prevent such developments and to forestall a provocative and counterproductive effort to manufacture entitlements.'[345]

Despite this ruling, China has not altered its claims and has arguably increased land reclamation activities in the South China Sea.[346] In the case of the *South China Sea Arbitration*, it appears

[335] *Ibid* 237.
[336] *Ibid* 237-250.
[337] *Ibid* 240.
[338] *Ibid* 240.
[339] *Ibid* 244.
[340] *Ibid* 245.
[341] *Ibid* 246.
[342] *Ibid* 246.
[343] *Ibid* para 621.
[344] *Ibid* 254.
[345] *Ibid* para 621.
[346] P Jakhar 'Whatever happened to the South China Sea ruling?' (2021) *The Interpreter* available at *https://www.lowyinstitute.org/the-interpreter/whatever-happened-south-china-sea-ruling* (accessed 25 July 2022).

that the Philippines has not enforced the ruling as the State believes that it is more important for them to have good relations with the government of China than to enforce a ruling of this nature.[347] The ruling has had little positive effect on the Philippines and may deter other countries from asserting similar claims against China or other powerful countries.[348]

However, the *South China Sea Arbitration* case has a far-reaching effect on island States that may lose territory due to rising sea levels. SIDS have access to vast maritime zones with extensive economic potential. Suppose the territory they possess no longer fits the criteria for an island. In that case, it is not beyond the realm of possibility that the maritime zones surrounding these areas may be challenged by States wishing to access the EEZ and continental shelf of these areas for economic benefit. This possibility is heightened when powerful countries are situated in close proximity to SIDS. Declassifying a maritime feature from an island to a rock would result in the loss of the EEZ and continental shelf adjacent that would become part of the high seas. From the *South China Sea Arbitration*, it is clear that there is a heavy onus to prove that a maritime feature can be considered an island when it has become a rock incapable of housing a human population.

Therefore, the ruling in the *South China Sea Arbitration* has some important implications. Suppose a SIDS falls below high tide, and the island State requires artificial modification of its territory to sustain its population and survive. In that case, it is possible that it may no longer possess island territory that is naturally formed in terms of international law. Whilst there would be evidence of previous human settlement before submergence, it is a high onus to prove that the possibility of human habitation remains. In addition, should the population of SIDS be relocated to an alternative location due to climate change, the State would no longer fulfil the element of human habitation required for island territory under UNCLOS. Without human habitation and economic activity, a maritime feature would no longer be considered an island capable of claiming an EEZ or continental shelf. A SIDS could not claim an EEZ or a continental shelf without human habitation or economic activity upon the territory. It asserted that it is unlikely that there will be economic activity on an island without a fully settled human community. Economic ventures without a population would almost certainly be limited to the waters surrounding the island and somewhat disconnected from the island itself. It is insufficient to establish a connection between the waters and a population that relies thereon.

[347] *Ibid*.
[348] *Ibid*.

As a result, the State would no longer be able to claim the revenue from the extensive maritime zones it once had access to.

3.4 Unique Challenges to Third World States

Many SIDS have historically faced difficulties inclusive of colonisation and threats to their self-determination, as highlighted in Chapter Three. The latest challenge facing these States in the form of sea-level rise is another fight that SIDS face for survival physically and within modern international law. Although rising sea levels is the latest battle for SIDS, the scars from colonialism and general historical marginalisation within international law still linger for some of these States. By way of example, the Marshall Islands, under the trusteeship of the USA set up by the UN Charter between 1946 and 1958, was a nuclear testing ground.[349] The USA set off 67 atomic and thermonuclear bombs, leaving radioactive fallout on 22 of the atolls in this area.[350] This nuclear testing resulted in the displacement of many indigenous people and the destruction of ancestral land.[351] In addition, immense human suffering resulted from the USA's actions, including congenital disabilities and cancer.[352] This is also not a unique experience; many other island States within the Pacific region were victims of nuclear testing. In a letter from Nauru in relation to the *Legality of the Threat or Use of Nuclear Weapons (Request for Advisory Opinion),*[353] it was stated that the Pacific was the scene of in excess of 250 nuclear explosions for testing purposes, affecting the health, wildlife and environment of the people living in the Pacific, and the effects will be felt for generations.[354] The Pacific people have already suffered so much due to their history of colonialism.

Currently, the Marshall Islands and other Pacific States stand to lose their homeland because of rising sea levels. The consequence of the potential declassification of islands to rocks or LTEs and the possible complete submergence of island territory is a new way that international law may indirectly perpetuate injustice toward SIDS. The predicament of SIDS today can be viewed as the continued systematic perpetuation of prejudice against these States. We must understand the issue facing SIDS in the context of their history.

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[349] I Falefuafua Tapu 'Finding Fonua: Disappearing Pacific Island Nations, Sea-level rise and Cultural Rights' (2020) 62 *Arizona Law Review* 793. See also *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 2016*, p. 833 para 16.

[350] BR Johnston 'Nuclear Disaster The Marshall Islands Experience and Lessons for a Post-Fukushima World' in E Deloyghrey *et al Global Ecologies and the Environmental Humanities: Postcolonial Approaches* (2015) 140.

[351] I Falefuafua Tapu *supra* 793.

[352] BR Johnston *supra* 141, 142.

[353] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, 1. C.J. Reports 1996, p. 226.

[354] Letter dated 15 June 1995 from counsel appointed Nauru, together with Written Statement of the Government of Nauru *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, 1.C.J. Reports 1996, p. 226 4 – 5.

The States of Mauritius, Seychelles, Maldives, Madagascar and Comoros are all islands States within the Indian Ocean that have a history of colonialism.[355] Some of these islands had indigenous habitation that pre-dated colonisation, and some were first inhabited upon colonisation.[356] Many Pacific Islands suffered a similar fate. SIDS such as Samoa, Cook Islands, Niue, Naura, Papua New Guinea, Fiji, Tonga, Micronesia, Ellice Islanders (now Tuvalu), Gilbert Islands (now the Republic of Kiribati), Banaba Islanders, Vanuatu, Marshall Islands, and Palau are all examples of Pacific Islands that have a long history of colonisation.[357] French Polynesia is an example of a Pacific island still considered a non-self-governing territory under the administering power of France.[358] The UN notes that there are still 17 non-self-governing territories with under two million people.[359] These non-self-governing territories are predominantly island States and include Anguilla, Bermuda, British Virgin Islands, Cayman Islands, Falkland Islands (Malvinas), Montserrat, Saint Helena, Turks and Caicos Islands, United States Virgin Islands, America Samoa, Guam, and New Caledonia.[360] While some of these island States are not considered SIDS, it is important to illustrate the deep-rooted link between island States and the perpetuation of injustice within international law.

In 2016, the Special Political and Colonization Committee noted at the 56th Anniversary of Decolonisation that there is still work to do to ensure the end of colonisation.[361] The continued fight for the end of colonisation and the reality of the consequences of climate actions for Third World States must be at the forefront of our minds when we consider mechanisms to remedy the effects of rising sea levels.[362] If we are aware of the injustices previously perpetuated against these States, we can accept that SIDS are vulnerable to the international legal consequences that come along with the rise in sea levels and the absence of clarity. As such, it is argued that these States require protection against further injustice.

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[355] J Houbert ''The Indian Ocean Creole Islands: Geo-Politics and Decolonisation' (1992) 30 (3) *The Journal of Modern African Studies* 467 - 468.
[356] *Ibid* 468.
[357] P de Deckker 'Decolonisation Processes in the South Pacific Islands: A Comparative Analysis Between Metropolitan Powers' (1996) 26 *VUWLR* 357 – 370.
[358] 'Non-Self-Governing Territories' *United Nations* available at *https://www.un.org/dppa/decolonization/en/nsgt* (accessed 3 August 2022).
[359] *Ibid*.
[360] *Ibid*. 'About Small Island Developing States' *United Nations* available at *https://www.un.org/ohrlls/content/about-small-island-developing-States* (accessed 3 August 2022).
[361] 'Marking Fifty-Sixth Anniversary of Decolonization Declaration, Special Committee Calls on Member States to Help End Colonial Rule' *United Nations General Assembly Press Release* (2016) available at *https://press.un.org/en/2016/gacol3301.doc.htm* (available 3 August 2022).
[362] The reference to 'Third World States' will be understood as those States that were previously colonised.

SIDS, due to the lack of access to resources, sea-level rise exposure, and their remote localities, are vulnerable to more powerful States. The history of nuclear testing and the submissions of some notable SIDS illustrate this reality. In its letter containing written submission in the *Legality of the Threat or Use of Nuclear Weapons (Request for Advisory Opinion)* Nauru highlighted that the legal opinion of the ICJ would provide much-needed 'assistance to small States in their efforts to protect themselves from the threat or use of nuclear weapons.'[363] A similar submission was made by Samoa.[364] Whilst these statements were made in relation to the issue of nuclear weapons, the same applies to the issue of rising sea levels. These SIDS need protection in international law to ensure their survival.

Okafor notes from the viewpoint of TWAIL scholars:

> 'Thus, the international law, which has so often facilitated the achievement of the goals of the much more powerful societies and states, was extended throughout the globe as a result of the colonial encounter. As such TWAIL scholars are convinced that understanding and exposing the technologies and colonial devices of international law is crucial to achieving an understanding of the nature of the current legal regime.' [365]

Whilst the post-colonial way international law perpetuates injustices to the third world may not be deliberate, it is part and parcel of a long tradition. The historical perspective of international law and colonialism is important in understanding how international law facilitates the difficulties that Third World States face.[366] The lack of action for SIDS in the face of rising sea levels highlights the inequalities of international relations. As Okafor notes, 'third-world peoples deserve no less dignity, no less security, and no less rights or benefits from international action than do citizens of Northern States'.[367] Therefore, it is essential for the international community to take steps toward securing the future of SIDS and, in doing so, prevent further prejudice within international law.

The consequences of climate change disproportionately affect SIDS even though these States do not contribute in large proportions to carbon emissions. Therefore, when considering legal

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[363] Letter dated 15 June 1995 from counsel appointed Nauru, together with Written Statement of the Government of Nauru *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, 1.C.J. Reports 1996, p. 226 7.
[364] Letter dated 15 June 1995 from the Permanent Representative of Samoa to the United Nations, together with Written State of the Government of Samoa Letter dated 15 June 1995 from counsel appointed Nauru, together with Written Statement of the Government of Nauru *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, 1. C.J. Reports 1996, p. 226 4.
[365] OC Okafor 'Newness, Imperialism, and International Legal Reform in Our Time: A TWAIL Perspective' (2005) 43 *Osgoode Hall Law Journal* 177.
[366] *Ibid* 178.
[367] *Ibid* 179.

mechanisms to remedy the inadequacies of international law in relation to sea-level rise, SIDS should be considered at the forefront of this battle. Furthermore, we should consider mechanisms to remedy the harsh consequences of international law for SIDS in the face of rising sea levels and propose adequate solutions that may ensure the security of these States well into the future.

4. The Possibility of Amending UNCLOS to Remedy its Insufficiencies in Light of Sea-Level Rise

The amendment to the provisions of UNCLOS to effect the change required in international law for SIDS would include amending the Article 60 provisions on artificial islands, the regime on islands in terms of Article 121, and the provisions on baselines including Article 5, Article 7, Article 8, Article 14, and Article 4 on the outer limit of the territorial sea. An amendment to UNCLOS would need to account for the fixing of baselines despite rising sea levels and, as a result, the outer limits of the maritime zones. The difficulties associated with the amendment procedures of UNCLOS are outlined below as well as the challenges associated with these amendments.

The UNCLOS contains amendment procedures in Articles 311 – 316. Article 311 (2) provides that the Convention should not alter the rights and obligations of States Party to agreements that are compatible with the Convention. In terms of Article 311 (3) agreements may modify or suspend operations of the Convention relating to the relations between two or more States Parties provided they are compatible with the object and purpose of the Convention. Further agreements should not affect the basic principles of the UNCLOS or the enjoyment of the rights and performance of obligations thereunder. Agreements relating to two or more States Parties modifying or suspending the regulations in UNCLOS must be deposited with the UN to notify other States Parties.[368]

Article 312 allows amendments wherein a State Party may write to the Secretary-General of the UN, propose amendments to the Convention, and request a conference to be convened.[369] This amendment process relates to any matters other than those in the Area.[370] Freestone and Oude Elferink note these amendments must be specific when drafted and sent to the Secretary-General.[371] The Secretary-General must then circulate the communication to all States Parties,

[368] Article 313 (4), UNCLOS.
[369] Article 312 (1), UNCLOS
[370] This includes the seabed, ocean floor, and the subsoil thereof.
[371] D Freestone AG Oude Elferink 'Flexibility and Innovation in the Law of the Sea – Will the LOS Convention Amendment Procedures Ever be Used?' in AG Oude Elferink *Stability and Change in the Law of the Sea: The Role of the LOS Convention* (2005) 176.

and not less than one-half of the States Parties must reply favourably to convene the conference. The decision-making procedure to amend UNCLOS at a conference must be the same as the Third United Nations Conference on the Law of the Sea or may be decided by the conference.[372]

In terms of Article 313 (1) of UNCLOS, a State Party may write to the Secretary-General proposing an amendment to UNCLOS by a simplified procedure in the absence of a conference relating to matters other than those in the Area. The Secretary-General must then circulate the communication to all States Parties to the Convention. Should a State Party, within 12 months from the date of circulation of the amendment, object to the amendment, it will be considered rejected and States Party must be notified thereof.[373] If there is no objection received, the proposed amendment will be considered to be adopted by simplified procedure, and all States Parties should be notified of this.[374] Once any amendments are adopted they must be open for signature by States Party to the Convention from the date of adoption at the Headquarters of the United Nations in New York.[375] In order for amendments to enter into force in terms of Article 316 (1) of UNCLOS, two-thirds of States Parties or 60 State Parties are required to accede to the amendment by way of ratification, whichever of the two is greater. The amendment will enter into force on the thirtieth day following the deposition of the instrument with the required ratification or accession.[376] An amendment may also prescribe that larger numbers are required in ratifications or accessions for the amendment to come into force.[377]

The amendment procedures in UNCLOS are extremely cumbersome. Should even one State Party reject a request for amendment in Article 313, the amendment would fail. Similarly, in the absence of at least half of the States Parties to UNCLOS consenting to an Article 312 amendment, no conference will be convened. Any amendment to the Convention relating to the attribution of maritime zones and territory to artificial islands may be in contravention of the existing provisions of UNCLOS and must be constructed carefully.[378] Freestone and Oude

[372] Article 312 (2), UNCLOS.
[373] Article 313 (2), UNCLOS.
[374] Article 313 (3), UNCLOS.
[375] Article 315, UNCLOS.
[376] Article 316 (1), UNCLOS.
[377] Article 316 (2), UNCLOS.
[378] M Gagain 'Climate Change, Sea-level rise, and Artificial Islands: Saving the Maldives' statehood and Maritime Claims Through the 'Constitution of the Oceans' (2012) 23 (1) *Colo. J. Int'l Envtl L. & Pol'y* 107.

Elferink assert that amending UNCLOS is complex due to the political compromises that were made for the 'package deal' that is UNCLOS balancing the demands of groups of States.[379]

Considering the difficulties involved in the agreement of UNCLOS, an amendment to the Convention would be unlikely. As Shibata notes in the drafting of UNCLOS, the preparatory work was not given to the ILC as the issue spanned politics, economics, and strategic considerations, amongst other aspects which could not strictly be dealt with by the ILC.[380] Additionally, with UNCLOS, it is crucial to consider that the first negotiating text was drafted after the third session of the Conference in 1975 was complete.[381] In essence, the Conference that ensued resulted in a draft text rather than a mechanism for negotiating an existing draft, as an initial draft of the Convention could not be produced prior to the Conference.[382]

As such, within Chapter Six, an additional proposal will be made for creating a new negotiating text, which is preferred over amending any existing convention to remedy the difficulties that sea-level rise creates for the maritime zones of SIDS. Among the reasons for this proposal is that the complexities that stem from rising sea levels pose threats to SIDS that exceed complexities relating to maritime zones and include difficulties maintaining statehood. Consequently, a new convention will allow parties to negotiate a way forward, considering the political complexities and the necessity for the development of international law.

5. Conclusion

The SIDS globally are at risk of losing vast maritime zones as a result of rising sea levels. Rising sea levels, lack of access to freshwater reserves, and insufficient food resources are all examples of the daily consequences of sea-level rise being faced by people living within SIDS. The UNCLOS provides for the drawing of baselines that are currently considered ambulatory in nature. State practice, primarily from the Pacific region, is emerging and supporting the fixing of baselines. However, more should be done to ensure the certainty and stability of maritime zones for SIDS. It is argued that preserving baselines is a step forward for SIDS and

[379] D Freestone AG Oude Elferink (note 28 above) 163. As Freestone and Oude Elferink note: 'States have systematically avoided the formal Amendment procedure of the Convention despite the time and effort that went into crafting its systems of checks and balances. The effort was deemed worthwhile in order to maintain the carefully balanced 'package deal' in which the demands of some groups of states were reflected in the agreement in return for the inclusion of other provisions favoured by other groups. These political compromises could be undermined by selective amendments.'

[380] A Shibata 'International Law-Making Process In The United Nations: Comparative Analysis of UNCED and UNCLOS III' 24 (1) (1993) *California Western International Law Journal* 33.

[381] *Ibid* 37.

[382] *Ibid* 37.

coastal States in creating certainty; it does not account for all of the difficulties that may result from rising sea levels for SIDS.

Where sea levels continue to rise at an inordinate rate, it may lead to the relocation of the populations that reside in many SIDS, and, in certain circumstances, it may result in the total inundation of island territory. According to the UNCLOS, an island needs to sustain human habitation and economic life in order for a State to claim vast maritime zones around the territory. It is argued that the coastline is the basis for drawing baselines from which the outer limits of maritime zones may be delineated. Article 2 of the UNCLOS expressly states that the maritime zones extend 'beyond its land territory'. It has been argued that the coastline's presence is essential for maintaining maritime zones. As such, the rise in sea level threatens the ability of SIDS to continue to possess maritime zones. This consequence of the rise in sea levels globally for SIDS should be understood within their economic context. SIDS's maritime zones may be helpful to these States even when they are forced to live in exile or relocate to the artificial territory. The *South China Sea Arbitration* provides us with an example of how a court or Tribunal may reclassify maritime features from islands to rocks or even LTEs in line with international law. As SIDS claim vast maritime zones, they may be vulnerable to disputes over territory where the island territory they claim, and exercise sovereignty over can no longer be considered islands under UNCLOS. It is important to understand that reclassification of a maritime feature from an island to a rock or LTE would mean that the vast maritime zones that were once under the control of SIDS would be appropriately reduced. For instance, if an island is reclassified into an LTE, the vast maritime zones that were previously claimed around the island territory would be considered part of the high seas. This consequence of rising sea levels would result in undue benefits to States globally at the expense of SIDS.

It is necessary to consider remedial action to provide a potential solution for SIDS to remedy the unjust consequences of international law due to rising sea levels. Currently, there is no certainty for SIDS, and the consequences of sea-level rise are becoming increasingly apparent. Remedial action should be suggested to remedy these insufficiencies within international law for SIDS. These remedies should not just be physical; legal remedies should also be contemplated to account for the unique position SIDS has within international law. The recommendations in Chapter 6 will consider the complexities discussed in the chapter above.

CHAPTER FIVE

Examining the Legal Consequences of the Use of Artificial Islands and Artificially Modified Natural Territory to Mitigate the Effects of Sea-level Rise

1. Preface

Artificial islands may, in some instances, be the saving grace for SIDS. Using artificial islands to establish safe havens against sea-level rise and extreme sea-level events may be the only lifeline for SIDS. The rapid rate at which sea levels are rising and the increase in extreme sea-level events may result in the loss of much of the natural territory claimed by SIDS within the next century. However, not all SIDS have taken the steps to establish artificial islands. In recent years, artificial islands have garnered negative attention in international law. Clive and Richard Schofield note that China's extensive artificial island building has drawn attention to the issue of artificial islands.[1] Widespread artificial island construction by China has taken place within the South China Sea, which is considered an essential body of water, as it is estimated that one-third of global shipping passes through this water.[2] As a result of this construction, China has laid claims to large portions of the South China Sea. These claims have been disputed as the South China Sea borders many other States that may have overlapping claims, including the Philippines, Malaysia, Taiwan, Vietnam, and Brunei.[3] Perhaps the most contentious aspect of this dispute is that China has constructed military facilities on islands and reefs that they occupy within this area.[4]

Consequently, these artificial islands enable China to have a military presence in the area, monitor the activities of other claimants within the region, and provide a strong indication of China's presence there.[5] In addition, China claims vast maritime zones around these artificial islands despite these maritime features not being considered eligible for use in claiming

[1] C Schofield R Schofield 'Claims to and From Low-Tide Elevations and Artificial Islands under the Law of the Sea' (2016) 2009(4) *Asia-Pacific Journal of Ocean Law and Policy* 38.
[2] M Raymond DA Welch 'What's Really Going On in the South China Sea?' (2022) 41 (2) *Journal of Current Southeast Asian Affairs* 215.
[3] European Parliamentary Research Service 'European Parliamentary Briefing on China's Compliance with Selected fields of International Law' available at *https://www.europarl.europa.eu/RegData/etudes/BRIE/2021/696207/EPRS_BRI(2021)696207_EN.pdf* (accessed 18 August 2023) 8.
[4] *Ibid* 9.
[5] M Raymond DA Welch (note 2 above) 221.

maritime territory in UNCLOS.[6] China continues to assert claims to vast maritime zones despite the Permanent Court of Arbitration ruling against the extensive claims in the case of *The Republic of the Philippines v The People's Republic of China*.[7] *In casu,* as highlighted in Chapter Four, it was found that many of the islands claimed by China to attract large maritime zones are LTEs or rocks, despite significant artificial modification of these maritime features to ensure that they are above high tide.[8] This ruling should have had far-reaching effects on the maritime zones that China has claimed from the presence of these territories. LTEs, rocks, and artificial islands cannot be used to draw baselines from which an EEZ and Continental Shelf may be claimed. Excessive claims to maritime territory in the absence of validity bring negative attention to the use of artificial islands. In reality, artificial islands may be considered positively as a means to save low-lying islands and SIDS. Artificial islands may be seen as a remedy in the event of total inundation of land territory or where land territory becomes uninhabitable.

As part of the analysis within this Chapter, it is important to understand first what an artificial island is, the entitlements of an artificial island in terms of the UNCLOS, whether artificial islands can be considered territory that island States may exercise sovereignty over, and the utilisation of artificial islands to maintain maritime zones for SIDS prospectively. From the outset, it is essential to distinguish between artificial islands that are built within the maritime zones of coastal States and the artificial modification of existing maritime territory that may be considered LTEs or rocks before modification. These issues are distinct as the maritime zones a State may claim from each of these maritime features as per UNCLOS differ significantly. Therefore, in this Chapter, we will consider both artificial islands built within the territorial sea or EEZ of a coastal State, as well as the artificial modification of territory such as LTEs or rocks to establish land territory above the water at high tide. We will then consider the nature of artificial islands in terms of considerations of territory and sovereignty, and the use of artificial islands to sustain maritime zones. Lastly, we will consider the unique circumstances of the Third World in relation to this topic.

2. Artificial Islands Under International Law

The definition of islands in terms of international law did not always expressly exclude artificial islands, as explained in Chapter Four of this thesis. Islands were initially defined

[6] *Ibid* 221.
[7] *The Republic of the Philippines and The People's Republic of China* PCA Case No 2013-19.
[8] *Ibid* 260.

within the Draft Convention deliberated on in the Acts of the Conference for the Codification of International Law on the territorial sea held at the Hague as follows:

> 'Every island has its own territorial sea. An island is an area of land, surrounded by water, which is permanently above high-water mark.'[9]

During the negotiations on the Draft Convention, the second sub-committee from the Hague Conference for the Codification of International Law, it was noted that the definition of the island was not intended to exclude artificial islands if these islands were 'true portions of the territory and not merely floating works, anchored buoys etc.'.[10] Lewis notes similarly that before UNCLOS, some artificial islands could generate a territorial sea as there was less distinction between naturally formed and artificial islands.[11] The USA proposed the addition of the word 'naturally formed' to define the island under UNCLOS.[12] For the USA, the idea that artificial islands or technical installations could attract a territorial sea, as provided for in earlier drafts, was undesirable.[13] The proposal by the USA to include the term naturally formed in defining an island was accepted with no debate from other States.[14] While the term naturally formed was intended to create clarity, Root notes that no test is provided for 'naturally formed' in terms of UNCLOS.[15]

Additionally, there has not been any provision for a test of this nature by the ICJ or the ITLOS.[16] The definition and history of the island State have been comprehensively discussed in Chapter Four; therefore, this will not be restated in detail. The issue of defining an artificial island has not yet been analysed, and the scholarship within this area is limited. However, it is crucial to consider the literature surrounding defining artificial islands and how the law distinguishes these islands from those that are naturally formed.

Within UNCLOS, artificial islands are governed by Article 60 rather than Article 121. Article 60 of UNCLOS provides that a coastal State has a right to 'construct and authorize' and regulate the construction, operation, and use of artificial islands. In addition, States can construct

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[9] League of Nations, Acts of the Conference for the Codification of International Law, Held at the Hague from March 13th to April 12th, 1930, Vol. I Plenary Meetings. Appendix II, Report of the Sub-Committee No. II., C. 351.M. 145. 1930. V., 133.
[10] *Ibid* 219.
[11] R Lewis 'The Artificial Construction and Modification of Maritime Features: Piling Pelion on Ossa' (2021) 52 (3) *Ocean Development & International Law* 241.
[12] *Ibid* 242.
[13] *Ibid* 242.
[14] *Ibid* 242.
[15] JL Root 'Castles in the Sand: Engineering Insular Formations to Gain Legal Rights over the Oceans' (2014) 32 *Chinese (Taiwan) Yearbook of International Law and Affairs* 60.
[16] *Ibid* 2.

artificial islands, installations, and structures that are aimed at allowing coastal States to explore, exploit, conserve and manage natural resources within the limits of Article 56 of UNCLOS.[17] Interestingly, the drafters of the UNCLOS made a distinction between artificial islands and artificial installations and structures in that artificial islands may be constructed for any reason. In contrast, artificial installations and structures are limited to reasons related to Article 56, such as exploring and managing natural resources and other economic purposes.[18] Article 60 further provides that the coastal State will exclusively exercise jurisdiction over the artificial islands, installations, and structures. A coastal State may also establish a 500-metre safety zone around an artificial island, installation, and structure to ensure the safety of navigation around it.[19] The reason for establishing the safety zones must relate to the nature and function of the artificial island, installation or structure, and it may not exceed 500 metres in distance from the outer edge. Ships that navigate the area where an artificial island, installation or structure is located must respect the safety zones of the coastal State and comply with any generally accepted international standards for navigation.[20] A coastal State may not establish the safety zone in an established sea lane.[21] Notably, Article 60 expressly provides that artificial islands, installations and structures are not akin to islands and may not possess a territorial sea.[22] The Article also provides that the presence of an artificial island, installation or structure does not change the delimitation of existing maritime zones, including the territorial sea, EEZ or continental shelf.[23]

In addition to the above, States have a right to jurisdiction over artificial islands in their EEZ. Article 79 states that Article 60 applies *mutatis* mutandis to artificial islands, installations, and structures that are located within the continental shelf of coastal States.

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[17] Article 56 of UNCLOS provides as follows:
In the exclusive economic zone, the coastal State has: (a) sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds; (b) jurisdiction as provided for in the relevant provisions of this Convention with regard to: (i) the establishment and use of artificial islands, installations and structures; (ii) marine scientific research; (iii) the protection and preservation of the marine environment; (c) other rights and duties provided for in this Convention. 2. In exercising its rights and performing its duties under this Convention in the exclusive economic zone, the coastal State shall have due regard to the rights and duties of other States and shall act in a manner compatible with the provisions of this Convention. 3. The rights set out in this article with respect to the seabed and subsoil shall be exercised in accordance with Part VI.
[18] R Churchill V Lowe A Sander *The Law of the Sea* (2022) 267.
[19] Article 60 (3) and Article 60 (4), UNCLOS.
[20] Article 60 (6), UNCLOS.
[21] Article 60 (7), UNCLOS.
[22] Article 60 (8), UNCLOS.
[23] Article 60 (8), UNCLOS.

Article 60 sets out parameters for artificial islands but does not define what an artificial island, installation, or structure comprises. Unlike Article 121, there are no strict requirements for a structure to be considered artificial. Determining whether an island is artificial or natural may not always be clear and may hinge on interpretation.[24] Root notes:

> 'An insular formation that predates mankind would be naturally formed; an offshore oil derrick would be an artificial island. Where along this continuum a formation transitions between artificial and natural is unclear.'[25]

Coastal States have broad powers to establish artificial islands within their EEZ; these powers have genuine limitations within international law. The difficult question to answer then is when an island is considered artificial in nature. Additionally, when may a natural island cross this threshold and be governed by Article 60 of UNCLOS rather than Article 121?

2.1 Defining the Artificial Island

As there is no definition of an artificial island provided for in terms of UNCLOS, we must look to the more ordinary understanding of the words. The term artificial is defined by the Oxford Learner's Dictionary as 'made or produced to copy something natural; not real'.[26] The term island has specific key characteristics, namely that it is an area of land that is surrounded by water and permanently above water at high tide, as provided for in Article 121 of UNCLOS. However, these two terms are not ordinarily defined as one. Papadikos notes there are difficulties determining the juridical status of artificial islands as an artificial island has been both associated with islands and ships.[27]

International courts and tribunals have not deliberated on what is considered an artificial island, installation, or structure. This is perhaps because it may seem obvious or somewhat easy to make such a determination. However, Oude Elferink provides a helpful definition of artificial islands and describes them as 'an area of land that is above water at high tide that is not naturally formed'.[28] The latter definition combines all the essential elements within the definitions of 'artificial' and 'island'. This definition aligns with the research presented within this Chapter and proves helpful in determining how to define an artificial island. However, it will be argued that this definition misses one additional requirement essential for artificial islands under

[24] JL Root (note 15 above) 2.
[25] *Ibid* 2.
[26] 'Artificial' *Oxford Learner's Dictionary* available at *https://www.oxfordlearnersdictionaries.com/definition/english/artificial* (accessed 1 September 2022).
[27] N Papadikos *The International Legal Regime of Artificial Islands* (1977) 89.
[28] AGO Elferink 'Artificial Islands, Installations and Structures' (2013) *Oxford Public International Law* 3.

international law. Essentially, the definition of an artificial island should comprise three elements: (i) the land must be above water at high tide (the island element); (ii) the land is not formed naturally; instead, it was constructed artificially (the artificial element); and (iii) the requirement not mentioned in the above definition is that the island remains above high tide as a result of artificial intervention (the casual element). Therefore, it is proposed that the definition of an artificial island should comprise 'an area of land that is not naturally formed, above water at high tide due to artificial intervention'. Within the broad category of artificial islands, distinctions have been made between artificial islands, installations, and structures, which must be clarified below.

2.1.1 Differentiating between artificial islands, installations, and structures

Lewis emphasises that there is a clear distinction between an artificial island, an installation or a structure.[29] Churchill, Lowe and Sander note that whilst UNCLOS does not provide a definition of 'artificial islands', 'installations, or 'structures', it appears to be the intention of the drafters of the Convention that the terms are distinct in the absence of overlap.[30] However, they assert that the difference lies in the feature's size, permanency and construction method.[31] Lewis provides the example of a 'technical installation', which is an artificial installation or structure built within the maritime zone of a coastal State or on the high seas.[32] Before Article 60 and the implementation of UNCLOS, there was a distinction between technical installations as described herein and those artificial installations and structures such as rigs, platforms or lighthouses.[33] A further distinction was drawn between those structures and islands formed artificially but with sand or rubble.[34] Lewis suggests that the term island signifies a high-tide insular feature.[35]

Saunders refers to the earlier work of Professor Soons in an attempt to understand what artificial islands, installations, and structures are. Soons classifies these structures into the following categories: Floating structures that are anchored to be kept in the same position; fixed structures that are resting on the seafloor; concrete structures; and lastly, structures that are

[29] R Lewis (note 11 above) 243.
[30] R Churchill V Lowe A Sander (note 18 above) 267.
[31] *Ibid* 267.
[32] R Lewis (note 11 above) 243.
[33] *Ibid* 243.
[34] *Ibid* 243.
[35] *Ibid* 243.

established from dumping natural substances, which he refers to as 'artificial islands.'[36] Churchill, Lowe and Sander explain the distinction between these structures as follows:

> 'It seems likely that the main criteria for differentiation are size and permanency, and possibly the method of construction. For example, in the *South China Sea* case the tribunal found that the construction of a fibreglass structure on a reef for the purpose of providing fishermen with shelter from storms was an installation or structure, whereas a concrete platform built up on a low-tide elevation that had a three-storey building, helipad, wharves and fortified seawalls was an artificial island.'[37]

The distinction between artificial islands, installations, and structures within UNCLOS provides a key to understanding the differences in these features. For this study, emphasis will be placed on artificial islands only as a mitigation mechanism for SIDS. This submission is due to historical differentiation that amounted to the limitation within UNCLOS of using artificial installations and structures for economic purposes that remain today. Although Churchill, Lowe and Sander note that the distinction is 'paradoxical', the distinction between these features is essential for this study.[38] For artificial islands to be a viable adaptation mechanism for SIDS, they must be able to house populations. It is outside of the scope of UNCLOS for artificial installations and structures to house long-term settlement of populations in terms of Article 56, which limits the rights of these features equivalent to the EEZ.

To analyse artificial islands comprehensively, we will consider artificial islands that are established upon natural territory, and we will also consider those structures that are completely artificial islands from their inception. The distinction is important as in the former category of an artificial island; there are instances where, despite artificial modification, a naturally formed island may remain as such without being considered an artificial island, and this is the rationale for including the casual element within the definition proposed above. For this reason, artificially altered natural territory requires more deliberation than those artificial islands that are fully artificial.

2.2 Artificially altered natural territory

Where an artificial island is entirely artificial, it is easy to determine that it will be governed by Article 60 of UNCLOS, allowing the coastal or island State the ability to claim only a safety

[36] I Saunders 'Artificial Islands in International Law' (2019) 52 *Vanderbilt Journal of Transnational Law* 649; AHA Soons 'Artificial Islands and Installations in International Law' (1974) *Law of the Sea Institute, University of Rhode Island, Occasional Paper No. 22* 1–2.
[37] R Churchill V Lowe A Sander (note 18 above) 67.
[38] *Ibid* 268.

zone around such structure. The situation becomes more complicated when the natural territory is artificially altered, as this may call into question the entitlements of the structure in its natural form.

The general rule is that artificially amending territory may not extend existing claims to maritime zones, as noted in the *South China Sea Arbitration* 'The status of a feature must be assessed on the basis of its natural condition.'[39] For instance, an LTE cannot be transformed into an island under Article 121 by way of land reclamation or human efforts.[40] Similarly, a rock cannot be transformed into a full island in terms of UNCLOS by way of land reclamation or human intervention.[41] It is argued by the Tribunal in the *South China Sea Arbitration* that allowing artificial modification to existing maritime features in order to amend existing entitlements would be contrary to the very purpose of Article 121 (3) of UNCLOS.[42] The assertions of the Tribunal in the *South China Sea Arbitration* have been backed by other States. The USA has been vocal regarding China's actions in conducting widespread land reclamation efforts in the South China Sea.[43] The USA has expressly stated:

> 'Land reclamation or other human activities that alter the natural state of a low-tide elevation or fully submerged feature cannot transform the feature into an island. Similarly, an island that is a "rock" under Article 121 (3) cannot, through enhancement by human activity be transformed into an island that is fully entitled to maritime zones.'[44]
>
> 'China's land reclamation and artificial islands do not strengthen China's territorial claims as a legal matter, and artificial islands do not generate territorial sea entitlements.'[45]

The position is different if a SIDS were to conduct land reclamation on an existing island that meets the requirements of Article 121(3); the artificial modification of that territory would have no bearing on the existing capabilities of the island State, and its implications would be limited to the baselines.[46] Therefore, work to protect the coast through breakwaters and sea walls may

[39] *South China Sea Arbitration* (note 7 above) 214.
[40] *Ibid* 214.
[41] *Ibid* 214.
[42] *Ibid* 214.
[43] U.S. Office of the Secretary of Defence, 'Annual Report To Congress: Military And Security Developments Involving The People's Republic Of China' 13 (2018) available at *https://media.defense.gov/2018/Aug/16/2001955282/-1/-1/1/2018-CHINA-MILITARY-POWER-REPORT.PDF* (accessed 28 October 2023).
[44] United States Department of State Bureau of Oceans and International Environmental and Scientific Affairs 'Limits in the Sea No. 150 People's Republic of China: Maritime Claims in the South China Sea' January 2022 available at *https://www.state.gov/wp-content/uploads/2022/01/LIS150-SCS.pdf* (accessed 24 August 2023).
[45] U.S. Office of the Secretary of Defence (note 43 above).
[46] N Oral 'International Law as an Adaptation Measure to Sea-Level Rise and Its Impacts on Islands and Offshore Features' (2019) 34 *The International Journal of Marine and Coastal Law* 433.

be considered part of the normal baseline.[47] As Soons asserts, 'Artificial conservation of the coastline, including that of islands, is fully permitted under public international law'.[48] Where reclamation or fortification efforts are undertaken on naturally occurring islands, but the territory then becomes uninhabitable, Oral notes that the Tribunal in the *South China Sea Arbitration* has expressly asserted that a feature currently lacking human habitation or economic life may not be classified as a rock where there is historical evidence to establish a history of habitation and economic life.[49] The Tribunal does not further analyse the limits of this, but it should be highlighted that the Tribunal asserted the following on assessing the ability of an island to sustain a human population:

> 'The Tribunal would first consider evidence of the use to which the feature has historically been put before considering whether there is evidence to suggest that historical record does not fully reflect the economic life the feature could have sustained in its natural condition.'

Therefore, whilst questions of historical claim come to the fore, it has also been suggested that historical evidence of human habitation and economic life on an island may be contradicted by evidence which reflects the inability to sustain human habitation and economic life upon the natural territory in the absence of artificial modification. As stated by the Tribunal *in casu,* assessments of this nature must be done on a case-by-case basis.[50] In essence, fortification measures to maintain coastal territories such as harbour works, breakwaters and sea walls are permitted under international law and affect only the baselines of an island State and not their claim to entitlements. Reclassifying an island to a rock will not be done lightly, especially where historical settlement and economic life existed before UNCLOS. However, the question may come before a court or Tribunal for deliberation, and the deliberation on the feature in its natural condition may be considered. Stoutenburg notes that where there is deliberation on the issue of artificial modification of maritime features, it would be important to consider if the natural land territory is 'above high tide' before modification to determine the entitlements and nature of the island.[51] Even if a small portion of the land remained naturally above water at high tide, it would still be considered a natural island after artificial modification.[52] Where only artificially constructed man-made material is above water at high tide, and none of the 'natural'

[47] *Ibid* 433. See also AHA Soons, 'The Effects of a Rising Sea Level on Maritime Limits and Boundaries' (1990) 37(2) *Netherlands International Law Review* 222.
[48] AHA Soons (note 47 above) 222.
[49] N Oral (note 46 above) 432.
[50] *South China Sea Arbitration* (note 7 above) para 546.
[51] JG Stoutenburg *Disappearing Island States in International Law* (2015) 166.
[52] *Ibid* 166.

land remains above the water at high tide, this would result in the artificial preservation of an island.[53]

In terms of rocks under UNCLOS, rocks are islands in the broad sense that may be used by a State to claim a territorial sea. If a rock is modified artificially, it may still be used to claim a territorial sea because it is an island *sensu lato*.[54] Should the newly altered rock be capable of housing human habitation due to the artificial modification, a State would still not be able to delineate an EEZ or continental shelf as the rights extended to the rock do not allow for such claims. This understanding accords with the view of the Tribunal in the *South China Sea Arbitration.* The Tribunal noted that Article 121 (3) should be understood as:

> 'Rocks which cannot, without artificial addition, sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf'.[55]

An LTE cannot be artificially modified into a natural island, but it can be turned into an artificial island through widespread artificial intervention. In essence, if, in its natural form, a maritime feature is an LTE and the artificial intervention establishes a feature above water at high tide, the nature of that structure would then be an artificial island. As such, the artificial island would have the entitlements provided in Article 60 of UNCLOS.

Therefore, the status of a maritime feature that has undergone land reclamation will be determined by what the feature is considered in its natural form as an essential consideration. International legal decisions and scholarly opinions may guide us on the nature of Article 60 of UNCLOS and how artificially altered natural territory has been considered in international law thus far.

In the joint dissenting opinion of Judges Bedjaqui, Ranjeva and Koroma in the *Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Merits, Judgment,* I.C.J *Reports 2001,* it was observed that the addition of 'natural' to ensure artificial islands were viewed distinctly from natural islands was to ensure the prevention of 'abusive extension of the territorial sea and to any encroachment on the freedom of the high seas'.[56] Stoutenburg submits a contrary argument, noting that the object and purpose of Article 60 does not accord with the declassification of an island to a rock where artificial territory modification preserves

[53] *Ibid* 166.
[54] Rocks are islands in the broad sense (*sensu lato*) in that they comprise naturally formed land that is above water at high tide. However, they are not islands in the strict sense (*sensu stricto*).
[55] *South China Sea Arbitration* (note 7 above) para 510.
[56] *Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Merits, Judgment, I.C.J Reports 2001 p. 40* Joint Dissenting Opinion of Judges Bedjaqui, Ranjeva and Koroma 208.

existing maritime rights.[57] The position is clear that naturally formed islands that are artificially modified may still be considered naturally formed islands where they remain above water at high tide and would not fall into the category of artificial islands.

Van Dyke notes that the reason for the addition of Article 60 was to discourage the expansion of LTEs to generate maritime zones where they would not ordinarily have access to vast maritime zones.[58] Therefore, if this provision is interpreted appropriately, it would result in land reclamation efforts on submerged features being considered artificial islands to prevent vast claims to maritime zones.[59] Van Dyke suggests that by this assertion, some of the structures located within the South China Sea should be legally considered 'artificial islands', with Subi Reef and Johnson South Reef as candidates for such classification.[60] This submission of Van Dyke accords with the Tribunal's ruling in the *South China Sea* Arbitration, which provides an in-depth discussion on each of these maritime features.

According to the Tribunal in the *South China Sea Arbitration*, many features in the South China Sea were artificially altered to sustain human life and economic activity. The Tribunal analysed these features in their natural form to determine the entitlements of these features. For example, on analysis of Subi reef, the Tribunal found that it was 'submerged at high tide in its natural condition' and, as such, in its natural form, is classified as an LTE.[61] The Tribunal observed the extremely vast expansion of Subi Reef, visible from aerial and satellite photographs, holding that the reef has been officially transformed into an artificial island.[62] China constructed the vast majority of the artificial islands through dredging activities using two cutter suction dredgers, 44 cargo supply vessels, 22 tugboats and a floating barge claim to

[57] JG Stoutenburg (note 51 above) 168.
[58] *JM Van Dyke WS Richardson 'Legal Status of Islands – with reference to Article 121 (3) of the UN Convention on the Law of the Sea' available at http://web.archive.org/web/20011102113630/www.hawaii.edu/law/facpubs/KoreanPaper-Islands12999.htm#_edn32 (accessed 10 September 2022).* Wherein Van Dyke notes: 'Article 60(8) was designed to discourage nations from building up submerged reefs and low-tide elevations in order to generate extended maritime zones where none had existed previously. If it is not interpreted according to its clear language, then we would foresee continued efforts to reclaim submerged features in order to lay claim to open ocean areas.'
[59] *Ibid*.
[60] *Ibid*. Wherein Van Dyke notes: 'Article 60(8) of the Law of the Sea Convention states clearly that artificial islands do not have the capacity to generate exclusive economic zones or continental shelves. It appears to be necessary to characterize some of the current structures in the South China Sea as "artificial islands." The Chinese occupations of Subi Reef and Johnson South Reef seem like obvious candidates for this characterization, as does the Malaysian occupation of Dallas Reef, and the Vietnamese occupations of Vanguard and Prince of Wales Banks. Another example is the Japanese islet of Okinotorishima.'
[61] *South China Sea Arbitration* (note 7 above) 350.
[62] *Ibid* see para 886 where the Tribunal notes 'the massive scale of China's work on Subi Reef and the transformation of nearly the entire atoll into an artificial island is apparent in area; and satellite photography and can be seen in satellite imagery from July 2012 and November 2015'.

reclaim both sides of the reef.[63] In the absence of any other means to survey the area, the Tribunal used the following images to make such a classification:

Subi Reef, 27 July 2012

Source: *The Republic of the Philippines and The People's Republic of China* PCA Case No 2013-19 Annexure 795

Subi Reef, 6 November 2012

Source*: The Republic of the Philippines and The People's Republic of China* PCA Case No 2013-19 Annexure 795

[63] *Ibid* para 885.

The example of Subi Reef, amongst other South China Sea maritime features, provides important considerations. It is evident from the example of Subi Reef that land reclamation on LTEs may turn a maritime feature into an artificial island. The Tribunal found that as a result of this classification, Subi Reef has no entitlement to a territorial sea, exclusive economic zone, or continental shelf as currently claimed by China.[64] The Tribunal further held that due to both Subi Reef and Johnson Reef being considered LTEs, the features were incapable of being appropriated but that they may be used only as a point with which the baseline for the territorial sea may be drawn as they were within the territorial sea of the coastal State.[65] The latter assertion suggests that the LTEs cannot be considered 'territory' capable of appropriation in their own right, but rather LTEs are part of the territory of a State that claims them due to the sovereignty it has over its territorial sea.

However, it is essential to note that a coastal State will not lose existing rights to maritime entitlements by modifying a feature. By conducting artificial modification, the coastal State cannot change the existing entitlements of an island, LTE, or rock. Therefore, the natural entitlements of a maritime feature can never be extended in international law as a result of any artificial additions to the territory.

So, what effect does this have on low-lying islands? It can be argued that artificial modification of territory to prevent an island from turning into a rock or LTE may be considered an abusive extension of maritime zones where these zones should otherwise form part of the high seas. While these areas have been appropriated for some time, maritime territory, including claims to an exclusive economic zone or continental shelf under the control of a State, should fall away to the high seas upon submergence of the island. An unjustified preservation of maritime territory in the absence of land territory can be argued as abusive and challenged by other States looking to contest the delineation of maritime territory.

It is important to highlight that the status of a maritime feature is not always permanent and may be subject to change over time. The example of the island of Qit'at Jaradah is an excellent case to illustrate this aspect, which came up for deliberation in the *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)*.[66] The judgment dealt with various islands, the long-standing dispute between Qatar and Bahrain and the sovereignty over the features and the status thereof. Qit'at Jaradah is a maritime feature within 12 nautical

[64] *South China Sea Arbitration* (note 7 above) 474.
[65] *Ibid* 474.
[66] *Maritime Delimitation and Territorial Questions between Qatar and Bahrain*, Merits, Judgment, I. C. J. Reports 2001, p. 40

miles of Qatar and Bahrain.[67] A number of activities have taken place on the feature, namely, erecting a beacon, drilling an artesian well, an oil concession, and licensing fish traps.[68] The feature is very small; at high tide, it measures 12 by four metres, and at low tide, it measures 600 by 75 metres.[69] Navigational aids have also been constructed, which were found to be legally relevant in determining the nature of the feature.[70] The feature also had been subject to artificial modification previously, and in 1986, the upper part of the surface was removed.[71] The matter came before the ICJ to determine, among other aspects, whether Qit'at Jaradah was an island. The Court held the feature to have 'recovered its island status by natural accretion'.[72] In its submissions to the Court, Qatar asserted that the physical status of Qit'at Jaradah '…has been constantly changing'.[73] After reviewing the evidence, the Court held as follows:

> 'The Court has carefully analysed the evidence submitted by the Parties and weighted the conclusions of the experts referred to above in particular the fact that the experts appointed by Qatar did not themselves maintain that it was scientifically proven that Qit'at Jaradah is a low-tide elevation. On these bases, the Court concludes that the maritime feature of Qit'at Jaradah satisfies the above-mentioned criteria and that it is an island which should as such be taken into consideration for the drawing of the equidistance line.'[74]

Perhaps what is most notable about this assertion of the court is that Qit'at Jaradah has been subject to change over long periods. In 1947, the British Government, which controlled Qit'at Jaradah, believed it was not an island.[75] Furthermore, it had previously been subject to artificial modification. Essentially, the artificial modification of a maritime feature such as a rock or LTE would be excluded from being considered an island; it is usually likely to be thought of as an artificial island. However, by removing its upper artificial platform, the feature regained its status as a fully entitled island in line with Article 121 (3) of UNCLOS.[76] This inevitably means that no particular classification of a maritime feature is permanent, and islands, artificial islands, LTEs and even rocks may change over time. It will always be possible to deliberate on the status of a maritime feature should the issue be uncertain, and the court or tribunal would have to consider the facts when the dispute is brought before it. This means that a maritime

[67] *Ibid* 63.
[68] *Ibid* 63.
[69] *Ibid* 63.
[70] *Ibid* 63.
[71] *Ibid* 63.
[72] *Ibid* 63.
[73] *Ibid* 63.
[74] *Ibid* para 195.
[75] *Ibid* 62.
[76] *Ibid* 62.

feature considered an island today, after decades of change, and perhaps changes to the climate, may undergo a declassification. If a maritime feature such as Qit'at Jaradah may, by natural accretion, recover its status as an island, so can any island, by natural changes, be reclassified to an LTE or rock. Aurescu and Oral refer to the example of Rockall in the UK, which was reclassified from an island to a rock, resulting in 60,000 square miles of maritime territory used for fishing being lost as a means to illustrate this possibility.[77] On this issue it is noted by Aurescu and Oral as follows:

> 'The partial inundation of a fully entitled island owing to sea-level rise could call into question its possible reclassification from the category of a fully entitled island to that of a rock, or even low-tide elevation, if the capacity to sustain human habitation or economic life of its own is lost. The criterion of sustaining human habitation and economic life of their own can be especially important in the case of islands made inhabitable because of sea-level rise. The potential consequences of being reclassified as a rock are significant.'[78]

Such a declassification may also occur when an island has been altered artificially to remain above high tide and, in its natural state, would have been reclassified into a rock. When human modification is involved in maintaining the nature of a maritime feature, the issue may come before a court or tribunal for deliberation. In such an instance, it would be possible for a court or Tribunal to look to satellite photographs of the maritime feature before the artificial intervention or, as suggested in the *South China Sea Arbitration*, conduct a site visit, refer to historical evidence, or appoint a technical expert hydrographer.[79] Where it is clear that the maritime feature in its natural form is a rock incapable of sustaining human habitation or economic life or is an LTE in its natural condition, artificial intervention to maintain this feature as an island would result in the creation of an artificial island with no entitlement to an exclusive economic zone, or a continental shelf.

Whilst there is no explicit mention of the requirements in Article 121 (3) having to be consistently met within UNCLOS, any maritime feature can be reviewed at any time in accordance with the requirements of the convention. The history of the feature as an island may prove helpful to the court. It may be evidence of a population leaving an island territory due to the inability to sustain a population. This evidence may be determinative in reclassifying an

[77] UNGA, ILC, Seventy-second session, 'Sea-level rise in relation to international law, First issues paper by Bogdan Aurescu and Nilüfer Oral, Co-Chairs of the Study Group on sea-level rise in relation to international law' Geneva, 27 April – 5 June and 6 – 7 August 2020, UN Doc. A/CN.4/740 para 206.
[78] *Ibid* para 190.
[79] *South China Sea Arbitration* (note 7 above) 15.

island to a rock where the feature is above high tide or worse, an LTE where it is below high tide.

3. Territorial Sovereignty Over Artificial Islands Under International Law

Now that we understand the maritime features considered artificial islands under international law, it would be prudent to analyse whether coastal States may have sovereignty over artificial islands, and whether they may be considered territories under international law. These deliberations are significant in the context of SIDS, which may establish these structures to migrate their populations. This is because one of the most important criteria of statehood is the territory upon which a population may reside, as discussed in Chapter Three. In the event of the total inundation of the natural territory of a SIDS where only artificial territory remains, it would be essential to consider whether the artificial islands could be considered territory. In addition, sovereignty over such an artificial island would be another important mechanism to sustain statehood. Whether an artificial island can be considered a sovereign territory depends on whether it has been fully classified as an artificial island from inception or has been built upon natural territory. Furthermore, it would also be important to consider where the structure is located. These considerations will be discussed in more detail below.

3.1 Artificial Islands Considerations Relating to Territory and Sovereignty

Territory and sovereignty go hand in hand, as Judge Alvarez notes in the case of *Albania v United Kingdom*[80]:

> 'By sovereignty, we understand the whole body of rights and attributes which a State possesses in its territory, to the exclusion of all other States, and also in its relations with other States. Sovereignty confers rights upon States and imposes obligations on them.'

Shaw notes that the basis of international law is the concept of the State, and in turn, the State is based upon sovereignty, and sovereignty is founded upon territory.[81] Therefore, we must consider first the concept of territory as it is the root of sovereignty.

The issue of territory and full sovereignty of artificial islands has not been certain. UNCLOS does not treat artificial islands the same way as natural islands for drawing baselines and delineating maritime zones. The issue of whether artificial islands can be considered territory and whether a State may exercise sovereignty thereon is central to the considerations of whether artificial maritime features, including islands, installations, and structures, can

[80] *Corfu Channel (Albania v United Kingdom*), *Judgment, 1949, I.C.J. Rep*. 4, 43 (Apr. 9) Separate opinion by Alvarez, J.
[81] M Shaw *International Law* 9 ed (2021) 416.

continue to fulfil the territory requirement for statehood. The issue of artificial maritime features as territory is distinct from the question of sovereignty of these features. However, the two issues are linked as territorial sovereignty embodies 'the integral character of the territory and the modern State'. [82] To assert territorial sovereignty, a State must possess the territory and have sovereignty over that territory. The traditional understanding of territory is inextricably linked to natural territory. As Saunders notes, territory has been understood to be naturally formed land.[83] The term *terra firma* provides us with this idea in that *terra* translates from Latin to English as the land or earth.[84]

Saunders notes that UNCLOS does not explain the nature of artificial islands as territory. However, in the Report of the Second Committee Number II of the 1930 League of Nations Codification Conference it was expressly stated that the original definition of an island did not exclude artificial islands that 'are true portions of territory and not merely floating works, anchored buoys etc.' as capable of being territory.[85] It was clear from these earlier deliberations that there was a difference between how floating works and anchored buoys would be viewed in juxtaposition to islands that are considered to be constructed from natural materials.

Saunders makes the important point that artificial islands were excluded from the definition of islands in UNCLOS not because they could not be considered territory but because of the maritime zones that could flow therefrom.[86] Saunders refers to the work of John Westlake, who emphasises the distinction between 'true' artificial islands and those that are considered simply rocks or buildings.[87] The concerns regarding artificial islands as territory are mostly centred around the issue of artificial installations such as lighthouses, rocks, or even floating structures.[88] Stoutenburg makes a similar distinction between artificial and floating islands, noting that floating islands are not considered territory, whereas traditional artificial islands may be considered 'defined State territory'; artificial installations, on the other hand, will not meet this criterion.[89] Historically, concerns did not extend to artificial islands permanently situated within the territory of a coastal State; instead, artificial installations garnered negative

[82] AT Camprubí *Statehood under Water: Challenges of Sea-Level Rise to the Continuity of Pacific Island States* (2016) 21.
[83] I Saunders (note 36 above) 652.
[84] *Ibid* 652.
[85] M Francois 'Report of the Second Committee' (1930) 24 (3) *The American Journal of International Law* 251.
[86] I Saunders (note 36 above) 651.
[87] *Ibid* 651.
[88] *Ibid* 651.
[89] JG Stoutenburg (note 51 above) 170.

attention.[90] With the promulgation of UNCLOS, the ability of artificial islands to generate maritime zones was removed, but Stoutenburg argues that their ability to be considered territory was not.[91] Therefore, whilst artificial islands, installations, and structures cannot be used by States to claim maritime zones, many authors argue that artificial islands may be considered territory for statehood. Before determining the nature of artificial islands as territory, it would be essential to consider what territory means historically in international law and whether artificial islands may fit this criterion.

According to Papadikos, territory in international law comprises a few aspects: naturally formed in that the territory is a portion of the earth's surface, conceptual stability, and physical stability.[92] In addition, it would also be important that a State occupies the space.[93] To determine whether an artificial island is considered territory, we must consider whether it meets these requirements. The requirement that territory must be a 'portion of the earth' should be considered first. The submission that territory must be natural is supported by the case of the *Island of Palmas,* which also precedes UNCLOS, wherein territory was referred to as a 'portion of the surface of the globe'.[94] Furthermore, the Arbitrator stated that:

> 'Territorial sovereignty is, in general, a situation recognized and delimited in space, either by so-called natural frontiers as recognised by international law or by outward signs of delimitation that are undisputed….'[95]

The Arbitrator's use of the word natural when referring to territory provides a clear notion that the general understanding of territory is based upon natural surfaces of the earth rather than artificial land. Papadikos asserts that it is unclear whether an artificial island may be considered territory in its own right; however, it would be possible for an artificial island that forms part of a naturally formed island to be considered territory.[96] It is believed that proximity can determine the status of rights a State may hold over artificial territory.[97] Papadikos submits that the requirement that the territory must be 'of the nature of territory' does not mean it must be a 'true portion of land'; rather, it should have those essential elements that portions of territory ordinarily have.[98] Papadikos notes that in order to fulfil the essential criteria for an island, the

[90] I Saunders (note 36 above) 651.
[91] JG Stoutenburg (note 51 above) 172.
[92] I Saunders (note 36 above) 659.
[93] *Ibid* 659.
[94] *Island of Palmas Case (Netherlands, USA)* 4 April 1928 Volume II pp. 829 -871 838.
[95] *Ibid* 838.
[96] *Ibid* 659.
[97] *Ibid* 659.
[98] N Papadikos *The International Legal Regime of Artificial Islands* (1977) 105.

territory must be inhabited by a self-sufficient community.[99] The artificial island would have to be a home for a community the same way as a natural island would be.[100] Therefore, it would appear that this criterion would be fulfilled by artificial islands that are established to house communities rather than those artificial islands that are constructed solely to be used for industrial purposes such as oil production platforms.[101] The critical element here is to ensure that a community is present that is housed and completely self-sufficient on the artificial island.[102] The latter element is similar to the requirements provided for statehood.

To the permanence of the structure as an essential element of territory, for an artificial island to be considered territory, Papadikos states that it doesn't need to be more permanent than a natural island.[103] It is further emphasised that natural islands are only relatively permanent as a natural island can change over time; volcanos provide an excellent example of this.[104] In the submissions, Papadikos suggests that artificial islands established to house self-sufficient urban communities should be viewed distinctly from other artificial islands established only for economic purposes.[105] The submission is primarily based on the fact that where an artificial island is used purely for economic purposes, a safety zone, as provided for in terms of UNCLOS, would be sufficient to safeguard such a structure.[106] However, the converse is true of artificial islands that house communities.

Presently, UNCLOS does not expressly prevent artificial islands from being considered territory. Saunders with reference to the work of Shaw, notes that artificial islands established within the territorial sea of a State would be under the sovereign and exclusive jurisdiction of the State that established the island, and as such, it would be considered the territory of the coastal State.[107] While these artificial islands cannot possess any territorial sea of their own, they can still be considered territory by many academic scholars.[108] This submission is based on the premise that a coastal State would be able to exercise sovereignty over the structure due to the sovereignty they exercise over the territorial sea. UNCLOS provides in Article 60 (2) that a coastal State has 'exclusive jurisdiction' over artificial islands, installations and

[99] *Ibid* 105.
[100] *Ibid* 105.
[101] *Ibid* 105.
[102] *Ibid* 105.
[103] *Ibid* 105.
[104] *Ibid* 105.
[105] *Ibid* 105.
[106] *Ibid* 106.
[107] I Saunders (note 36 above) 660.
[108] See I Saunders (note 36 above); N Papadikos (note 98 above); M McDougal W Burke *The Public Order Of The Oceans*: *A Contemporary International Law of the Sea* (1962).

structures constructed within their exclusive economic zone or their continental shelf in terms of Article 80. No exclusive jurisdiction is provided to artificial islands, installations and structures constructed upon the high seas by a State in terms of Article 87 of UNCLOS. Whilst the term 'exclusive jurisdiction' does not immediately translate to territory, other sources may provide guidance. While Saunders, Papadikos, Professor McDougal and Professor Burke[109] have written on the capability of artificial islands to be considered territory, some assertions contradict these submissions that must be considered.

Clive and Richard Schofield submit that artificial islands:

> '…are clearly not land territory that can be appropriated, a State may nonetheless hold sovereignty over an artificial island on account of their location within a maritime zone over which that State has sovereignty.'[110]

It is submitted that Clive and Richard Schofield are correct in their assertion. The artificial island, even when established within the territorial sea, cannot be considered territory or *terra firma* in the traditional sense. An artificial island established within the territorial sea may be considered to be under the sovereignty of a coastal State due to the rights that the coastal State exercises validly over the maritime territory due to the adjacent land territory. However, that does not mean that the artificial island can be considered akin to other naturally formed territories. The jurisprudence of the ICJ and other international tribunals backs up this viewpoint. It will be argued below that an artificial island that is entirely artificial may be under the sovereignty of a State wherein it is established within the territorial waters; however, an artificial island established outside of this zone would be allowed to be used for the purpose in line with the zone it was constructed in. For instance, an artificial island constructed in the EEZ may only be used for purposes in line with this zone. As such, where land reclamation activities occur, the entitlements of the feature in its natural status would be relevant and contribute to the feature's ability to be considered territory.

Saunders notes that numerous States conduct land reclamation activities, and none of them has had to deal with any challenges by other States over the ability to claim this land as territory.[111] Challenges based on environmental and navigational considerations have, however, been considered. Saunders refers to the writings of Philip Jessup from 1927, where it was noted that in dredging and creating manmade territory, the territorial waters of a coastal State may be

[109] M McDougal W Burke (note 108 above) 64; N Papadikos (note 98 above); I Saunders (note 36 above).
[110] C Schofield R Schofield (note 1 above) 66.
[111] I Saunders (note 36 above) 660.

extended.[112] This is related explicitly to dredging activities on existing territory rather than a situation where new territory is established. The position would be different when considering artificial islands. The position of territory that has undergone land reclamation activities appears to be clear in that these areas can be considered territory only where they form part of the existing territory of a coastal State. For instance, if an island State conducted land reclamation activities on the coastline of an existing island above the water at high tide, the island would keep its existing entitlements and remain territory in terms of international law. This is because artificial modification of the coastline does not change the nature of the feature.[113] An island above water at high tide before land reclamation activities will remain natural as the artificial modification has not dramatically altered its nature. In such an instance, the island would remain a territory, or *terra firma*, and a coastal State would keep its existing sovereignty over the territory.

The situation would be different if it were an LTE seeking to be converted into an island due to artificial intervention. In the joint dissenting opinion of Judges Bedjaqui, Ranjeva and Koroma, in the *Maritime Delimitation and Territorial Questions between Qatar and Bahrain,* it was noted as follows concerning Qit'at Jaradah as a maritime feature:

> 'The assimilation of islands to land territory is moreover explicable purely in terms of geomorphological considerations: in both cases, by contrast with atolls and cay, the stable underlying element is *terra firma*; thus they have a physically durable base which ensures their permanence. In the case of Qit'at Jaradah, how otherwise to explain the ease with which the upper surface could be removed and subsequently restored? In law, this assimilation must be understood in conjunction with the notion of effectiveness of sovereignty; sovereignty, in international law, implies minimum stable terrestrial base, which is not to be found in maritime features above the waterline which are not islands.'[114]

Similarly, in the judgment of *Qatar v Bahrain,* the court expressly remarked that the existing rules of international law do not equate with the submission that an LTE can be territory in the same way that islands are.[115] While it has never been a question of whether islands, including rocks, constitute territory or *terra firma*, the law treats LTEs distinctly. For instance, the Court remarked that an island, including rocks, may claim a territorial sea of their own, and an LTE may not.[116] Therefore, in terms of acquiring territory, islands are not the same as LTEs and

[112] *Ibid* 660.
[113] *South China Sea Arbitration* (note 7 above) para 305.
[114] *Qatar v Bahrain* (note 66 above) 173.
[115] *Ibid* para 206.
[116] *Ibid* 64.

other land territory. An LTE can only be considered territory when it is located within the territorial sea of a claiming coastal State.

Additionally, in the case of *Nicaragua v Colombia,* it was asserted by the Court:

> 'It is well established in international law that islands, however small, are capable of appropriation (see, e.g., Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain), Merits, Judgment, I.C.J. Reports 2001, p. 102, para. 206). By contrast, low-tide elevations cannot be appropriated, although "a coastal State has sovereignty over low-tide elevations which are situated within its territorial sea, since it has sovereignty over the territorial sea itself" (ibid., p. 101, para. 204) and low-tide elevations within the territorial sea may be taken into account for the purpose of measuring the breadth of the territorial sea.'[117]

As Clive and Richard Schofield remark, 'LTEs cannot be "upgraded" to "full" insular status'.[118] If the LTE is situated within the territorial sea of a coastal State, it would be safe to assume that the coastal State exercises sovereignty over the LTE by implying that the State exercises sovereignty over the territorial sea where it is located. Without the territorial sea, the LTE would not be under the coastal State's sovereignty. The implication is that the State can access the artificial island, unfettered by the interference from outside sources and may exercise its powers thereon. However, this does not make the artificial island territory.

The position within the case of *Nicaragua v. Colombia* was further restarted in the *South China Sea Arbitration* wherein it was held that an LTE that was not naturally above water at high tide is not capable of appropriation even where human intervention has resulted in the maritime feature being permanently above water at high tide.[119] It was expressly stated by the Tribunal that:

> '…low-tide elevations do not form part of the land territory of a State in the legal sense. Rather they form part of the submerged landmass of the State and fall within the legal regimes for the territory sea or continental shelf, as the case may be. Accordingly, and as distinct from land territory, the Tribunal subscribes to the view that "low-tide elevations which are situated within its territorial sea, since it has sovereignty over the territorial sea itself."'[120]

[117] *Territorial and Maritime Dispute (Nicaragua v. Colombia), Judgment, I.C.J. Reports 2012,* p. 624 para 26.
[118] C Schofield R Schofield (note 1 above) 66.
[119] *Ibid* 661.
[120] *South China Sea Arbitration* (note 7 above) 132 para 309.

By implication that an LTE cannot be assimilated to territory when present within a territorial sea, it must be argued that an artificial island that is entirely artificial cannot be considered territory even where it is constructed within the territorial sea of a State.

Saunders notes, however, that the assertion that LTEs are incapable of appropriation is contrary to State practice, as the case of the Republic of Minerva contradicts this.[121] It is to be argued by analysis of the Republic of Minerva that an LTE or artificial island is not capable of appropriation under international law and would attract only the rights that the State has over the waters that it is situated within. The Republic of Minerva reefs are situated southwest of Tonga and southeast of Fiji within the high seas.[122] The Ocean Life Research Foundation (OLRF) tried to declare them as sovereign when they dredged up land, wrapped coral in seven layers of chicken wire and reinforced this with concrete so that it was above mean high water and erected markers with beacons and radar reflectives with a flag representing the Republic of Minerva.[123] The OLRF was an attempt by people in business from the USA and the UK to build a city by reclaiming land on the Minerva Reef.[124] The Republic of Minerva attempted to gain recognition when it declared sovereignty by sending a letter to more than 100 nations, which was not well received, with only the Sultanate of Oecussi Ambeno on the island of Timor recognising this sovereignty, other countries, including Fiji, believed that the Republic of Minerva would set a dangerous precedent.[125] This led to a Tongan mission in 1972 to Minerva, which established a refuge station on the reefs.[126] Tonga undertook land reclamation and called the islands Teleki Tokelau and Teleki Tonga.[127] The government of Tonga claimed sovereignty over these islands and a territorial sea around them on the 15th of June 1972.[128] Admittedly, this was before the promulgation of UNCLOS, but the South Pacific Forum recognised the association that Tonga has with the Minerva Reefs and further noted that the Forum would not consider any other claims for sovereignty over the Minerva Reefs.[129] This assertion by the

[121] I Saunders (note 36 above) 661.
[122] *Ibid* 672.
[123] L Song 'The Curious History of the Minerva Reefs: Tracing the Origin of Tongan and Fijian Claims Over the Minerva Reefs' (2019) 54(3) *The Journal of Pacific History* 4.
[124] *Ibid* 4.
[125] *Ibid* 5-6.
[126] *Ibid* 6.
[127] Tonga Government Gazette Extraordinary 'Proclamation' 15 June 1972 available at *https://faolex.fao.org/docs/pdf/ton5226.pdf* (accessed 21 August 2023).
[128] *Ibid.*
[129] L Song (note 123 above) 6-7.

South Pacific Forum was made without expressly stating that Tonga had sovereignty over the reefs.[130]

However, claims to Minerva Reefs got more complex after UNCLOS was promulgated. Song notes that the extended maritime zones established by UNCLOS, of which both Tonga and Fiji are party, made the situation more complex.[131] Upon delineating their EEZ, Fiji deposited charts showing that the Minerva Reefs were within these boundaries. Tonga has claimed Minerva Reefs and the surrounding waters, and these claims overlap with Fiji's.[132] Therefore, it stands to reason that Minerva Reef's claims may be disputed, as there have been reported tensions between Fiji and Tonga in the area.[133] On the 14th of June 2011, the Government of Fiji stated that Minerva Reef is within the EEZ waters of Fiji and that challenges to this statement should be directed to the UN dispute resolution mechanism, namely the ITLOS.[134] Despite the Minerva Reefs falling within the EEZ of Fiji, they would not have full sovereignty or general jurisdiction over the reefs.[135] Fiji have sovereign rights that follow from their EEZ; therefore, the sovereign rights relate only to economic resources or environmental considerations on the reefs.[136] The claims of Fiji to the Minerva Reefs overlap with those of Tonga to the Minerva Reefs in that they are closer to Tonga than Fiji. It has also been noted that in international law, LTEs are not appropriable when located outside the territorial sea, as asserted by the ICJ in the *Qatar v Bahrain* case and the *Nicaragua v Colombia* case.[137]

It is submitted that the case of Minerva Reef is much like the case of the *South China Sea.* If it were to come under scrutiny, it is argued that these islands are incapable of appropriation by Tonga or any other State as they are artificial in nature. The rights to an artificial feature as claimed by a coastal or island State hinges on the location of the feature and/or the nature of the maritime feature it is built upon in its natural form.

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[130] *Ibid* 6-7.
[131] *Ibid* 13.
[132] *Ibid* 13. See Fiji 'List of geographical coordinates of points' available at *https://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/DEPOSIT/fji_mzn60_2007.pdf* (accessed 1 September 2023).
[133] ES Waqanivala 'The Spirit of Minerva: Notes on a Border Dispute in the Pacific' (2018) 9 (1) *Eurasia Border Review* 103.
[134] Government of Fiji 'Minerva Reef is within Fiji's EEZ' 14 June 2011 available at *https://www.fiji.gov.fj/Media-Centre/News/Minerva-Reef-is-within-Fiji%E2%80%99s-EEZ* (accessed 21 August 2023).
[135] L Song (note 123 above) 13.
[136] *Ibid* 13.
[137] *Qatar v Bahrain* (note 66 above) para 206; and *Territorial and Maritime Dispute (Nicaragua v Colombia)*, Judgment of 19 November 2012, [2012] ICJ Reports 624, at p. 641, para. 26.

Therefore, it is important to consider that different forms of artificial islands carry different consequences in determining whether they are territory in the traditional sense. In the instance of natural land territory that is being artificially modified by way of land reclamation activities, it is possible that these structures would be considered territory if they are above water at high tide before modification. However, the position is different when the natural territory being modified artificially is an LTE or rock. The LTE cannot be artificially modified into the territory. The position is evident in international law that LTEs do not equate to islands and are not considered territory or *terra firma* capable of appropriation. Lastly, artificial islands that are fully artificial in nature cannot be considered territory, but a coastal State may be able to claim sovereignty over the feature should they be situated within the territorial sea of a coastal State; this ultimately depends on where the artificial island is situated within existing maritime zones. The consequences of this assertion will be discussed in more detail below.

4. Sustaining Maritime Zones Amidst Sea-Level Rise with Artificial Islands

Artificial islands are, in some instances, a viable mechanism to house the population of SIDS to avoid rising waters and mitigate the effects of widespread flooding. Whilst these features are expensive to construct, they may be the only means to house the populations of SIDS without total migration. However, their ability to be used to sustain populations within SIDS may also be affected by the ability to claim maritime zones around these features. As highlighted in earlier chapters, many SIDS rely on their expansive maritime zones, including their EEZ, to export fisheries and, in some instances, sustain the local population. To continue to claim maritime zones, SIDS must maintain the coastline of the natural territory as this is where the right to the adjacent maritime zones is based. If the natural territory of SIDS becomes completely submerged, this raises concerns regarding the continued maintenance of maritime zones and statehood with only artificial territory remaining.

The Maldives provides an excellent example of a SIDS that has constructed an artificial island, which is viewed as a City of Hope for the State. Hulhumalé in the Maldives is an artificial island that was constructed next to Malé, the capital of the Maldives, to provide a basis to mitigate sea-level rise.[138] The artificial island was established by pumping sand from the seafloor onto a previously submerged coral platform, raising it two metres above sea level.[139]

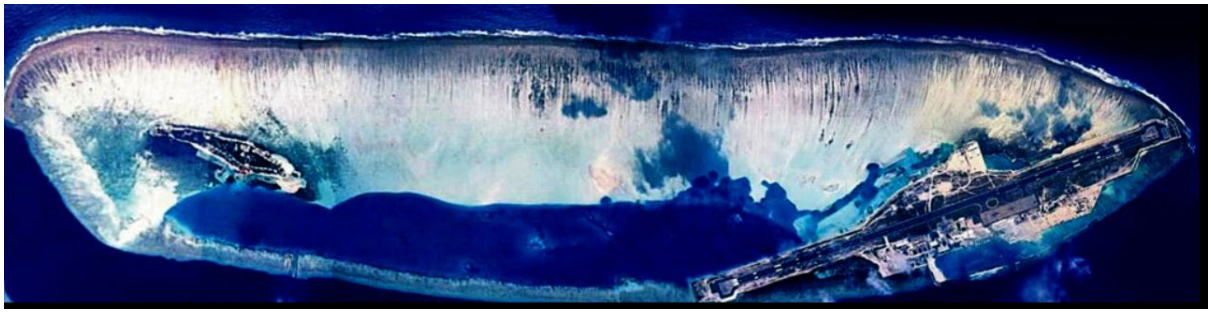
[138] A Sakamoto *et al* 'Mitigating Impacts of Climate Change Induced Sea Level Rise by Infrastructure Development: Case of the Maldives' (2022) 17 (3) *Journal of Disaster Research* 328.
[139] *Ibid* 328.

Hulhumalé is a lagoon situated on the island of Hulhulé.[140] Therefore, the construction of Hulhumalé is linked to an existing island and built upon a lagoon via land raising. In terms of international law, the lagoon or coral platform that Hulhumalé was constructed upon is sufficiently closely linked to the land domain of Hulhulé to be subject to the regime of internal waters.[141] Before this land reclamation effort, there was no population living on this coral platform, meaning widespread construction could occur without having to displace the population on the island.[142] It is important to highlight that the coral platform was submerged and was not capable of habitation. The island was constructed near the capital, Malé, to encourage migration to this area.[143] After Phase 1 of the project was completed in 2004, 1000 people migrated to the artificial island. In 2020, 98,744 people were living in Hulhumalé.[144]

Hulhumalé stands one metre above Malé and provides more climate resilience than any other island located in the Maldives.[145] In order to stand as a beacon of hope for this coastal State, the artificial island needs to be capable of being considered territory to sustain the statehood of the Maldives as well as the maritime zones surrounding the island State as the island State would be unable to fulfil Article 121 of UNCLOS. In the event of the total inundation of the natural territory of the Maldives, Hulhumalé, standing as an artificial territory, would be unable to claim a territorial sea, contiguous zone, exclusive economic zone, or continental shelf as the Maldives would effectively lose claim to the existing maritime zones claimed from archipelagic baselines as drawn around the island State.[146] Whilst this has not yet occurred, and Hulhumalé is secure within current maritime zones, Stoutenburg asserts that if submergence of the natural islands were to occur, the question of whether a State can use this artificial island to claim maritime zones becomes vital.[147]

The following portrays satellite images of Hulhumalé and the artificial transformation of the island from 1997 – 2018:

[140] Urbanco 'Hulhumalé The City of Hope' available at *https://www.urbanco.mv/hulhumale/* (accessed 22 August 2023).
[141] United Nations Office for Ocean Affairs and the Law of the Sea 'The Law of the Sea Baselines: An Examination of the Relevant Provisions of the United Nations Convention on the Law of the Sea' *United Nations Publication Sales NO. E.88.V.5* 10.
[142] A Sakamoto *et al* (note 138 above) 328.
[143] *Ibid* 328.
[144] *Ibid* 328.
[145] M Gagain 'Climate Change, Sea-level rise, and Artificial Islands: Saving the Maldives' Statehood and Maritime Claims Through the 'Constitution of the Oceans' (2012) 23 (1) *Colo. J. Int'l Envtl. L. & Pol'y* 86.
[146] JG Stoutenburg (note 51 above) 173.
[147] *Ibid* 173.



Island of Hulhumalé, 1997

Source: 'Hulhumalé' Housing Development Corporation, available at *https://www.urbanco.mv/hulhumale/* (accessed 22 August 2023)

Island of Hulhumalé, 2018

Source: 'Hulhumalé' Housing Development Corporation, available at *https://www.urbanco.mv/hulhumale/* (accessed 22 August 2023)

The island of Hulhulé, where Hulhumalé was built, is not immune to the effects of rising sea levels and flooding. In the Maldives, 80% of the land is less than one metre above sea level.[148] The island of Hulhulé was previously completely flooded, as well as the airport located thereon, due to abnormally high tidal waves in April of 1987.[149] The waves damaged the sea walls around the city and the airport. Wadey *et al.* noted that the tidal wave event was made worse by land reclamation efforts that lowered the Malé reef by half a metre to extend land closer to the reef's edge.[150] The reclaimed land was the worst affected by the tidal waves as floods washed away the landfill, an estimated 300,000 metres squared washed away.[151] The reason

[148] A Amores *et al* 'Coastal Flooding in the Maldives Induced by Mean Sea-Level Rise and Wind-Waves: From Global to Local Coastal Modelling' (2021) 8 *Frontiers in Marine Science* 2.
[149] M Wadey *et al* 'Coastal Flooding in the Maldives: An assessment of historic events and their implications' (2017) 89 (133) *Natural Hazards* 145.
[150] *Ibid* 15.
[151] *Ibid* 15.

for the high tidal waves causing widespread flooding for two to three days is not settled, but it is alleged that it was due to a storm in the Indian Ocean.[152] Creating an artificial island on an existing island does not guarantee that the island and artificial territory thereon are immune to the effects of climate change. Should the Hulhulé island become submerged due to rising sea levels, it will no longer be considered an island in international law. This would leave Hulhumalé as an entirely artificial island, without the maritime rights of an island and with the limitations that come with the artificial territory. Similarly, if all the natural islands that make up the territory of the Maldives were to be submerged or uninhabitable with only Hulhumalé remaining, it would call into question the ability of the Maldives to remain a State and assert rights over the adjacent maritime zones. Therefore, the long-term preservation of SIDS requires more consideration. It is not just the construction of artificial islands that will save these States; it may provide a basis for physical survival, but other factors need to be present to ensure economic stability and international recognition.

Whilst this may seem inconsequential, the World Bank notes that sea-level rise, in the most severe scenario, would result in the submergence of most of the Maldives.[153] Hulhumalé is two metres above sea level, making it double as high as the capital of Malé.[154] At two metres, the artificial island is half a metre higher than the average height of the other islands in the Maldives.[155] Whilst the island of Hulhumalé is much more flood-resistant than most islands, it has been suggested that even Hulhumalé may not withstand the more severe rises in sea level over time into the second century.[156] Therefore, the idea that Hulhumalé may, at some point, be the only remaining island in the event of severe climate change would result in much of the expansive maritime zones surrounding the Maldives being lost and potentially loss of claims to statehood in the absence of such an artificial island being considered territory.

The issue of the loss of maritime entitlements of coastal States has been deliberated on by the co-chairs of the ILC's study group on sea-level rise.[157] In the observations of the co-chairs, there is a difference between artificial islands that are 'newly constructed artificial islands' as

[152] *Ibid* 15.
[153] The World Bank 'Development and Climate Change' (2010) *World development report* 6
[154] A Sakamoto *et al* 'Mitigating Impacts of Climate Change Induced Sea-level rise by Infrastructure Development: Case of the Maldives' (2022) 17 (3) *Journal of Disaster Research* 328.
[155] *Ibid* 328.
[156] S Brown *et al* 'Land raising as a solution to sea-level rise: An analysis of coastal flooding on an artificial island in the Maldives' (2020) 13 *Journal of Flood Risk Management* 9.
[157] UNGA, ILC, 'Sea-level rise in relation to international law, First issues paper by Bogdan Aurescu and Nilüfer Oral, Co-Chairs of the Study Group on sea-level rise in relation to international law' Geneva, 27 April – 5 June and 6 – 7 August 2020, UN Doc. A/CN.4/740 57.

governed by Article 60 (8) of UNCLOS and those measures to protect existing islands.[158] In the latter instance, it would be equitable and fair for these features to be artificially conserved and their existing entitlements maintained.[159] This accords with the deliberations above on extending existing land territory above water at high tide. Whilst this provides some assistance to SIDS, it does not provide a solution that considers the circumstances facing some SIDS.

It is crucial to consider the widespread construction that must take place to raise an existing island by as much as two metres. It is likely that to undertake a project of this nature on an existing island, temporary relocation of the entire population would have to occur to implement these changes. This may also be affected by population density. For example, Tuvalu comprises a total area of 26 square kilometres with a coastline spanning 24 kilometres.[160] There are 369 inhabitants per kilometre squared, making the nation amongst the most densely populated in the world.[161] Similarly, Kiribati has a population density of 156 inhabitants per square kilometre, which has continued to increase on a yearly basis.[162] The Maldives has 1715 inhabitants per square kilometre;[163] with this in mind, it makes more practical sense for a wholly new artificial island to be created on an LTE, submerged coral platform, or upon any suitable feature such as an artificial base due to the sheer number of inhabitants in the available natural land area already above high tide.

With this in mind, it would not be practical to allow SIDS to undertake widespread modification on existing islands only to allow continuity of the State. In some instances, the required widespread construction would be too logistically cumbersome for the State to undertake on existing territory. Under international law, the island State would have to artificially protect some of its natural coastline to continue to claim its maritime zones. This assertion is based on submissions by the sea-level rise study group on sea-level rise, the ILA SLRC, scholars, and even the ICJ.[164]

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[158] *Ibid* para 215.
[159] *Ibid* para 216.
[160] 'Tuvalu' available at *https://www.worlddata.info/oceania/tuvalu/index.php* (accessed 27 January 2023).
[161] 'Population density (people per sq. km of land area) – Tuvalu' available at *https://data.worldbank.org/indicator/EN.POP.DNST?locations=TV* (accessed 27 January 2023).
[162] 'Population density (people per sq. km of land area) – Kiribati' available at *https://data.worldbank.org/indicator/EN.POP.DNST?locations=KI* (accessed 27 January 2023).
[163] 'Population density (people per sq. km of land area) – Maldives available at *https://data.worldbank.org/indicator/EN.POP.DNST?locations=MV* (accessed 27 January 2023).
[164] UNGA, ILC, Seventy-fourth session, Sea-level rise in relation to international law, Additional paper to the first issues paper (2020), by Bogdan Aurescu and Nilüfer Oral, Co-Chairs of the Study Group on sea-level rise in relation to international law, Geneva, 24 April-2 June and 3 July-4 August, UN Doc A/CN.4/761 para 149; ILA, Committee on Baselines under International Law of the Sea, 'Sofia Conference (2018)' available at *https://www.ila-hq.org/en_GB/documents/conference-report-sydney-2018-5* (accessed 16 August 2023) 4; NH

5. *Considering Interests of Equity in Interpreting International Law on Artificial Islands for SIDS*

It would be in the interests of equity to allow SIDS to artificially alter territory to enable the preservation of their island States regardless of the natural nature of the land. However, it would be up to courts and tribunals to ensure equitable results for these States should the issue be called into question. Although courts such as the ICJ must produce equitable results, it is argued that this is not always the case, which is a cause for concern from the perspective of Third World States.

For example, in the dissenting opinion in the *Qatar v Bahrain* case referenced earlier in this chapter by the Judges Bedjaoui, Ranjeva, and Koroma, it was highlighted that the judgment left a sour taste in the mouths of 'the crowd, both in Bahrain and in Qatar'.[165] The dissenting judgment emphasized that the award in the case and the ruling, particularly in relation to Qit'at Jaradah, was distorted by inequity.[166] This assertion was based upon the fact that *in casu,* the Court ordered that the Hawar islands be awarded to Bahrain and not Qatar despite them being closer to Qatar than Bahrain. This award is argued by the dissenting Judges Bedjaoui, Ranjeva, and Koroma to have been centred around the British decision on the 11th of July 1939 awarding Hawar Islands to Bahrain, which the dissenting judges noted to be directly shrouded by rival oil interests.[167] In the memorials submitted by Qatar, it is asserted that the decision by the British in 1939 was a result of ongoing pressure by oil companies as to the ownership of Hawar Islands; as such, Britain ignored the law and local customs.[168] It was also further argued that the British official stationed in the Gulf asserted that the decision was substantively incorrect and unfair at the time of the decision.[169] The arbitral decision was also deemed binding on the parties despite protests from the Sheikh of Qatar and the presence of fraud in that Britain had undertaken to respect the territorial integrity of Qatar and did not do so, allowing Bahraini occupation of the Hawar Islands without informing the Sheikh of Qatar.[170] The decision was

Thao 'Sea-Level Rise and the Law of the Sea in the Western Pacific Region' (2020) 13 (1) *Journal of East Asia and International Law* 141; *Maritime Delimitation in the Area between Greenland and Jan Mayen*, Judgment, I.C.J. Reports 1993, p. 38, para 80; and *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969* , p. 3.

[165] Joint Dissenting Opinion of Judges Bedjaqui, Ranjeva and Koroma (note 56 above) para 7.

[166] *Ibid* para 205.

[167] *Ibid* para 215.

[168] *Case Concerning Maritime Delimitation and Territorial Questions Between Qatar and Bahrain, Memorial of submitted by the State of Qatar,* Volume 1, 10 February 1992, 22.

[169] Joint Dissenting Opinion of Judges Bedjaqui, Ranjeva and Koroma (note 56 above) 24.

[170] *Ibid* 124.

also taken by the United Kingdom, which had a special protective relationship with both parties to the arbitration.[171] The dissenting judges noted the following:

> 'No one can be unaware of the real motives underlying the legal contrivance which was the British decision of 1939, directly inspired as it was by rival oil interests. The authors of that decision troubled themselves so little with legal coherence that the only "principle" applied was: "oil dominates the land and the sea". We could not therefore find a legal pretext for ratifying such a decision without making our own contribution to this kind of contrived deceptive legal edifice which poorly conceals the interests clearly underlying it and is damaging to the rights of the peoples concerned.'[172]

The dissenting judgment further noted that 'colonial or protectorate law have no place' within contemporary international law.[173] The willingness of the ICJ to accept the validity of a decision with origins of inequity illustrates the ability, whether deliberate or not, of international law to perpetuate further injustices that have historically existed within international law. It illustrates the all-present ability of international law to avoid engaging with the complex history of international law rooted in colonisation and plunder.[174] Gathii argues that it is essential to embrace the practice and scholarship of international law about and from the Third World and notes that it should be an essential part of the discipline to demarginalize the Third World input within the field of international law and learn from the different visions of international law that it brings.[175] When making decisions based on historical title to islands, the considerations of colonialism and possible prejudice from countries in a position of power must be understood and taken into account. Considering the validity of decisions that illustrate such inequality among the parties is essential. If the Judges of the ICJ, when deliberating on the judgment, reviewed the issue of the title over Hawar Islands from the Third World perspective, such as considered in the dissenting judgment of Bedjaoui, Ranjeva, and Koroma, the outcome would have differed, ensuring that the history of the position of these two States in relation to the United Kingdom and other relevant factors would have become essential to the enquiry. Determining what would be equitable for these States owing to the history of protectorate statehood under the United Kingdom would have been necessary. The decision by the ICJ in the *Qatar v Bahrain* judgment also further illustrates that leaving room for

[171] *Ibid* para 214.
[172] *Ibid* para 215.
[173] *Ibid* para 217.
[174] JT Gathii 'The Promise of International Law: A Third World View' (2021) 36 U. INT'l L. REV 379.
[175] *Ibid* 379.

uncertainty in international law may leave SIDS open to inequity within the international legal system.

6. Conclusion

The hurdles that present themselves in the quest for the survival of SIDS on artificial islands cannot be fully remedied with existing international law. Using artificial islands as a physical remedy to submerging island States may ensure the survival of SIDS prospectively; however, there is no international legal basis for artificial islands to be considered territory within international law. Additionally, under the UNCLOS, artificial islands may not be used by States to delineate maritime zones from baselines as drawn by SIDS in the event of submergence of natural territory. Similarly, if the natural territory of a SIDS becomes uninhabitable, the outer limits of the maritime zones delineated may be at risk. It is essential to reconsider how developments in international law can accommodate the use of artificial islands by SIDS well into the future in place of existing submerged land territory.

An island such as Hulhumalé in the Maldives stands as a physical mechanism to house the population of Maldives as changes to the climate affect their natural territory, only providing a physical basis for survival. These considerations are important as the Maldives is the only SIDS that has taken steps to create an artificial island to provide some permanent territory for its population. Other SIDS will likely have to consider similar construction should they wish to survive in their current locations.

Whilst it may seem obvious to suggest that SIDS should modify existing islands that are above water at high tide to maintain their maritime territory and natural land territory, it is essential to note that conducting widespread artificial modification of existing territory is more complex than modifying territory that currently does not house a population such as LTEs. The modification of an existing natural island to keep it above water would not affect the island's status or claims to territory; it is argued that these situations will be few and far between for SIDS due to the scarcity of land resources. Additionally, it is within the realm of possibility that the all-natural territory of SIDS may become submerged. In such an instance, the artificial territory created by these SIDS may be the only remaining territory.

The inability of SIDS to continue to survive legally and economically upon artificial islands in the face of submerging territory is an injustice of international law that requires a permanent remedy. While it is possible to interpret international law liberally, it does not provide enough certainty for SIDS. To achieve parity in international law, a mechanism will be suggested to

account for the needs of SIDS by the creation of a new negotiating text, to be discussed in Chapter Six. This new negotiating text will propose the amendment of the current international law on artificial islands, suggesting an exceptional remedy for SIDS allowing artificial islands, under certain limited circumstances, to be considered territory that may accede to a SIDS.

CHAPTER SIX

Recommendations and Conclusion

1. Preface

Three fundamental challenges exist for SIDS stemming from rising sea levels as a result of the changing climate. These challenges are divided into complications relating to (i) statehood where the migration of an entire population or the submergence of natural territory occurs; (ii) the maintenance of maritime zones despite the submergence of natural territory; and (iii) the difficulties in terms of international law in claiming artificial islands as substitute 'territory' in place of sinking or uninhabitable natural territory. These three central issues have been considered in detail in the preceding chapters. It has been highlighted in Chapter Three that SIDS may struggle to maintain statehood if their territory becomes completely submerged or uninhabitable. It has further been emphasised that territory may never be an abstract right for the maintenance of statehood.[1] Whilst there is a general presumption of State continuity, this presumption is used to maintain statehood where there is a temporary incapacity, such as the brief fall of a government.

Similarly, in the absence of any natural territory of a SIDS, claims to the existing adjacent maritime territory may lapse. This is because the absence of a coast that establishes the right of a State over the adjacent maritime territory prevents continued claims thereon. It is also not possible for SIDS to construct artificial islands on rocks or LTEs to ensure State continuity wherein the natural coastline is lost, as such action would turn these maritime features into artificial islands, which are heavily regulated within UNCLOS in terms of Article 60. Artificial islands are not viewed the same as natural islands in international law. The permanent loss of physical territory is a situation we have not yet seen in international law. However, with the speed at which sea levels are rising, this is an eventuality we may see within the next century.

As highlighted in the ten new insights in climate science presented at the COP27 in November 2022, adaptation measures to mitigate the effects of climate change cannot

[1] *Island of Palmas* case (Netherlands/USA) 4 April 1928, Volume II 829-871.

keep up with the rapid pace of changes to the climate. At present, adaptation mechanisms are insufficient to ensure the survival of SIDS in most instances:

> 'Limits to adaptation are most frequently reported for vulnerable groups in low-income regions and are especially acute for Small Island States and low-lying coastal zones more generally. The distribution of investments in adaptation reflects underlying socio-economic inequalities, reinforcing patterns of vulnerability. Existing adaptation efforts for example in food systems and infrastructure, are insufficient to adequately reduce risks associated with current and future climate impacts. But even with the right support to implement available adaptive strategies, limits to adaptation will be unavoidably breached in some instances…We are already breaching adaptation limits, and adaptation will only become more difficult as we approach 1,5°C or even 2°C average global warming. This implies that the remaining available adaptive actions will be even more demanding, which, in turn, can create more social stress and further risks. We cannot endlessly adapt to climate change. Therefore, adaptation is not a substitute for mitigation. Deep and swift mitigation efforts are critical to avoid the widespread breaching of limits to adaptation.'[2]

The report further stresses that the lowest-lying island States are at risk of becoming uninhabitable.[3] States, particularly SIDS, need to take sustainable adaptation measures that will allow them to survive for the next century and beyond and for international law to encourage such adaptation. In addressing attendees at COP27, Minister Simon Kofe from Tuvalu shared his country's plan for survival, noting:

> 'As our land disappears, we have no choice but to become the world's first digital nation. Our land, our ocean, our culture, are the most precious assets of our people. And to keep them safe from harm, no matter what happens in the physical world, we will move them to the cloud. Islands like this one, won't survive temperature increases, rising sea levels and droughts so we will recreate them virtually.'[4]

Pursuant to these genuine concerns for SIDS, this chapter discusses the remedies that may be utilised by SIDS and proposes the creation of a new negotiating text that aims to bridge

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[2] '10 New Insights in Climate Science 2022' *Future Earth, The Earth League and WCRP* (2022) Stockholm available at *https://10insightsclimate.science/wp-content/uploads/2022/11/10NICS-2022-Report_digital.pdf* (accessed 29 January 2023) 13 – 14.
[3] *Ibid* 14.
[4] 'Hon. Minister Simon Kofe Speaks at COP27' *Department of Foreign Affairs Government of Tuvalu* 21 November 2022 available at *https://dfa.gov.tv/index.php/2022/11/21/hon-minister-simon-kofe-speaks-at-cop27/* (accessed 30 January 2023).

the existing gaps in international law to allow for the long-term survival of these States regardless of changes to the climate. This negotiating text will allow States to negotiate climate resilience for SIDS and encourage the discussion on allowing adaptation measures in certain instances, provided specific criteria are met. These criteria that will be proposed are a mechanism of oversight over the development of artificial islands to mitigate the effects of climate change.

It is outside the scope of the proposed negotiating text to consider human rights issues relating to climate migration and displacement. Whilst this thesis does not consider the human rights issues relating to sea-level rise and climate change, it should be noted that these are genuine concerns that deserve attention from the international community and provisions relating to these issues could be added to the negotiating text for further deliberation.

Before considering the proposal for a negotiating text, we must summarise the issues and key findings discussed throughout the preceding chapters and then discuss other possible remedies for SIDS. The considerations will also be discussed through the lens of TWAIL, which is particularly relevant to the context of this study in presenting the Third World approach. The chapter will conclude with a proposed new negotiating text and discuss the rationale for its selection as the most appropriate remedy, suggesting that a negotiating text be reviewed by the UN and member States with the intention that a convention shall follow, taking into account the special circumstances of SIDS in the interest of equity.

2. Sea-level Rise and Statehood

Chapter Three of this thesis established that statehood is primarily regulated by the criteria provided for within the Montevideo Convention as these requirements have integrated into customary international law.[5] The Montevideo Convention stipulates four requirements for States to attain and maintain statehood. Article 1 of the Convention provides that the State should possess a permanent population, defined territory, government, and capacity to enter into relations with the other States. Upon analysing the four requirements of statehood, it was established that the limits of State continuity fundamentally rest on the requirements of territory and population. Whilst there is a

[5] *Prosecutor v. Slobodan Milosevic* Case No. IT-02-54-T, 16 June 2004 para 86; United Nations Security Council Resolution 827 (1993), Adopted by the Security Council at its 3217 meeting on 25 May 199, UN Doc S/RES/827 (1993).

presumption of State continuity, this concept does not mean that the State continues in perpetuity despite the absence of fundamental requirements of statehood such as territory or a population.[6] Where territory is lost due to sea-level rise and submergence of the territory results in permanent migration of the population, this defect in statehood is not temporary; it is permanent as territory cannot 'reappear'.[7] Many prominent scholars, including Oppenheim, Shaw, Stoutenburg, and Crawford, maintain a similar position.[8] It was also highlighted that maritime territory cannot stand in place of the land territory if it becomes submerged. This is because the State asserts claim over its maritime territory from the presence of its coastline.

Notably, the loss of statehood is automatic and is a fact regardless of the withdrawal of recognition. Widespread withdrawal of recognition may signal to the international community that State extinction has occurred, but it would remain a fact regardless of this action.[9] Additionally, removing a State from the membership of the UN may provide a strong signal that the State ceases to exist. This assertion is based on the value of UN membership for States.

This thesis proposes an amendment to international law by developing a new negotiating text to remedy some insufficiencies, including statehood. However, it is essential to consider viable alternatives available to SIDS for maintaining statehood to establish why a negotiating text is preferred. One alternative remedy is adapting an original portion of existing territory, otherwise known as *in situ* adaptation. While *in situ* adaptation is always preferred, it has inherent weaknesses as a comprehensive remedy.

2.1 Preservation of a Small Portion of the Territory of SIDS (*in situ* adaptation)

Preserving a portion of the current territory upon which the people of SIDS reside is the most preferable option for maintaining statehood.[10] This option would not only prevent the forced relocation of an entire population but also allow the preservation of cultural

[6] D Wong 'Sovereignty Sunk? The Position of 'Sinking States' at International Law' (2013) 14 *Melbourne Journal of International Law* 21.
[7] *Ibid* 21-22.
[8] L Oppenheim *International Law. A Treatise* 8 ed (1911) para 168; JG Stoutenburg *Disappearing Island States in International Law* (2015) 254; M Shaw *Title to Territory in Africa: International Legal Issues* (1986) 2; J Crawford *The Creation of States in International Law* 2 ed (2006) 2 8.
[9] JG Stoutenburg *Disappearing Island States in International Law* (2015) 301-302.
[10] D Freestone D Çiçek 'International Law Aspects of Sea Level Rise' (2023) *The World Bank* available at *https://documents.worldbank.org/en/publication/documents-reports/documentdetail/099102323194070970/p18131503d291a01f08924056a1fc13b79c* (accessed 3 March 2024) 53.

identity for the populations that reside upon these territories. Preserving a small portion of territory with the ability to house a small population would be sufficient to maintain the statehood of a SIDS.[11] Freestone and Çiçek note that international law allows a coastal State to conduct land reclamation to elevate or rebuild islands that may be affected by rising sea levels.[12] This would be to retain the current entitlements that the State possesses.[13] Stoutenberg notes:

> 'A functional interpretation of the territory criterion therefore suggests that pieces of land which are too small to permit the permanent habitation of at least a certain number of people do not qualify as territory for the purposes of defining statehood, as they cannot constitute the territorial basis of organized societies. In order to effectively retain a state territory, a threatened island state would therefore need to ensure that at least some part of its island domain remains habitable.'[14]

While this may seem to be an easy fix to the statehood problems that SIDS may face, it possesses limitations. Freestone and Çiçek assert that *in situ* adaptation is not always 'physically possible'.[15] This is because some SIDS, including those located in the Pacific, anticipate their land becoming completely inundated by seawater and do not have the means to conduct the kind of widespread adaptation required for survival. For example, in the 9260th meeting of the Security Council in February 2023, sea-level rise and the implications for international peace and security were considered. In this session, representatives of many SIDS, including Federated States of Micronesia, Palau, Kiribati, and Tuvalu, among others, spoke to the Security Council about the urgency of the matter and the lack of resources to adapt. The representative of Palau, Ms Seid, noted as follows:

> 'The risk of sea level rise to the Pacific islands is such that many of us have taken severe measures to address it. In Kiribati, former President Anote Tong introduced a "migration with dignity" strategy and purchased 5,500 acres in Fiji for supplementary food production in order to combat food insecurity and provide a potential location in which to resettle if sea level rise were to render Kiribati uninhabitable. Similarly, fearing total inundation, the nation of Tuvalu has launched an initiative to upload a virtual version of the country into the metaverse as a means to preserve the country and its culture. It sounds

[11] *Ibid* 254.
[12] *Ibid* 40.
[13] *Ibid* 40.
[14] JG Stoutenburg (note 9 above) 524.
[15] D Freestone D Çiçek (note 10 above) 53.

like science fiction — something we might see in a movie about some made-up disaster — but those are two real-life examples that are happening today.'[16]

Ms Seid further noted that in countries such as the US, the Biden Administration has given 75,000,000 USD to tribal communities gravely affected by climate change to enable relocation; in SIDS, there is no physical land or fiscal capabilities to enable such measures.[17] Below, we will discuss the financial impediments to utilising this mechanism for adaptation.

The major impediment to adaptation *in situ* is funding, which is not a once-off cost but requires ongoing funding if sea levels continue to rise. The example of Okinotorishima stands as a case study for this assertion. Okinotorishima is a small island that lies off the coast of Japan; in its natural form, Okinotorishima is roughly the size of a king-size bed, but it stands as a significant island for Japan, as its loss would result in a significant reduction in maritime zones for the State.[18] While the maintenance of Okinotorishima is not a matter of State continuity or State extinction, the case may be used to illustrate the practical difficulties of adaptation to SIDS. In 1988, the government of Japan started a project to encase Okinotorishima's rocks in concrete and steel banks to prevent ocean erosion, which cost 240,000,000 dollars some 36 years ago.[19] Tsaltas *et al.* noted in 2010 that the total cost of preservation of Okinotorishima was 29,3 billion yen in the absence of the preservation costs annually.[20] The cost of fortifying an island against erosion across many SIDS globally would be exponentially higher in the current day, mainly because this would require a more extensive project allowing the continued residence of a portion of the population of the SIDS to reside therein with the basic structures required for survival with human dignity.

Should climate funds yield increased funding for adaptation of SIDS or should the ICJ find that States may be legally responsible for their acts and omissions that have caused harm to the climate system with particular reference to SIDS, this does not resolve the

[16] United Nations Security Council, Seventy-eighth year, 9260th meeting, Threats to international peace and security, Sea-level rise: implications for international peace and security, UN Doc S/PV.9260 (Resumption 1) 18.
[17] *Ibid* 18.
[18] *Ibid* 409.
[19] *Ibid* 410.
[20] G Tsaltas *et al* 'Artificial Islands and Structures as a Means of Safeguarding State Sovereignty Against Sea Level Rise. A Law of the Sea Perspective' (2010) *Paper Presented at the 6th ABLOS Conference "Contentious Issues in UNCLOS – Surely Not?"* 2.

complexities. Land reclamation and land preservation do not guarantee the absence of disputes without reforming the law. For instance, Okinotorishima has been the subject of debate between Japan and China, as China claim that it should be regarded as artificial island due to the widespread reclamation efforts that have taken place in the ongoing efforts to maintain Okinotorishima.[21] While it is settled in international law that reclamation efforts do not turn an island into an artificial island, over a prolonged period, continued efforts to preserve an island to house a small population on a SIDS whilst all other islands surrounding have disappeared may give rise to questions of the nature of the modified island in its natural form.

3. Sea-level Rise and Maritime Zones

In Chapter Four, it was highlighted that the maritime zones of SIDS are under threat due to the rise in sea levels. Traditionally, normal baselines, as drawn in terms of Article 5 of UNCLOS, have been considered to be ambulatory in nature.[22] This means that as sea levels rise, baselines recede landward, affecting the outer limits of these maritime zones. Similarly, straight baselines use geographical points to draw the baseline in terms of Article 7 of UNCLOS. Normal baselines, straight baselines, and archipelagic baselines may be under threat due to sea-level rise, which may bring into contention the points that have been used to draw baselines as they move landward.[23]

The SLRC of the ILA adopted a resolution in the interests of legal certainty that baselines should be fixed to ensure stability and legal certainty; this resolution was taken *de lege ferenda* as a recommendation.[24] Furthermore, State practice is emerging, particularly in the Pacific region but is also extending further as there is State will for the fixing baselines. Some examples of this can be seen in the statements from the 9260th Security Council meeting: The representative for the Philippines asserted in the meeting of the Security Council that they favour the maintenance of maritime baselines over ambulatory baselines, the representative of Chile emphasized the preservation of baselines, the

[21] *Ibid* 4.
[22] ILA, Committee on Baselines under International Law of the Sea, 'Sofia Conference (2018)' available at *https://www.ila-hq.org/en_GB/documents/conference-report-sydney-2018-5* (accessed 16 August 2023) 31.
[23] ILA, Committee on International Law and Sea Level Rise 'Sydney Conference (2018)' available at *https://www.ila-hq.org/en_GB/documents/conference-report-sydney-2018cteeversion* (accessed 12 August 2023) 10.
[24] ILA, Committee on International Law and Sea-level rise, 78th Conference of the International Law Association 'Resolution 5/2018' 19-24 August 2018 available at https://www.ila-hq.org/en_GB/documents/conference-resolution-sydney-2018-english-2 (accessed 26 January 2023).

representative of the Dominican Republic noted that reviewing or updating baselines or external limits would undermine peace and security, and the representative of Antigua and Barbuda noted that baselines and maritime zones shall apply without being reduced due to sea-level rise.[25] The Declaration on Preserving Maritime Zones in the Face of Climate Change-related Sea-Level Rise is a strong indication of the establishment of a regional rule of customary international law that the Pacific States do not intend to update or review their baselines and that the baselines of these States shall be maintained without reduction regardless of physical changes as a result of sea-level rise.[26] However, developing a new rule within international customary law is not without difficulties.

Stoutenburg's opinion is that the development of a new rule would be retrospective; as such, States would have to wait for rising sea levels to move baselines and then assert the continued exercise of their rights over the area.[27] States cannot assert what they will do if baselines move to establish a rule of customary international law.[28] Until a new customary international law is established, the uncertainty within international law will persist.[29] Whilst customary international law is practised by those States most affected by rising sea levels and is said to be uniform in these areas, the difficulties cementing a new rule of customary international law centre around ensuring the rule's universality.[30] If the rule were to be followed within a particular area, excluding others, it may be considered a 'particular' custom, creating more limited obligations for other States.[31] It was noted in the *North Sea Continental Shelf* case that establishing a new rule of customary international law does not have to occur over a long period; it may take place over a short period, but if it is a short period, there must be 'extensive and virtually uniform' practice, and there should further be 'general recognition that a rule of law or legal obligation is involved.'[32] While some States assert the willingness to adhere to such a rule of international law, others may oppose the rule and would not be bound to respect it.[33] As such, it is asserted that the current practice may amount to a 'particular' custom, and there

[25] United Nations Security Council, Seventy-eighth year (note 16 above) 2, 7, 15.
[26] See the Declaration on Preserving Maritime Zones in the Face of Climate Change-related Sea-Level Rise available at *https://www.forumsec.org/2021/08/11/declaration-on-preserving-maritime-zones-in-the-face-of-climate-change-related-sea-level-rise/* (accessed 4 March 2024).
[27] JG Stoutenburg (note 9 above) 208.
[28] *Ibid* 208.
[29] *Ibid* 208.
[30] *Ibid* 209.
[31] *Ibid* 209.
[32] *North Sea Continental Shelf, Judgment, I.C.J. Reports* 1969, para 43.
[33] JG Stoutenburg (note 9 above) 209.

should be a drive toward a resolution that requires the cooperation of other States to attempt to establish a universal practice of international law.

Despite this recommendation for international law to fix baselines and the emergence of State practice, fixing baselines does not negate the general customary international legal understanding that the maritime zones measured from baselines exist due to natural territory, namely, a coastline. Coastal States assert control over adjacent land territory by having a coastline adjacent to it.[34] The principle is often referred to as the land dominates the sea principle. This principle is said to permeate the very essence of the UNCLOS.[35] As such, it is asserted that some portion of the coastline of a State must remain in place for the continued maintenance of maritime zones.

While the land dominates the sea principle and UNCLOS as the *de lege lata* does not prevent the fixing of baselines, the fixing of baselines does not reverse 'the current system of attribution of maritime zones'. It does not replace the regime provided in UNCLOS, but it would attempt to complement it.[36] The UNCLOS as a convention aimed to codify and develop the law of the sea to ensure the '…strengthening of peace, security, cooperation and friendly relations among all nations in conformity with the principles of justice and equal rights…'.[37] The essential mechanism of the UNCLOS was to further the purposes and principles of the UN Charter.[38] The UNCLOS preamble specifies that the convention aims to provide a legal order for the seas and oceans in order to facilitate international communication.[39] As such, fixing baselines in line with recent State practices in the Pacific will ensure that the aims and purpose of UNCLOS are realised by ensuring legal stability and certainty of the law of the sea to ensure further peace. Additionally, the proposal to fix baselines will also further achieve a 'just and equitable international economic order' that further emphasizes the 'special interests and needs of developing countries' among these countries, SIDS.

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[34] *North Sea Continental Shelf, Judgment, I.C.J. Reports* 1969, p. 3; *Continental Shelf (Libyan Arab Jamahiriya/ Malta)* 1985 ICJ 13 para 49; UNGA, ILC, Seventy-fourth session, Sea-level rise in relation to international law, Additional paper to the first issues paper (2020), by Bogdan Aurescu and Nilüfer Oral, Co-Chairs of the Study Group on sea-level rise in relation to international law, Geneva, 24 April-2 June and 3 July-4 August, UN Doc A/CN.4/761 para 149.
[35] NH Thao 'Sea-Level Rise and the Law of the Sea in the Western Pacific Region' (2020) 13 (1) *Journal of East Asia and International Law* 138.
[36] JG Stoutenburg (note 9 above) 194, 207.
[37] Preamble, UNCLOS.
[38] Preamble, UNCLOS.
[39] Preamble, UNCLOS.

As such, changes are required in international law to allow the continued maintenance of maritime zones despite the land territory of SIDS becoming submerged or uninhabitable.

4. Sea-Level Rise and Artificial Islands as Mitigation Mechanisms

Within Chapter Five, the nature of artificial islands as territory was considered, as well as the use of artificial islands to sustain maritime zones. Within this Chapter, it was provided that Article 60 (8) of UNCLOS expressly states that 'artificial islands, installations and structures do not possess the status of islands' and may not have a territorial sea of their own, an EEZ, or continental shelf. However, it was also highlighted that artificial islands are distinct from artificial installations and structures in that the latter do not have the ability to provide long-term housing for populations.[40] UNCLOS does not expressly assert that artificial islands are not territory, but it was ascertained that they cannot be considered territory. This is based upon the understanding that LTEs are not considered territory[41] under international law, and by implication, fully artificial islands cannot be territory. Essentially, if the artificial island modifies existing territory, it may be considered territory in terms of international law for statehood. Artificial modification to natural territory does not change the feature's natural entitlements. A court or tribunal may enquire into the status of the feature in its natural form before any modifications to determine its nature.[42]

While a small population of a State may reside on an artificial island physically, the impediments to their long-term survival would be to ensure that the State can maintain its statehood and that the maritime zones they have always controlled remain in place. Even if the State were to assert control over some portion of natural territory, such as a rock, this would be insufficient to maintain its vast maritime zones, including an EEZ and continental shelf. Within Chapter Five, it was highlighted that SIDS rely, to a large extent, on the maritime zones that surround their coastline. This includes fishing for daily sustenance by the people residing on the territory and also the use of resources from the EEZ toward GDP by the State.

If existing maritime zones lapse upon the loss of a natural coastline and no natural territory remains, concerns regarding maritime territory and statehood will come to the

[40] See Article 60 (1) (b) of UNCLOS and Article 56 of UNCLOS.
[41] *Territorial and Maritime Dispute (Nicaragua v. Colombia), Judgment, I.C.J. Reports 2012,* p. 624 para 26.
[42] *The Republic of the Philippines and The People's Republic of China* PCA Case No 2013-19 para 306.

fore.[43] To ensure the maintenance of maritime zones and statehood where only an artificial island remains, international law reform must be conducted to allow artificial islands to be considered substitute territory within limited circumstances.

5. The Argument for the Certainty a New Convention May Bring

As mentioned in the discussion on the reinterpretation of existing law, including the international legal principles on statehood and the baseline provisions within UNCLOS, is not a viable option for SIDS. Additionally, creating new customary international law to account for the difficulties that rising sea levels cause in international law is only a step toward a 'particular' custom in the field of maritime zones that would require time to become entrenched as a worldwide custom. The issues that result from sea-level rise span multiple avenues and are governed by multiple international legal principles. The complexities that result from rising sea levels cannot be left to the courts with the view that they may administer justice in the interests of equity toward SIDS. There may be instances where the law does not favour the situation of SIDS, and it may not be possible to interpret all aspects of international law equitably. We will look to the example of the ICJ, which holds an important position within international law as a structure. The ICJ has not always been willing to step in and assist States in protecting their rights in terms of international law when doing so would be contrary to principles entrenched within international law.

In the case of *East Timor (Portugal v. Australia),*[44] the ICJ was approached to assist Portugal in protecting the people of East Timor's right to self-determination and the rights and duties of Portugal concerning East Timor as its administering power. Portugal approached the Court regarding a dispute on the exploration and exploitation of the continental shelf of the Timor Gap. East Timor is a territory administered by Portugal, which has also been confirmed in Security Council Resolutions.[45] However, on the 27th of August 1975, Portugal's civil and military authority withdrew from East Timor and on the 7th of December 1975, Indonesia's armed forces stormed the island of Atauro.[46] The territory has remained under the control of Indonesia, and it is alleged that this is at the

[43] UNGA, ILC, Seventy-fourth session, Sea-level rise in relation to international law, Additional paper to the first issues paper (note 34 above) 60.
[44] *East Timor (Portugal v. Australia),* Judgment, I.C.J. Reports 199*5,* P. 90.
[45] United Nations, Security Council, Resolution 384 (1975), Adopted by the Security Council at its 1869th meeting on December 1975, UN Doc S/RES/384(1975).
[46] *East Timor (Portugal v. Australia)* (note 44 above) 96.

will of the people.[47] Australia asserted that they had recognised Indonesia as the administering power of East Timor but not the means by which they became the occupying power.[48] Despite this, Australia concluded a treaty with Indonesia concerning East Timor, creating a 'Zone of Cooperation in an area between the Indonesian Province of East Timor and Northern Australia'.[49] In essence, Portugal asserted that the agreement concluded by Australia with Indonesia was invalid as Indonesia could not conclude agreements with respect to East Timor and its corresponding maritime territory due to Portugal's rights and duties with respect to this territory.

Australia, contrary to the claims of Portugal, asserted that the ICJ did not have jurisdiction to hear the matter as the court would need to rule on the actions of Indonesia without their consent.[50] The Court noted as follows:

> 'In the Court's view, Portugal's assertion that the right of peoples to self-determination, as it evolved from the Charter and from United Nations practice, has an *erga omnes* character, is irreproachable. The principle of self-determination of peoples has been recognized by the United Nations Charter and in the jurisprudence of the Court…; it is one of the essential principles of contemporary international law. However, the Court considers that the *erga omnes* character of a norm and the rule of consent to jurisdiction are two different things. Whatever the nature of the obligations invoked, the Court could not rule on the lawfulness of the conduct of a State when its judgment would imply an evaluation of the lawfulness of the conduct of another State which is not a party to the case. Where this is so, the Court cannot act, even if the right in question is a right *erga omnes*.'[51]

In asserting that the right to self-determination is an *erga omnes* right, the ICJ noted that the right is undeniable and there is a universal interest in protecting it. The Court affirmed the UN Security Council Resolution 384 (1975), which 'expressly called for respect for 'the territorial integrity of East Timor as well as the inalienable right of its people to self-determination in accordance with General Assembly resolution 1514 (XV)'.[52] The Court further noted that it was not 'necessarily prevented' from deciding when the judgment at hand may affect a State's interest that is not party to the case; however, in *casu*, the rights

[47] *Ibid* 96.
[48] *Ibid* 97.
[49] *Ibid* 98.
[50] *Ibid* 100.
[51] *Ibid* para 29.
[52] *Ibid* 103. Reference is made to the United Nations Security Council, Resolution 384 (1975) of 22 December [on the East Timor question] , UN Doc S/RES/384 (1975).

and obligations of Indonesia were so essential to the judgment.[53] The fact that Indonesia would not be a party to the case would run contrary to an essential principle of international law in that jurisdiction is exercised with consent.[54] Therefore, where the Court decides on a matter which can, in turn, affect other States, it may nevertheless proceed; however, where the State that is absent is so essential to the case that its rights and responsibilities are the very subject matter of the Court, the Court will decline to exercise its jurisdiction. Unfortunately, it did not change the outcome of this case that it would have been equitable for the ICJ to rule on the matter.

Furthermore, the stance of the UN General Assembly or the Security Council in affirming the right of self-determination for the people of East Timor did not have a bearing on the matter due to the limitations on the jurisdiction of the court, which are intrinsic to international law. As such, the Court concluded by reaffirming the right of the people of East Timor to self-determination and declined to exercise jurisdiction in the matter.[55] In essence, the Court's hands were effectively tied by the limitations provided within international law despite considerations of morality.

It is argued that the structure and jurisprudence of international law contain inherent power imbalances that negatively affect the Third World, including SIDS. Much of international law is based upon the consent of States, which is its inherent limitation. States with less international power have little right of recourse against more powerful States in the absence of consent. Additionally, international legal structures do not provide mechanisms to circumvent this power imbalance. As Eslava and Pahuja assert:

> 'The most significant point of departure of TWAIL from what might loosely be called 'mainstream' interpretations of international law, is in TWAIL's insistence that issues of material distribution and imbalances of power affect the way in which international legal concepts, categories, norms and doctrines are produced and understood.'[56]

It is hard to reconcile the rationale of international law protecting the rights of States to consent, even where their conduct may be considered unlawful, over the right to self-determination and the protection of the natural resources and related rights of indigenous

[53] *Ibid* 104.
[54] *Ibid* 105.
[55] *Ibid* 105.
[56] L Eslava S Pahuja 'Between Resistance and Reform: TWAIL and the Universality of International Law' 3 (1) (2011) *Trade, Law and Development*
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peoples' as highlighted in the *East Timor (Portugal v. Australia)* case. Therefore, it is argued that relying on the equitable interpretation of the rights that international law can provide to SIDS in the face of submerging land territory amid rising sea levels does not provide enough certainty.

The power imbalances inherent within international law remain within the structures wherein a new negotiating text may be debated. However, it is argued that these power imbalances may be balanced by the benefits that the more powerful States can gain from the development of international law. A new convention that ensures the permanency of SIDS in terms of their statehood and the maintenance of maritime zones would indirectly benefit powerful States. As Stoutenburg highlights, if the island State becomes extinct, this would have far-reaching implications for the State's debts as they would remain unpaid, and the creditor State would not have any rights of recourse against the State.[57] Currently, there is no State practice for a situation of this nature, and the dissolution of State debt is a possible consequence of State extinction. It would not be in favour of more powerful States that have offered financial assistance to SIDS, which may stand to become uninhabitable and possibly submerged. For example, China, India, Indonesia, Malaysia, Morocco, Russia, United Arab Emirates and Venezuela have been providing critical partnerships to SIDS, and combining resources from providers allows additional financing prospects.[58] The Lowry Institute has estimated that China has provided just under two billion USD in funding to the SIDS in the Pacific and has become an essential source of finance within the region.[59] Consequently, China, as a large funding partner of the Pacific, would have a vested interest in preserving the statehood of SIDS.

An additional complexity that may sway more powerful States in favour of legal developments amid rising sea levels is the legal status of persons affected by rising sea levels. If a State ceases to exist legally, the people within the State will become stateless as 'its former nations would have no trouble demonstrating that no *existing* State

[57] JG Stoutenburg (note 9 above) 443.
[58] OECD 'Financing for development in small island developing states: A focus on concessional finance' In *Making Development Co-operation Work for Small Island Developing States* (2018) available at *https://www.oecd-ilibrary.org/sites/9789264287648-7-en/index.html?itemId=/content/component/9789264287648-7-en#:~:text=The%20Lowry%20Institute%20estimates%20that,some%20important%20%E2%80%9Ctraditional%E2%80%9D%20providers.* (accessed 5 March 2024).
[59] *Ibid*.

considered them as its nations'.[60] Stoutenburg further asserts that States are likely to receive persons who have been environmentally displaced from low-lying Pacific island States, including the USA, Australia, and New Zealand.[61] Therefore, it is in the best interest of these States to support an initiative to create certainty within international law on the statehood of SIDS and any other mechanisms to prevent the displacement of the people that inhabit these islands.

Whilst some traditional TWAIL scholars have resisted international law and the value of international legal structures to create change,[62] there are more recent understandings that international law plays a significant part in the international normative regime, noting the value of the existing institutional structures of international law. Therefore, the considerations of the difficulties faced by SIDS and how international law can empower this portion of marginalised States by any means necessary serve the ideals of many TWAIL scholars.[63] In essence, as stated by Anghie, '…law can play its ideal role in limiting and resisting power',[64] which is the purpose of the proposed negotiating text.

The addition of a new negotiating text to be deliberated on with the intention to produce a new convention will result in the further fragmentation of international law; it is argued that this fragmentation creating *lex specialis* will serve the interests of SIDS as well as the objective to create a law that limits and resists power. The main driving factor toward fragmentation in the current instance is that it allows the diversification of international legal norms into a previously unregulated field of sea-level rise and the effects thereof for SIDS.[65]

Dehm touches on the difficulties faced previously within international environmental law and the problems faced in producing agreements to limit climate change. Dehm asserts that the focus on the North-South gap and the calls to address the historical inequality of the regime, particularly within international law, is essential, but focusing on these issues solely brings with it risks.[66] These risks include States not observing how international

[60] JG Stoutenburg (note 9 above) 407.
[61] *Ibid* 408.
[62] See for instance C Miéville, *The Commodity-Form Theory of International Law: An Introduction* (2004) 17(2) Leiden Journal of International Law 271.
[63] L Eslava S Pahuja (note 56 above) 110.
[64] A Anghie *Imperialism, Sovereignty, and the Making of International Law* (2004) 318.
[65] H van Asselt F Sindico M Mehling 'Global Climate Change and the Fragmentation of International Law' 30 (4) (2008) *Law & Policy* 426.
[66] J Dehm 'Reflections on Paris: thoughts towards a critical approach to climate law' (2018) Hors-série (septembre 2018) *Revue québécoise de droit international* 21.

environmental law (and other avenues of international law) may be complicit in the reproduction and reinforcement of these inequalities. [67] Therefore, the focus should be on how to use international law to achieve an outcome that addresses inequities, even where the input may appear 'unequal' on the surface. The critical aspect of the reformation of international law should focus on the output of equality.

Additionally, van Asselt, Sindico, and Mehling note that many treaties that deal with environmental aspects (which may be equally important for the issue of climate change) have been negotiated in parallel, which essentially assists in working toward a main objective; this may have positive effects on the different treaties.[68] It is important then, for any new treaties, including the negotiating text proposed below on the issue of sea-level rise and mitigation of its effects, to work in harmony with the existing treaties on the issue of climate change.

6. The Case for Fragmentation of International Law

The fragmentation of international law refers to:

> '…the dynamic growth of new and specialised subfields of international law after 1989, to the rise of new actors besides States (international organizations, non-governmental organizations (NGOs) and businesses), and to new types of international norms outside the acknowledged sources.'[69]

Peters notes that the process of fragmentation of international law was triggered by the post-Cold War, when a range of multilateral treaties were concluded.[70] Arguably, as time has progressed, the fragmentation of international law has only become more significant. The issue of fragmentation of international law was studied by the ILC study group, which concluded its study in 2006 with its final report.[71] In its final report, the Commission noted that fragmentation of international law in terms of its substantive aspects has both positive and negative aspects results: competing and incompatible rules, principles, rule systems and institutional practices; and the expansion of international law diversifying it

[67] *Ibid* 21.
[68] H van Asselt F Sindico M Mehling (note 65 above) 431.
[69] A Peters 'The refinement of international law: From fragmentation to regime interaction and politicization' 15 (3) (2017) *International Journal of Constitutional Law* 673.
[70] *Ibid* 673.
[71] ILC 'Conclusions of the work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law' (2006) available at *https://legal.un.org/ilc/texts/instruments/english/draft_articles/1_9_2006.pdf* (accessed 16 September 2023).

in terms of its techniques but also its objects.[72] In essence, expanding international law results in the development of the law to account for the changes and demands of the world.[73] Despite the difficulties that fragmentation of international law creates, the Commission asserted that the challenges are not new and can be dealt with through techniques that international lawyers have used to reconcile conflicts of law previously.[74] The most significant issue with the fragmentation of law is that more general laws may conflict with more specific laws. The maxim *lex specialis deorgat legi generali* essentially suggests that when two or more norms deal with the same subject matter, it is important to prioritise the more specific international law.[75] Below, we will consider both the negative and positive effects of fragmentation in a bit more detail.

6.1 Negative Effects of Fragmentation

Hafner asserts that fragmentation has the ability to endanger the legitimacy and reliability of international law as a source.[76] Fragmentation may result in conflicts and incompatible laws, such as treaty conflicts and other conflicts of norms or memorandum, among other sources.[77] In terms of substantive law, multiple regimes may deal with the same aspect, and more general laws may directly compete with more specialised law (*lex specialis*).[78] Mehling notes that as the body of international law grows, there are threats to the idea of one of the main objectives of international law, namely 'unity and coherence of international law'.[79]

The diversification of law into sectionalism and regionalism worldwide has resulted in specific global regimes, which are, in some instances, geographic and provide the context of a unique nature over more general law.[80] The growing sectionalism and regionalism have benefits and drawbacks. Wherever there are multiple laws, there will be multiple

[72] *Ibid* 177.
[73] *Ibid* 177.
[74] *Ibid* 177.
[75] ILC, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, Fifty-eighth session, Geneva, 1 May-9 June and 3 July-11 August 2006, A/CN.4/L.702 8.
[76] G Hafner 'Pros and Cons Ensuing from Fragmentation of International Law' 24 (4) (2004) *Michigan Journal of International Law* 856.
[77] A Peters (note 69 above) 679.
[78] G Hafner (note 76 above) 856.
[79] H van Asselt F Sindico M Mehling (note 65 above) 426.
[80] G Hafner (note 76 above) 856.

obligations, which may create conflicts with obligations amongst States, and this is the major issue of fragmentation.[81]

Another complication of fragmentation may be forum shopping due to varied jurisdictions emulating from different sources of law. The fragmentation of international law may result in the ability of various courts to review one situation due to the numerous sources of law regulating one single circumstance, and States may decide to use the mechanism that is in their best interests.[82] As such, using one dispute settlement mechanism to resolve a dispute remedies the dispute within that system and does not assist the other dispute settlement systems.[83] In essence, this does not create one harmonious system of judicial activity within international law.[84]

6.2 Positive Effects of Fragmentation

The positive of the fragmentation of international law is that it illustrates an increase in the diversity of the legal norms of international law and the expansion of international law into previously unregulated areas.[85] The fragmentation of international law has created critical areas such as human rights, environmental law, and even international commerce over the history of international law.[86] Additionally, the more that international law diverges, the more diverse views of States may be represented.[87]

The positive effect of fragmentation is that States may be more amenable to complying with international law when it better reflects their needs. This is particularly so when the norms reflect the political situation within a region and the States within that region.[88] Additionally, the specialisation of laws accommodates individual positions of States over more generalised international laws.[89] It is essential to respect the fact that States do not always have the same views on what fundamental values should be preserved by international law,[90] and as such, a more diversified international law may better serve the interests of all States.

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[81] *Ibid* 856-857.
[82] *Ibid* 857.
[83] *Ibid* 857.
[84] *Ibid* 857.
[85] H van Asselt F Sindico M Mehling (note 65 above) 426.
[86] *Ibid* 416.
[87] *Ibid* 426.
[88] G Hafner (note 76 above) 850-851.
[89] *Ibid* 859.
[90] *Ibid* 859.

This is particularly relevant when considering the predicament of SIDS. Whilst the fragmentation of international law comes with negatives, the diversification of international law for SIDS is an invaluable positive. It aligns with the drive to protect Third World States in international law. It is important to remember that the origins of international law, whilst it claims universality, cannot shy away from its roots shrouded in the 'complexes of superiority'.[91] An example of this, for instance, comes in the seats of the ICJ, which has been arguably considered the most critical court in international law.[92] The central role of the ICJ and the ILC in law-making cannot be defined. Whilst the ICJ has expressly provided in Article 9 of the Statute of the International Court of Justice[93] to ensure representation, in practice, the seats of the court have not historically provided for representation.[94] As Tladi notes:

> 'In practice—with the exception of a recent election—States respect an informal agreement to reserve a set of number of seats for different regions, thus ensuring *some s*pread and representatives. Yet, questions can be asked about whether this representation is sufficiently fair and equitable. To make a rough comparison, under this general understanding, WEOG (that group of States that I routinely describe to my students as the group of "white rich States"), a significantly smaller group, whether in terms of number of States or populations, is "entitled" to a third of the seats (five seats), while Africa, which has nearly double the number of States and larger population, is entitled only a fifth (three seats). Similarly, the Group of Asia and the Pacific which also accounts for nearly double the number of States of WEOG and nearly sixty percent of the population of UN members, is entitled to only two seats. These are truly remarkable statistics, but they should come as no surprise. A close inspection of this informal arrangement reveals that the "desired" composition of the Court reflects the composition of the UN Security Council—a body whose lack of representativeness is well documented.'[95]

Despite widespread calls to champion equity and representation, the structures of international law cannot avoid the origins and the history of international law. It is

[91] O Ba 'International Justice and the Postcolonial Condition' 63 (4) (2017) *Africa Today* 51.
[92] D Tladi 'Representation, Inequality, Marginalization, and International Law-Making: The Case of the International Court of Justice and the International Law Commission' 7 (2022) *UC Irvine Journal of International, Transnational, and Comparative Law* 69.
[93] Statute of the International Court of Justice, 26 June 1945, 33 UNTS 993, (entry into force 31 August 1965).
[94] D Tladi (note 92 above) 78.
[95] *Ibid* 78.

asserted that accepting the problematic tendencies of international law and using the existing legal structures to champion a cause for marginalised States is a mechanism for change. It is also a means to accept that international law and its historical legacy cannot be undone overnight. It is important, then, to work toward a form of substantive equality by providing for more diverse voices in the international legal order. Creating a convention that puts SIDS at the forefront is a mechanism for empowering marginalised voices and finding space for these States within international law.

Additionally, the negative aspects of fragmentation of international law do not create serious concerns within the current content. In terms of conflicting laws, it has been well documented within this thesis that there are currently no conflicts between the current developments of international law and other international legal instruments. For instance, fixing baselines is not in conflict with UNCLOS. Similarly, the proposals within the negotiating text complement the existing structures within the UNFCCC and the frameworks therein. The negotiating text to be proposed is envisaged as a stand-alone convention providing for *lex specialis*, specific to the protection of SIDS. Whilst this thesis contributes to the wording of a draft informed negotiating text specific to SIDS, it should be noted that these provisions may also be included in a broader convention which has yet to be drafted that may deal with other consequences of sea-level rise. Regardless of whether this convention stands alone or is included within a broader convention yet to be created on the sea-level rise issue, the proposed provisions would still be relevant.

To adequately remedy the gaps to survival for SIDS, the convention will need to cover the following categories: statehood, maintaining maritime zones, and allowing the creation of substitute artificial islands to sustain a population in place of natural territory. The convention is envisaged as a multilateral treaty. The nature of treaties and the intricacies of this process will be discussed briefly below.

7. Proposal for a New Convention

Shaw notes that there are no specific requirements regarding the treaty's form to exist.[96] Hollis notes that the Report of the Working Group on the Review of Multilateral Treaty-Making Process concluded in 1984 provides us with more guidance on the initiation stage of treaty-making in relation specifically to multilateral treaties.[97] In the working report, it

[96] M Shaw International Law 9 ed (2021) 789.
[97] DB Hollis *The Oxford Guide to Treaties* (2020) 2 (ed) 203.

is expressly observed that a State may take the following aspects into account before initiating a multilateral treaty: whether the subject matter of the proposed treaty is already regulated in international law, the interest of the international community in the subject matter, whether a multilateral treaty is the best means to achieve the objectives of regulation, and the other activities undertaken on the area.[98]

Additionally, it is preferable for a proposal of a multilateral treaty to be accompanied by an explanatory note indicating support for the conclusion of a multilateral treaty on a particular subject area.[99] Where a proposal for a multilateral treaty is submitted to the UNGA or any other competent organ to receive the submission, preparations may ensue to evaluate the proposal, including distributing questionnaires, legal research, and gathering data.[100] It is also important to consider the creation method of the multilateral treaty. For instance, a State may propose making a multilateral treaty in line with the UN Framework, or they may submit a draft of the treaty for consideration.[101] Alternatively, the ILC may draft the treaty.[102] Members of the UN would also be able to provide their comments on the content of a treaty submitted for consideration.[103] State members of the UN or members of any specialised or related agencies of the UN or competent international organisations can view and additionally comment on a proposed treaty where this is appropriate.[104] A multilateral treaty may also be created by negotiation within a forum or body; the States that participate in the process may be considered the participating States, and other participants may also be included, such as international organisations.[105]

In the present circumstance, it would be prudent for the SIDS collectively to submit a draft treaty for consideration by the UNGA for further negotiation within a conference setting. The UNGA may consider the draft negotiating text and decide to convene a diplomatic conference to negotiate a convention. A diplomatic conference would allow

[98] UNGA Sixth Committee (39th Session), 'Report of the Working Group on the Review of the Multilateral Treaty-Making Process' (27 November 1984) UN Doc A/C.6/39/L.12 4.
[99] *Ibid* 4.
[100] *Ibid* 4.
[101] *Ibid* 4.
[102] *Ibid* 4.
[103] *Ibid* 4.
[104] *Ibid* 4.
[105] *Ibid* 4.

the consideration of this draft negotiating text by subject experts who may assist with valuable input and consideration.

SIDS need to champion the cause for their own survival. Still, other States should have input in creating a multilateral treaty to ensure support from the international community and the development of international law to extend beyond regional initiatives. The importance of a collaborative effort in any mechanism to provide a solution to the difficulties created by rising sea levels has been highlighted by SIDS within UN structures. The representative of Tuvalu at the 9260th meeting of the Security Council emphasized the words of the Director of Climate Change of the Pacific Community in stating that solutions 'must be jointly created and enacted' by the Governments of island States and the peoples who reside therein, with the necessity for global discussion where the difficulties faced by these States are deliberated on and realised.[106] Furthermore, the representative of Tuvalu noted that there needs to be a 'global solution' that includes the international community and has welcomed the Rising Nations Initiative launched by Pacific Atoll Heads of States in 2021.[107] The Rising Nations Initiative is aimed at protecting the statehood of atoll countries located in the Pacific with the drive to preserve the sovereignty of these States.[108] The project aims to deepen knowledge, partnerships, and advocacy by bringing together academics and experts to work within the UN and World Bank systems to consider policy discussions for the long-term adaptation of these States.[109] The project uses Tuvalu as the pilot study country.[110] The concluding aim is to put forward a global campaign to 'more effectively inform policymakers, climate action movements and global citizens' on the extreme urgency of rising sea levels and climate change for atoll countries located in the Pacific.[111]

Currently, SIDS, particularly those in the Pacific, are attempting to establish a legal framework to account for the consequences of rising sea levels and climate change more generally. The first step in this process is requesting advisory opinions on the States'

[106] United Nations Security Council, Seventy-eighth year, 9260th meeting (note 16 above) 29.
[107] *Ibid* 30. See also UN, Department of Economic and Social Affairs, Sustainable Development, 'Rising Nations Initiative' available at *https://sdgs.un.org/partnerships/rising-nations-initiative* (accessed 4 March 2024).
[108] UN, Department of Economic and Social Affairs, Sustainable Development, 'Rising Nations Initiative' (note 107 above).
[109] *Ibid*.
[110] *Ibid*.
[111] *Ibid*.

requirements to prevent damage to the climate and the oceans in both the ICJ and ITLOS. The former Governor-General of Tuvalu has stated the significance of these advisory opinion requests: 'Through the International Court of Justice and the International Tribunal of the Sea, small island states must create strong legal frameworks on climate change.'[112] Furthermore, the co-chairs of COSIS have asserted that international courts and tribunals 'have a role to play' in creating a new legal framework.[113] It is understood that the first step in the creation of a legal framework is understanding the obligations of States to protect the climate. This is because SIDS require a settlement to enable the wide-scale adaptation required in the face of rising sea levels. As the representative of Tuvalu noted in the 9260th meeting of the Security Council:

> 'Let me put forward Tuvalu's views on what is needed, as outlined by my Prime Minister, the Honourable Kausea Natano. Apart from the urgent efforts to address such issues within climate change mitigation and adaptation, we need a global settlement that guarantees nation States, such as mine, a permanent existence beyond the inhabitable life of our actual homes – one that recognizes and protects our cultural integrity, our human and economic capital and our sovereignty.'[114]

The calls for a global settlement include the protection of the rights of island States to the land and ocean, additional safeguards of the heritage of their nations and the relocation of the people that reside within these States.[115] Tuvalu has also called for a '…globally just and equitable solution'.[116] Similarly, Kiribati has emphasized the need to reestablish confidence in 'multilateral cooperation and diplomacy, and renewed commitment to accountability, good governance and responsive policies' regarding climate-related crisis and other aspects.[117]

Other States, including Argentina, have voiced support for the work of the ILC on statehood and its continuity in the event that territory is lost, supporting the 'progressive

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[112] Commission of Small Island States on Climate Change and International Law 'COSIS 2022 Annual Report' October 2022 available at *chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.cosis-ccil.org/storage/documents/COSIS_Annual-Report_2022.pdf* (accessed 5 March 2024) 16.
[113] *Ibid* 9.
[114] United Nations Security Council, Seventy-eighth year, 9260th meeting (note 16 above) 30.
[115] United Nations General Assembly, General Debate, Statement His Excellency Kausea Natano Prime Minister, 23 September 2022 available at *https://gadebate.un.org/en/77/tuvalu* (accessed 5 March 2024).
[116] *Ibid.*
[117] United Nations General Assembly, General Debate, Statement His Excellency Taneti Maamau President, 23 September 2023 available at *https://gadebate.un.org/en/78/kiribati* (accessed 5 March 2024).

development of international law and its codification'.[118] Botswana asserted that they welcome and support the initiates by the leaders of Pacific atoll countries to 'protect their statehood, preserve their sovereignty and safeguard the rights and heritage of the populations affected', further reiterating that people should not be forced to leave the places they call home.[119] The Prime Minister of the Cook Islands Mark Brown, noted at the Pacific Islands Forum Regional Conference on Preserving Statehood and Protecting Persons that the goal is for the 'progressive development of international law' and that the work of the Pacific Islands Framework is to be at the forefront of the advocacy for their legal rights and entitlements.[120] The USA has indicated a strong position on the issue of sea-level rise and the difficulties relating to statehood and maritime zones:

> '…the United States will work with other countries toward the goal of lawfully establishing and maintaining baselines and maritime zone limits and will not challenge such baselines and maritime zone limits that are not subsequently updated despite sea-level rise caused by climate change.
>
> Turning to the ILC's more recent work on this topic, the United States appreciates the Commission's efforts with respect to issues related to statehood. These matters are of vital concern to States that are most at risk from sea level rise. The issues that the Study Group has identified in its work so far raise complex legal questions related to foundational aspects of international law. Given the lack of applicable State practice in relevant areas, it is difficult to draw definitive conclusions on how international law will develop. The United States looks forward to working with other countries to address legal issues of statehood as they arise.'[121]

As such, there is support from SIDS and third-party States to consider the development of international law through collaboration on the way forward.

Having now canvassed the issues faced by SIDS and possible legal avenues to ameliorate the loss of statehood and maritime zones, this thesis takes the position that a new negotiating text would be the most suitable remedy within international law for SIDS.

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[118] United Nations Security Council, Seventy-eighth year, 9260th meeting (note 16 above) 37.
[119] *Ibid* 16.
[120] Pacific Islands Forum 'REMARKS: Forum Chair, Cook Islands Prime Minister Brown to Regional Conference on Preserving Statehood, Persons' 27 March 2023 available at *https://www.forumsec.org/2023/03/27/remarks-forum-chair-cook-islands-prime-minister-brown-to-regional-conference-on-preserving-statehood-persons/* (accessed 5 March 2024)
[121] United States Mission to the United Nations, 'US Remarks at a Meeting of the Sixth Committee on Agenda Item 77: Report of the International Law Commission on the Work of its Seventy-third Session' (27 October 2022) 2.

This section contributes as a recommendation for a full draft convention with the purpose of serving as an informal negotiating text. The proposed full negotiating text appears below:

Draft negotiating text

5 March 2024

United Nations Convention on Mitigating the Loss of Maritime Zones and Statehood Due to the Effects of Sea Level Rise for Small Island Developing States by the Establishment of Substitute Artificial Islands

PREAMBLE

Recalling that the United Nations Framework Convention on Climate Change 1992, the Paris Agreement 2015, and related agreements aim to mitigate the threat that climate change poses to all States globally,

Recalling further that the mechanisms to mitigate climate change have not prevented widespread changes to the climate, including sea-level rise, which have resulted in climate-related vulnerabilities for Small Island Developing States,

Recognising that Small Island Developing States are significantly affected by sea-level rise and climate change and have planned their development in reliance on the rights to their maritime zones guaranteed in the United Nations Convention on the Law of the Sea 1982,

Noting that climate change and rising sea levels have accentuated the need for a Convention to mitigate the disproportionate international legal consequences of adverse changes to the climate on Small Island Developing States,

Recognising the desirability of establishing, through this Convention, a framework in the interests of legal stability to maintain the statehood, sovereignty, and maritime zones of Small Island Developing States despite rising sea levels,

Considering that the achievement of these goals will ensure the realisation of a just and equitable international legal order for Small Island Developing States, providing clarity in international law for all States,

Desiring this Convention to further develop the principles embodied in customary international law and the United Nations Convention on the Law of the Sea, 1982, to ensure equity in international law,

Believing that codifying and allowing the progressive development of international law will strengthen harmonisation, peace, security, and cooperation among States Party as provided for within the United Nations Charter, 1945 and that this Convention applies without prejudice to rights and obligations of States under the relevant Conventions and rules of international law.

Article 1

Definitions

1. For the purposes of this Convention
   (a) 'Actual or imminent threat' means a physical danger to a State's territory that is real, or requires immediate action or attention in response to an urgent situation,
   (b) '"Adverse effects of climate change" means changes in the physical environment or biota resulting from climate change which have a significant deleterious effect on the composition, resilience or productivity of natural and managed ecosystems or on the operation of socio-economic systems or on human health and welfare.' [122]
   (c) 'Artificial island' means an artificially constructed area of land, other than an artificial installation or structure, surrounded by water which is above water at high tide.
   (d) '"Climate change" means a change of climate which is attributed directly or indirectly to human activity that alters the composition of the global atmosphere and which is, in addition to natural climate variability, observed over comparable time periods.' [123]
   (e) '"Environmental impact assessment" means a process to identify and evaluate the potential impacts of an activity to inform decision-making.'[124]
   (f) 'Irreparable harm' means loss or damage that occurs to the land territory of a State by natural elements which cannot be repaired or adequately remedied by compensation,

[122] This definition is borrowed from the UNFCCC, Article 1 (1).
[123] This definition is borrowed from the UNFCCC, Article 1 (2).
[124] This definition is in line with the Agreement under the United Nations Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas beyond National Jurisdiction, Date of Adoption 19 June 2023, Article 1 (10). The rationale for borrowing this definition is to ensure it aligns with recent State practice.

(g) ‘Island’ means a naturally formed area of land, surrounded by water which is above water at high tide in line with the provisions of the United Nations Convention on the Law of the Sea, 1982.

(h) ‘Maritime zones’ means the internal waters, territorial sea, contiguous zone, exclusive economic zone, and continental shelf as delineated in line with the United Nations Convention on the Law of the Sea 1982.

(i) ‘Small Island Developing States’ means a distinct group of 39 States identified in Annex 1, recognised as a special case due to their unique environmental and developmental challenges at the 1992 United Nations Conference on Environment and Development held in Rio de Janeiro, Brazil.

(j) ‘“Sea-level rise” means a change to the height of sea level, both globally and locally at seasonal, annual, or longer time scales due to (1) a change in ocean volume as a result of a change in the mass of water in the ocean (e.g., due to melting of glaciers and ice sheets), (2) changes in ocean volume as a result of changes in ocean water density (e.g., expansion under warmer conditions), (3) changes in the shape of the ocean basins and changes in the Earth’s gravitational and rotational fields, or (4) local subsidence or uplift of the land.’[125]

(k) ‘State concerned’ means the relevant Small Island Developing State as defined within this Convention that is considered to be at actual or imminent threat of irreparable harm due to sea-level rise.

(l) ‘Statehood’ means the status of being a recognised independent nation in line with the requirements for statehood in terms of customary international law.

(m) ‘States Parties’ means States which have consented to be bound by this Convention and for which this Convention is in force.

(n) ‘Substitute artificial island’ means an artificial island where such island is constructed to substitute natural island territory as a result of the adverse effects of climate change, which may cause or have caused irreparable harm to the State concerned.

[125] This definition was adapted from the IPCC, 2019: Annex I: Glossary [Weyer, N.M. (ed.)]. In: IPCC Special Report on the Ocean and Cryosphere in a Changing Climate [H.-O. Pörtner, D.C. Roberts, V. Masson-Delmotte, P. Zhai, M. Tignor, E. Poloczanska, K. Mintenbeck, A. Alegría, M. Nicolai, A. Okem, J. Petzold, B. Rama, N.M. Weyer (eds.)]. Cambridge University Press, Cambridge, UK and New York, NY, USA, 696.

(o) ‘Sustainable development’ means development that does not cause irreparable harm to, or depletion of, natural resources.

Article 2

Recognition of the Special Circumstances of Small Island Developing States

States Parties recognise the specific needs and special circumstances of Small Island Developing States that are particularly vulnerable to the adverse effects of climate change and have to bear a disproportionate or abnormal burden of these affects that should be given full consideration.

Article 3

Preservation of Maritime Zones

1. Once, in accordance with the United Nations Convention on the Law of the Sea, 1982, States concerned and third-party coastal States that possess a territory and population have validly established their maritime zones and notified the Secretary-General of the United Nations of the coordinates of these baselines, they shall be preserved without reduction, notwithstanding sea-level rise.
2. Once, in accordance with the United Nations Convention on the Law of the Sea, 1982, States concerned and third-party coastal States that have not retained their territory and population have previously validly established their maritime zones and notified the Secretary-General of the United Nations of the coordinates of these baselines, they shall be preserved without reduction, notwithstanding sea-level rise.
3. The outer limits of the territorial sea, contiguous zone, and exclusive economic zone that flow from the baselines as preserved in subsection 1 or 2, shall be preserved, without reduction, notwithstanding sea-level rise.

Article 4

Accession of Substitute Artificial Islands

Notwithstanding the legal regime of natural islands established under the United Nations Convention on the Law of the Sea, 1982, a substitute artificial island that is constructed in line with Article 5 below, may substitute natural territory of the State concerned by accession.

Article 5

Establishment of Substitute Artificial Islands

1. Prior to the approval of construction by the Commission, a State concerned establishing a substitute artificial island(s) must comply with the following criteria and adduce evidence of the compliance to the Commission established under this Convention:
   (a) the substitute artificial island(s) must be constructed due to the actual or imminent risk of the natural island territory of a State concerned becoming permanently uninhabitable or submerged as a result of the adverse effects of sea-level rise;
   (b) the substitute artificial island(s) may be constructed within the territorial sea, contiguous zone, or exclusive economic zone of a State concerned and shall not be required to be constructed upon the existing natural island territory it substitutes;
   (c) the substitute artificial island(s) shall not be established within recognized sea lanes essential for international navigation or upon the high seas;
   (d) the substitute artificial island(s) must serve the purpose of housing the population of the State concerned in order to safeguard such population from the adverse effects of climate change including sea-level rise;
   (e) the substitute artificial island(s) must be sustainably developed within the territorial sea, contiguous zone, or exclusive economic zone of the State concerned in a position that least affects the marine environment, and States concerned shall ensure that the potential impacts on the marine environment

of planned activities under their jurisdiction or control are assessed in terms of Article 10 below;

(f) there are no other mechanisms that may be employed by the State concerned claiming the substitute artificial island to maintain its existing natural island territory.

Article 6

Maritime Zones of Substitute Artificial Islands

1. A substitute artificial island(s), established under Article 5, may substitute submerged or submerging natural island territory of a State concerned to maintain existing claims to maritime zones in line with the United Nations Convention on the Law of the Sea, 1982 including the territorial sea, contiguous zone, and the exclusive economic zone.
2. The substitute artificial island(s) and the existing maritime zones of the State concerned shall be shown on charts of a scale or scales adequate for ascertaining their position to be deposited with the United Nations. Where appropriate, lists of geographical coordinates of points, specifying the geodetic datum, may be substituted for such outer limit lines or lines of delimitation.
3. The maritime zones, validly established in line subsection 1 above, shall continue to apply around substitute artificial island(s) without reduction, notwithstanding changes connected to sea-level rise.

Article 7

Statehood and the Protection of Sovereignty Despite the Effects of Sea-level Rise

1. The existing statehood of a State concerned and the sovereignty over submerged island territory and the adjacent territorial sea of such State will remain unaffected by the submergence of natural island territory as a result of the adverse effects of sea-level rise.

2. The existing statehood of a State concerned will remain unaffected by the total temporary or permanent migration of population, as a result of the adverse effects of sea-level rise.

Article 8

International Cooperation

States Parties shall promote international cooperation to mitigate the effects of climate change in line with the United Nations Framework Convention on Climate Change 1992, the Paris Agreement 2015, and other related international instruments, in an effort to mitigate the effects of sea-level rise on Small Island Developing States.

Article 9

Environmental Impact Assessment

1. Upon establishment of substitute artificial island(s) by a State concerned, the State concerned shall ensure that an environmental impact assessment is conducted on the area wherein such substitute artificial island(s) shall be constructed in accordance with this Article and submit the environmental impact assessment to the Commission established under this Convention for approval. A party conducting such an assessment shall:

   (a) ensure that the activity is monitored in a manner consistent with the requirements of internationally accredited environmental impact assessments;

   (b) ensure that environmental impact assessment reports and any relevant monitoring reports are made available to the Commission in a timely manner after the conclusion of the environmental impact assessment.

2. Upon the submission of the information referred to in paragraph 1 (a) – (b) above, the Commission may provide comments to the State concerned indicating whether the planned substitute artificial island(s) may be constructed.

Article 10

Establishment of the Commission

This Convention hereby establishes the Commission on Mitigating the Loss of Maritime Zones and Statehood, which shall function in accordance with Article 11-12 below.

Article 11

The Commission

1. The Commission shall consist of 21 members who shall be experts in the field of international law, geology, geophysics or hydrography, and sustainable development elected by States Parties to this Convention from among their nationals, having due regard to the need to ensure equitable geographical representation.
2. The members of the Commission shall serve in their personal capacities and not on behalf of the States who nominated them for election to the Commission.
3. The election will be held as soon as possible but, in any case, within 12 months after the date of entry into force of this Convention. At least three months before the date of each election, the Secretary-General of the United Nations shall address a letter to the States Parties, inviting the submission of nominations. The Secretary-General shall prepare a list in alphabetical order of all persons nominated and shall submit it to all the States Parties.
4. Elections of the members of the Commission shall be held at a meeting of States Parties convened by the Secretary-General at United Nations Headquarters. A two-thirds attendance of States Parties shall constitute a quorum; the persons elected to the Commission will be those nominees who obtain a two-thirds majority of the votes of the representatives of States Parties that are present and voting.
5. Members of the Commission will serve a non-renewable term of five years from the date of appointment.

Article 12

Functions of the Commission

1. The functions of the Commission shall include:

(a) the development, as appropriate, of international and intergovernmental programmes and networks or organisations to assess and finance adaptation options for Small Island Developing States.

(b) to make recommendations on whether a substitute artificial island, claimed by a State concerned in line with Article 5 (1) (a) – (f), is constructed in line with the purpose and objectives of the provisions of this Convention.

(c) to review the environmental impact assessment, as completed in line with Article 10, in order to make recommendations on whether the location of the proposed substitute artificial island is appropriate in minimising the impact on the ocean environment.

(d) to provide scientific, technical and legal advice, to the extent considered necessary and valuable, with the view of adverse effects of climate change and the effects on Small Island Developing States.

Article 13

Signature[126]

'This Convention shall be open for signature by all States and regional economic integration organisations from [insert date] and shall remain open for signature at United Nations Headquarters in New York until [insert date].'

[126] This is an operational Article ordinarily included in all Conventions. As such, it is partly borrowed from the wording of Agreement under the United Nations Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas beyond National Jurisdiction, Date of Adoption 19 June 2023 (BBNJ Treaty). The rationale for partly borrowing this definition is to ensure it aligns with recent State practice.

Article 14

Ratification, approval, acceptance, and accession[127]

'The Convention shall be subject to ratification, approval or acceptance by States and international organisations. It shall be open for accession by States and regional economic organisations from the day after the date on which the Convention is closed for signature. Instruments of ratification, approval, acceptance and accession shall be deposited with the Secretary-General of the United Nations.'

Article 15

Entry into force[128]

1. 'This Convention shall enter into force 120 days after the date of deposit of the sixtieth instrument of ratification, approval, acceptance or accession.
2. For each State or regional economic integration organization that ratifies, approves or accepts this Convention or accedes thereto after the deposit of the sixtieth instrument of ratification, approval, acceptance or accession, this Convention shall enter into force on the thirtieth day following the deposit of its instrument of ratification, approval, acceptance or accession.
3. For the purposes of paragraphs 1 and 2 of this article, any instrument deposited by a regional economic integration organization shall not be counted as additional to those deposited by the member States of that organization.'

Article 16

Conference of the States Parties to the Convention[129]

1. A Conference of the States Parties to the Convention is hereby established.
2. The first meeting of the Conference of the States Parties shall be convened by the Secretary-General of the United Nations not later than one year following the

[127] This is an operational Article ordinarily included in all Conventions, with wording that has been partly borrowed from the BBNJ Treaty (note fn. 144 above).
[128] This is an operational Article ordinarily included in all Conventions, with wording that has been partly borrowed from the BBNJ Treaty (note fn. 144 above).
[129] This is an operational Article ordinarily included in all Conventions, with wording that has been partly borrowed from the BBNJ Treaty (note fn. 144 above).

entry into force of this Convention. Thereafter, meetings of the Conference of States Parties shall be held in accordance with the rules of procedure adopted by the Conference of the States Parties.

3. The Conference of the States Parties shall ordinarily meet at the United Nations Headquarters or at the seat of the secretariat.
4. The Conference of the Parties shall at its first Conference adopt, by consensus, the rules of procedure for itself and the Commission.

Article 17

Amendment[130]

1. After the expiry of five (5) years from the date of entry into force of this Convention, a State Party may, by written communication to the Secretary-General of the United Nations, propose an amendment who shall thereupon communicate the proposed amendment to the States Parties. If, within six months from the date of circulation of the communication, not less than one half of the Parties reply favourably to the request, the Conference of the States Parties to the Convention shall be convened for the purpose of considering and deciding on the proposal.
2. The Conference of the States Parties shall make every effort to achieve consensus on each amendment. If all efforts at consensus have been exhausted and no agreement has been reached, the amendment shall, as a last resort, require for its adoption a two-thirds majority vote of the States Parties present and voting at the meeting of the Conference of the States Parties.
3. Amendments to this Convention shall enter into force for the States Parties ratifying, approving, or accepting them on the thirtieth day following the deposit of instruments of ratification, approval or acceptance by two thirds of the number of Parties as at the time of adoption of the amendment.

[130] This is an operational Article ordinarily included in all Conventions, with wording that has been partly borrowed from Agreement under the United Nations Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas beyond National Jurisdiction, New York, 19 June 2023 (BBJN Treaty)

Article 18

Denunciation[131]

A State Party may denounce this Convention by written notification to the Secretary-General of the United Nations. Such denunciation shall become effective shall take effect twelve months after the date of receipt of the notification, unless the notification prescribes a later date.

Article 19

Annexes

Annex I forms an integral part of this Convention and, unless expressly provided otherwise, a reference to this Convention to one of its Parties includes a reference to the annex I relating thereto.

Article 20

Depositary[132]

The Secretary-General of the United Nations shall be the depositary of this Convention and any amendments or revisions thereto.

Article 21

Authentic texts[133]

The Arabic, Chinese, English, French, Russian and Spanish texts of this Convention are equally authentic.

[131] This is an operational Article ordinarily included in all Conventions, with wording that has been partly borrowed from the BBNJ Treaty (note fn. 130 above).
[132] This is an operational Article ordinarily included in all Conventions, with wording that has been partly borrowed from the BBNJ Treaty (note fn. 130 above).
[133] This is an operational Article ordinarily included in all Conventions, with wording that has been partly borrowed from the BBNJ Treaty (note fn. 130 above).

ANNEX I. SMALL ISLAND DEVELOPING STATES

1. Antigua and Barbuda
2. Bahamas
3. Barbados
4. Belize
5. Cabo Verde
6. Comoros
7. Cook Islands
8. Cuba
9. Dominica
10. Dominican Republic
11. Republic of Fiji
12. Grenada
13. Guinea-Bissau
14. Guyana
15. Haiti*
16. Jamaica
17. Republic of Kiribati
18. Republic of the Maldives
19. Marshall Islands
20. Federated States of Micronesia
21. Mauritius
22. Nauru
23. Niue
24. Palau
25. Papua New Guinea
26. Samoa
27. São Tomé and Príncipe
28. Singapore
29. St. Kitts and Nevis
30. St. Lucia
31. St. Vincent and the Grenadines
32. Seychelles

33. Solomon Islands
34. Suriname
35. Timor-Leste
36. Tonga
37. Trinidad and Tobago
38. Tuvalu
39. Vanuatu

END

8. The Rationale for Recommending a Treaty

The proposed negotiating text is aligned with the criteria provided in the Report of the Working Group on the Review of Multilateral Treaty-Making Process concluded in 1984, which sets out the reasons for creating a multilateral treaty. Existing treaties or conventions do not fully regulate the subject matter of the proposed negotiating text, and whilst there is State practice in this regard, some State practices have been conflicting. Currently, the UNCLOS provides guidance on the rights and duties of coastal States, including island States, in claiming their maritime territory. However, with the rapidly changing climate, new challenges are presenting themselves to SIDS. It is important to allow SIDS the opportunity to adapt and adjust to these changes and continue to survive within international law. The full effects of sea level have not yet been accounted for in international law, and the concerns for SIDS are only set to increase. Whilst mechanisms to curb climate change have been extensively considered, there is little work to effect permanent legal change within international law to account for sea-level rise and other climate-related changes.

In terms of the practical usefulness of a draft negotiating text, it is asserted that a multilateral treaty is the best mechanism to govern this area and prevent the further marginalisation of SIDS in terms of international law. Suppose this issue is left up to the interpretation of current international law. In that case, there may be room for more powerful States to utilise the additional resources available to them in order to benefit from the situation. The Solomon Islands, a SIDS, recently signed a security pact with China, allowing Chinese military presence in the country and within the Indo-Pacific region.[134] An agreement of this nature also supports the Solomon Islands in view of the difficulties the State faces.[135] This is an example of how SIDS may become suspectable in the oversight of more powerful States within their territories. Previously, the USA had interests within the Solomon Islands and aimed to deepen ties to address issues such as climate change and illegal fishing.[136] It should be highlighted that the interest of more powerful States such as China and the USA in the Solomon Islands is because it stands

[134] PM Kim 'Does the China-Solomon Islands security pact portend a more interventionist Beijing?' *Brookings* 6 May 2022 available at *https://www.brookings.edu/blog/order-from-chaos/2022/05/06/does-the-china-solomon-islands-security-pact-portend-a-more-interventionist-beijing/* (accessed 9 February 2023).
[135] *Ibid*.
[136] *Ibid*.

as a strategic point for both of these States as the Pacific region is considered a geopolitical region.[137]

Therefore, the vulnerability of these States and their deep-rooted need for survival with limited access to resources leaves them in the hands of the global community in the absence of legal clarity. This may result in something as simple as a strategic partnership wherein there is an imbalance of power; however, it may have more far-reaching effects.

If we aim to transform international law to ensure the equality of all States, a Convention to protect SIDS would be an important step forward. It has been highlighted that Third World States have been described as 'recipients and not participants' within international law and the creation thereof.[138] A Convention that sets out to provide special protection to SIDS is just one way that we can remove a form of underlying prejudice within international law affecting SIDS who have historically been victims of injustice against more powerful States. Whilst there is a long way to go to ensure full equality within international law, equitable climate finance for these States is another vital hurdle to justice. However, the issue of climate migration is outside of this study's scope. It should be remembered that one of the essential missions of the UN as an entity is to ensure peaceful relations between States.[139] A Convention to create stability and certainty would be beneficial not just for SIDS but also for all UN Member States.

At the time of writing this thesis, no treaty-making activities were undertaken or proposed within any other bodies or forums. Whilst there is active research of the ILC on this area, and there are other frameworks that govern the issue of climate change, none provide specific protection for SIDS, who are the worst affected by adverse climate-related changes.

9. Secondary Approach for the Development of International Law

If a treaty of this nature does not receive enough support, it would be prudent for the ILC to conclude a comprehensive report, which they may recommend to the General Assembly for a resolution to be taken. Such a resolution must comprehensively provide for:

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[137] *Ibid*.
[138] M Mutua A Anghie 'What is TWAIL' (2000) 94 *Proceedings of the Annual Meeting (American Society of International Law)* 35.
[139] Article 1 (1), United Nations Charter, Date of Adoption 26 June 1945, 1 UNTS XVI, (entered into force 12 June 1968).

1. The continued maintenance of statehood of SIDS despite the adverse changes to their natural territory as a result of sea-level rise.
2. The fixing of baselines and the maintenance of maritime zones to provide certainty in international law despite rising sea levels;
3. In the event of the total submergence of the natural island territory, SIDS may establish artificial islands to substitute natural island territory to be considered 'substitute artificial islands';
4. The distinction between artificial islands and substitute artificial islands should be made apparent, with the latter being considered territory;
5. Provision of set criteria provided to States for the use of substitute artificial islands as territories; and
6. The ILC should consider the use of the existing platform to examine claims to substitute artificial islands.

Whilst a resolution by the General Assembly would not provide as much legal certainty as a convention, it would still signify the intention to create recommendations that are binding in international law. According to the Statute of the International Law Commission 1947,[140] Article 23 provides that the ILC may recommend to the General Assembly to refrain from taking action,[141] to take note of a report by the ILC or adopt a report by resolution,[142] to recommend a draft to Members with the impression that there will be a conclusion of a convention,[143] or to convene a conference with the position to conclude a convention.[144] In terms of Article 23(2) of the Statute of the International Law Commission, it is also possible to refer a draft back to the ILC to enable them to reconsider or redraft any submissions. Additionally, Article 22 requires the ILC to include a final draft explanatory report to be attached to any recommendations; such a report may bring to the attention of the Secretary-General and General Assembly the dire need to provide solace to SIDS in the face of climate change to ensure legal adaptation. It is important to highlight that many conventions were born from General Assembly resolutions and are part of a long process toward a convention. Additionally, there is a general sense within

[140] Statute of the International Law Commission, 1947 Adopted by the General Assembly in resolution 174 (II) of 21 November 1947, as amended by resolutions 485 (V) of 12 December 1950, 984 (X) of 3 December 1955, 985 (X) of 3 December 1955 and 36/39 of 18 November 1981.
[141] Article 23(1)(a), Statute of the International Law Commission.
[142] Article 23(1)(b), Statute of the International Law Commission.
[143] Article 23(1)(c), Statute of the International Law Commission.
[144] Article 23(1)(d), Statute of the International Law Commission.

international law that non-binding instruments are essential. Barelli asserts that the ICJ has emphasised the importance of General Assembly resolutions in that they may establish a rule within international law or support the emergence of *opinion iuris*.[145] The general understanding of resolutions under international law is for States not to disregard them.[146] However, it is submitted that in light of the vulnerable position SIDS are in, a convention would provide legal obligations binding on the parties bound to the contents.

10. Conclusion

Sea-level rise is undoubtedly the biggest challenge to SIDS today. Unfortunately, rising sea levels only seem to be intensifying, and SIDS need to adapt to survive in this rapidly changing world. Whilst mitigation is important, adaptation is essential. Even with drastic mitigation measures to slow down the changes to the climate, sea levels will continue to rise.[147] SIDS face severe challenges in adaptation, but many of these States are trying to survive by creating innovative solutions. In the face of this fight for survival, it would be essential to allow international law to adapt and allow for the continued recognition of these States. This recognition includes the maintenance of statehood, as SIDS would want to continue to advocate for the rights of the people who rightfully inhabit the territory that they currently control, even where the population may relocate, and the existing natural territory becomes submerged. It would also be in the interests of equity to (i) allow the continued recognition of maritime zones that SIDS currently possess and (ii) allow the establishment of substitute artificial islands to emerge in place of natural territory that inevitably becomes submerged or uninhabitable.

A new negotiating text is the most preferable mechanism to allow for this development of international law as there will inevitably be instances where adaptation is impossible. It is asserted that a negotiating text may provide the basis for the convening of a conference by the United Nations, allowing Member States to consider the unique challenges being faced by SIDS and deliberate on the creation of a final Convention that

[145] M Barelli 'The Role of Soft Law in the International Legal System: the case of the United Nations Declaration on the Rights of Indigenous Peoples' (2009) 58 (4) *International and Comparative Law Quarterly* 967.
[146] *Ibid* 977.
[147] IPCC, 2021: Chapter 9 Ocean, Cryosphere and Sea Level Change. In IPCC, 2021: Climate Change 2021: The Physical Science Basis. Contribution of Working Group I to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change [Masson-Delmotte, V., P. Zhai, A. Pirani, S.L. Connors, C. Péan, S. Berger, N. Caud, Y. Chen, L. Goldfarb, M.I. Gomis, M. Huang, K. Leitzell, E. Lonnoy, J.B.R. Matthews, T.K. Maycock, T. Waterfield, O. Yelekçi, R. Yu, and B. Zhou (eds.)]. Cambridge University Press, Cambridge, United Kingdom and New York, NY, USA 1318.

serves the needs of SIDS and the international community at large. The negotiating text proposed within this Chapter is not intended to serve as a final instrument but rather a starting point for negotiations between UN Member States. Whilst a final Convention will result in the further fragmentation of international law, it is suggested that this fragmentation is necessary and crucial to allow for the further development of international law, allowing adaptation to changing circumstances.

Current international law could never have accounted for the severe challenges that sea-level rise is presenting to SIDS, and it is crucial to consider how international law can adjust to the new needs of the international community, of which SIDS are an essential part. The negotiating text that is proposed above caters to SIDS and its unique case; it may also provide a basis for how international law may grow and develop as new challenges present themselves for other States with further changes to the climate.

In order to maintain equality amongst sovereign States, it is important to consider the needs of the marginalised (in this instance, SIDS) above the needs of the rest in certain unique contexts such as climate change. In essence, this study has considered how the international community may strive for equality for SIDS who are disproportionately affected by sea-level rise as a result of changes to the climate. These vulnerabilities stem from the inability of the international community to curb global emissions and, as such, the rapid changes to the climate. Creating a convention to allow for the continued existence of SIDS and the maintenance of their precious maritime resources is one way the international community may set out to achieve equity for SIDS that have contributed the least to climate change but are most affected by this crisis. A resolution by the General Assembly on a comprehensive report by the ILC would be another strong alternative solution.

Regardless of the avenue taken to bring about development within international law, it is clear that change is required to consider the difficulties that climate change presents for SIDS. These States deserve protection in international law and assurance of their continued existence, with all existing maritime entitlements in perpetuity.

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