

**Antigua & Barbuda**  
**Response to the International Law Commission**  
**Second Issues Paper on Sea Level Rise and the effect on Statehood**  
**and Protection of Persons A/CN.4/752**

This submission is provided on behalf of the State of Antigua and Barbuda on the subject of “Sea Level rise in relation to international law”, which is currently included on the International Law Commission’s programme of work during its seventy-first session. In accordance with the syllabus issued by the ILC’s Study Group, this submission focuses solely on a substantive discussion of the second set of issues (those related to the effect of sea level rise on Statehood) as Antigua and Barbuda believes that the concept of statehood is integral to protection of persons under the current international human rights regime.

Antigua and Barbuda would like to thank the Study Group for its comprehensive Second Issues Paper.

The submission proceeds in three parts. Part A communicates Antigua and Barbuda’s position on the effect of Sea Level rise on Statehood. Part B provides an alternative position to allow for Antigua and Barbuda’s views to be reflected in that discussion. Part C then concludes with a short commentary on the conclusions of the Second Issues Paper as it relates to protection of persons affected by rising sea levels.

Antigua and Barbuda considers that the appropriate position regarding the impact of sea-level rise on statehood is as follows:

First, the Montevideo convention is not the correct treaty to determine the continued existence of a State. Antigua & Barbuda takes this position because (1) the general and consistent practice of states does not support this and (2) considerations of equity and fairness necessitate that this approach cannot be the proper approach applicable to this novel scenario.

Second, the most applicable principle to determine the effect of rising sea levels on statehood is the principle of the continued existence of a State. Antigua and Barbuda takes this position because of (1) the general and consistent practice of states supports this principle (2) the principle of self-determination supports the continued existence of a State unless and until the affected peoples decide otherwise.

In the alternative, if States do not accept this position, Antigua and Barbuda contends that the Montevideo convention should be interpreted more generously as it relates to the continued existence of a State in keeping with the strong presumption of the persistence of the State and the right of self-determination.

## **PART A – POSITON ON THE EFFECT OF SEA LEVEL RISE ON STATEHOOD**

### **I. The Montevideo convention is not applicable when assessing the effect of sea level rise on Statehood.**

1. From Antigua and Barbuda's interpretation of international law, the Montevideo convention is not the appropriate principle to apply when determining the effect of rising sea levels on Statehood.
2. The novelty of this scenario that is facing the world is noted by all Member States and the International Law Commission itself. However, in an attempt to determine the potential way forward, the Montevideo convention gives limited assistance for several reasons.
3. Article 1 of the 1933 Convention on the Rights and Duties of States (the Montevideo Convention) lays down the most widely accepted formulation of the criteria of statehood in international law.<sup>1</sup> The criteria namely, (1) permanent population (2) defined territory (3) government and (4) capacity to enter into relations with other states (the Montevideo criteria), assesses the elements needed for the creation of a State. However, Antigua and Barbuda is of the view that this criteria does not provide requirements for the maintenance of statehood<sup>2</sup>.
4. This extended interpretation of the Montevideo criteria was not the contemplation of the framework when it was envisioned nor is this application to the determination of continuation of States an interpretation that is supported by the general and consistent practice of States.

#### **a. General and consistent practice of States does not support this application of the Montevideo convention.**

5. The general and consistent practice of States has indicated that the temporary or permanent extinction of one or more of the Montevideo criteria does not affect the continuation or persistence of the State.
6. There are several occurrences in history where States have lost one of the Montevideo criteria, but have nonetheless, maintained their status as States. Many of these examples have been cited within the Second Issues Paper<sup>3</sup>.
7. Accordingly, Antigua and Barbuda concludes that where there is a question of the continued existence of a State. The Montevideo criteria are not determinative since

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<sup>1</sup> M. Shaw, *International Law* (9<sup>th</sup> Edition, Cambridge University Press, 2021) 182.

<sup>2</sup> C. Giorgetti *A Principled Approach to State Failure* (Martinus Nijhoff Publishers 2010) 65-66.

<sup>3</sup> 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 A/CN.4/752.

there have been many occasions where States have continued to exist despite the loss of one or two of the criteria.

8. The literature has gone as far to suggest that “although the Montevideo requirements must exist for the creation of States, the consequences of the change of one of the elements in practice are not clear, and in fact do not extinguish or alter the position of States within the international system.”<sup>4</sup> In fact, examples of statehood continuing despite the loss of a criterion are more readily identifiable than examples of the loss of a criterion resulting in the extinction of a State.
9. While it is not unusual for governments to disappear, it is rather rare for States to become extinct. This will not happen in international law as the result of the illegal use of force<sup>5</sup>, nor as a consequence of internal upheavals within a state<sup>6</sup>, but it may occur by consent<sup>7</sup>, which is itself an exercise of self-determination by the peoples involved.
10. What is consistent, in all scenarios where a State has lost one or more of the Montevideo criteria, is that there has been a strong presumption by the international community that the State shall continue despite the loss of one or more criteria.
11. It therefore means that be a different principle that governs the continuation of a State under international law as the general and consistent practice of states does not support the position that the loss of the Montevideo criteria has an effect on the continuation of statehood. Nor have examples of the extinction of States resulted from the loss of any Montevideo criteria without the consent and support of the peoples exercising their right to self-determination.

**b. Considerations of equity and fairness do not support this application of the Montevideo convention.**

12. Antigua and Barbuda considers that considerations of fairness and equity mean that it is critically important that international law operates to maintain the existence of established States. A failure to do so would result in inequitable and unfair treatment of States that are severely affected by rising sea levels, who would be disproportionately affected by any change to their status of statehood, notwithstanding that they have contributed virtually nothing to the climate crisis.

**i. The Montevideo convention is a regional treaty**

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<sup>4</sup> C. Giorgetti *A Principled Approach to State Failure* (Martinus Nijhoff Publishers 2010) 65-66.

<sup>5</sup> The Kuwait crisis in 1990 and the current Ukraine crisis both demonstrate this.

<sup>6</sup> Such as Somalia in the early 1990's.

<sup>7</sup> Examples include North and South Yemen uniting in May 1990 and the dissolution of Czechoslovakia in January 1993.

13. The Montevideo convention was adopted at the Seventh International Conference of American States<sup>8</sup>. This was a regional convention between Member States from North America, Latin America, South America and the Caribbean. The agreement has been ratified by the Brazil, Chile, Colombia, Costa Rica, Cuba, the Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Panama, Paraguay, United States and Venezuela. Argentina, Peru and Uruguay have signed the convention but have not ratified it.
14. Therefore, the Montevideo convention in its original context was a convention only involving the states of that part of the world. Following the core tenets of international law, the treaty at that time would have only been binding on the States parties to the convention. Noting that this is a regional treaty, the membership of the convention cannot increase to global membership.
15. However, Antigua and Barbuda does not object to the recognition of Article 1 of the convention as an accurate statement of customary international law. It is agreed that the Montevideo criteria captures the existing legal norms and its principles and therefore does not merely apply to the signatories, but to all subjects of international law as a whole.
16. While the application of this provision is universal, the common interpretation of this Montevideo criteria has always been that the criteria applies to the creation of the State.
17. While the language of Article 1 does not directly mention the term “creation”, it is clear from the general and consistent practice of States that the interpretation applies to the assessment of the creation of a State.<sup>9</sup>
18. It is therefore, contrary to the understanding of Article 1 of the Montevideo convention to proceed with this generous interpretation of the criteria to apply to the continuation of States.
19. Additionally, noting the original context of the treaty. The argument should not be made that the interpretation of the original parties to the convention should prevail over the interpretation provided by the general and consistent practice of States<sup>10</sup> for two reasons.
20. The first is the primary reason of this section, that principles of equity and fairness should not allow for a small group of nations to impose their interpretation (where

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<sup>8</sup> These were the meetings of the Pan American Union, which later became the Organization of American States.

<sup>9</sup> Vienna Convention on the Law of Treaties (adopted 23<sup>rd</sup> May 1969, entered into force 27<sup>th</sup> January 1980) Article 31(3)(b) allows states to interpret the provisions of a convention with the context of any subsequent practice in the application of the treaty.

<sup>10</sup> Antigua and Barbuda is not suggesting that this current argument is being made by solely the Member States to the Montevideo convention. However, if that argument is made in the future, Antigua and Barbuda will oppose such a position based on the arguments herein.

it is inconsistent with the general and consistent practice of States) on the rest of the international community.

21. The second is that Article 1, codifies customary international law and therefore, in principle, the proper interpretation of this customary international rule should be determined by all States.

## ii. The exercise of self-determination must be respected

22. The right to self-determination is a sacrosanct principle within the international legal order. The UN Charter clarifies two meanings of the term self-determination. First, a state is said to have the right of self-determination in the sense of having the right to choose freely its political, economic, social, and cultural systems.<sup>11</sup> Second, the right to self-determination is defined as the right of a people to constitute itself in a state or otherwise freely determine the form of its association with an existing state.<sup>12</sup>
23. The ICJ aids in expounding on the principle in the *Western Sahara* Advisory Opinion by providing the following summary:

The principle of self-determination provides that the people of colonially defined territorial unit in question may freely determine their own political status. Such determination may result in independence, integration with a neighbouring State, free association with an independent state or any other political status freely decided upon by the people concerned.<sup>13</sup>
24. The principle can be found repeated in several international treaties<sup>14</sup>, declarations and the jurisprudence of international courts and tribunals.
25. Thus, it is clear that this principle is not only an “essential principle of contemporary international law”<sup>15</sup> but it also has a central role within the context of creation of statehood and preserving the sovereignty and independence of states.<sup>16</sup>
26. To accept an interpretation of the Montevideo criteria that extends beyond the original interpretation as the criteria for the continuation of statehood, would mean

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<sup>11</sup> United Nations Charter (adopted 26<sup>th</sup> June, 1945, entry into force 24<sup>th</sup> October, 1945) Article 1, paragraph 2.

<sup>12</sup> Charter of the United Nations (adopted 26<sup>th</sup> June, 1945, entry into force 24<sup>th</sup> October, 1945) Article 55, paragraph 1).

<sup>13</sup> *Western Sahara* Advisory Opinion ICJ reports, 1975, pp. 12, 33, 68.

<sup>14</sup> International Covenant on Economic, Social and Civil Rights (adopted 16 December 1966, entry into force 3 January 1976); International Covenant on Civil and Political Rights (adopted 16 December 1966, entry into force 23 March 1976).

<sup>15</sup> The ICJ emphasized this character of the principle in *East Timor (Portugal v Australia)* ICJ Reports, 1995, pp. 90, 102 and reaffirmed it in *Construction of a Wall* Advisory Opinion ICJ Reports, 2004 pp. 136, 171-172; *Kosovo* Advisory Opinion ICJ Reports, 2010, pp. 403, 436; *Chagos* Advisory Opinion ICJ reports, 2019, pp. 95, 118, 131.

<sup>16</sup> M. Shaw, *International Law* (9<sup>th</sup> Edition, Cambridge University Press, 2021) 235.

ignoring the very exercise of self-determination of the several states that are severely affected by rising sea levels and thereby ignoring the preservation of sovereignty and independence that was implicit in the exercise of self-determination that created the states in question.

27. It would be untenable for a people who have already expressed its right to self-determination through statehood, to have that statehood cease in a manner that is imposed upon them. Statehood should only cease if another form of expression of the right to self-determination was explicitly sought by the people who are entitled to exercise their right to self-determination.<sup>17</sup>

**iii. Most States that are severely affected by rising sea levels are de minimis contributors to the problem and are virtually incapable, even with best efforts, of stopping the progression.**

28. The nature of the threat that rising sea levels pose to statehood is itself unique and novel. Traditionally, legal challenges to the persistence of particular states have arisen in situations in which a particular State no longer retains control over terrestrial territory or the population residing in that terrestrial territory; instead, a different government assumes control of the aforementioned territory and population.<sup>18</sup> Essentially, the challenge to statehood rested on the failure of the first state to retain control over the criteria and the success of a second State to seize that control.
29. However, with inundation, there is no loss of criteria to a second State. This is not a scenario of a clash of two sovereign nations attempting to exert influence over the same area of land. This is an entirely new creature created from as a result of the climate change and the associated rising global temperatures.<sup>19</sup>
30. Antigua and Barbuda is a small island developing state, that despite contributing less than 1% to global greenhouse gas emissions is on the front line in facing the adverse effects of climate change, which includes rising sea levels.<sup>20</sup>
31. It is no exaggeration to say that the threat is existential to our society. Unfortunately, the response capacity of states like Antigua and Barbuda, that will be severely affected by rising sea levels to the point of possible permanent effects on statehood, is de minimis.

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<sup>17</sup> Liechtenstein ([https://www.un.org/en/ga/sixth/76/pdfs/statements/ilc/21mtg\\_liechtenstein\\_2.pdf](https://www.un.org/en/ga/sixth/76/pdfs/statements/ilc/21mtg_liechtenstein_2.pdf); A/C.6/76/SR.21, para 4).

<sup>18</sup> Submission by the Principality of Liechtenstein to the International Law Commission on the topic “Sea-Level Rise in relation to International Law”, 12<sup>th</sup> October 2021, page 2.

<sup>19</sup> For a discussion on the causes of sea level rise please see the Intergovernmental Panel on Climate Change Reports.

<sup>20</sup> For a discussion of projected adverse effects of climate change within the OECS region see Organization of Eastern Caribbean States (OECS), “OECS Climate Change Adaptation Strategy & Action Plan: Climate Trends and Projections for the OECS Region”, April 1<sup>st</sup>, 2020.

32. Nevertheless, the fact remains that the effect of rising sea levels on the state will not result in the temporary conversion of one or two criteria from one state to another state, but rather, it is likely that both the government and arguably the population shall still be in existence, as they may be simply relocated to another terrestrial territory.
33. Despite this distinguishing characteristic, Antigua and Barbuda, still maintains that the proper approach in such a situation, is not to extend the interpretation of the Montevideo criteria to assess whether the state shall continue or not, but rather the affected people should be able to determine how to express their right to self-determination.<sup>21</sup>
34. Noting that the State has persisted in some scenarios despite the loss of one, two, three or even all of the Montevideo criteria, Antigua and Barbuda maintains that there must be a different principle that governs the continuation of States in international law which is evidenced by the general and consistent practice of States persisting despite the loss of the Montevideo criteria.
35. Antigua and Barbuda submits that this principle is the presumption of the continuation of the State. This presumption has been applied in the several examples of States continuing despite the loss of the Montevideo criteria. Most importantly, the presumption should equally apply in the event of total or partial inundation of the terrestrial territory of a State or country, or the relocation of its population.

## **II. The presumption of the continuance of States is the most applicable principle to the circumstances.**

36. While some consideration can be given to the Montevideo criteria in the assessment of the continuation of a State, Antigua and Barbuda maintains that these criteria are not the determining factor to evaluate the continuation of statehood. This is evidenced by both state practice and principles of equity and fairness as described in section I above.
37. Rather the continued existence of States is foundational to our current international order<sup>22</sup> and, as such, a presumption of the continuation of the state has developed in the general and consistent practice of States.
38. Antigua and Barbuda contends that in any discussion of statehood in the context of rising sea levels, it should be noted that there is in principle and in practice a strong presumption of the persistence of States, including their rights and

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<sup>21</sup> Liechtenstein ([https://www.un.org/en/ga/sixth/76/pdfs/statements/ilc/21mtg\\_liechtenstein\\_2.pdf](https://www.un.org/en/ga/sixth/76/pdfs/statements/ilc/21mtg_liechtenstein_2.pdf); A/C.6/76/SR.21, para. 4).

<sup>22</sup> Solomon Islands ([https://www.un.org/en/ga/sixth/76/pdfs/statements/ilc/22mtg\\_solomonis\\_2.pdf](https://www.un.org/en/ga/sixth/76/pdfs/statements/ilc/22mtg_solomonis_2.pdf); A/C.6/76/SR.23, para. 4).

obligations under international law.<sup>23</sup> This presumption is clearly exemplified by the general and consistent practice of States and it supplements the principle of self-determination and the rights that flow from it.

**a. General and consistent State practice supports this position.**

39. Antigua and Barbuda asserts that the international community has a history of assisting States in exercising their right to self-determination, through the manifestation of statehood, as there are many examples of State practice where the international community has accepted the persistence of States despite the absence or drastic alteration of Montevideo criteria.
40. Governments in exile were a common way for a State to continue international representation during times of War, where territory and even population were absent from the State's control. Regardless these States persisted and were even allowed to maintain representation at the United Nations on some occasions. This is evidence of the international community supporting the strong presumption of the continuation of States.<sup>24</sup>
41. Usefully exemplified in the Second Issues Paper, there are also some States that do not have defined borders due to ongoing border disputes and some States that no longer exert control over any jurisdiction<sup>25</sup>. Nevertheless, the States have persisted.
42. Similarly, the features of some States have drastically changed through history. In most instances States have persisted despite undergoing transformative reformations, ranging from modest monarchies to global empires, surviving revolutions, anarchies, and coup-de-tats. Through those periods, the States in question continued and persisted as the same entity in international law.
43. Additionally, examples exist of States that have for a period been voluntarily suppressed or extinguished, and subsequently re-established on the same or substantially the same territory and were still regarded as for relevant purposes the same entity. Both Syria and South Africa are examples of the presumption being applied in this context. Syria's United Nations membership revived upon its separation from the United Arab Republic in 1961, without the need for readmission. The South African Republic was also regarded as the same State before and after a period of extinction through annexation by the British (1877–81).<sup>26</sup>
44. There are even examples of State practice where States have continued to exist despite significant changes in more than one of its original features under the

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<sup>23</sup> Liechtenstein ([https://www.un.org/en/ga/sixth/76/pdfs/statements/ilc/21mtg\\_liechtenstein\\_2.pdf](https://www.un.org/en/ga/sixth/76/pdfs/statements/ilc/21mtg_liechtenstein_2.pdf); A/C.6/76/SR.21, para 4).

<sup>24</sup> 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 A/CN.4/752, paras. 138-153.

<sup>25</sup> 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 A/CN.4/752, paras. 112-127.

<sup>26</sup> J. Crawford, *The Creation of States in International Law* (2<sup>nd</sup> Edition, Oxford University Press 2007) 690.



Montevideo criteria.<sup>27</sup> Examples include Serbia after 1918, Germany after 1945 and the Federal Republic of Yugoslavia after 1991. Perhaps the best example, however, is the case of Poland after 1945.

45. Poland's territory and population were radically redistributed, and an entirely different political and constitutional system was imposed. The new government of Poland was hardly independent. But Poland after 1945 was treated in practice as the same State as Poland before 1939.<sup>28</sup> Thus, despite substantial alterations in three of the Montevideo criteria, the State of Poland still persisted.
46. It is clear that the principle of the strong presumption of the persistence of the State is supported and exemplified by continuous State practice and that presumption is grounded in the right to self-determination.

**b. The principle of self-determination supports this position.**

47. As mentioned above the right to self-determination is a sacrosanct principle within the international legal order. Common Article 1 of the ICESCR<sup>29</sup> and ICCPR<sup>30</sup> expound that “[a]ll peoples have the right to self-determination”, and that it is by virtue of the right of self-determination that peoples may “freely determine their political status and freely pursue their economic, social and cultural development.” The right to self-determination is thus not only foundational but inalienable, including the expression of that right through statehood.<sup>31</sup>
48. It is therefore vital that the people most immediately affected by sea-level rise are able to rely on the presumption that international law would continue to uphold their right to self-determination, including its manifestation through statehood.<sup>32</sup> This right to self-determination belongs to the peoples affected, the States whose land territory is most likely to be inundated by rising sea-levels, and who may be relocated as a result.<sup>33</sup>
49. The right to self-determination therefore underpins the presumption of the continuation of the state, by recognising, respecting, and protecting the result of that peoples exercise of their self-determination; the state itself.

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<sup>27</sup> J. Crawford, *The Creation of States in International Law* (2<sup>nd</sup> Edition, Oxford University Press 2007) 692.

<sup>28</sup> J. Crawford, *The Creation of States in International Law* (2<sup>nd</sup> Edition, Oxford University Press 2007) 692.

<sup>29</sup> International Covenant on Economic, Social and Civil Rights (adopted 16 December 1966, entry into force 3 January 1976).

<sup>30</sup> International Covenant on Civil and Political Rights (adopted 16 December 1966, entry into force 23 March 1976).

<sup>31</sup> Submission by the Principality of Liechtenstein to the International Law Commission on the topic “Sea-Level Rise in relation to International Law”, 12<sup>th</sup> October 2021, page 1.

<sup>32</sup> Liechtenstein ([https://www.un.org/en/ga/sixth/76/pdfs/statements/ilc/21mtg\\_liechtenstein\\_2.pdf](https://www.un.org/en/ga/sixth/76/pdfs/statements/ilc/21mtg_liechtenstein_2.pdf); A/C.6/76/SR.21, para 4).

<sup>33</sup> Submission by the Principality of Liechtenstein to the International Law Commission on the topic “Sea-Level Rise in relation to International Law”, 12<sup>th</sup> October 2021, page 1.

50. Ultimately, in the case of a people that had already expressed its right to self-determination through statehood, statehood should cease only if another form of expression of the right to self-determination was explicitly sought.<sup>34</sup>

### Conclusion

Once a State has been established, extensive civil strife or the breakdown of order through foreign invasion or natural disasters are not considered to affect [international legal] personality.<sup>35</sup>

Antigua and Barbuda maintains that the strong presumption of persistence of a State should remain as the applicable principle to determine the continuation of the existence of a State.

This presumption is a common thread that ties all the State practice in this area together, as have been outlined in the many examples raised in the Second Issues Paper and referred to in this response above.

This presumption also enshrines the right to self-determination and principles of stability, certainty, predictability, and security.

Therefore, Antigua and Barbuda concludes that considering all the points raised above, rising sea levels cannot be a justification for the erasure of a State and for denying the vulnerable State vital representation in the international legal order.<sup>36</sup> It should not have an effect on statehood as the “presumption – in practice a strong one – is in favour of the continuance, and against the extinction, of an established State.”<sup>37</sup>

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<sup>34</sup> Liechtenstein ([https://www.un.org/en/ga/sixth/76/pdfs/statements/ilc/21mtg\\_liechtenstein\\_2.pdf](https://www.un.org/en/ga/sixth/76/pdfs/statements/ilc/21mtg_liechtenstein_2.pdf); A/C.6/76/SR.21, para 4).

<sup>35</sup> I. Brownlie, *Principles of International Public Law* (6<sup>th</sup> Edition, 2003) 71.

<sup>36</sup> Solomon Islands ([https://www.un.org/en/ga/sixth/76/pdfs/statements/ilc/22mtg\\_solomonis\\_2.pdf](https://www.un.org/en/ga/sixth/76/pdfs/statements/ilc/22mtg_solomonis_2.pdf); A/C.6/76/SR.23, para. 4).

<sup>37</sup> J. Crawford, *The Creation of States in International Law* (2<sup>nd</sup> Edition, Oxford University Press 2007) 700.

## **PART B – ALTERNATIVE VIEWS ON THE APPLICABILITY OF THE MONTEVIDEO CONVENTION**

### **III. In the alternative, the Montevideo convention should be interpreted in line with the strong presumption of the persistence of the State and the principle of self-determination.**

1. Notwithstanding, the concerns raised in Part A of the submissions, Antigua and Barbuda wishes to share, as an alternative submission, its views on the applicability of the Montevideo Convention in the context of this novel experience of rising sea levels.
2. Antigua and Barbuda contends that the assessment of the legal ramifications of rising sea levels on statehood should be rooted in the perceptions of those specially affected.<sup>38</sup>
3. Antigua and Barbuda therefore suggests that the Montevideo criteria should be examined, not as an evaluation of the continuation of statehood, but rather, as a tool to assist and assess an understanding of how statehood can continue despite the loss of certain Montevideo criteria.
4. This expansive interpretation is in keeping with international law because ultimately it would be in keeping with and would supplement the principle of the strong presumption of the persistence of the State and the right of self-determination of peoples. With these two principles underlying the foregoing analysis, Antigua and Barbuda wishes to submit this possible interpretation for consideration of the ILC and the membership of the United Nations, as the progressive development of Public International Law depends on the action and commitment of States and the wider international community.

#### **a. Defined Territory**

5. Antigua and Barbuda's interpretation of international law is that "territory" of the State includes both terrestrial and maritime territory. For example, the Constitution of The Maldives reads "The Territory of the Maldives encompasses the land, air, sea and seabed within the archipelagic baselines of the Maldives drawn in accordance with the law, and includes the territorial waters, the seabed and the air space thereof beyond the said baselines."<sup>39</sup>

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<sup>38</sup> Submission by the Principality of Liechtenstein to the International Law Commission on the topic "Sea-Level Rise in relation to International Law", 12<sup>th</sup> October 2021, page 2.

<sup>39</sup> Similar clauses exist in 32 Latin American Constitutions, with some even using language that could be interpreted to include the full maritime delimitation under UNCLOS see The Constitution of Nicaragua, Article 10; Constitution of Colombia, Article 101; The Constitution of Peru, Article 54; and *Walter Arévalo-Ramírez*, *Constitutionalization of Territory: Jurisdictional Challenges to the ICJ Delimitation Judgements in Latin America*, *Völkerrechtsblog*, 03.09.2021.

6. In addition to this Antigua and Barbuda maintains and supports the position of the Alliance of Small Island States (AOSIS) that notwithstanding rising sea levels, baselines deposited in accordance with the 1982 United Nations Convention on the Law of the Sea are fixed and as such the maritime territory of States will not change regardless of rising sea levels. Therefore, Antigua and Barbuda does not accept that rising sea levels will affect this Montevideo criterion of defined territory once a State has deposited their baselines in accordance with the UNCLOS.<sup>40</sup>
7. Thus, as a starting point, Antigua and Barbuda and other states severely affected by rising sea levels shall retain immutable maritime territory regardless of rising sea levels.
8. In addition to this position, Antigua and Barbuda notes the options listed in Part V, C of the Second Issues Paper<sup>41</sup> and appreciates that States may use these options or a combination thereof as a means of securing terrestrial territory to supplement their immutable maritime territory based on their deposited baselines.
9. As states severely affected by rising sea levels exploring these options, they should note that state practice confirms that there is no necessity in international law for territory to be (a) defined and settled (b) contiguous or (c) unaltered.
10. There is no necessity in international law for defined and settled boundaries.<sup>42</sup> A State may be recognized as legal person even though it is involved in a dispute with its neighbours as to the precise demarcation of its frontiers, so long as there is a consistent band of territory that is undeniable controlled by the government of the alleged State.<sup>43</sup>
11. For example, Israel has been accepted by the majority of nations as well as the United Nations as a valid state despite the fact that its frontiers have not been finally settled. Similarly, the continuing border dispute between Guyana and Venezuela has not affected either State's status as a legal subject of international law. In fact, most of the new states emerging after the First World War were recognized de facto or de jure before their frontiers were determined by treaty.<sup>44</sup>

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<sup>40</sup> For a discussion on the inviolability of maritime boundaries that have been fixed by treaties see Information and examples of State practice on "Sea-level rise in relation to international law" A submission by the Republic of Maldives. 2019/UN/N/50, pages 18-27; *Aegean Sea Continental Shelf (Greece v. Turkey)*, Judgment, 1978 I.C.J. 3, ¶85 (Dec. 19); *Bay of Bengal Maritime Boundary Arbitration (Bangladesh./India)*, ¶216 (Perm. Ct. Arb. 2014) (citing *Temple of Preah Vihear (Cambodia v. Thai.)*, Merits, Judgment, 1962 I.C.J. 6, 34 (June 15)).

<sup>41</sup> 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 A/CN.4/752, paras. 198-226.

<sup>42</sup> M. Shaw, *International Law* (9<sup>th</sup> Edition, Cambridge University Press, 2021) 183.

<sup>43</sup> M. Shaw, *International Law* (9<sup>th</sup> Edition, Cambridge University Press, 2021) 183.

<sup>44</sup> H. Lauterpacht, *Recognition in International Law* (Cambridge University Press, 1948) 30. The doctrine of *uti possidetis* also supports this presumption of statehood.

12. Antigua and Barbuda also notes that the defined territory of a State, in some instances, is geographically discontinuous<sup>45</sup> and, as such, States that are severely affected by rising sea levels can maintain their immutable maritime territory even if their new terrestrial territory is located in a separate location.
13. Moreover, there are specific examples of States undergoing tremendous alterations to their territory without any adjustments to their status as States. The most notable of these examples is the United Kingdom, which has remained the same State since at least 1707, despite the acquisition and loss of significant terrestrial and maritime territory across the globe. The unification of Federal Republic of Germany and the German Democratic Republic on the 3<sup>rd</sup> of October 1990 is another example, albeit an example of a significant increase in terrestrial and maritime territory. Nonetheless, in neither of these cases, nor in any other, was the continuation of the State challenged.<sup>46</sup>
14. Finally, Antigua and Barbuda also notes that States such as the Holy See and the Sovereign Order of Malta have been deprived of most, if not all, of their jurisdiction over defined territories, but nonetheless maintained some tenet of international legal personality.<sup>47</sup>
15. Thus, the principle of the strong presumption of the persistence of States will inform this interpretation of this criterion of the Montevideo criteria by retaining the existence of statehood for States severely affected by rising sea levels that may only retain their immutable maritime territory, if such State is incapable of securing new terrestrial territory.

## **b. Population**

16. Population and territory have some clear linkages despite them being two separate criteria. Antigua and Barbuda, therefore, acknowledges that same considerations in Part B – III – a above would generally apply.
17. Thus, where States severely affected by rising sea levels seek redress that involves a change in terrestrial territory so too would that change result in an adjustment of that State's population. However, such an adjustment no matter how stark should not affect the continuation of that State.
18. Currently there is no lower limit prescribed in international law, in text or in practice, for a State to satisfy this criterion, and, as such, as States explore arrangements that best address their specific issues due to rising sea levels, there

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<sup>45</sup> 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 A/CN.4/752, paras. 90.

<sup>46</sup> J. Crawford, *The Creation of states in International Law* (2<sup>nd</sup> Edition, Oxford University Press 2007) 673-676.

<sup>47</sup> 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 A/CN.4/752, paras. 112-127.

should not be a minimum standard imposed as it relates to population (or terrestrial territory for that matter).

19. Distinction must also be drawn between population and nationality, while the population of a State may consist of nationals, nationality can extend to persons who live outside of the State's terrestrial territory. While the two concepts are distinct in international law, there is some practice among States that signifies how intertwined these two concepts are.
20. For example, in Kiribati where efforts to mitigate the effects of rising sea levels have already commenced, we see that despite the residents of some of the state's lowest-lying islands, having been moved to Fiji, those residents are still afforded seats in the House of Representatives in Kiribati and are still able to participate in governance despite no longer being located in the terrestrial territory of Kiribati.<sup>48</sup>
21. Thus, nationals of Kiribati, who arguably are not part of the population since they do not reside in the terrestrial territory of Kiribati, are still contributing to the effective governance of the State. There are other examples of both overseas citizens being allowed to vote in their national elections in other States.<sup>49</sup>
22. Additionally, in several AOSIS Member States, remittances from nationals residing abroad are a significant source of income and development. Remittances represent on average about three-quarters of total external financing in 2017-2018 in SIDS.<sup>50</sup> The diaspora for many SIDS is a vital part of the identity and development of the country.
23. These points are raised to highlight, that while nationality is not a Montevideo criterion, a discussion must be had about the nationals of States severely affected by rising sea levels and how an interpretation of the Montevideo criteria that supplements the strong presumption of the persistence of states and the principle of self-determination can offer protection to those nationals not residing in the terrestrial territory.
24. An individual's nationality of a State shall persist for as long as the State persists. Nationality also applies regardless of individuals residing within that State's terrestrial territory or not. Hence, those nationals of states severely affected by rising

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<sup>48</sup> Kiribati's purchase does not mean sovereignty over the land. As such, there is no legal guarantee that the people of Kiribati could move to the land, and the terms of the migration would be solely contingent on the Fijian administration in "Kiribati's land purchase in Fiji: does it make sense?" by James Ellsmoor and Zachary Rosen on <https://devpolicy.org/kitibatis-land-purchase-in-fiji-does-it-make-sense-20160111/#:~:text=The%20President%20of%20Kiribati%2C%20A%20note.the%20face%20of%20this%20threat>.

<sup>49</sup> Examples include France, United Kingdom, Chile, Canada, Finland, Singapore, Brazil, Ireland, Belgium, Tuvalu, Turkey, Switzerland, Sweden, Spain, New Zealand, USA, South Africa, Japan, Luxembourg, Philippines, Malta, Namibia, Australia, Greece, India Germany, Netherlands, Austria, Czech Republic, Denmark. Some States have even gone further to have a representative of citizens living abroad within the national parliament/assembly; for example Italy, Mexico, Dominican Republic, France, Guinea-Bissau, Peru, Tunisia, Portugal and Romania.

<sup>50</sup> UN-OHRLLS, "Financing for Development of Small Island Developing States" at page 40-41.

sea levels must continue to be represented in the international legal order or they are at risk of becoming stateless, which is contrary to an individual's human rights.<sup>51</sup>

25. While the current regime attempting to address statelessness does not contemplate the effects of rising sea levels on the protection of human rights, there is a principle in international law for states to work together to avoid statelessness. Accordingly, one way to address statelessness is to recognize the persistence of the state despite rising sea levels to ensure that the population of those States severely affected by rising sea levels are not classified as stateless all at once.
26. It is on this basis that Antigua and Barbuda remind the international community that the right to self-determination is integral to the idea of statehood and accordingly, it is also integral to our interpretation of the Montevideo criteria. Those States who become severely affected by rising sea levels should have the right to decide whether they will continue as a State or not, and similarly, they should decide what form they wish their State to continue in.
27. Antigua and Barbuda acknowledged to achieve this will require the assistance of the international community and, as such, the principle of the strong presumption of the persistence of States should be applied in this context, as it has been in other contexts, so as to allow the specially affected populations to exercise their right to self-determination freely.
28. Antigua and Barbuda contends that a system can be put in place, without much difficulty, to allow for continued recognition of nationality of States severely affected by rising sea levels and to address questions of dual-nationality and status of nationals from these states within foreign territories, depending on what solutions individual States seek as a result of their specific effects due to rising sea levels.

### **c. Government**

29. Antigua and Barbuda posits that this criterion is arguably the most flexible of the Montevideo criteria. This is evidenced by the many instances of Governments in exile, civil wars and coup de tats throughout history. The majority of which did not result in the dissolution of any of the States involved, as Governments are merely representatives of the sovereignty of the nation itself.
30. It is therefore Antigua and Barbuda's position that once the State persists so too does the necessity for its governance. At this time, Antigua and Barbuda cannot prescribe what forms that governance may take as states respond to rising sea levels, but Antigua and Barbuda notes that throughout history a wide range of governance structures have been put in place, often times with the assistance of the international

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<sup>51</sup> Universal Declaration on Human Rights (Resolution 217 A, adopted 10 December, 1948) at Article 15 expounds that everyone has the right to a nationality, and no one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.

community, to maintain the continued existence of governmental functions and, in so doing, securing the continuance and persistence of individual States.

31. A significant example of this was during the First and Second World Wars, where the territories of several European States had been occupied by a third power but the representation of said States fell on Governments in exile. These Governments in exile were usually located within and exercised functions from the territory of another sovereign State. This was also the case during Cambodia – at the time referred to as Democratic Kampuchea- following the Vietnamese invasion of December 1978 and of Kuwait between 1990 and 1991, following the invasion and annexation by Iraq.<sup>52</sup>
32. In addition to these instances of support being provided bilaterally to secure the continued governance of States, assistance in governance has on some occasion been aided by international organizations, for example the United Nations and the Republic of Congo.<sup>53</sup>
33. Moreover, in some instances States were recognized by the international community despite the central Government not having effective control over the entire terrestrial and maritime territory. For example, both Croatia and Bosnia and Herzegovina were recognized as independent states by European Community member states and admitted to membership of the United Nations at a time when both states were faced with a situation where non-governmental forces controlled substantial areas of the territories in question.<sup>54</sup>
34. Even in the case of Somalia in the 1990's where there was no effective governance structure for a period of time, the principle of a strong presumption of States was respected and upheld by the international community since the State of Somalia's existence continued uninterrupted.
35. Ultimately, Antigua and Barbuda contends that the position in international law is most accurately reflected as  
A foundation of effective control is required for statehood. Conversely, however, a comprehensive breakdown in order and the loss of control by the central authorities in an independent state will not obviate statehood.<sup>55</sup>

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<sup>52</sup> 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 A/CN.4/752, para. 100.

<sup>53</sup> J. Crawford, *The Creation of states in International Law* (2<sup>nd</sup> Edition, Oxford University Press 2007) 55 – 58; Higgins, *Problems and Process* (Oxford University Press, 1994) 40; and C. Hoskyns, *The Congo Since Independence* (Oxford University Press, 1965).

<sup>54</sup> M. Shaw, *International Law* (9<sup>th</sup> Edition, Cambridge University Press, 2021) 184-185; Additionally, the question of the status of Kosovo raises questions on the requirement of effective governance as Kosovo made a declaration of independence in 2008, when at the time some areas of the territory were not under the control of the central government.

<sup>55</sup> J. Crawford, *The Creation of States in International Law*, (2<sup>nd</sup> Edition, Oxford University Press, 2006) 719 -722; S. Ratner, "The Cambodia Settlement Agreements" (1993) Vol. 87 *American Journal of International Law*, p.1-41; T.M. Franck, "The Democratic Entitlement" (1994) Vol. 29 *University of Richmond Law Review*, p.1-55.



36. For a political society to function reasonably effectively it needs some form of government or central control. However, this is not a precondition for recognition as an independent country. It should be regarded more as an indication of some sort of coherent political structure and society, than the necessity for a sophisticated apparatus of executive and legislative organs.<sup>56</sup>
37. States severely affected by rising sea levels, however, will still need to exercise effective governance in two major areas: firstly, the populations of these States will still be in existence and would equally need an effective governance system to assist in securing and protecting their international human rights. Secondly, as a large ocean State, Antigua and Barbuda, and states of similar characteristics who are affected, will still need to govern its immutable marine territory despite the effects of rising sea levels.
38. Thus, Antigua and Barbuda maintains that the interpretation of this existence of this criterion should be supported by the right to self-determination and the strong presumption of States. Recognition, respect and upholding of these principles in the interpretation and application of the Montevideo criteria by the international community shall aid the citizens of States severely affected by rising sea levels to remain protected by and represented within the international legal order.

#### **d. Capacity**

39. This final criterion is dependent on the international community recognizing and supporting a state's international legal personality. However, Antigua and Barbuda contends that in this scenario the final criterion is dependent on the international community recognizing the continued existence of the state despite that state being severely affected by rising sea levels. This is more an evaluation of fact, facts from which legal consequences flow.
40. Accordingly, based on the strong presumption of continuity of the State and the principle of self-determination, Antigua and Barbuda asserts that States severely affected by rising sea levels should be able to retain their capacity to enter into relations with other States and other subjects of international law. The continuation of international legal personality is an established practice of States and has only been possible with the international cooperation of States. As such, Antigua and Barbuda strongly insists that this practice should be continued.
41. To deny this right would not only contravene, the established practice supporting the presumption of the persistence of States, the right to self-determination and the principle of international cooperation of States in upholding their international obligations, but it would also be a violation of fairness and equity, in that, Antigua and Barbuda, like many other states severely affected by rising sea levels are being

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<sup>56</sup> M. Shaw, *International Law* (9<sup>th</sup> Edition, Cambridge University Press 2021) 184.

condemned to a fate that we had no part in creating. A fate resulting from a problem that we are unable to solve on our own despite our greatest efforts.

### **Conclusion**

The very nature of the challenge we face as a result of rising sea levels engages the current concepts of international law in a novel and unique way. The international rules governing statehood have never contemplated a situation where the terrestrial territory may no longer exist.

Stability of the law is not possible without adaptation to new circumstances.<sup>57</sup>

As such, our responses in international must be based in law, but most also extrapolate and incorporate necessary principles and equity to find a novel solution to a novel challenge. An exercise of progressive development to solve an existential threat to our society.

It is with this context that Antigua and Barbuda suggests this generous interpretation of the Montevideo criteria which interprets the application of the different criteria from the perspective of those peoples severely affected by rising sea levels. This interpretation allows for territory, population and effective governance to exist in future manifestations that differ from the current “expected” manifestations, but nevertheless allow the States severely affected by rising sea levels to continue to exist within the international paradigm (if the Montevideo criteria is identified as the primary criteria for the determination of the continuation of the State).

This interpretation is proposed as an alternative to the strict imposition of the Montevideo criteria and is informed by the right to self-determination, the strong presumption of States and affirms the principles of stability, certainty, predictability, security and international cooperation of States to uphold their international obligations.

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<sup>57</sup> Bernard Oxman, “The Fortieth Anniversary of the United Nations Convention on the Law of the Sea” (2022) Vol. 99 *International Law Studies* pp. 865-873, 872.

## **PART C – THE PROTECTION OF PERSONS AFFECTED BY SEA LEVEL RISE**

### **IV. Preliminary observations on the protection of persons affected by sea level rise**

1. Antigua and Barbuda shall only make short comments at this time in response to the Second Issues Paper as it relates to the Protection of Persons affected by Sea Level Rise.
2. Antigua and Barbuda agrees with the conclusions of the Second Issues Paper as it relates to the Protection of Persons affected by Sea Level Rise captured succinctly in Part IV- I- B of the Second Issues Paper.
3. As noted, sea level rise has the potential to create long-term or permanent movement of persons within a country or to another country. Displacement within one's own country and cross-border displacement to third countries in the context of climate change and disasters, including sea-level rise, is a multicausal phenomenon, involving interaction with other, economic, social and political factors.<sup>58</sup>
4. The current international legal frameworks that are potentially applicable are indeed fragmented and are mostly general in application to disasters or climate change.<sup>59</sup> The framework as it currently stands is not adequate to provide a wholistic and comprehensive response to this multicausal phenomenon.
5. Antigua and Barbuda therefore commends the ILC for the important work done in this paper and looks forward to the comments made by UN Member States on how we can better approach the protection of persons in this context.
6. In this vein, Antigua and Barbuda commends the efforts already being made by UN Member States and international organizations, especially that done by and for small island developing states, in advancing the protection of their citizens in the face of rising sea levels.<sup>60</sup>
7. However, Antigua and Barbuda contends that an integral part of a comprehensive solution must be determining the role that States will play in the protection of persons and therefore determining how rising sea levels will affect the existence of States.
8. It is for this reason that the focus of Antigua and Barbuda's submissions have been on the presumption of the persistence of states as being the applicable principle to apply in determination of the continuation of the state and the Montevideo framework, if used, should be interpreted in line with the strong presumption of the persistence of the State and the principle of self-determination as outlined in Parts A and B above.
9. Nevertheless, as a part of the international community and in accordance with its obligation of cooperation, Antigua and Barbuda shall continue to engage in the

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<sup>58</sup> 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 A/CN.4/752, para. 427.

<sup>59</sup> 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 A/CN.4/752, para. 429.

<sup>60</sup> 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 A/CN.4/752, Part Three, section III.

multiple for a addressing the protection of persons both generally and specifically as it relates to the adverse effects of climate change.

**-END-**