

Sea Level Rise and Self Determination

The Court deals with sea level rising in an attentive way, but the care it takes not to overcommit itself on the law is likely to lead to complaints of reticence. Sea level rise is an especially sensitive issue for small island States, particularly those who would lose maritime territory if the baselines of maritime zones recognised in the law of the sea were to shift landward, and to undergo alteration in other respects. This is likely, given the normal baseline is the low tide mark and taking into account also the special archipelagic baselines regime. For certain States, the further possibility of losing the entirety of their land territory to the rising oceans by century's end is the spectre. Questions then arise about ongoing Statehood. This is the most obvious of the potentially existential threats dealt with in the Advisory Opinion.

The Court validated such concerns, observing that the Intergovernmental Panel on Climate Change (IPCC) has described **sea level** rise as unavoidable and has concluded with a high **level** of confidence that associated risks will continue to increase.¹ This may potentially lead to forced population displacement within or cross borders and affect States' territorial integrity and permanent sovereignty over their natural resources.² In respect of baselines, the Court made the specific finding that the provisions of the United Nations Convention on the Law of the **Sea** "do not require States parties, in the context of physical changes resulting from climate-induced related **sea level** rise", to update charts and coordinates showing either their maritime zone baselines or the outer limits of the maritime zones once established in accordance with the United Nations Convention on the Law of the Sea (UNCLOS).³

This is significant as a win for small island States, but it is a somewhat minimalist finding. The Court does not state for instance that baselines are fixed as a matter of general international law, whereas Judge Aurescu calls for the fixed baseline solution to be recognised as established in customary international law.⁴ The Court's interpretive reasoning appears to be based simply on the text of UNCLOS, and even here the Court identifies as relevant but does not appear interpretively greatly to rely either on the views that many States, and the International Law Commission, have expressed in support of this interpretation, or on customary international law arguments.⁵ Time may be required here for customary international law to develop.

In respect of Statehood the Court was again minimalist, although, importantly, expressing the view that once a State was established "the disappearance of one of its constituent elements would not necessarily entail the loss of its Statehood".⁶ However again, this was a significant statement

¹ *Obligations of States in respect of Climate Change*, Advisory Opinion of 23 July 2025 [2025] ICJ Reports [356].

² [357].

³ [362].

⁴ Separate Opinion of Judge Aurescu [13], citing the 2021 Declaration of the Pacific Islands Forum on Preserving Maritime Zones in the Face of Climate Change-Related Sea-Level Rise; the Apia Commonwealth Ocean Declaration of 26 October 2024, para 13; and the Dhaka Glasgow Declaration of the Climate Vulnerable Forum of 2 November 2021, page 5.

⁵ *Obligations of States* (n 1) [360] and [361] citing the 2021 Declaration of the Pacific Islands Forum on Preserving Maritime Zones in the Face of Climate Change-Related Sea-Level Rise, para 1, as supported by the Declaration of the Seventh Meeting of the Organisations of African, Caribbean and Pacific States Ministers in Charge of Fisheries and Aquaculture, 8 April 2022, page 8; and Report of the International Law Commission on its work at its Seventy-sixth Session, p. 11, (Official Records of the General Assembly, Eightieth Session, Supplement No. 10 (UN doc. A/80/10) Annex I, Final Report of the Study Group on Sea Level Rise in relation to International Law, paras 30 and 31.

⁶ [363]. See also the 2023 Pacific Islands Forum Declaration on the Continuity of Statehood and the Protection of Persons in the Face of Climate Change-Related Sea-Level Rise. See also International Law Commission, Final Report of the Study Group on Sea Level Rise (n 145) paras 35ff.

because it confirmed speculation that there may be room to accommodate the possibility that fulfilling the traditional criteria for Statehood in the Montevideo Convention on the Rights and Duties of States 1933 on a continuing basis may not be essential to Statehood in all cases (a defined territory, permanent population, government and the capacity to enter into relations with other States). Judge Tomka considered this remark deeply troubling, due to the possibility it might give rise to readings of the Advisory Opinion as endorsing the deconstruction of Statehood.⁷

The Court also remarked that the potential effects of **sea level** rise on the international legal principles of territory integrity and permanent sovereignty over natural resources are closely connected with the right to self determination, and said that therefore "**sea level** rise is not without consequences for the exercise of this right". This is also a remark that could herald later legal arguments and developments.

The Court is saying that States' GHG emissions might undermine the right to self determination of the peoples of other States, a fundamental principle of international law.⁸ The right to self-determination is both *ius cogens* (a peremptory norm) and an obligation *erga omnes* (an obligation among all States), and this potential but preventable result would appear to be a serious breach of the right. It seems to this writer that the scheme of responsibility in the International Law Commission's 2001 Articles on State Responsibility indicates that States would be obliged not to recognise the change in legal situation that resulted, for instance the disappearance of a State and its land territory.⁹ This would be, in addition to secondary legal obligations to cooperate to bring such a serious breach to an end if present GHG emitting conduct is a breach that is scientifically predicted to undermine the right of self determination in such egregious ways.¹⁰ These cooperative obligations would supplement those already recognised in primary law. In any event the Court emphasised strongly that States are obliged to cooperate in dealing with climate change induced **sea level** rise, a duty lying at the core of the United Nations Charter.¹¹

⁷ Declaration of Judge Tomka [12] – [11]. Cf Separate Opinion of Judge Aurescu [20]–[22], calling for more attention to the presumption of continued Statehood and taking the view that affected States would continue to be members of the United Nations and other international organisations.

⁸ Considering the Court's approach to baselines overly cautious, and calling for greater attention to the matter of self-determination, Separate Opinion of Vice-President Sebutinde, [8]. For discussion, Dave-Inder Comar, "The ICJ's Historic Nod to Self-Determination and Climate Change Impacts", *Völkerrechtsblog*, 7 August 2025.

⁹ International Law Commission's articles on "Responsibility of States for Internationally Wrongful Acts 2001", Yearbook of the International Law Commission, 2001, vol. II (Part Two), Articles 40, 41(2); and see *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion*, I. C. J. Reports 2004, p. 136, at pages 88, 155, 156, 159 163(3)(D); *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, Advisory Opinion* of 18 July 2024 [232] –[243], [255]–[257] particularly at [240]–[241], [273]–[279], and [280], [285(7) and (8)].

¹⁰ *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion*, I.C.J. Reports 2019 (I) [180] [182].

¹¹ *Obligations of States* (n 1) [364].