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# **Statehood Guaranteed?**

## Contributions of Sinking Small Island Developing States to Global Governance

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### Acknowledgements

Thanks are due, first and foremost, to Dr Kathryn Nash (University of Edinburgh), for the opportunity to publish this report, as well as her support and valuable comments throughout the drafting process. The author is moreover appreciative of Professor James Harrison (University of Edinburgh) for his remarks on the initial version, which steered it in the right direction; as well as of Adam Farquhar, Niamh Henry, Sanja Badanjak, and Tim Epple from the PeaceRep Team, for the helpful interactive feedback session. Thanks are also due to Allyson Doby, Alice Raymond and Rick Smith of Smith Design Agency for production work and to the Edinburgh Law School for their support to this project.

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DOI: <http://dx.doi.org/10.7488/era/6103>

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## Abstract

This report examines the distinctive position of sinking Small Island Developing States (SIDS), a group of 39 States, located in the Caribbean, the Pacific, the Atlantic, the Indian Ocean, and the South China Sea. As unique global actors, their legal and political contributions to global governance, specifically with regards to the consequences of climate change-induced sea level rise on statehood, merit further attention.

First, the analysis briefly maps out the evolution of SIDS as global actors, and their legitimacy as norm entrepreneurs. It investigates the specificities of SIDS' action on the global stage: through alliance building and by leveraging different institutional frameworks. Second, it explores the strategies for change initiated by SIDS, through a case study of their actions in the area of the law on statehood. The report showcases how SIDS are seeking to alter the rules of the game: by reconceptualising statehood and its recognition, a core condition for the participation of entities in global governance institutions.

These developments carry significant implications not only for the evolving concept of statehood in international law, but also for anticipating and mitigating emerging sources of geopolitical tension. As the international community grapples with the growing physical and political impacts of climate change, the creative innovations pioneered by SIDS may shape how communities most affected by rising sea levels defend their way of life—and inspire other States facing different climate-related challenges to reimagine their own responses.

## Key Findings

- ▶ SIDS pursue their interests through strategic alliance-building and participation in intergovernmental organisations, amplifying their voice on the global stage by combining forces. Through alliance-building, SIDS have been instrumental in judicial proceedings before the International Tribunal for the Law of the Sea (ITLOS) and the International Court of Justice (ICJ) concerning States' rights and obligations with respect to climate change, as well as in the formulation of declarations and regulatory frameworks.
- ▶ With respect to codification and progressive development of the law, SIDS have been particularly active in the International Law Commission's (ILC) work on 'Sea-level rise and international law'. Individual SIDS were at the origin of the topic being included on the ILC's agenda, and they have been instrumental in the substantive work through the submission of comments in different constellations.
- ▶ SIDS are active through advocacy in multilateral fora, such as at the UN Framework Convention on Climate Change Conferences of the Parties (COPs) and the recent UN Summit of the Future, and have adopted several policy initiatives—for instance, the Rising Nations Initiative—aimed at preserving the SIDS' sovereignty and their statehood, while safeguarding the rights of affected populations.
- ▶ Substantively, SIDS have made important contributions to the law on statehood and how it might be affected by rising sea levels. Climate change-induced rise of sea levels can have a profound impact on the concept of statehood, for which territory is a central notion. In the case of low-lying SIDS, sea level-rise entails a probable loss of most or all of their territory, meaning their continued statehood could come into question. Any proposed solutions—from the building of artificial islands to entirely deterritorialised statehood—impact the territorial notion of statehood and would demand reconceptualization of current international law. Indeed, the issue of rising sea-levels is not solely about territory, but affects political independence, sovereignty, and self-determination. SIDS have spearheaded efforts in responding to these challenges, advancing the law on statehood in two main respects:
  - On the one hand, SIDS have expansively interpreted the rules governing States' obligations of recognition of statehood, including a duty of remedial recognition of statehood for breaches of international law by polluting States.

- On the other hand, they have changed the ways in which States relate to each other, by either imposing recognition as a treaty condition; or by changing their own form of representation, and becoming purely maritime sovereign States. The most striking example of this is Tuvalu's proposal for digital nationhood: it would reterritorialize Tuvalu's statehood by linking maritime space to cyberspace, displaying the coordinates of the former territory in their digital spaces.
- The implications of climate change for State borders are wide-ranging, and go beyond rising sea-levels and shifting maritime zones. For example, natural borders formed by rivers might shift, glaciers and ice caps melt, desertification might change the landscape, influencing not only maritime borders and coastlines, but also territorial borders. The SIDS' argumentation for remedial recognition of their territories, irrespective of physical changes, works particularly well for their own specific consequences, yet is not always compatible with different circumstances caused by climate change. Nevertheless, their approach can serve as inspiration for other States dealing with the consequences of climate change.
- States gaining inspiration from SIDS' creative approaches to statehood, including through digitisation, should remain aware of the possible downsides, or at least the impacts of such pervasive changes to their representation on the international stage—not in the least due to the possible commodification of their data. Moreover, innovative solutions might lead to questionable results, with controversial entities gaining a claim to statehood, or controversial paths to statehood being justified. As such, caution remains advised before following in the SIDS' footsteps and applying their strategies to a different factual constellation.

## Acronyms and Abbreviations

<b>AOSIS</b>	Alliance of Small Island States
<b>ARSIWA</b>	Articles on the Responsibility of States for Internationally Wrongful Acts
<b>BBNJ Agreement</b>	United Nations Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas Beyond National Jurisdiction
<b>CARICOM</b>	Caribbean Community
<b>COP</b>	Conference of the Parties
<b>COSIS</b>	Commission of Small Island States on Climate Change and International Law
<b>FRDP</b>	Framework for Resilient Development in the Pacific
<b>ICJ</b>	International Court of Justice
<b>IGO</b>	Intergovernmental organisation
<b>ILC</b>	International Law Commission
<b>ITLOS</b>	International Tribunal for the Law of the Sea
<b>PIF</b>	Pacific Islands Forum
<b>SIDS</b>	Small Island Developing States
<b>UNCLOS</b>	UN Convention on the Law of the Sea
<b>UNFCCC</b>	UN Framework Convention on Climate Change
<b>UNGA</b>	UN General Assembly

## Introduction

The Intergovernmental Panel On Climate Change (IPCC) has confirmed that global mean sea levels are rising due to climate change, will continue to rise, and that the rise is accelerating.<sup>1</sup> Coastal ecosystems and settlement patterns of low-lying islands are profoundly impacted, endangering local and indigenous cultures.<sup>2</sup> These issues will only be exacerbated by the projected permanent submergence of land.<sup>3</sup> The effects of rising sea levels on the continued existence of island States' territories is especially salient, as underscored by the International Law Commission (ILC) in its 2022 Second Issues Paper on 'Sea-level rise in relation to international law', since proposed solutions have a far-reaching impact on the very notion of statehood in public international law.<sup>4</sup>

Small Island Developing States (SIDS) are rightly worried about rising sea levels, and in the face of increasing risk to their territories, they have been increasingly active in international fora, advocating for solutions to the threats to their continued existence as States. Their proposed actions would profoundly impact the landscape of global governance: on the one hand, they expansively interpret the rules governing States' obligations of recognition of statehood; on the other hand, they reconceptualise statehood and representation, thus changing the ways in which States relate to each other.

SIDS are operating in an international legal vacuum: there are no clear-cut rules about what would happen if a State lost its entire territory due to natural causes. As such, these States have a singular opportunity to make legally creative contributions to the evolution of global governance frameworks. The question remains whether the international community is open to these changes, and what their consequences might be. However, they have been expertly leveraging their status as unique actors to bring about evolutions in international law and politics.

For the purposes of this report, global governance will be defined as a complex of institutions, practices and processes between States and other actors on the global plane, to address common challenges and articulate common interests.<sup>5</sup> This includes norms and rules, as well as both formal and informal institutions and practices, for the purpose of channelling shared expectations and steering international cooperation.<sup>6</sup>

After a discussion of the SIDS' legitimacy as advocates and norm entrepreneurs, this report will highlight two aspects of global governance that they are actively aiming to influence: the norms and rules governing relations between States, and the practices of representation and cooperation between States.



# 1. SIDS' legitimacy as advocates and norm entrepreneurs

## 1.1. Small Island Developing States as unique global actors

The term Small Island Developing States refers to a group of 39 States, located in the Caribbean, Pacific, Atlantic, Indian Ocean and the South China Sea.<sup>7</sup> These States were officially recognised as a distinct category of global actors for the first time at the United Nations Conference on Environment and Development in 1992.<sup>8</sup> States agreed that they faced unique social, economic, and environmental challenges, due to their 'small size, limited resources, geographic dispersion and isolation from markets', while also sheltering 'a very high share of global biodiversity'.<sup>9</sup>

Already in 1992, States recognised that certain SIDS were at risk of losing their entire national territories due to global warming and sea-level rise.<sup>10</sup> Commitments to the sustainable development of SIDS were further made in 1994 at the Global Conference held in Barbados, which culminated in the Barbados Programme of Action identifying priorities and specific actions necessary to address the special challenges faced by SIDS as a result of, among others, climate change and sea-level rise.<sup>11</sup> In 2014, SIDS were added to the mandate of the UN Office of the High Representative for Least Developed Countries, Landlocked Developing Countries and Small Island Developing States.<sup>12</sup> Additionally, SIDS were recently designated as a category of States deserving recognition of their special circumstances in 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 (BBNJ Agreement).<sup>13</sup>

With SIDS recognised as especially vulnerable to the effects of climate change, they have been able to utilise this recognition in their advocacy work. For example, in their written submissions before both the International Tribunal for the Law of the Sea (ITLOS) and the International Court of Justice (ICJ) in the context of their respective advisory opinions on climate change, the participating SIDS shaped their narrative around their shared vulnerabilities, highlighting uneven existential threats and issues of State responsibility.<sup>14</sup>

SIDS have used their special status under international law in different ways. Through alliance-building, they have been able to leverage different institutional frameworks.

## 1.2. Stronger together: alliance building

SIDS have used alliance-building tactics to strengthen their position as advocates for their continued existence and the protection of their interests, and they are supported by several intergovernmental organisations (IGOs). Some of these IGOs have a mixed membership; others exclusively consist of SIDS.

### (a) Alliance of Small Island States

The most important IGO consisting solely of SIDS is the Alliance of Small Island States (AOSIS), an IGO established in 1990 during the Second World Climate Conference in Geneva, which carries out advocacy and aims to influence international environmental policy.<sup>15</sup> AOSIS is mainly concerned with amplifying SIDS' marginalised voices in the areas of climate change and sustainable development.<sup>16</sup> AOSIS is particularly active on the global plane. For example, in 2024, it adopted its 'Leaders Declaration on Sea Level Rise and Statehood', affirming that the statehood of SIDS cannot be challenged by climate change, and that they will remain members of the UN and all its specialised agencies.<sup>17</sup> AOSIS' Statement on the Global Stocktake at the 2023 COP28 was also particularly impactful, and strong evidence of its ambitions and advocacy.<sup>18</sup>

### (b) Commission of Small Island States on Climate Change and International Law

Linked to AOSIS, there exists another specialised SIDS alliance: the Commission of Small Island States on Climate Change and International Law (COSIS). COSIS was established right before COP26 in 2021, with a mandate to 'promote and contribute to the definition, implementation, and progressive development of rules and principles of international law concerning climate change, including, but not limited to, the obligations of States relating to the protection and preservation of the marine environment and their responsibility for injuries arising from internationally wrongful acts in respect of the breach of such obligations.'<sup>19</sup> COSIS is active in judicial proceedings, having initiated the request for an ITLOS advisory opinion on climate change, in line with its specific competence to do so.<sup>20</sup> Its membership is open to all AOSIS members.<sup>21</sup>

### **(c) Pacific Islands Forum (PIF)**

Additionally, many SIDS are part of the Pacific Islands Forum (PIF), which is a strategic regional partnership aimed at collaboration and cooperation between its members—which include larger developed countries, such as Australia and New Zealand—to ensure peace, harmony, security, social inclusion and prosperity.<sup>22</sup> The PIF has been especially active in the area of rising sea-levels, for instance at the UN Framework Convention on Climate Change (UNFCCC) Conferences of the Parties (COPs); or through its Framework for Resilient Development in the Pacific 2017-2030 (FRDP).<sup>23</sup> Crucially, the PIF adopted its 2021 'Declaration on Preserving Maritime Zones in the Face of Climate Change-related Sea-Level Rise', declaring that its members would fix their baselines at the current levels, notwithstanding climate change-related sea-level rise (see *infra*, section 2.2.).<sup>24</sup> It moreover organised the 2023 'Regional Conference on Preserving Statehood and Protecting Persons: Legal Options and Institutional Responses to the Impacts of Sea-Level Rise, in the context of International Law', specifically working on the continued existence of SIDS as States.<sup>25</sup>

### **(d) Caribbean Community (CARICOM)**

Several SIDS are members of the Caribbean Community (CARICOM), an IGO focusing on regional integration,<sup>26</sup> which has observer status in the UN General Assembly (UNGA)<sup>27</sup> and concluded a cooperation agreement with the UN.<sup>28</sup>

### **(e) Indian Ocean Commission**

SIDS also participate in the Indian Ocean Commission, whose membership solely contains islands, and which advocates for the specific interests of its members in the areas of 'preservation of ecosystems, sustainable management of natural resources, maritime safety, entrepreneurship, public health, renewable energy and culture'.<sup>29</sup>

### **(f) UN Office of the High Representative for Least Developed Countries, Landlocked Developing Countries and Small Island Developing States**

Finally, SIDS are represented by the UN Office of the High Representative for Least Developed Countries, Landlocked Developing Countries and Small Island Developing States, which aims to protect and advance their interests through several programmes. On the one hand, it established the SIDS Global Business Network aimed at harnessing private investment.<sup>30</sup> On the other, it has organised the SIDS National Focal Points Network to enhance coherence and coordination for sustainable development issues, centred around peer-learning and the exchange of best practices.<sup>31</sup>

## **1.3. Action across the board: leveraging different institutional frameworks**

Through the above alliances, as well as individually or in different constellations, SIDS have been able to leverage a variety of institutional frameworks to advocate for their interests, especially in the context of climate change and their continued statehood. This report will touch upon three examples: (a) advocacy via judicial proceedings at the ICJ and the ITLOS, (b) codification and progressive development of the law through the ILC, and (c) general activism in political fora.

### **(a) Judicial proceedings**

SIDS have played a crucial role in the requests for advisory opinions submitted to the ITLOS in 2022 and the ICJ in 2023. The ITLOS has already delivered its unanimous Advisory Opinion on Climate Change and International Law on 21 May 2024;<sup>32</sup> the proceedings before the ICJ are still pending, but the oral phase was concluded in December 2024.<sup>33</sup> SIDS were at the forefront of the judicial action:

COSIS submitted the request for an ITLOS advisory opinion on climate change and international law, relating specifically to the obligations of the UN Convention on the Law of the Sea (UNCLOS) State Parties to reduce marine pollution, and to protect and preserve the marine environment.<sup>34</sup> Written observations were submitted by four individual SIDS (Mauritius, Nauru, Belize, and Micronesia), as well as collectively by COSIS and the Pacific Community (counting 14 SIDS among its members).<sup>35</sup> Comoros also appeared for the oral hearings, in addition to the initial four participating at the written stage.<sup>36</sup>

In the same decision in which COSIS decided to request an advisory opinion from ITLOS, it also expressed its support for Vanuatu's initiative at the UNGA to request an ICJ advisory opinion, directing its Legal Experts to assist COSIS members in their submissions to the ICJ.<sup>37</sup> Indeed, the UNGA's request for advisory opinion to the ICJ was initiated by Vanuatu, supported by three other SIDS (Antigua and Barbuda, the Federated States of Micronesia, and Samoa), as well as fourteen other States.<sup>38</sup>

The question has been raised by Guilfoyle as to the utility of such judicial proceedings initiated by smaller States, including SIDS.<sup>39</sup> He argues that it is part of their strategy of 'legal statecraft': using legal arguments to create political leverage in order to advance policy objectives.<sup>40</sup> He points out, as is argued in this report, that such judicial proceedings are used by small States as part of a broader strategy to change norms, leveraging different institutional frameworks, and collecting support for their interests.<sup>41</sup> Judicial proceedings are especially useful, according to Guilfoyle, because their outcome can delegitimise the actors having been pronounced in violation of international law, and mobilise support from other States.<sup>42</sup>

SIDS advocating in the field of climate change and law of the sea is an especially salient example of legal statecraft techniques: two advisory opinions were requested, in two different yet both highly legitimate international tribunals, effectively pitting the SIDS against the larger and more powerful polluting States—even if the proceedings were not contentious.<sup>43</sup> The delegitimising aspect of the SIDS' legal statecraft is particularly present in the ICJ proceedings, where they argue that polluting States have duties of recognition as a consequence of violations of international law (see *infra*, section 2.2.a.).

Before both the ICJ and the ITLOS, SIDS harnessed existing international law to advance their policy objectives—including their continued existence as States with fixed maritime zones—claiming that their (progressive) interpretations were already part and parcel of the law. This is evident from both the introductory remarks of the Prime Ministers of Antigua and Barbuda and Tuvalu before ITLOS, as well as AOSIS' statement before the UNGA Sixth Committee on the ILC's work (see *infra*, (b)).<sup>44</sup> As such, they use the fora available to them to help steer international law and international politics.<sup>45</sup>

## **(b) Codification and progressive development of the law**

The ILC included the topic of 'Sea-level rise in relation to international law' in its programme of work in 2019.<sup>46</sup> It was included following requests for inclusion by Tonga and the Pacific SIDS (Fiji, Kiribati, Marshall Islands, Micronesia, Nauru, Palau, Papua New Guinea, Samoa, Solomon Islands, Tuvalu and Vanuatu), represented by the Marshall Islands in 2017, and the Federated States of Micronesia put forward a proposal for its inclusion in the long-term programme of the ILC in 2018.<sup>47</sup> It is on the basis of that Micronesian proposal that the Working Group eventually recommended 'Sea-level rise and international law' for the ILC. Debates on the topic started in 2021, after being postponed due to the COVID-19 pandemic. Since then, SIDS have been active in contributing to the ILC's work.

Some SIDS submitted individual comments to the ILC, either as a completely separate and comprehensive submission (Antigua and Barbuda, 2021<sup>48</sup> and 2024;<sup>49</sup> the Maldives, 2019;<sup>50</sup> the Bahamas, 2024),<sup>51</sup> or as a complement to the submissions by IGOs, such as the Pacific Islands Forum and AOSIS (Micronesia, 2019).<sup>52</sup> The Pacific Islands Forum made three submissions to the ILC (2019,<sup>53</sup> 2021,<sup>54</sup> 2023),<sup>55</sup> based on information it collected from individual members, as well as from regional organisations, setting out the relevant State practice with regards to the topics discussed.

AOSIS submitted its 'Declaration of the Heads of State and Government of the Alliance of Small Island States (AOSIS) on Sea-level Rise and Statehood' to the ILC, in which the members affirm that their statehood cannot be challenged by climate change-related sea-level rise.<sup>56</sup> AOSIS also addressed the UNGA's Sixth Committee, commenting on the ILC's latest work on Sea-level rise. It reiterated three important ideas, which were the subject of debate at the ILC: first, that the rationale underlying the SIDS' statements on the issue of statehood were interpretations of international law as it stands, and that there are positive rules on the continuity of statehood; second, that the Montevideo criteria for statehood apply for the creation of States only, not for their continued existence; and third, that continuity of statehood is not a presumption to be rebutted, but a principle in international law.<sup>57</sup> AOSIS also requested the ILC to offer a true path forward in its final report on the topic—which has not been finalised yet—instead of simply summarising its work up until then.<sup>58</sup>

The contributions of SIDS on the issue of statehood, and the outcomes of the ILC work until now, will be discussed in more detail in section 2 of this report.

### (c) General advocacy and policy initiatives

SIDS also advocate in multilateral fora, and through a wide range of broad political initiatives. First, they are active at the UNFCCC COPs, especially through AOSIS. For instance, during the most recent COP29 in Baku in November 2024, AOSIS delegates walked out of the overtime talks for not being sufficiently included,<sup>59</sup> and their chairman stated that '[a]fter this COP29 ends, we cannot just sail off into the sunset. We are literally sinking', emphasising the different situations of developed and developing States.<sup>60</sup> From the very beginning of negotiations, AOSIS had emphasised the importance of accounting for the needs and concerns of those with the least capacity, who are at the same time most affected—including both SIDS and the Least Developed Countries.<sup>61</sup>

Additionally, SIDS continue advocating within the broader context of the UN. At the UN Summit of the Future in September 2024, the Tuvaluan and Tongan Prime Ministers specifically emphasised the gravity of the challenges posed by climate change-induced sea level rises for their territories, identities, culture, and heritage.<sup>62</sup> The Prime Minister of the Marshall Islands stated that 'we will not be wiped off the map, nor will we go silently to our watery graves'.<sup>63</sup>

As such, SIDS take every opportunity to express their concerns on the international stage, calling other States to action. Additionally, they have launched the 'Rising Nations Initiative'.<sup>64</sup> This empowerment and adaptation programme specifically aims to preserve SIDS' sovereignty, protect their statehood, and safeguard the rights of affected populations through knowledge accumulation, digitalisation, and cultural preservation with the support of the rest of the world.<sup>65</sup>

## 2. Focus: contributions to the law on statehood

Through the above methods, SIDS have been integral participants in the debate around their continued existence as States. In order to highlight the pervasiveness of SIDS' pathways for change, a short introduction to the law on statehood as it stands is useful. The following sections will explore in more detail the innovative interpretations championed by SIDS with regards to remedial recognition of statehood and the conditions for inter-State relations.

### 2.1. Current state of the law

Statehood is currently understood as being effective, meaning there is a factual situation underlying the legal fiction of the State.<sup>66</sup> The 1933 Montevideo Convention outlines four fact-based criteria that an entity must cumulatively fulfil in order to become a State.<sup>67</sup>

1. The entity must have a permanent population: the population must have permanently settled on its territory, regardless of whether all of them hold its nationality.<sup>68</sup>
2. The entity must have a claim to a defined territory. The ILC, in its work on sea-level rise and international law, defined territory as a 'concrete physical scope—whatever its size—over which the State exercises its sovereignty and jurisdiction.'<sup>69</sup> There is no minimum size requirement for this territory, as long as the entity is independent.<sup>70</sup> Territory does not need fixed, defined boundaries, nor must it be continuous.<sup>71</sup> With regards to the inhabitability of a territory, which is especially salient for sinking SIDS, members of the ILC Study Group on Sea-level rise recalled that uninhabitability does not affect the qualification of a piece of land as territory under the UNCLOS.<sup>72</sup> This could mean there is a basis for claims to sovereignty without inhabitable land mass. An important caveat, however, is that the UNCLOS does not define what constitutes territory for the purposes of statehood.<sup>73</sup>
3. There must be an effective government, meaning that it exercises jurisdiction and sovereignty over the territory and population in question.<sup>74</sup>



4. The entity must have the capacity to enter into relations with other States. It is thus sovereign and independent, and is only limited by the sovereignty of other States when acting on the international stage. The notion of independence is central to statehood. It is especially salient for new States, since the independence of existing States is protected under the Charter of the United Nations. Consequently, a State could continue to exist as a legal person even in the absence of effectiveness, if its integrity and independence are affected by an international wrongful act. This again can be the basis for claims to continued recognition of sovereignty, based on wrongful conduct by other States under international environmental law (see *infra*).

Two crucial evolutions potentially influencing the position of SIDS are worth mentioning at this point.

First, the four Montevideo criteria are increasingly seen as applying only to the creation of a State, and not its continued existence, including by the SIDS:<sup>79</sup> a State would not immediately be extinguished if one or more criteria were no longer fulfilled.<sup>80</sup> There is a presumption of continuity of statehood, which is inextricably linked to the nature of international law as a system regulating the coexistence of separate, independent States.<sup>81</sup> This is arguably substantiated by examples of States no longer fulfilling one of the four criteria, and still being recognised as legal persons. The ILC mentions the Holy See, the Order of Malta, and the phenomenon of governments in exile.<sup>82</sup> At the UNGA's Sixth Committee meeting about sea-level rise and international law, several States emphasised the strong presumption in State practice favouring a State's continued existence.<sup>83</sup> Notwithstanding this presumption, territory remains an important condition for the life of a State, especially in the case of SIDS. The general rule under the law of the sea is that the land dominates the sea, and it is the configuration of the coastline that determines the maritime zones a State can exercise (sovereign) rights over.<sup>84</sup> This is particularly salient for SIDS, who are very much reliant on economic activities in the coastal areas, and on ocean resources.

Second, recognition fulfils a crucial role in the continuity of statehood, although it has never been codified, nor is it seen as a 'condition' for statehood *per se*.<sup>85</sup> There are two accepted theories of State recognition, and the debate about which prevails remains unsolved.<sup>86</sup> The first is declaratory recognition: recognition is merely a declaration of a fact which already exists and does not outweigh empirical evidence.<sup>87</sup>

The second is constitutive recognition: it is a legal, formal requirement for statehood, the absence of which is fatal to statehood.<sup>88</sup> It is unclear whether there is a duty to recognise States which fulfil the Montevideo conditions. In any event, there is a duty not to recognise the consequences of breaches of *jus cogens* under international law.<sup>89</sup> This can include a duty not to recognise the statehood of an entity that came about through breaches of peremptory norms.<sup>90</sup> The latter duty is one that is harnessed by the SIDS in their argumentation before the ICJ (see *infra* 2.2.a.).

SIDS rely heavily on the concept of recognition in their advocacy for their continued existence as sovereign States. They aim to retain full independence and the capacity to have powers and responsibilities on the international level—not just possess certain rights.<sup>91</sup>

## 2.2. SIDS' legal innovations

### a. Remedial recognition of statehood

Through the above-mentioned methods of advocacy, SIDS are contributing to a new understanding of global governance: they interpret the obligations of States in respect of climate change in a far-reaching manner. A prime example of these innovative interpretations can be found in the arguments the SIDS submitted to the ICJ in the context of its Advisory Opinion on the Obligations of States in respect of Climate Change<sup>92</sup>—the request for which had been initiated by several SIDS (see *supra*, section 1.3.(a)).<sup>93</sup>

The SIDS link the issue of statehood to the legal consequences of States breaching their obligations in respect of climate change. They argue that polluting States have a remedial duty to recognise their statehood, when they suffered a loss of territory as a consequence of breaches of peremptory norms of international law by the polluting States. They thus reverse, or at least reformulate, the current duty of non-recognition of the consequences of an unlawful act, into a duty of recognition. Indeed, under art. 41(2) of the Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA), States are obliged not to recognise the illicit situation resulting from a breach of peremptory norms.<sup>94</sup>

The SIDS have slightly different approaches to their formulation of the remedial recognition duty, but aim for the same end result. Vanuatu's Written Statement and Comments were the clearest on this issue; it was the State spearheading the request for the Advisory Opinion.

Mauritius, Vanuatu, and the Melanesian Spearhead Group (the Fiji Islands, the Solomon Islands, and Papua New Guinea) all referred to States' obligation not to recognise as lawful any situation resulting from serious breaches of international law.<sup>95</sup>

Vanuatu explicitly made the link with the duty of non-recognition when arguing before the ICJ,<sup>96</sup> and it referred to two other recent cases before the ICJ, where the Court decided in the same vein: the *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*<sup>97</sup> and *Legal Consequences arising from the policies and practices of Israel in the occupied Palestinian territory, including East Jerusalem*<sup>98</sup> advisory opinions. In the latter case, the ICJ pronounced that States are obliged 'not to recognise any changes in the physical character or demographic composition, institutional structure or status of the territory occupied (...)'.<sup>99</sup> The illicit situation not to be recognised in the SIDS' circumstances is the extinction of statehood and the lapse of maritime zones.<sup>100</sup>

This extinction of statehood would be illegal because it followed from breaches of the principle of self-determination, according to Vanuatu, Papua New Guinea, Kiribati, the Fiji Islands, Micronesia, and Tuvalu.<sup>101</sup> These SIDS emphasise that the jus cogens and erga omnes right to self-determination<sup>102</sup> is crucial in relation to States' obligations concerning climate change, especially for indigenous peoples with their close ties to the land.<sup>103</sup> Indeed, climate change affects their potential to make free and autonomous choices about their political status, economic, social and cultural development.<sup>104</sup> Some SIDS argue that breaches of this right to self-determination lead to additional legal consequences, other than non-recognition of the illicit situation: a duty on all States to recognise the continued enjoyment of their right in the same way they had previously been enjoying it—that is, as an independent State.<sup>105</sup>

Vanuatu adds that other States identified the remedial recognition duty in relation to other rights: the principles of legal certainty and stability, the right of permanent sovereignty over natural resources, the right of States to survival, the principle of territorial integrity, the principle of stability of boundaries, and obligations of cooperation.<sup>106</sup> The Bahamas, for example, insisted that the duty of cooperation in UNCLOS would entail the recognition of the continued statehood and sovereignty of SIDS vulnerable to rising sea-levels,<sup>107</sup> since the presumption of continuity of statehood is a well-established principle of international law.<sup>108</sup>

Vanuatu additionally argues that the duty of remedial recognition is not only the consequence of a breach of *jus cogens*, but that it can also be understood as 'declaratory relief' in the context of obligations of reparation and compensation for breaches of other international obligations.<sup>109</sup>

These arguments demonstrate that these SIDS rely on a constitutive theory of recognition: recognition by the international community would suffice to keep their statehood and sovereignty from being extinguished. Their insistence on recognition of their statehood, either as a remedy or as a form of reparation, has been at the forefront of their current advocacy. The pending advisory opinion is one example of that, and the next section will offer a second example in the sphere of bilateral relations between States.

## **b. Altering the conditions for inter-State relations**

### **Recognition as a condition for treaty relations**

Tuvalu put the obligation of recognition of continued statehood into effect years before it was argued before the ICJ: it requires its treating partners in bilateral agreements to explicitly recognise its statehood in perpetuity. In 2023, it amended its Constitution to protect Tuvaluan statehood in perpetuity, regardless of climate change-related changes to its territory, as such effectively including a presumption of its own immortality.<sup>110</sup> To uphold this constitutional protection, its foreign policy included the demand that all States it deals with in external relations recognise its statehood in perpetuity and its fixed maritime zones.<sup>111</sup> Already in 2021, 'Initiative 2' of its 'Te Ataeao Nei' project aimed at securing Tuvaluan nationhood through diplomatic initiatives, obtaining bilateral and multilateral recognition of permanent Tuvaluan statehood and fixed maritime zones in all relations with other States.<sup>112</sup>

A recent example of Tuvalu conducting its foreign relations according to that policy is the conclusion of the Falepili Union Treaty with Australia, which entered into force in 2024. This Treaty contains the following unambiguous clause: 'The Parties recognise (...) the statehood and sovereignty of Tuvalu will continue, and the rights and duties inherent thereto will be maintained, notwithstanding the impact of climate change-related sea-level rise.'<sup>113</sup> It moreover would allow a quota of Tuvaluan citizens to relocate to Australia under favourable conditions, and foresees financial support from Australia to assist Tuvalu in its climate security.<sup>114</sup>

A similar clause, respecting and protecting Nauru's sovereignty, was added in the 2024 Nauru-Australia Treaty.<sup>115</sup> Papua New Guinea's Constitution also declares that its national sovereignty is absolute and could never be undermined by foreign assistance of any sort.<sup>116</sup> Additionally, Fiji's 2021 Climate Change Act recognises the need to safeguard Fiji's sovereignty and maritime zones through its regional and international policies.<sup>117</sup>

Tuvalu's initiative in particular shows that it relies on recognition of statehood under international law as constitutive. It has carefully worded what, precisely, is to be recognised by the partner-State: they must secure statehood in perpetuity, and not merely participation in the international legal order or international legal personhood.<sup>118</sup>

Consequently, they are differentiating their situation from that of other existing deterritorialised entities, such as the Holy See or the Sovereign Order of Malta: these have legal personality, but are not States.<sup>119</sup> Undoubtedly, SIDS are arguing for the recognition of a new type of State: a deterritorialised State with fixed maritime zones.

### **Deterritorialised statehood with maritime sovereignty**

Through the way SIDS are advocating for the recognition of statehood and sovereignty for deterritorialised entities, they are altering how States represent themselves in international relations. Indeed, they emphasise that the issue of rising sea-levels is not solely about territory, but is chiefly about political independence, sovereignty, and self-determination.<sup>120</sup> By arguing for deterritorialising statehood—that is, for the recognition of States without a territory—they take the claims for remedial recognition one step further, moving away from the traditional notion of statehood as effectiveness.<sup>121</sup>

SIDS argue that it is not because the land disappears that the nation—and thus the State as an agent on the international plane—should also disappear: land and nation, territory and sovereignty, can be detached once a State exists.<sup>122</sup> They are able to argue as such since sovereignty is understood differently by Pacific Islanders due to their history of sea voyages and their understanding of their relation to the ocean.<sup>123</sup> As such, SIDS state that deterritorialisation, combined with a fixation of existing baselines and maritime zones, could form a sufficient basis for them to exercise their right to self-determination and sovereignty.

Both individual SIDS and the PIF have been implicitly and explicitly suggesting that the basic principle of the Law of the Sea—that the land dominates the sea<sup>124</sup>—could be overhauled in favour of purely maritime sovereignty. Purely maritime sovereignty, in this view, would include the fixing of the current baselines so that the SIDS' maritime zones form the basis for their exercise of sovereignty.

For example, the PIF members signed the 'Declaration on Preserving Maritime Zones in the face of Climate Change-related Sea-level Rise', which states that nothing in the UNCLOS excludes the fixing of maritime zones, notwithstanding climate change-related sea-level rise.<sup>125</sup> They also stated their intention not to review and update their baselines and maritime zones.<sup>126</sup>

Additionally, several SIDS argued—in their submission before the ICJ<sup>127</sup> and elsewhere<sup>128</sup>—that the fixing of baselines, as publicised in accordance with art. 16 of UNCLOS, would not be contrary to its spirit, would respect the principles of stability and equity, and that other States would have the obligation to recognise those fixed baselines.<sup>129</sup>

As long as SIDS do not relocate and acquire new sovereign territory, their sovereignty would be grounded in maritime space.<sup>130</sup> This argument turns a core principle of international law on its head: rather than claiming that States determine maritime zones, it would be the maritime zones creating a basis for statehood.

This alone, however, is not sufficient to give shape to an entity that qualifies as a State: sovereignty needs to be performed in some way.<sup>131</sup> Tuvalu has proposed an innovative solution to give shape to deterritorialised States: digital statehood. In 2021, it announced that its Future Now Project (Te Ataeao Nei) included efforts to 'digitise all Government administrative services and establish digital archives of Tuvalu's history and cultural practices to create a digital nation.'<sup>132</sup> In this way, it would continue performing the requisite sovereignty functions for a dispersed Tuvaluan people.<sup>133</sup>

While the continued existence in the global legal order as a deterritorialised State would safeguard the possibility of relations between States, it deeply impacts the way States relate to each other. First, the physical population of the sinking SIDS will have to move to another State's territory, and will thus fall under another State's jurisdiction, regardless of their nationality.<sup>134</sup>

Second, questions arise as to the government: it is no longer a centralised actor, exercising sovereignty over a defined area of the globe in which it resides, but a floating actor. Tuvalu's digital nationhood proposal includes a possible solution. It makes use of spatial computing technologies to link the virtual component of their digital nation to a specific physical space, projecting the GPS coordinates of Tuvalu on their home screen. As such, it is argued that Tuvalu is 'reterritorialising' through the linkage between maritime space and cyberspace.<sup>136</sup>

By arguing for deterritorialisation, the SIDS subscribe to a flexible conception of statehood, claiming that changes in population, territory, government, or all three, do not necessarily lead to State extinction.<sup>137</sup> Tuvalu's proposal emphasises continued agency and representation, regardless of the disappearance of territory, showing radical ownership of the future instead of passively awaiting extinction with the loss of its territory.<sup>138</sup> The viability of a project of deterritorialisation—and of the acceptance of new types of international legal persons—is deeply connected to historical contingency and the context of the impending loss of statehood.<sup>139</sup>

### 3. Implications

#### 3.1. New questions arise

SIDS strive for a fairer conception of statehood, accounting for both the factual and legal context of a loss of territory.<sup>140</sup> They contribute to a pervasive rethinking of global governance frameworks, especially in the context of the law on statehood. Not only are they enhancing the stringency of obligations on other States, but their proposed transformation of their own status on the international plane also has a deep impact on how States relate to them. Their chosen pathways for contributing to the evolution of international law and relations give their end goal strong chances of success.

Nevertheless, while their innovative, flexible views on statehood and its remedial recognition are intended to respond to their own victimhood, the consequences of accepting such conceptions could be more far-reaching. The impact of the SIDS' contributions is twofold: on the one hand, influencing the broader ways in which the international community responds to the effects of climate change; on the other hand, it specifically affects the law on statehood in general, covering situations outside of climate change-related problems.

With respect to the broader effects of climate change on international law, several examples suggest that there is a need for a new understanding of how political entities share space on Earth. On the spectrum between fixing current borders and far-reaching flexibility, different approaches to the changing natural environment exist. Such issues are evident in several current examples.

First, national borders have already been affected by climate change-induced natural events. For instance, the melting of glaciers in the Alps on the border between Switzerland and Italy has led them to revise their boundary through bilateral agreements.<sup>141</sup> A similar problem has arisen on the border between India and Bangladesh, where worsened monsoons change the flow of tributaries determining the shared border, and in the Sahel due to desertification.<sup>142</sup> An issue of river flow change due to natural phenomena over time on the border between Benin and Niger even led to an ICJ case in 2005.<sup>143</sup> Adopting the SIDS' proposed 'conservative' approach of recognising the pre-climate change geographically exact territorial delimitations might be less evident when natural borders are concerned. Indeed, when a border is formed by a river, for instance, and the river's flow is altered, one of the States will lose sovereign rights over that part of the river, which could deprive them of resources.



As such, instead of adhering to geographical coordinates, States might be willing to give up some territory in order to retain the natural border. Additionally, whereas the redrawing of the frontier between Switzerland and Italy happened amicably—as was the case between Italy and Austria, who agreed on a moving border to account for melting glaciers<sup>144</sup>—the same cannot be said for all such situations. For example, the border between Argentina and Chile on the Southern Patagonian Ice Field remains disputed.<sup>145</sup> Even more controversial is the case of the Kashmir region: the Line of Control demarcating the ceasefire line between India and Pakistan ends at the Siachen Glacier, which is unmapped and disputed, and which is a strategically important area for both States, thus only contributing to the instability in the border region.<sup>146</sup> In this case, there are no agreed upon geographical coordinates to fall back upon. Agreement between the border States is highly unlikely, yet the effects of climate change continue to have an impact on the region. As such, the SIDS' solution would not be able to offer solace in controversial and unstable circumstances.

A related issue is that of the melting ice caps in both the Arctic and Antarctic, which can have different consequences. In the Arctic, existing disputes about territorial and maritime borders, specifically those concerning naval passages and continental shelves, might be exacerbated.<sup>147</sup> Moreover, approaches to such disputes in the Arctic might conversely offer perspectives for SIDS as well: Canadian Inuits are known to live on the ice between Canadian islands, and in international negotiations over the Arctic, their living on the ice has allowed it to be treated as an extension of land.<sup>148</sup> This could lead to a discussion on artificial islands or purely maritime sovereignty. The melting of the ice mainly raises questions for the opening up of water passages that could become navigable for extended periods of time, and might be qualified as straits.<sup>149</sup> In the Antarctic, the Antarctic Treaty precludes States from making any new territorial claims.<sup>150</sup> The question arises as to whether that would also apply to any climate change-induced alterations to those territories that fall under historical claims, and their respective territorial waters. In essence, that does not entail any new claims—yet would impact the equilibrium. The SIDS' position, claiming for conserving the geographical coordinates of a States' sovereign zones, does not fit with the particulars of the situation at the poles, just as it did not sit well with the situation of controversial border disputes as demonstrated above.

Additionally, rising sea levels do not only affect islands, but also coastal States. Changes in maritime borders can be especially salient for those States. If it were argued that they could also fix their baselines, following the example of island States, then there could be evidence of the emergence of a customary rule allowing all States to fix their baselines. For now, however, there is no sufficiently widespread and consistent State practice and *opinio juris*. A slippery slope could follow from the SIDS' argumentation on fixing their baselines, to the effect that there might arise arguments for a fixation of all borders, natural or not, territorial or maritime, in case of climate change-induced shifts, which would be far from undisputed—as demonstrated in this section.

Finally, climate change does not only affect the territory requirement for statehood, but can have drastic impacts on population. Not only do climate change-induced natural disasters affect a State's habitability—as is the case for the SIDS—but they exacerbate the already precarious situation of displaced persons, the majority of whom live in areas vulnerable to the effects of climate change.<sup>151</sup> As such, populations will necessarily become much more movable, endangering a second requirement for statehood. This shows that, at least for the continued existence of States, a new conception of statehood might be necessary in light of climate change.

All of the above examples demonstrate that climate change in general can have far-reaching consequences for State borders, outside of rising sea levels and maritime zones. The SIDS' argumentation for remedial recognition of their territories, irrespective of physical changes, works particularly well for their own specific consequences, yet is not always compatible with different circumstances. Nevertheless, it can serve as inspiration for other States dealing with different consequences of climate change.

With respect to the state of international law beyond climate change-related developments, the SIDS' claims and argumentation could have far-reaching consequences: willingly or unwillingly, they could be at the origin of a sea change.

For example, Tuvalu's claims to statehood in perpetuity raise broader questions for treaty law. Tuvalu's treaty partners, such as Australia, who agreed to recognise its statehood in perpetuity, would remain bound by those obligations in perpetuity. While perpetual treaty obligations are not expressly prohibited or regulated by the Vienna Convention on the Law of Treaties (VCLT), it does deal with the application of successive treaties treating with the same subject.

In accordance with article 30(3) VCLT, a newer treaty between the same parties about the same subject could displace an earlier one. Should the parties differ, then with respect to third States, relations will be governed by the newer treaty. Should Tuvalu's statehood cease to exist, despite its own best efforts, then Australia's obligation to recognise it in perpetuity in relation with other States could extinguish along with it. This begs the question as to what value a treaty obligation to recognise statehood in perpetuity could have. Since it is unclear whether recognition is declaratory or constitutive, the effect of obligations to recognise statehood is uncertain as well. This is a broader concern for SIDS, since they rely heavily on recognition. If the criteria for statehood, especially territory, are decoupled from continued existence as a sovereign State, then recognition by the international community becomes increasingly important, influencing the debate on whether recognition is declaratory or constitutive of statehood. A third way may be envisaged: recognition is mainly declaratory, but in case of mass recognition or non-recognition, this can create a fact.<sup>152</sup>

Another novelty with possibly wide-ranging consequences for international law lies in the use of digitalisation as a medium for statehood. Fleur Johns broached this topic in her 2023 book, *#Help: Digital Humanitarianism*, which explores how traditional territorial States today are already transformed through digitisation. Her arguments are *a fortiori* applicable to fully digital statehood. Johns states that digitisation of the State does not only affect the representation of the State, but also the way a State goes about fulfilling its functions: instead of an analogue logic, a digital State would overwhelmingly rely on digital logic.<sup>153</sup> Johns explains how this logic manifests itself throughout the four Montevideo criteria, in light of increasing digitisation. With respect to the permanent population criterion, Johns states that the population is increasingly visualised in terms of actionable data, instead of people.<sup>154</sup> With respect to territory, Johns remarks on the twofold consequences of digitalisation on territory: on the one hand, territory is seen as increasingly fragmented and unstable, due to it being rendered 'informational'; on the other hand, conversely, the territoriality of satellites and other types of digital infrastructures, such as servers, becomes more and more significant.<sup>155</sup> Digitisation of territory moreover allows for a more precise and granular differentiation between pieces of territory in border areas.<sup>156</sup>

Johns emphasises, however, that the digital capacities that lead to the 'datafication' of territory are held not by States, but by companies that put it up for sale.<sup>157</sup> Whereas this already leads to dangerous inequalities among territorial States, the effect of such commodification of territorial data is particularly problematic for a State that only exists in the virtual space, which could become dependent on market- and profit-oriented companies. This in turn could impact the right to self-determination. With respect to the government criterion, Johns points out that political leaders increasingly emulate technology leaders' positions when they fulfil State functions.<sup>158</sup> Finally, with respect to States' relations with other States on the global plane, Johns highlights that the inequalities between data collection and analysis between States, and their dependence on private companies, might also impact their interrelations as equal sovereign States.<sup>159</sup> Overall, digital statehood might thus be far more consequential than imagined in first instance.

From a broader perspective on statehood, SIDS might set a precedent for controversial entities to have a claim to deterritorialised statehood—through their argumentation for a stringent obligation of remedial recognition of continued statehood on States internationally responsible for the loss of territory.<sup>160</sup> This is especially salient for entities which lack the component of territory in some way, but are still recognised by a large swath of States—think of the legal status of the State of Palestine. Since the recent (careful) advisory opinion of the ICJ, there has been an opening to remedial recognition of statehood, or at least, the non-recognition of the consequences of the violation of self-determination.<sup>161</sup> The SIDS' advocacy might have a profound impact on this area of international law, depending on what the ICJ decides in its advisory opinion on the *Obligations of States in respect of climate change*. A reconceptualisation of statehood as deterritorialised also raises hypothetical questions about entirely new types of entities: would spaceships floating in space qualify for statehood if they could perform sovereignty in some way that is not connected to territory on Earth?

### 3.2. What we can learn from SIDS

With the current shifts of geopolitics and the move towards a more multipolar world, the SIDS' strategies to have their interests respected might be more effective than ever, as regional and sub-regional actors gain in influence. SIDS are already adept at harnessing these fora for their purposes, contributing to law-making and alliance-building at several levels. Sub-regional actors, especially smaller Global South States, could take on a more central role in international negotiations and law-making, particularly in addressing contemporary challenges such as climate change. The broad strategy of legal statecraft employed by the SIDS could serve as a blueprint for smaller States to follow.

This section highlights the most important aspects of the SIDS' argumentation that other actors could learn from, even when taken out of the specific context of their struggle for continued statehood. At the very least, their strategy is a useful one to be aware of for its potential impact on global governance.

1. SIDS heavily rely on alliances and intergovernmental organisations to strengthen their voices in international negotiations and on the global plane as a whole, increasing the impact of their statements and better protecting their interests. Moreover, they do not rely on one singular forum, but have become members to different organisations with distinct purposes. This allows them to defend their various interests in the most appropriate way, allying with like-minded States encountering similar challenges.
2. SIDS mobilise existing, authoritative institutions, such as the ICJ and ITLOS, as part of their broader strategy of advocacy. By doing so, they harness the legitimacy of these institutions in order to delegitimise stronger States that breach international law. This fits within strategies of legal statecraft or lawfare, which are especially salient for smaller States. At the same time, SIDS are active in the field of codification and progressive development of the law. Thus, they cover both the origin of the law, and the way it is being interpreted by courts, maximising their possible impact.

3. By actively involving themselves in both the creation and interpretation of international law, SIDS steer its development. This not only has consequences for their particular circumstances—continued statehood in the face of loss of territory due to climate change—but also impacts the broader applicable regimes. For instance, the SIDS' argumentation for a remedial recognition of statehood after an internationally wrongful act might have consequences beyond the law on statehood, leading to a general reinforcement of the negative duty of non-recognition of the consequences of an unlawful act. They add in a positive aspect that can add symbolic or even strong legal value in cases of other types of breaches: it comes down to a duty of recognition of the initial state of affairs where a breach of international law disrupts the status quo. A second example of this broader impact on international law can be gleaned from their interpretation of UNCLOS as allowing for the fixing of baselines. As stated above, that would not only have consequences for island States' maritime zones, but could also affect maritime delimitations between coastal States.
4. SIDS have moreover demonstrated an impressive degree of creativity in the interpretation of international law, encouraging flexibility in their representation on the global stage. This refers, for example, to the inclusion in bilateral treaties of obligations for partner States to recognise continued statehood, and to Tuvalu's willingness to continue existing as a digital nation if necessary. The previous section has shown that such a transformation would have far-reaching impacts on its statehood in practice, at least within the intellectual framework on statehood created in the Montevideo Convention. Combining such creativity and flexibility with their broader jurisprudential and advocacy strategies, the SIDS have effectively offered a blueprint for how smaller, less-developed States can deal with contemporary challenges in international law and relations in a way that maximises impact.

In conclusion, SIDS' political and legal contributions in multiple international fora have many implications on global governance frameworks, and are bound to influence the evolution of the law on statehood—and international law in general—for the future.

## Endnotes

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- <sup>2</sup> Ibid 367-374, 376.
- <sup>3</sup> Ibid 376.
- <sup>4</sup> ILC, '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' (19 April 2022) UN Doc A/CN.4/752 [4].
- <sup>5</sup> James Nathan Rosenau and Ernst Otto Czempiel, *Governance without government: order and change in world politics* (Cambridge University Press 1992); Ramesh Thakur and Luk Van Langenhove, 'Enhancing Global Governance Through Regional Integration' (2006) 12 *Global Governance* 233; Jan Aart Scholte, 'Global Governance, accountability and civil society' in Jan Aart Scholte (ed), *Building Global Democracy?* (Cambridge University Press 2012) 8; Craig N Murphy, 'Global Governance' in Joel Krieger (ed), *The Oxford Companion to International Relations* (Oxford University Press 2014); 'Global Governance' (World Economic Forum, 2024) <<https://intelligence.weforum.org/topics/a1Gb0000000LHN2EAO>> accessed 7 December 2024; 'Global Governance' (Global Challenges Foundation, 2024) <<https://globalchallenges.org/global-governance/>> accessed 7 December 2024.
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- <sup>9</sup> 'Agenda 21' 17.123-124.
- <sup>10</sup> 'Agenda 21' 17.125.
- <sup>11</sup> 'Barbados Programme of Action' Global Conference on the Sustainable Development of SIDS (Barbados 25 April-6 May 1994) UN Doc A/CONF.167/9.
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- <sup>13</sup> 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 (adopted 19 June 2023, opened for signature 20 September 2023 until 20 September 2025) (BBNJ Agreement) art. 7(m).

<sup>14</sup> Paula Wojcikiewicz Almeida, Valentine Tissot Pinheiro, Vitor Furtado de Melo, 'Foreign Legal Policy in Practice: Assessing Global South Narratives in ITLOS Advisory Proceedings on Climate Change' (*Opinio Juris*, 2025) <<https://opiniojuris.org/2025/02/12/foreign-legal-policy-in-practice-assessing-global-south-narratives-in-itlos-advisory-proceedings-on-climate-change/>> accessed 24 March 2025.

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<sup>16</sup> 'About us' Alliance of Small Island States (accessed 16 February 2025) <<https://aosis.org/about/chair-of-aosis/>>.

<sup>17</sup> AOSIS Leaders Declaration on Sea Level Rise and Statehood (23 September 2024).

<sup>18</sup> AOSIS Statement on the Global Stocktake at the Twenty-Eight Session of the Conference of the Parties to UNFCCC (13 December 2023).

<sup>19</sup> Agreement for the establishment of the Commission of Small Island States on Climate Change and International Law (entry into force 31 October 2021) art. 1(3).

<sup>20</sup> Agreement for the establishment of the Commission of Small Island States on Climate Change and International Law art. 2(2); *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) (12 December 2022) <[https://www.itlos.org/fileadmin/itlos/documents/cases/31/Request\\_for\\_Advisory\\_Opinion\\_COSIS\\_12.12.22.pdf](https://www.itlos.org/fileadmin/itlos/documents/cases/31/Request_for_Advisory_Opinion_COSIS_12.12.22.pdf)> accessed 24 March 2025.

<sup>21</sup> Agreement for the establishment of the Commission of Small Island States on Climate Change and International Law arts. 3(1) and 4(1).

<sup>22</sup> 'Who We Are' *The Pacific Islands Forum* (accessed 24 March 2025) <<https://forumsec.org/pacific-islands-forum>>.

<sup>23</sup> 'Climate Change and Disasters' *The Pacific Islands Forum* (accessed 24 March 2025) <<https://forumsec.org/climate-change-and-disasters>>.

<sup>24</sup> Pacific Islands Forum Declaration on Preserving Maritime Zones in the face of Climate Change-related Sea-level Rise (6 August 2021).

<sup>25</sup> 'SPC DG Minchin to Regional Conference on Preserving Statehood and Person' *The Pacific Island Forum* (accessed 24 March 2025) <<https://forumsec.org/publications/remarks-spc-dg-minchin-regional-conference-preserving-statehood-and-person>>.

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<sup>28</sup> Cooperation Agreement between the Secretariat of the United Nations and the Caribbean Community Secretariat (1997).

<sup>29</sup> 'About Us' *Indian Ocean Commission* (accessed 24 March 2025) <<https://www.commissionoceanindien.org/en/ioc-presentation/>>.



<sup>30</sup> UNOHRRLS, 'Small Island Developing States Global Business Network' (accessed 16 February 2025) <<https://www.un.org/ohrrls/sids-gbn>>.

<sup>31</sup> UNOHRRLS, 'SIDS National Focal Points' (accessed 16 February 2025) <<https://www.un.org/ohrrls/content/sids-national-focal-points>>.

<sup>32</sup> ITLOS *Climate Change and International Law* (Advisory Opinion, 21 May 2024).

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<sup>34</sup> *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) (12 December 2022) <[https://www.itlos.org/fileadmin/itlos/documents/cases/31/Request\\_for\\_Advisory\\_Opinion\\_COSIS\\_12.12.22.pdf](https://www.itlos.org/fileadmin/itlos/documents/cases/31/Request_for_Advisory_Opinion_COSIS_12.12.22.pdf)> accessed 24 March 2025.

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<sup>37</sup> COSIS 'Decisions of the Third Meeting of the Commission of Small Island States on Climate Change and International Law' (26 August 2022) <[https://www.itlos.org/fileadmin/itlos/documents/cases/31/COSIS\\_Decision\\_with\\_note\\_by\\_the\\_Registry.pdf](https://www.itlos.org/fileadmin/itlos/documents/cases/31/COSIS_Decision_with_note_by_the_Registry.pdf)> accessed 24 March 2025, at [2].

<sup>38</sup> UNGA 'General Assembly Official Records Sixty-fourth Plenary Meeting' (29 March 2023) UN Doc. A/77/PV.64 at 2.

<sup>39</sup> Douglas Guilfoyle, 'Litigation as Statecraft: Small States and the Law of the Sea' (2023) 0 *British Yearbook of International Law* 1 <<https://doi.org/10.1093/bybil/brad009>> 3-4.

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<sup>41</sup> Ibid 4-5, 7.

<sup>42</sup> Ibid 11, 16-17.

<sup>43</sup> Douglas Guilfoyle, 'Small states, legal statecraft and opening submissions in the ITLOS climate change advisory proceedings' (*EJIL:Talk!*, 18 September 2023) <<https://www.ejiltalk.org/small-states-legal-statecraft-and-opening-submissions-in-the-itlos-climate-change-advisory-proceedings/>> accessed 26 March 2025.

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<sup>45</sup> Guilfoyle, 'Litigation as Statecraft' 10-11.

<sup>46</sup> ILC, 'Report on the work of the seventy-first session' (2019) UN Doc. A/74/10 p. 340, [265].

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<sup>56</sup> AOSIS Leaders Declaration on Sea Level Rise and Statehood (23 September 2024).

<sup>57</sup> Samoa (on behalf of the Alliance of Small Island States (AOSIS)), 'Statement by Samoa on behalf of the Alliance of Small Island States (AOSIS) under Agenda Item 79 – Report of the International Law Commission – Cluster 1' (23 October 2024) [14]–[16].

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<sup>59</sup> Ajit Niranjana, Bibi van der Zee and Alan Evans, 'Cop29: Climate finance deal agreed but talks remain deeply divided – as it happened' (The Guardian, 24 November 2024) <<https://www.theguardian.com/environment/live/2024/nov/23/cop29-talks-go-into-overtime-as-countries-wrangle-over-finance-deal-live-coverage?page=with:block-6741d1b18f086501868e8166>> accessed 24 March 2025; Georgina Rannard, 'We were ready to leave climate summit' – negotiator tells BBC' (BBC, 25 November 2024) <<https://www.bbc.co.uk/news/articles/cpwrkwx9x9o>> accessed 26 March 2025.

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<sup>66</sup> James Crawford, *The Creation of States* (2nd edn, Oxford University Press 2006) 45–46.

<sup>67</sup> Convention on Rights and Duties of States adopted by the Seventh International Conference of American States (26 December 1933) 165 LNTS 19 (Montevideo Convention) art 1.

<sup>68</sup> ILC, 'Second issues paper' [77].

<sup>69</sup> Ibid [88].

<sup>70</sup> James Crawford, *The Creation of States* 46–47; Veronika Bilková, 'A State Without Territory?' in Martin Kuijter and Wouter Werner (eds), *Netherlands Yearbook of International Law* 47 (T.M.C. Asser Press 2016) 23.

<sup>71</sup> ILC, 'Second issues paper' [89]–[90].

<sup>72</sup> United Nations Convention on the Law of the Sea (10 December 1982) 1833 UNTS 3 (UNCLOS) art. 121; ILC, 'Report of the Study Group on Sea-level rise in relation to international law' (15 July 2024) UN Doc A/CN.4/L.1002 [25].

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<sup>74</sup> ILC, 'Second issues paper' [98].

<sup>75</sup> Ibid [101]–[103].

<sup>76</sup> *Island of Palmas* (Netherlands v United States of America) (1928) 2 RIAA 838; James Crawford, *The Creation of States* (2nd edn, Oxford University Press 2006) 62.

<sup>77</sup> Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI (UN Charter) art. 2(4).

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<sup>79</sup> See for instance: Samoa (on behalf of the Alliance of Small Island States (AOSIS)), 'Statement by Samoa on behalf of the Alliance of Small Island States (AOSIS) under Agenda Item 79 – Report of the International Law Commission – Cluster 1' (23 October 2024) [15].

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<sup>84</sup> *North Sea Continental Shelf* (Federal Republic of Germany v. Denmark) (Merits) [1969] ICJ Rep 3 [96].

<sup>85</sup> James Crawford, *The Creation of States* 38, 93.

<sup>86</sup> James Crawford, *The Creation of States* 19; Gleider Hernández, *International Law* (2nd edn, Oxford University Press 2022) 131.

<sup>87</sup> *Tinoco Arbitration* (Great Britain v Costa Rica) (1923) 1 RIAA 381.

<sup>88</sup> Gleider Hernández, *International Law* 131.

<sup>89</sup> ILC, 'Report of the International Law Commission on the Work of its 53rd Session' (23 April-1 June and 2 July-10 August 2001) UN Doc A/56/10, Chapter IV. E (ARSIWA) art. 41(2); James Crawford, *The Creation of States* 19-22.

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<sup>92</sup> *Obligations of States in respect of Climate Change* (Order of 20 April 2023) [2023] ICJ Rep 338.

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<sup>95</sup> *Obligations of States in respect of Climate Change* (Written Comments of the Republic of Mauritius) [2024] [237]; *Obligations of States in respect of Climate Change* (Written Statement of the Melanesian Spearhead Group) [2024] [326]; *Obligations of States in respect of Climate Change* (Written Statement of the Republic of Vanuatu) [2024] [605].

<sup>96</sup> *Obligations of States in respect of Climate Change* (Written Statement of the Republic of Vanuatu) [2024] [602].

<sup>97</sup> *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* (Advisory Opinion) [2019] ICJ Rep 95 [180]-[182].

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<sup>99</sup> *Ibid* (italics by this author).

<sup>100</sup> *Obligations of States in respect of Climate Change* (Written Statement of the Republic of Vanuatu) [2024] [605]; *Obligations of States in respect of Climate Change* (Written Comments of the Republic of Vanuatu) [2024] [199].

<sup>101</sup> *Obligations of States in respect of Climate Change* (Written Statement of the Republic of Vanuatu) [2024] [605]; *Obligations of States in respect of Climate Change* (Verbatim Record 2024/40) [2024] 74; *Obligations of States in respect of Climate Change* (Verbatim Record 2024/43) [2024] 25-26 (Papua New Guinea) and 47 (Kiribati); *Obligations of States in respect of Climate Change* (Verbatim Record 2024/42) [2024] 20 (Cook Islands); *Obligations of States in respect of Climate Change* (Verbatim Record 2024/45) [2024] 26 (Micronesia); *Obligations of States in respect of Climate Change* (Verbatim Record 2024/51) [2024] 54, 57 (Tuvalu).

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<sup>104</sup> *Obligations of States in respect of Climate Change* (Written Statement of the Republic of Vanuatu) [2024] [294].

<sup>105</sup> *Ibid* [488]; *Obligations of States in respect of Climate Change* (Verbatim Record 2024/43) [2024] 26-27 (Papua New Guinea); *Obligations of States in respect of Climate Change* (Verbatim Record 2024/49) [2024] 12-13 (Saint Vincent and the Grenadines); *Obligations of States in respect of Climate Change* (Verbatim Record 2024/51) [2024] 57-58, 60 (Tuvalu).

<sup>106</sup> *Obligations of States in respect of Climate Change* (Written Comments of the Republic of Vanuatu) [2024] [199].

<sup>107</sup> *Obligations of States in respect of Climate Change* (Written Statement of the Commonwealth of the Bahamas) [2024] [224], [226].

<sup>108</sup> *Obligations of States in respect of Climate Change* (Written Comments of the Commonwealth of the Bahamas) [2024] [96].

<sup>109</sup> *Obligations of States in respect of Climate Change* (Written Statement of the Republic of Vanuatu) [2024] [487], [588]; ARSIWA arts. 35-36.

<sup>110</sup> The Constitution of Tuvalu Act 2023 Division 1 section 2(1).

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<sup>112</sup> Tuvalu's Future Now Project (Te Ataeao Nei Project) (27 October 2021) <<https://drive.google.com/file/d/1F8Ksc99AsokfJRChQs7lluCiciC-ftny/view>>.

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<sup>114</sup> The Falepili Union Treaty arts. 2-3.

<sup>115</sup> The Nauru-Australia Treaty arts. 1(c), 5(2)(a) and 5(5).

<sup>116</sup> Constitution of the Independent State of Papua New Guinea 1975; Pacific Islands Forum, 'Information Paper: Submission to the International Law Commission on the Sub-Topic of Sea-level Rise in Relation to Statehood and to the Protection of Persons Affected by Sea-level Rise' (31 December 2021) <[https://legal.un.org/ilc/guide/8\\_9.shtml#govcoms](https://legal.un.org/ilc/guide/8_9.shtml#govcoms)> [58].

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<sup>118</sup> Tuvalu's Future Now Project (Te Ataeao Nei Project); The Falepili Union Treaty art. 2.

<sup>119</sup> ILC, 'Second issues paper' [112] *et seq*; ILC, 'Report of the Study Group' [26]; Derek Wong, 'Sovereignty Sunk? The Position of 'Sinking States' at International Law' 385.

<sup>120</sup> Delf Rothe, Ingrid Boas, Carol Farbotko and Taukiei Kitara, 'Digital Tuvalu: state sovereignty in a world of climate loss' (2024) 100 International Affairs 1491 1498.

<sup>121</sup> James Crawford, *The Creation of States* 702-703.

<sup>122</sup> Jane McAdam, 'Disappearing States', Statelessness and the Boundaries of International Law' 7; Veronika Bílková, 'A State Without Territory?' 25-26; Delf Rothe et al., 'Digital Tuvalu: state sovereignty in a world of climate loss' 1496-1497.

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<sup>124</sup> *North Sea Continental Shelf* (Federal Republic of Germany v. Denmark) (Merits) [1969] ICJ Rep 3 [96].

<sup>125</sup> Pacific Islands Forum Declaration on Preserving Maritime Zones in the face of Climate Change-related Sea-level Rise (6 August 2021).

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<sup>127</sup> *Obligations of States in respect of Climate Change* (Written Comments of the Commonwealth of the Bahamas) [2024] [221]-[224]; *Obligations of States in respect of Climate Change* (Written Comments of the Melanesian Spearhead Group) [2024] [326]; *Obligations of States in respect of Climate Change* (Written Comments of the Parties to the Nauru Agreement Office) [2024] [57]; *Obligations of States in respect of Climate Change* (Written Comments of the Republic of Vanuatu) [2024] [487], [588], [605]; *Obligations of States in respect of Climate Change* (Verbatim Record 2024/51) [2024] 60 (Tuvalu); Rosemary Rayfuse, 'W(h)ither Tuvalu? International Law and Disappearing States' (2009) 9 UNSW Law Research Paper 1 3; Andrea Caligiuri, 'Sinking States: The statehood dilemma in the face of sea-level rise' (2022) 1 Questions of International Law 23 33.

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<sup>129</sup> Rosemary Rayfuse, 'International Law and Disappearing States. Maritime Zones and the Criteria for Statehood' (2011) 41 Environmental Policy and Law 281 283.

<sup>130</sup> Derek Wong, 'Sovereignty Sunk? The Position of 'Sinking States' at International Law' 384.

<sup>131</sup> Delf Rothe et al., 'Digital Tuvalu: state sovereignty in a world of climate loss' 1497.

<sup>132</sup> Tuvalu's Future Now Project (Te Ataeao Nei Project) (italics by this author).

<sup>133</sup> Delf Rothe et al., 'Digital Tuvalu: state sovereignty in a world of climate loss' 1506-1507.

<sup>134</sup> Derek Wong, 'Sovereignty Sunk? The Position of 'Sinking States' at International Law' 385-386; Abhimanyu George Jain, 'The 21st Century Atlantis: the International Law of Statehood and Climate Change-Induced Loss of Territory' (2014) 50 *Stanford Journal of International Law* 1 49.

<sup>135</sup> Delf Rothe et al., 'Digital Tuvalu: state sovereignty in a world of climate loss' 1501.

<sup>136</sup> Ibid.

<sup>137</sup> Krystyna Marek, *Identity and Continuity of States in Public International Law* 547-548; James Crawford, *The Creation of States* 700; Maxine Burkett, 'The nation ex-situ: on climate change, deterritorialised nationhood and the post-climate era' 345.

<sup>138</sup> Delf Rothe et al., 'Digital Tuvalu: state sovereignty in a world of climate loss' 1504.

<sup>139</sup> Alejandra Torres Camprubi, *Statehood under water. Challenges of Sea-Level Rise to the Continuity of Pacific Island States* (Brill Nijhoff 2016) 112-113; Veronika Bilková, 'A State Without Territory?' 25.

<sup>140</sup> Maxine Burkett, 'The nation ex-situ: on climate change, deterritorialised nationhood and the post-climate era' 362.

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PeaceRep: The Peace and Conflict Resolution Evidence Platform is a research consortium based at Edinburgh Law School. Our research is rethinking peace and transition processes in the light of changing conflict dynamics, changing demands of inclusion, and changes in patterns of global intervention in conflict and peace/mediation/transition management processes.

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PeaceRep is funded by UK International Development from the UK government.



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