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# Pacific Islands in the face of sea level rise: some reflections from an international law perspective

*Las islas del Pacífico ante la subida del nivel del mar: algunas reflexiones desde la perspectiva del derecho internacional*

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**Abstract:** Because they are at the frontline of climate change, Pacific islands' governments and populations have early alerted on effects of sea level rise, a phenomenon that raises an urgent and existential threat in this part of the world. Among the legal questions emerging from that emergency, consequences on territorial integrity and sovereignty, State continuity, permanence of maritime limits and boundaries, as well as protection of human rights, are of crucial importance. Pacific islands' representatives pushed for more awareness on those issues, and they are also actively participating to the construction of legal responses, particularly in the framework of the Pacific Islands Forum (PIF).

This article proposes an analysis of consequences of sea level rise from an international law perspective, focusing on Pacific States and territories. Effects of sea level rise being more present and documented in Oceania than in any other area in the world, a regional approach deserves specific attention and can usefully serve a general reflection on these challenges. The text thus aims to study impacts of sea level rise on territorial integrity and human rights at a regional scale, and to address more general prospects on development of international law.

**Keywords:** Pacific (Islands), Law of the Sea, Sea Level Rise, Climate Change, Migration.

**Resumen:** Por estar en primera línea del cambio climático, los gobiernos y las poblaciones de las islas del Pacífico han contribuido tempranamente a alertar sobre los efectos de la subida del nivel del mar, un fenómeno que plantea una amenaza urgente y existencial en esta parte del mundo. Entre las cuestiones jurídicas que se derivan de esa emergencia, son de crucial importancia las consecuencias sobre la integridad territorial y la soberanía, la continuidad de los Estados, la permanencia de los límites y las fronteras marítimas, así como la protección de los derechos humanos. Los representantes de las islas del Pacífico no sólo han puesto de relieve estas cuestiones, sino que también participan activamente en la elaboración de respuestas jurídicas, en particular en el marco del Foro de las Islas del Pacífico.

Este artículo propone un análisis de las consecuencias de la subida del nivel del mar desde la perspectiva del derecho internacional, centrándose en los Estados y territorios del Pacífico. Dado que los efectos de la subida del nivel del mar están más presentes y documentados en Oceanía que en cualquier otra zona del mundo, un enfoque regional merece una atención específica y puede servir para una reflexión general sobre estas cuestiones. El texto pretende, pues, analizar los impactos de la subida del nivel del mar sobre la integridad territorial y los derechos humanos a escala regional, y abordar perspectivas más generales sobre el desarrollo del derecho internacional.

**Palabras clave:** Islas del Pacífico, Derecho del Mar, elevación del nivel del mar, cambio climático, migración.

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**Summary:** I. INTRODUCTION. II. GENERAL OVERVIEW OF PACIFIC STATES AND TERRITORIES. II.1. Legal diversity. II.2. Characteristics explaining vulnerability towards sea level rise. III. SEA LEVEL RISE, SOVEREIGNTY AND TERRITORIAL INTEGRITY OF PACIFIC STATES AND TERRITORIES. III.1. Continuity of State. III. 2. Preservation of maritime limits and boundaries. IV. PROTECTION OF HUMAN RIGHTS. IV.1. Impacts of sea level rise on Pacific inhabitants' human rights. IV.2. Climate displacement planification. A. Internal relocation. B. International displacements. V. CONCLUSION. VI. BIBLIOGRAPHIC REFERENCES.

## I. INTRODUCTION

Pacific Islands constitute a unique environment for many reasons. Their singularity is primarily due to their geographical location and the history of their settlement. It is also directly linked to the incredible biological and cultural diversity of those territories. More than 30,000 islands dot the largest and deepest ocean on the planet<sup>1</sup>. They are usually divided into three groups: Melanesia, Micronesia and Polynesia<sup>2</sup>.

Sometimes perceived as terrestrial «confetti», with a limited population in number, the States and territories of the Pacific long remained on the fringe of social, legal and political sciences research<sup>3</sup>. However, their lack of visibility does not do justice to their remarkable richness, nor to the geopolitical space they now occupy. Over the years, these States and territories have become immense maritime nations, with the application of the law of the sea providing them with exclusive economic zones (EEZ) whose dimensions are unique in the world. While the spatial basis for the exercise of their sovereign powers was thus expanded, due to the progressive recognition of State rights over maritime spaces during the 20th century, it is also very directly threatened by the effects of climate change. For years now, Pacific States and territories have been warning about the consequences of climate change as an existential

<sup>1</sup> More than 166 million km<sup>2</sup>. See WEST, J. F.; FOSTER, S., «Pacific islands», *Encyclopedia Britannica*, 17 nov. 2020.

<sup>2</sup> This division, based on cultural groups of population, is now criticized for its lack of cultural legitimacy. It is nevertheless still very commonly used in geographical descriptions and political analyses of the region.

<sup>3</sup> That made the French author J.M.G. LE CLEZIO speak about the «invisible continent»: *Raga, Approche du continent invisible*, Paris, Seuil, 2006. It is also interesting to note that the occidental perspective, including in the literature, mainly focuses on the apparent «emptiness» of the Pacific. However, in the islands cultures perspectives, the ocean is far from being empty: it constitutes the main resource, and is rather a communication channel than an obstacle. See LAGARDE, L., «Les 'Vikings du soleil levant': exploration, appropriation et exploitation du Pacifique par les Océaniens», in G. Giraudeau (dir.), *Les enjeux territoriaux du Pacifique*, PUNC, 2021, p. 27.

threat, and the greatest threat to their security<sup>4</sup>. Among these manifestations, sea level rise has particularly severe impacts on territories and populations – through flooding, submersions and salinization of the soil –, while it raises unprecedented legal issues.

Obviously, sea level rise is not occurring only in the Pacific, and is nowadays a global challenge. However, the singularities of Pacific islands in the face of sea level rise justify to dedicate a specific research to them, as a result of two principal observations. Firstly, the impact of sea level rise on those territories is like nowhere else visible and documented – although contributing poorly to the emission of greenhouse gases, Pacific States are the first suffering their impact<sup>5</sup>. There's a lot to learn from that experience, in terms of the new challenges raised, but also in terms of the practical and legal measures that have been implemented to deal with this threat. Secondly, Pacific islands, through their representatives, not only alerted the international community<sup>6</sup>, but also actively contributed for new legal responses to emerge. For these reasons, analyzing legal aspects of sea level rise in the Pacific can usefully feed a global reflection<sup>7</sup>. Such conclusion actually justified the recent publication of a World Bank report whose scope is precisely focused on the area<sup>8</sup>.

After a general overview of Pacific States and territories (II), this article will deal with legal aspects of sea level rise linked to territorial integrity and sovereignty (III) and guarantee of human rights for the concerned populations (IV).

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<sup>4</sup> For instance: Boe Declaration of Regional Security, 2018: «We reaffirm that climate change remains the single greatest threat to the livelihoods, security and wellbeing of the peoples of the Pacific...» [<https://www.forumsec.org/2018/09/05/boe-declaration-on-regional-security/>]. The linked between climate change and security is now quite well established in front of the Security Council (see for instance SC/14260, 24 juillet 2020), and had been recognized by the General Assembly several years ago (A/64/281 June 2009).

<sup>5</sup> Pacific islands produce less that 0,03 % of the whole amount of greenhouse gases on the planet: <https://www.sprep.org/news/low-carbon-development-shared-the-pacific-island-way>.

<sup>6</sup> Among them Anote Tong, former president of Kiribati, or more recently Tuvalu Prime Minister, nominated in 2022 for Peace Nobel Price after the emblematic speech *in situ* during the COP.

<sup>7</sup> See Report of the International Law Association, D. VIDAS, J. MC ADAM, D; FRESTONE, International Law and Sea Level Rise, Brill, 2019. For a global perspective in French: BORÉ-EVENO, V., *Élévation du niveau de la mer et droit international*, Pedone, 2022, to be published.

<sup>8</sup> FREESTONE, D.; CIÇEK, D., *Legal Dimensions of Sea Level Rise: Pacific Perspectives*, World Bank Report, 2021, 71 p.

## II. GENERAL OVERVIEW OF PACIFIC STATES AND TERRITORIES

### II.1. *Legal diversity*

The expression of «Pacific States and territories» usually refers to the islands located in a geographical area also called «Oceania». Most of these States and territories are members of the Pacific Islands Forum (PIF), that is to say Australia, Cook Islands, Federated States of Micronesia, Fiji, French Polynesia, Kiribati, Nauru, New Caledonia, New Zealand, Niue, Palau, Papua New Guinea, Marshall Islands, Samoa, Solomon Islands, Tokelau (associated territory of the PIF), Tonga, Tuvalu, and Vanuatu. There is however no consensus on the list the expression refers to. In its broadest sense, it also includes the American territories of Hawaii, Northern Mariana Islands, Guam and the American Samoa, as well as Pitcairn and Wallis-and-Futuna. It often excludes, though, the American territories, and in its narrowest sense, it sometimes excludes Australia and even New Zealand. This article will mainly focus on the narrow version of the list, for the structural and economical characteristics these States and territories share in the face of sea level rise.

This being said, there is among these islands, an incredible diversity of legal situations, to the point that we can refer to Oceania as a «legal laboratory». Part of these archipelagos are independent States, born with the wave of decolonization, like Fiji, Tonga, Palau or Solomon Islands. Some of them have singular constitutional history, like Vanuatu, which was a British and French condominium called «New Hebrides» before its independence in 1980. Several of these independent States are associated with their former colony. The «association of States» is a flexible concept which usually refers to independent entities which would transfer defense and external relations competencies to a «Partner-State»<sup>9</sup>. Micronesia, Marshall Islands and Palaos are associated with United-States through the «Compacts of Free Association». Niue and Cook Islands are associated with New Zealand.

Another part of these islands are non-sovereign entities. For instance, Tokelau, which has its own government, is a dependent territory of New Zea-

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<sup>9</sup> On this notion, HAVARD, L., *L'État associé. Recherches sur une nouvelle forme de l'État dans le Pacifique sud*, Presses Universitaires d'Aix-Marseille, Coll. «Droit d'Outre-Mer», 2018, 484 p.

land<sup>10</sup>. Another example is the situation of New Caledonia, New Polynesia, and Wallis-et-Futuna: all of them are French overseas territories with their own statute regarding to the constitution<sup>11</sup>.

## II.2. *Characteristics explaining vulnerability towards sea level rise*

Numerous aspects explain why Pacific islands are today on the frontline of sea level rise. One of them is geological. They are two main types of archipelagos in the area: high volcanic-based islands (Hawaiï belong to this category), and low-coral formations. The coral islands, composed only of coral reefs, are particularly numerous in the Pacific, and are also more easily submerged. They are land formations composed solely of «the accumulation of calcareous skeletons of corals (...) consolidated by other organisms such as calcareous red algae»<sup>12</sup>, including atolls, a type of coral island in the form of a ring known as the «barrier reef», with a very low attitude, and housing a lagoon<sup>13</sup>. Coral reefs are today among the most threatened ecosystems in the world<sup>14</sup>, due to the combination of several factors, notably ocean acidification and the increasing urbanization of certain areas. Above all, the geological configuration of the atolls, in particular their low altitude, exposes them very directly to the phenomena of progressive and accidental submersion. The territorial integrity of the Pacific archipelagos is thus threatened by the prospect of a decrease in land area<sup>15</sup>.

Four of the five atoll nations in the world, i.e. States or sub-State territories composed solely of low-lying atoll formations, are located in the region:

<sup>10</sup> <https://www.tokelau.org.nz/Tokelau+Government.html>

<sup>11</sup> Article 74 of the French constitution provides for the autonomy of the overseas collectivities and the applicable legal regime (New Polynesia and Wallis-et-Futuna belong to this category). Another part of the constitution (Title XIII refers to the *sui generis* statute of New Caledonia).

<sup>12</sup> PAYRI, C. E., «La Nouvelle-Calédonie, terre de nickel, archipel de corail», in *La Nouvelle Calédonie, archipel de corail* (sous la direction du même auteur), IRD, 2018, p. 15. We translate.

<sup>13</sup> Library of the National Geographic Society, *Encyclopedia*, «Atoll».

<sup>14</sup> MOATTI, J.-P., «Une impérieuse urgence», p. 11, in *La Nouvelle-Calédonie, archipel de corail*, IRD, 2018, *op.cit.*

<sup>15</sup> FREESTONE, D.; CIÇEK, D., *Legal Dimensions of Sea Level Rise: Pacific Perspectives*, Rapport de la Banque mondiale, *op. cit.*, pp. 5 et 5. Recent studies show that these ecosystems can nevertheless renew themselves and thus «resist» to some extent. However, the combined effect of the consequences of climate change on these systems, although difficult to assess precisely, puts them directly at risk.

Kiribati, Marshall Islands, Tokelau and Tuvalu (the fifth one being The Maldives in the Indian Ocean). These atoll nations are small (12 km<sup>2</sup> for Tokelau), and are the more directly threatened by sea level rise. They could become uninhabitable, or even disappear in the worst-case scenario. Climate change is for them an existential threat<sup>16</sup>.

Additionally, the IPCC frequently underlined the lack of uniformity in the sea level rise phenomenon on a global scale: the waters are rising faster and more intensely in the southwest Pacific, at least since the 1990s<sup>17</sup>.

The economic situation of those islands is another aspect to be taken in consideration at the time of assessing effects of sea level rise. It raises a range of difficulties, including the appropriate implementation of mitigation measures, such as infrastructures capable of minimizing occasional and permanent flooding (sea walls are in any case very imperfect structures and obstruct the exchange of sediments between sea and land). The UN group of «Small Island Developing States (SIDS)» counts with many Pacific States. They form together the sub-group of «P-SIDS»<sup>18</sup>, whose members have a 3626 US dollars average GDP per capita<sup>19</sup>. Most of these States have developed their economic policies on the marine resources, that could be threatened by the impact of sea level rise on their delimitation<sup>20</sup>.

### III. SEA LEVEL RISE, SOVEREIGNTY AND TERRITORIAL INTEGRITY OF PACIFIC STATES AND TERRITORIES

Sea level rise raises two sets of fundamental issues linked to sovereignty and territorial integrity, by affecting the territorial basis of sovereign entities. One considers the possible disappearance of States, particularly the atoll nations already mentioned. The other deals with the permanence of their maritime limits and boundaries.

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<sup>16</sup> This scenario was discussed in the United Nations. See MCADAM, J., «Disappearing States', Statelessness and Relocation», in J. McAdam (ed.), *Climate Change, Forced Migration and International Law*, Oxford, 2012, p. 122.

<sup>17</sup> «For example, in the western Pacific Ocean, rates were about three times greater than the global mean value of about 3 mm per year from 1993 to 2012», IPCC AR/5, 2013, p. 1148.

<sup>18</sup> <https://sustainabledevelopment.un.org/index.php?menu=1520>.

<sup>19</sup> World average is 10909 dollars in 2020, World Bank: <https://donnees.banquemondiale.org/indicateur/NY.GDP.PCAP.CD?locations=S2>.

<sup>20</sup> *Infra*.

### III.1. *Continuity of State*

Apart from the case of temporary flooding due to meteorological events, the submersion of territories is a progressive phenomenon. It requires to consider the case of the disappearance of the constituent elements of the State. To which extent sea level rise threatens the very existence of sovereign entities? To get an answer, we must refer to the classical constituent elements of State, which are, as formulated in the Montevideo Convention: a «permanent population», «a defined territory», a «government» and the «capacity to enter into relations with the other states»<sup>21</sup>.

As already illustrated by several islands, as the Carteret islands in Papua New Guinea, and because it is a progressive phenomenon, the first constituent element which might be missing is the one of the permanent population: a territory becomes uninhabitable before it is completely submerged. The encroachment of land can cause excessive demographic pressure on small areas, and deprive individuals of their fundamental rights, like access to housing, education, health, and finally forces them to move away. Also, salinization of soils makes them unfit for any kind of cultivation and complicates access to drinking water.

For these reasons, States such as Kiribati or Tuvalu could see their entire population exiled. They are States with a very limited population in number (121300 inhabitants for Kiribati with half in the capital, 10400 for Tuvalu with half on the main island<sup>22</sup>), but paradoxically with a strong demographic pressure compared to the available resources<sup>23</sup>. Once the population displaced, the government might have to be exiled too, thus weakening the third constituent element. In the end, the territory could be entirely submerged.

While these elements – population, territory and government – are useful in determining the birth of the State and its disappearance, their normative scope is not clear, especially with regard to their temporality<sup>24</sup>. It is difficult to

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<sup>21</sup> Montevideo Convention, 1933, Article 1. The three first ones are also mentioned, although in a slightly different formulation, in the *Deutsche continental Gas-Gesellschaft vs. Poland* arbitration (1<sup>st</sup> August 1929), in the Article 1 of the Resolution on Recognition of New States and New Governments by the Institute of International Law (Brussels, 23 April 1936), and by the Arbitration Commission on Yugoslavia (1992).

<sup>22</sup> Data: Universalis.

<sup>23</sup> See MCADAM, J., «Disappearing states, statelessness and relocation», in J. MC ADAM (ed.), *Climate change, Forced Migration, and International Law*, Oxford, 2012, p. 132.

<sup>24</sup> See JEANNENEY, J., «L'Atlantide. Remarques sur la submersion de l'intégralité du territoire d'un Etat», *RGDIP*, vol. 118, n° 2014, p. 101 et suiv.

determine for instance at which point a population would be considered not permanent: we know at least that is not a question of proportion<sup>25</sup>. Also, international law anticipates the disappearance of the State, but due to dissolution, merger or division, and provides for the modalities of succession. It does not anticipate the unprecedented case of a State whose constituent elements are threatened by an external event such as sea level rise<sup>26</sup>. Governments of the Pacific were logically among the first to request that reflections be carried out on this subject, in order to respond to the numerous problems surrounding the question of continuity: maintenance of rights over maritime spaces, membership of international organizations, viability of treaty commitments...

Several scenarii have been put forward by the doctrine based on a presumption of the continuity of the State. The main ones envisage either the transfer of the population and the government to a territory acquired by sale or lease<sup>27</sup>, with possibly the maintenance of a minimal population on the still emerged lands<sup>28</sup>, or a fusion with another State. Another theory is that of the «deterritorialized State», «State off the ground», or «Nation *ex-situ*»<sup>29</sup>. Based on the necessary continuity of the right of peoples to self-determination, N. Ross proposes an «*ex-situ* self-determination» which, according to the author, is possible in the form of a legal autonomy within another State<sup>30</sup>.

An early illustration of these perspectives is the purchase, in 2014, of land in Fiji by Kiribati under the presidency of Anote Tong. The land, bought from the Anglican Church (this was not an interstate transfer), would have been since then converted to farming with Chinese authorities' assistance, after the change of presidency<sup>31</sup>.

<sup>25</sup> MCADAM, J., «Disappearing states, statelessness and relocation», in J. Mc Adam (ed.), *Climate change, Forced Migration, and International Law*, Oxford, p. 132. The author takes the example of Samoa and Tonga, which are sovereign States, but with respectively 56,9% and 46% of the population living outside of the country.

<sup>26</sup> FREESTONE, D.; CIÇEK, D., *Legal Dimensions of Sea Level Rise: Pacific Perspectives*, *op. cit.*, p. 21.

<sup>27</sup> Which would be an application of the «territory-object» perspective.

<sup>28</sup> See ROSS, N. J., *Low-lying States, Climate change-induced relocation, and the collective right to self-determination*, thesis submitted to the Victoria University of Wellington, 2019, p. The author takes the example of Pitcairn, with a population of about 50, to which the United Nations General Assembly has nevertheless recognized a collective right to self-determination.

<sup>29</sup> BURKETT, M., «The Nation *Ex-Situ*: On climate change, deterritorialized nationhood and the post-climate era», *Climate Law*, vol. 2, 2011, pp. 345-374

<sup>30</sup> ROSS, N. J., «Low-Lying States, Climate-Change Induced Relocation, and the Collective Right to Self-Determination», Thesis submitted to the Victoria University of Wellington, 2019, 307 p.

<sup>31</sup> <https://www.theguardian.com/world/2021/feb/24/kiribati-and-china-to-develop-former-climate-refuge-land-in-fiji>.

If the authors sometimes differ on the solutions, they all recognize the huge practical difficulties of implementing them. Within these possibilities, the hypothesis of the off-ground state directly questions the relationship between State and territory, and invites us to go beyond the Westphalian model of sovereignty<sup>32</sup>. The continuity of the pre-existing State would also require the resolution of much broader issues than territory, including the guarantee of the rights of the entirely relocated population within a «host State».

It leaves open, at this stage, the question of whether the State with a land territory that has become uninhabitable would retain its rights over the maritime spaces created by the partially or totally submerged territory. That would then be a contradiction to the principle according to which «the land dominates the sea». Because it questions the permanence of State territory, sea level rise is in the process of «modifying the representations of territory in international law»<sup>33</sup>. This profound change is already underway in Oceania, where submerged land raises legal and practical issues, and has consequences on maritime limits and boundaries.

### III.2. *Preservation of maritime limits and boundaries*

Among all the questions surrounding rising seas, the impact on maritime limits and boundaries is of crucial importance for the Pacific. It is a security issue, including food security as the ocean is the main source of protein for most of the region's populations without any real alternative. Maritime spaces are also essential to their economic survival. For most of Oceania States, maritime resources are of substantial contribution to household income and national budget, particularly through fishing license concessions<sup>34</sup>. Moreover, the maintenance of maritime jurisdictions could also prove decisive for the legal and practical survival of a deterritorialized State. However, sea level rise could affect considerably the perimeter of such areas. There is in Oceania, also called «the Blue Continent», a unique proportion between land territory and maritime spaces under state jurisdiction. This ratio is explained by a 360-degree projection of the islands, especially marked in the case of the archipelagos: several

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<sup>32</sup> *Ibid.*, p. 354.

<sup>33</sup> JEANNENEY, J., *op. cit.*, p. 115. We translate.

<sup>34</sup> See <https://www.un.org/ohrlls/content/about-small-island-developing-states>.

of these States are «archipelagic States» within the meaning of Part IV of the Montego Bay Convention<sup>35</sup>. For example, the surface of the EEZ of Tuvalu is 27,000 times its land area. The region counts with 28 million km<sup>2</sup> of maritime space under State jurisdiction, i.e. about 20% of the world's EEZs<sup>36</sup>.

### EEZ areas compared to land territory in the Pacific

Territory / Source	Land territory in km <sup>2</sup>	EEZ in km <sup>2</sup>
Fiji / <a href="http://www.pacific.undp.org">http://www.pacific.undp.org</a>	18.274	1.260.000
Kiribati / <i>FAO Fishery country profile: fao.org</i>	810	3.500.000
Cook Islands / <i>Spc.int</i>	240	1.947.760
Federated States of Micronesia / <i>Fao.org</i>	701	2.980.000
Nauru / <i>Spc.int</i>	21	293.079
Niue / <i>Spc.int</i>	259	390.000
New Caledonia <a href="https://limitesmaritimes.gouv.fr/ressources/tableau-des-superficies">https://limitesmaritimes.gouv.fr/ressources/tableau-des-superficies</a>	18.576	1.240.601
Palau / <i>Undp.org</i>	459	600.000
French Polynesia <a href="https://limitesmaritimes.gouv.fr/ressources/tableau-des-superficies">https://limitesmaritimes.gouv.fr/ressources/tableau-des-superficies</a>	4.167	4.537.730
Solomon Islands / <i>Fao.org</i>	2.990	1.611.839
Samoa / <i>Fao.org</i>	2.935	120.000
Tokelau <a href="https://www.tokelau.org.nz">https://www.tokelau.org.nz</a>	12,2	300.000
Tonga / <i>Fao.org</i>	720	667.957
Tuvalu / <i>Fao.org</i>	30	756.313
Vanuatu / <i>Spc.int</i>	11.830	628.220
Wallis-et-Futuna <a href="https://limitesmaritimes.gouv.fr/ressources/tableau-des-superficies">https://limitesmaritimes.gouv.fr/ressources/tableau-des-superficies</a>	142,4	256.644

Source: G. Giraudeau, «Les mutations de la territorialité dans le Pacifique», in *Les enjeux territoriaux du Pacifique*, PUNC, 2021, p. 44.

<sup>35</sup> This is the case of Fiji, Kiribati and Vanuatu.

<sup>36</sup> Data of SCP: <https://gem.spc.int/key-work/oceans-maritime-programme>.

Sea level rise can cause the low-water mark to recede, and/or submerge all or part of the base points used to draw straight baselines and archipelagic baselines. Some geographical features taken into account for delimitation negotiations and/or as special circumstances can also suffer substantial modification. It can thus affect baselines, outer limits and boundaries of maritime spaces under State jurisdiction. However, the Law of the Sea Convention (UNCLOS), because it was negotiated when sea level rise was not yet a challenge, does not address these issues. Article 7.2 on permanent straight baselines for deltas and «other natural conditions» causing highly unstable coastlines, and Article 76 (§§ 8 and 9) on the final outer limits of the continental shelf are the only apparent exceptions, but they are of no help in ensuring the stability of other maritime limits. Therefore, the Pacific governments, concerned about these questions, have been developing for several years a regional policy to respond to these uncertainties.

In 2020, the impact of sea level rise on maritime boundaries and limits was formally included in the International Law Commission (ILC) work programme<sup>37</sup>. Not surprisingly, a majority of Pacific States are among the fifteen UN members that requested this inclusion during the 6th Committee's debates in the General Assembly in 2017<sup>38</sup>. They also have been particularly active in the Commission's work since then.

The ILC Study Group early searched for a body of state practice that could provide guidance on the evolution of international law regarding maritime zones and sea level rise. Two types of actions were identified in the Pacific. First, Pacific States efforts to define the baselines, boundaries and outer limits of their maritime spaces, particularly since the 2010 Framework for a Pacific Oceanscape initiative, were acknowledged<sup>39</sup>. New points of reference were deposited with the United Nations Secretariat. While such deposits do not freeze the boundaries, they do provide some stability, especially since UNCLOS does not retain any obligation to update straight baselines, or even to publish the coordinates of normal baselines. At the same time, a growing

<sup>37</sup> *Official Records of the General Assembly, Seventy-third Session, Supplement No. 10 (A/73/10)*, ¶ 369.

<sup>38</sup> These 15 States are: Indonesia, Marshall Islands for the P-SIDS (Fiji, Kiribati, Marshall Islands, Federated States of Micronesia, Nauru, Palau, Papua New-Guinea, Samoa, Solomon Islands, Tonga, Tuvalu and Vanuatu), Peru, Roumania, Tonga: Bogdan Aurescu et Nilüfer Oral, A/CN.4/740, note 5. Four States voted against the enrolment of the topic in the Commission's programme: Cyprus, Slovaquia, Czech Republic and Greece.

<sup>39</sup> PIF: <https://www.forumsec.org/wp-content/uploads/2018/03/Framework-for-a-Pacific-Oceanscape-2010.pdf>

number of boundaries were delimited between Pacific States, supported by the Pacific Island Maritime Boundaries Project<sup>40</sup>. This was a real challenge, as the geographical configuration of the region multiplies the shared boundaries for each State. For example, Kiribati shares 9 boundaries with 6 different States. In Wallis-et-Futuna, the waters under French jurisdiction are delimited with 5 States. According to the data of the Pacific Community (SPC), 38 of the 45 bilateral boundaries were delimited in July 2020<sup>41</sup>.

Secondly, different regional instruments point out the importance for preservation of maritime limits and boundaries, such as the Samoa Pathway (2014)<sup>42</sup>, the Taputaputea Declaration (2015)<sup>43</sup>, the Delap Commitment (2018)<sup>44</sup> and the PIF Secretariat Communiqué of the 49th Pacific Islands Forum (2018) annexed to the Boe Declaration<sup>45</sup>. The PIF Secretariat Communiqué of the 50th Pacific Islands Forum (2019) records a collective commitment to contribute to the development of international law for the permanence of maritime boundaries<sup>46</sup>.

On the basis of these elements, the International Law Association's (ILA) Committee on Sea Level Rise and International Law recognized in 2018 the existence of

«(...) a *prima facie* evidence of the development of a regional State practice in the Pacific islands – many of which are the most vulnerable to losses of territory and, consequently, baseline points from sea level rise. The Pacific island States would of course be among those «States whose interests are specially affected», a significant attribute regarding the establishment of a general practice in the formation of a new rule of customary international law... The emergence of a new customary rule will require a pattern of State practice, as well as *opinio juris*»<sup>47</sup>

<sup>40</sup> A project supported by SPC and Australia.

<sup>41</sup> See map of the project, website of the SCP.

<sup>42</sup> A/Res/69/15 du 15 décembre 2014.

<sup>43</sup> Signed by Polynesian leaders on 16 July 2015: <https://www.samoagovt.ws/wp-content/uploads/2015/07/The-Polynesian-P.A.C.T.pdf>.

<sup>44</sup> [https://www.pnatuna.com/sites/default/files/Delap%20Commitment\\_2nd%20PNA%20Leaders%20Summit.pdf](https://www.pnatuna.com/sites/default/files/Delap%20Commitment_2nd%20PNA%20Leaders%20Summit.pdf)

<sup>45</sup> 6 September 2018: <https://www.forumsec.org/2018/09/06/forty-ninth-pacific-islands-forum-nauru-3rd-6th-september-2018/>.

<sup>46</sup> 16 August 2019: <https://www.forumsec.org/wp-content/uploads/2019/08/50th-Pacific-Islands-Forum-Communique.pdf>.

<sup>47</sup> Sydney Report of the Committee on International Law and Sea-Level Rise (2018), p. 18.

The ILC Study Group on Sea-Level Rise went even further in its first topic paper, attesting to the existence of a practice in the Pacific and South-East Asia for the preservation of baseline and outer limits, meeting the requirements of the substantive element of a customary rule<sup>48</sup>. The same conclusion was reached for maritime delimitations and boundaries<sup>49</sup>. Although it was considered premature to recognize the existence of an *opinio juris*, the first topic paper notes that «the general reliance of the conduct», on the basis of «legal stability and security», is an «indication in that sense»<sup>50</sup>.

To this regard, the August 2021 PIF Declaration on Preserving maritime Zones in the Face of Climate Change-Related Sea-Level Rise deserves to be pointed out<sup>51</sup>. The text main originality is that it is entirely dedicated to the preservation of maritime jurisdictions, and is thus not a mere iteration of previous declarations. It provides a useful clarification of the legal grounds for the Pacific practice mentioned above. The preamble refers to the principles underlying UNCLOS<sup>52</sup>, as well as the obligation to interpret it in good faith under its Article 300. The text also addresses the intent of the drafters of the Montego Bay Convention, who, according to PIF leaders, considered coasts and maritime zones and coastlines to be stable when formulating the dispositions. Moreover, it underlines that Pacific small island developing States built their governance policies on the assumption of this stability. Thus, the signatories declare their intention,

«... once having, in accordance with the Convention, established and notified [their] maritime zones to the Secretary-General of the United Nations... to maintain these zones without reduction, notwithstanding climate change-related sea-level rise... without any revision or updating»<sup>53</sup>.

The PIF declaration thus sheds important light on how this regional practice is «conducted with a sense of legal right or obligation», to use the ILC's formulation of the constituent elements of custom<sup>54</sup>. It could be tak-

<sup>48</sup> Issues Paper, *supra* note 8, § 104 (g)-(i).

<sup>49</sup> *Ibid.*, § 141.

<sup>50</sup> *Ibid.*, §§ 104 et 141.

<sup>51</sup> Declaration on Preserving Maritime Zones in the Face of Climate-Change Related Sea-Level Rise, PIF, 6 August 2021.

<sup>52</sup> Stability, security, certainty, predictability, equity, fairness, and justice.

<sup>53</sup> PIF Declaration, *op. cit.*

<sup>54</sup> ILC Report, *supra* note 7, Part V, Conclusion 9.

en into account to assess the crystallization of the practice into a customary norm at a regional or even general level, an option left open by the working group. It thus appears that the PIF, although it went through a major crisis in 2020 when the Micronesian States announced their withdrawal from the organization after the election of the new president<sup>55</sup>, remains an essential framework for cooperation in Oceania, and for the development of international law in response to the challenges raised by climate change. Through their action, Pacific States and territories, far from being passive, are shaping the future of maritime limits and boundaries regarding International Law of the Sea<sup>56</sup>. The ILC's work will be crucial, as some legal aspects of such a preservation would still need to be clarified.

Although Law of the Sea and Human Rights are two distinct branches of International Law, the situation of individuals impacted by sea level rise is also directly linked to the continuity of States and the preservation of maritime spaces, whether it concerns their statehood and their access to economic resources. Protection of human rights in the face of sea level rise is an urgent matter in Oceania.

#### IV. PROTECTION OF HUMAN RIGHTS

The interaction between human rights and climate change is growingly recognized, thanks to climate litigation and UN bodies practice, especially the Human Rights Council (with no less than 11 resolutions on human rights and climate change between 2008 and 2011<sup>57</sup>). It mainly concerns, on the one hand, the situation of people suffering from the consequences of climate change and on the other hand, the protection of people forced to migrate due to its impacts. In the Pacific, these issues have to be analyzed under the light of an important element: the absence of a regional mechanism of protection for human rights.

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<sup>55</sup> See RGDIP, chronique des faits internationaux, 2020-2.

<sup>56</sup> GIRAUDEAU, G., «Is the Pacific Shaping the Future of Maritime Limits and Boundaries?», *ASIL-Insight*, vol. 25, issue 23, October 2021: <https://www.asil.org/insights/volume/25/issue/23>.

<sup>57</sup> Resolutions 7/23 (2008), 10/4 (2009), 18/22 (July 2011), 26/27 (July 2014), 29/15 (July 2015), 32/33 (July 2016), 35/20 (July 2017), 38/4 (July 2018), 42/21 (July 2019), 44/7 (July 2020), 47/24 (July 2021). Other resolutions more generally deal with environment and human rights. For details: <https://www.ohchr.org/EN/Issues/HRAndClimateChange/Pages/Resolutions.aspx>.

IV.1. *Impacts of sea level rise on Pacific inhabitants' human rights*

The impacts of sea level rise on Oceania populations are no longer a projection but a reality, which is widely documented. In the Federated States of Micronesia for instance, insecurity of access to food and water due to sea level rise was identified as one of the most serious problems nationwide<sup>58</sup>. Even if assessing its precise effects on individuals and groups is a difficult task, because of different reasons including the establishment of the causal chain, the NGO Human Rights Measurement initiative recently tried to evaluate such impact with scales. Last reports evaluate the impact of climate change on human rights in Fiji at 4.4/6 in 2020, partly because of the effects of rising waters on food security and crop resilience<sup>59</sup>; at 3.6/6 in Samoa, with increased flooding in urban areas – one of the causes of obstacles to the access to education – and coastal degradation forcing relocations<sup>60</sup>; and at 5.1/6 in Kiribati, with problems of access to drinking water and forced relocations involving greater violence against vulnerable groups<sup>61</sup>.

Sea level rise affects the full range of individual and collective human rights, with notable intensity, due to geographical and structural characteristics. Pacific SIDS, particularly the Atoll States, are especially vulnerable to the effects of rising seas, with the vast majority of the population living within a few meters of the coast. In this regard, sea level rise is only one of many aspects of climate change that undermine the human rights of SIDS, and in many places reinforces already existing inequalities. At stake are at least the rights to food, education, health, and even, as clearly established by the Human Rights Committee in its famous *Teitiota* decision, the right to life as enshrined in Article 6 of the ICCPR<sup>62</sup>.

<sup>58</sup> BURKETT, M., *loc. cit.*, p. 351, quoting FLETCHER, C.H.; RICHMOND, B. M., *Climate Change in the Federated States of Micronesia: Food and Water Security, Climate Risk Management, and Adaptive Strategies*, 2010.

<sup>59</sup> <https://rightstracker.org/en/country/FJI?tab=pacific-region-data>

<sup>60</sup> <https://rightstracker.org/en/country/WSM?tab=pacific-region-data>

<sup>61</sup> <https://rightstracker.org/en/country/KIR?tab=pacific-region-data>

<sup>62</sup> «Furthermore, the Committee recalls that environmental degradation, climate change and unsustainable development constitute some of the most pressing and serious threats to the ability of present and future generations to enjoy the right to life», UN Human Rights Committee, on request n° 2728/2016, *Ioane Teitiota v. New-Zealand*, 24 October 2019 (publication 7 January 2020), CCPR/C/127/D/2728/2016, § 9.11.

In her August 2020 report on cultural rights and climate change, Karima Bennoune recalls that

«[s]ome populations and places are disproportionately affected and the rights and cultures of people in low-lying small island developing states, indigenous peoples, rural populations, women, people with disabilities, people living in poverty and others are particularly at risk»<sup>63</sup>.

The example of the library in Tuvalu, «(...) the only library in the country; located 20 meters from the shore», «threatened by sea level rise» is cited upstream<sup>64</sup>. Moreover, the report rightly notes that

«people with strong cultural ties to the land, sea, natural resources and ecosystems, including indigenous peoples, rural populations and fishermen, are experiencing disproportionate devastation to their cultural lives, both individually and collectively»<sup>65</sup>.

There is indeed a tenuous link between populations and environment in the Pacific<sup>66</sup>, especially in the existing connection between men and the ocean, which is everywhere, which provides food, resources used in traditional costumes or artistic manifestations, which heals. For Louis Lagarde, it also occupies the place that land occupies in continental societies: namely the «natural environment that connects the world of the living and the dead»<sup>67</sup>. Thus, «(s)pecial geographical sites, linked to the ocean, signal the entrances to the land of the dead, such as capes or passes in the reef», «the deceased is deposited in deep-sea dugouts that are placed in rock shelters, one crosses the lagoon to go and bury others on islets separated from the main island»<sup>68</sup>. From then on, the rise of the water threatens in many territories of the Pacific the places dedicated to the funeral rites. Because Oceanian cultures reserve the best places, that is to say close to the sea, for the deceased, they are most of the time submersible. Many villages have already had to consider relocating their cemeteries, a particularly traumatic prospect in Oceanian societies.

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<sup>63</sup> A/75/298, §7.

<sup>64</sup> *Ibid.*, § 4.

<sup>65</sup> *Ibid.*, § 7.

<sup>66</sup> See, MOHAMED-GAILLARD, S., *Histoire de l'Océanie*, Armand Colin, 2015, chapter 2.

<sup>67</sup> LAGARDE, L., *loc. cit.*, p. 31. We translate.

<sup>68</sup> *Ibidem.*

These impacts are also strengthened by the limitations of protection of human rights at a national and regional level. Although significant efforts have been made to improve ratification of international human rights instruments over the past decade, many Pacific States are still not parts to the major instruments, including the 1966 Covenants<sup>69</sup>.

Status of Human Rights Treaties Ratification in the Pacific, 8 December 2020, source: SPC<sup>70</sup>

	ICESCR	ICCPR	CERD	CEDAW	CAT	CRC	CRMW	CRPD	CPPED
AUSTRALIA	01 Dec 75	11 Aug 86	01 Sept 75	28 Jul 81	08 Aug 89	17 Dec 09		17 Jul 08	
COOK ISLANDS				11 Aug 06		9 Jan 07		8 May 09	
FJI	26 Aug 08	19 Aug 12	11 Jan 73	28 Aug 91	14 Mar 16	14 Aug 91	19 Aug 18	7 Jan 17	19 Aug 18
KIRIBATI				17 Apr 04	27 Jul 07	13 Dec 91		22 Sept 13	
MARSHALL ISLANDS	17 Apr 01	17 Apr 01	11 Apr 18	2 Apr 06	12 Apr 08	4 Dec 93		17 Apr 11	
FED. STATES MICRONESIA				1 Sept 04		1 May 91		7 Dec 16	
NEW ZEALAND	28 Dec 76	28 Dec 78	27 Nov 71	10 Jul 85	01 Dec 85	08 Apr 91		28 Sept 08	
NAURU		5 12 Nov 01	5 12 Nov 01	21 Jan 11	26 Sept 13	27 Jul 94		27 June 12	
NUE						20 Dec 95			
PALAU	5 20 Sept 11	4 Aug 91	5 20 Sept 11	11 Jan 11	5 20 Sept 11				
PAPUA NEW GUINEA	21 Jul 88	21 July 88	27 Oct 92	22 Jan 89		2 Mar 91		26 Sept 13	
SAMOA		11 Feb 08		25 Sep 91	28 Mar 99	29 Nov 94		1 Dec 16	17 Nov 17
SOLOMON ISLANDS	17 Apr 82		17 Mar 83	8 Apr 07		10 Apr 91		5 21 Sept 08	
TONGA			16 Feb 02			6 Nov 91		5 15 Nov 07	
TUVALU				6 Dec 99		12 Sept 95		24 Dec 13	
VANUATU		21 Nov 08		8 Sept 91	12 Jul 11	7 Jul 91		14 Oct 08	5 6 Feb 07

<sup>69</sup> Observations of SPC, *Human Rights in the Pacific. A Situational Analysis 2020*, p. 8.

<sup>70</sup> *Ibid.*, p. 10.

Another particularity of the legal background in the Pacific is that there is no regional system for the protection of human rights, a regrettable absence in view of the vulnerability observed. Although a few initiatives in this direction have already been taken, they have never yet been successful<sup>71</sup>.

Paradoxically, despite the weaknesses highlighted, Pacific Island governments have actively contributed to the change of perspective that «humanized climate change»<sup>72</sup>. They were among the initiators of this movement, as members of the SIDS group, notably by signing the Malé Declaration on the Human Dimension of Global Climate Change<sup>73</sup>. They are also well represented in the support organized behind the Costa Rican initiative for the «Geneva Pledge for Human Rights in Climate Action»<sup>74</sup>.

Also, the role played by the PIF and its members in the recent creation of the mandate of a Special Rapporteur on the promotion and protection of human rights in the context of climate change, by the Human Rights Council, on October 8, 2021, should be highlighted<sup>75</sup>. At COP 25, Marshall Islands President H.E. Hilda Heine publicly called for the creation of such a mandate on behalf of the Climate Vulnerability Forum (CVF)<sup>76</sup>, a call «... reiterated by Bangladesh in 2020 as Chair of the CVF, by the Marshall Islands and other developing countries in July 2020, by the Pacific States of Micronesia in October 2020, and by the Foreign Ministers of the Pacific Islands Forum (PIF) in October 2020»<sup>77</sup>. By June 2021, the PIF Foreign Ministers again requested the Human Rights Council to establish such a mandate<sup>78</sup>.

This significant appointment is the recognition of a longtime effort to promote the acknowledgment of the relationship between climate change and

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<sup>71</sup> IMRANA JALAL, P., «Why Do We Need a Pacific Human Rights Commission?», *Victoria University of Wellington Law Review*, vol. 11, 2009, p. 177.

<sup>72</sup> Quoting the expression of COURNIL, Ch. et PERRUSO, C., «Réflexions sur ‘l’humanisation’ des changements climatiques et la ‘climatisation’ des droits de l’Homme. Émergence et pertinence», *La Revue des droits de l’homme*, 14, 2018.

<sup>73</sup> 14 November 2017: [http://www.ciel.org/Publications/Male\\_Declaration\\_Nov07.pdf](http://www.ciel.org/Publications/Male_Declaration_Nov07.pdf).

<sup>74</sup> 13 February 2015. Among the 17 signatories: Marshall Islands, Kiribati, Federated States of Micronesia, Palau and Samoa.

<sup>75</sup> A/HRC/RES/48/14.

<sup>76</sup> <https://thecvf.org/our-voice/statements/president-heine-statement-to-the-cvf-partners-leaders-event-at-unfccc-cop25/>.

<sup>77</sup> BILLARD SCHACHTER, C.; MINGRONE, F., «Un rapporteur special de l’ONU sur les droits de l’homme et les changements climatiques ? Perspectives régionales», *friedrich-ebert-stiftung*, January 2021, p. 2.

<sup>78</sup> *Ibidem*.

human rights. It is aimed to «develop recommendations on how to address and prevent the adverse effects of climate change on the enjoyment of human rights, and on the ways to strengthen the integration of human rights concerns into climate policymaking and legislation»<sup>79</sup>. It will also be an «awareness-raising» tool for States and International bodies to take a human rights perspective on climate change issues<sup>80</sup>.

#### IV.2. *Climate displacement planification*

The deterioration of living conditions in the Pacific islands already caused many persons to move, either by being relocated within their State, or, more exceptionally, by crossing an international border. It is difficult to evaluate precisely the number of individuals concerned. Some studies have undertaken these uncertain calculations, and estimate that, in the Pacific Islands, between 665,000 and 1.7 million people will be forced to migrate by 2050 as a result of the consequences of climate change, partly due to sea level rise<sup>81</sup>. The displacements that already took place were widely analyzed<sup>82</sup>. This research

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<sup>79</sup> SAVARESI, A., «The UN HRC recognizes the right to a healthy environment and appoints a new Special Rapporteur on Human Rights and Climate Change. What does it all mean?», EJIL: Talk!, October 12, 2021: <https://www.ejiltalk.org/the-un-hrc-recognizes-the-right-to-a-healthy-environment-and-appoints-a-new-special-rapporteur-on-human-rights-and-climate-change-what-does-it-all-mean/>.

<sup>80</sup> *Ibidem*.

<sup>81</sup> KUPFERBERG, J. S. (n.d.). Migration and dignity – relocation and adaptation in the face of climate change displacement in the Pacific – a human rights perspective. *The International Journal of Human Rights*, 2021, p. 10, se fondant sur les travaux de CAMPBELL, J., «Climate-Change Migration in the Pacific.» *The Contemporary Pacific*, vol. 26, no. 1, University of Hawai'i Press, 2014, pp. 1-28. For projections of «micro-States» Tuvalu, Kiribati and Nauru, the DevPolicy report can be usefully consulted: CURTAIN, R.; DORNAN, M., «A pressure release valve ? Migration and climate change in Kiribati, Nauru, and Tuvalu», February 2019, 34 p., <https://devpolicy.org/publications/reports/Migration-climate%20change-Kiribati-Nauru-Tuvalu.pdf>.

<sup>82</sup> See GHARBAOUI, D., «Social and cultural dimensions of environment-related mobility and planned relocations in the South Pacific », chapitre 24 in F. GEMENNE et R. MCLEMAN (dir.), *Routledge Handbook of Environmental Displacement and Migration*, Routledge, 2018; KUPFERBERG, J. S. (n.d.). Migration and dignity – relocation and adaptation in the face of climate change displacement in the Pacific – a human rights perspective. *The International Journal of Human Rights*, 2021, pp. 1-26; YAMADA, S.; BURKETT, M. and MASKARINEC, G. G., *Sea-Level Rise and the Marshallese Diaspora*, Environmental Justice. March 2017; BURKETT, M., *Lessons from Contemporary Resettlement in the South Pacific*, Columbia J. Int'l Affairs (Spring 2015); MCADAM, J., 'Lessons from Planned Relocation and Resettlement in the Past', *Forced Migration Review* 49 (2015).

mainly highlights the consequences of internal relocations on human rights, as well as the difficulty of anticipating international displacements. To understand the huge difficulties inherent to relocations, such movements must be placed in a historical and demographic context. Numerous natural disasters already caused the displacement of Oceania communities in the past<sup>83</sup>. Demographic movements from the lower islands to the higher ones, where the urban centers, including the capitals, are often located, are also well identified. Even in the low-lying archipelagos, the demographic distribution is not homogeneous. For instance, in Tuvalu «about 42% of the population of resides in Funafuti, the capital and only urban center»<sup>84</sup>. In Kiribati, the demographic pressure is already very strong on the capital Tarawa, a pressure increasing with the demographic growth, and due to the lack of resources in the rest of the archipelago<sup>85</sup>. Thus, many population displacements due at least partially to sea level rise are part of already existing trends, and it is difficult to clearly identify the chain of causality.

#### IV.2.1. Internal relocation

When they are planned, internal relocations are based on private or public programs, whose anticipation is fortunately becoming more precise. Among the known examples, those of several Fijian villages<sup>86</sup>, of Choiseul in the Solomon Islands, and of the inhabitants of the Carteret Islands in Papua New Guinea, have mainly attracted the attention of researchers<sup>87</sup>. They attest to the existence of several difficulties, including the financing of these settlements, the cultural and linguistic adaptation of these communities, the access to land (where the land tenure system may not allow access to property due to the application of customary rights), and the maintenance of social organization.

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<sup>83</sup> KUPFERBERG, J. S., *op. cit.*, p. 10. See *infra*.

<sup>84</sup> MC ADAM, J., «Disappearing states, statelessness and relocation», in J. Mc Adam (ed.), *Climate change, Forced Migration, and International Law*, Oxford, 2012, p. 125.

<sup>85</sup> See CURTAIN, R.; DORNAN, M., «A pressure release valve? Migration and climate change in Kiribati, Nauru, and Tuvalu», *op. cit.*, p. 2: «Significant population growth is projected in Kiribati by the UN. By 2050 it is projected that Kiribati's population will near 180,000 people. Population growth is likely to be concentrated in the main urban area on South Tarawa, as people in outer islands who largely depend on subsistence livelihoods are pushed to migrate due to population pressures and environmental changes. Resource constraints mean that South Tarawa will not be able to support this population growth.»

<sup>86</sup> Particularly Tukuraki Village, on the main island Viti Levu, in 2012.

<sup>87</sup> See the list of publications already mentioned, note 82.

The case of the Carteret Islands is symptomatic of these obstacles. Located about three hours by boat from Bougainville, these very low-lying islands early suffered from the effects of sea level rise – the phenomenon combines the consequences of climate change and geological changes in the sinking of the land mass<sup>88</sup>. Their inhabitants were thus often considered as the first climate change-induced displaced persons<sup>89</sup>. The uninhabitability of the islets was mainly due to the increasing impossibility of cultivating the taro, the local tropical root vegetable, but also to more intense tides, and to the salinization of drinking water. Pushed by such conditions, Ursula Rakova, a native leader from the Carteret, organized the relocation of her community<sup>90</sup>. In the absence of support from the public authorities, the modalities of this relocation had to be built. Some land was purchased from the local church in Bougainville, and a cocoa cooperative was created to ensure the financial autonomy of the inhabitants. Financing the facilities has unsurprisingly proved to be a major obstacle, and even the transfer of donations was extremely complex<sup>91</sup>. For Maxine Burknett, the gradual relocation of the Carteret people is a clear illustration of the need for clarification and recognition of these human movements as climate change adaptation measures, so that they can be appropriately funded. It also demonstrates the necessity of an inclusive policy framework, at the national level, to organize such displacements<sup>92</sup>.

Recent developments in planification of relocation have been mainly based on soft law and development of national strategies. International law recommendations on internal displacement, such as the International Organization for Migration (IOM) guidelines<sup>93</sup>, were usefully integrated, with the help of experts, at a national level. The IOM regional strategy for Asia and the Pacific provides for an inclusive platform, in which are developed different kind of partnerships with other United Nations agencies, local governments,

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<sup>88</sup> From Ursula Rakova's testimony, Oxfam, *Sisters on the planet: Carteret Islands*, 2009.

<sup>89</sup> MUNOZ, S. M., «Understanding the human side of climate change relocation», *The Conversation*, 11 juin 2019.

<sup>90</sup> BURKETT, M., *Lessons from Contemporary Resettlement in the South Pacific*, Columbia J. Int'l Affairs (Spring 2015), p. 77.

<sup>91</sup> *Ibid.*, p. 78 et suiv.

<sup>92</sup> *Ibidem*.

<sup>93</sup> IOM, *Mapping Human Mobility (Migration, Displacement and Planned Relocation) and Climate Change in International Processes, Policies and Legal Frameworks*, 2018, on implementation of Task Force on Displacement under the Warsaw International Mechanism for Loss and Damage (WIM) and the United Nations Framework Convention on Climate Change (UNFCCC).

and civil society actors<sup>94</sup>. The IOM is also one of the partners for the Pacific Climate Change Migration and Human Security (PCCMHS) program<sup>95</sup>, with the International Labour Organization (ILO), the Office of the United Nations High Commissioner for Human Rights (OHCHR), the United Nations Economic and Social Commission for Asia and the Pacific (ESCAP), the Platform on Disaster Displacement and the PIF.

At a national level, the publication by the Fijian government of a specific guide in 2019 was a first in Oceania<sup>96</sup>. Focusing on human rights, the guide adopts a holistic approach to climate change-induced internal displacement<sup>97</sup> and identifies three distinct stages, before, during and after relocation<sup>98</sup>. While recalling the primary obligation of the State to protect its population, these recommendations repeatedly emphasize that relocation is a local (communities, households, individuals) and non-state initiative. The plan is a symbol of increased awareness on these issues, but it is still relatively unsubstantiated and demonstrates the considerable work that remains to be done to protect the most vulnerable. Enough important to be noted, its publication was accompanied by the creation of a special fund, Fiji's Climate Relocation and Displaced Peoples Trust Fund for Communities and Infrastructure, to facilitate the cash transfers that are essential for the numerous expected relocations<sup>99</sup>. Further consultations should soon lead to the establishment of similar guides in other territories<sup>100</sup>. Practical benefits of these programs are still to be witnessed.

<sup>94</sup> See IOM Regional Strategy for Asia-Pacific: [https://www.iom.int/sites/g/files/tmzbd1486/files/documents/asia\\_and\\_the\\_pacific\\_regional\\_strategy\\_2020-2024\\_11nov20\\_v04.pdf](https://www.iom.int/sites/g/files/tmzbd1486/files/documents/asia_and_the_pacific_regional_strategy_2020-2024_11nov20_v04.pdf).

<sup>95</sup> Sur cette enceinte de dialogue: <https://reliefweb.int/report/world/pacific-governments-conclude-regional-policy-dialogue-climate-related-mobility>.

<sup>96</sup> *Displacement guidelines in the context of climate change and disasters*, 2019, <https://www.adaptation-community.net/wp-content/uploads/2020/03/Displacement-Guidelines-Fiji-2019.pdf>.

<sup>97</sup> It quotes as an opening: C. CORENDEA, 2017, Migration and human rights in the wake of climate change – A policy perspective over the Pacific, UNU-EHS: «*As human mobility is increasingly understood as a subsidiary effect of climate change processes, the relationship between environmental change (defined here as an inclusive concept including environmental degradation, climate change and disasters), human rights and human mobility becomes an interrelated and interconnected hybrid concept, where State practices may not address one without addressing the others*».

<sup>98</sup> The «PRE-displacement process», the «IN-displacement process», and the «POST-displacement process».

<sup>99</sup> SPREP: <https://www.sprep.org/news/fijis-displacement-guidelines-launched-at-the-moana-blue-pacific-pavilion>. Such financing had been sorely lacking in the past. It is estimated that 80 are targeted by the project, 600 communities could be impacted in the coming years. In 2020, New Zealand announced it would donate 2 million dollars to the Fund: <https://www.rnz.co.nz/news/political/410430/new-zealand-to-give-2m-to-fiji-climate-change-relocation-fund>.

<sup>100</sup> An ongoing process in the Cook Islands and Solomon Islands.

They also need improvement regarding how specific groups voices and needs can be included in their conception and implementation.

#### IV.2.2. International displacements

In low-lying archipelagos, internal relocation of climate change-induced displaced people is impossible to plan, as there is no elevated land or places far away the coastlines. This situation raises the complex issue of international climate change-induced displacements. The difficulty inherent to internal displacement is multiplied tenfold in the case of human movements involving the crossing of international borders. The complexity of the legal questions raised in that case, is reflected in the absence of consensus on the vocabulary to be used. Strictly speaking, they are no «climate change refugees», as the Geneva Convention of 1951 does not apply to these persons. The text was negotiated at a time when effects of climate change were not in the mind of the authors. It focuses on individual rights, and the notion of «persecution», as it is judicially interpreted, does not easily fit with climate change as the causal element. At the same time, the inapplicability of the convention does not imply the inapplicability of the whole International Refugee Law. At the contrary, at least part of it, through principles as the «non-refoulement» one, is applicable to individuals forced to leave their country because of climate change, as recognized in the UN Human Rights Committee decision on the Teitiota case<sup>101</sup>. The vocabulary used is then a question of perspective. The necessity to develop and interpret International Refugee Law to guarantee a better protection for those persons, could justify to advocate for the use of the expression «Climate change refugees» despite the inapplicability of the Geneva Convention. At the same time, the development and adaptation of Human Rights Law might be a more winning option, and is not necessarily exclusive from the other. Concomitantly, the political shift to «resilience» in the Pacific, rather than focusing on migration, tends to discard any reference to refugee law in the national and regional programs.

In terms of projections, international displacements mainly concern atoll nations whose territory could become uninhabitable. They are incomparable, in numbers, with projections regarding South Asia<sup>102</sup>. However, they raise

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<sup>101</sup> *Supra*.

<sup>102</sup> For statistical projections, see World Bank Grounswell Report: <https://openknowledge.worldbank.org/handle/10986/36248>.

specific questions in the Pacific, as the uninhabitability of these territories could provoke the displacement of their entire population, and then the disappearance of one the constituent elements of statehood<sup>103</sup>. Such perspective grounded the Migration with Dignity (MWD) program initiated by former Kiribati President Anote Tong in the 2010s<sup>104</sup>.

It is important to mention that, for local communities, displacement is very a last resort option. In the recent years, Pacific States and territories representatives have growingly insisted on the necessity to focus on resilience and responsibilities of greenhouse gases principal emitters to provide for resources allowing people to stay on their land. This political shift explains the reluctance of Pacific States to accept a «climate change visa» proposed in New Zealand. The project to create this residence permit, submitted in 2017 by the new minister for climate change, quickly dropped, precisely because Pacific States asked the New Zealand government to support adaptation instead of movement, and preferred to avoid the «stigma of being ‘refugees’»<sup>105</sup>. Tired of a media and academic discourse focused on the vulnerability of populations, and determined to fight to defend the unique bond linking them to their land, activists and politicians are asking above all to obtain the means to stay at home. This includes a desire to have the responsibility of greenhouse gases emitting States recognized, and to obtain sufficient funds for resilience, notably through the loss and damage mechanism. The Torres Strait case is part of this dynamic, aiming to have the responsibility of the Australian government to take the necessary measures to avoid the displacement of the community recognized.

The «last resort option» is the perspective adopted by the Marshall Islands’ National Strategic Action Plan 2020-2030, which considers relocation of the population, though, but as the last solution<sup>106</sup>. The plan thus underlines how the Marshall Islands government «faces the stark choice as a low-lying Pacific island nation: either relocate or find other options [and is] considering

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<sup>103</sup> *Supra*.

<sup>104</sup> See MCNAMARA, K. E., «Cross-Border Migrations with Dignity in Kiribati», *Forced Migration Review*, May 2015, vol. 49, p. 62.

<sup>105</sup> See DEMPSTER, H., «New Zealand’s «climate refugee» visas: lessons for the rest of the world», 31 January 2020, DevPolicy: <https://devpolicy.org/new-zealands-climate-refugee-visas-lessons-for-the-rest-of-the-world-20200131/>.

<sup>106</sup> National Strategic Plan 2020-2030, Republic of Marshall Islands: <https://www.theprif.org/sites/default/files/2020-08/Marshall%20Islands%20National%20Strategic%20Plan%202020%20to%202030.pdf>, «Adaptation to climate change and sea level rise», p. 22.

whether to relocate all 55.000 citizens (...) or to find them other feasible options»<sup>107</sup>. Such dichotomy is also grounding the reflections of the New Zealand Pacific Climate Displacement Plan new version<sup>108</sup>. Moreover, it is one of the very interesting aspects of the ILA 2018 Sydney Declaration, precisely insisting on the necessary consent of the people concerned<sup>109</sup>.

Historically, the Pacific already experienced international relocations. During the colonial era, some of them were organized because of environmental events. Among 86 relocations of entire communities surveyed in the region, 37 resulted from the uninhabitability of some territories and/or lack of resources mainly due to human activity<sup>110</sup>. Among those examples, is the relocation in the 1940s of migrants from the Gilbert and Ellice Islands (today Kiribati and Tuvalu respectively), due to phosphate mining for the former, and demographic pressure in relation to the limited food available for the latter<sup>111</sup>. Organized within the colonial borders, these movements did not involve any particular administrative procedures<sup>112</sup>. The massive exploitation of phosphate, and the resulting destruction of Nauru's ecosystems, also motivated a similar project in the 1960s, supported by UN, to transfer all the inhabitants to Australia, before being discarded by the local government<sup>113</sup>.

Today, after the wave of decolonization, mobility between the Pacific territories is still facilitated, in particular because of the wide variety of constitutional statutes<sup>114</sup>. For example, nationals of the Federated States of Micronesia, the Marshall Islands and Palau can settle and work in the United States under the Free Association Agreements<sup>115</sup>. Residents of the Cook Islands and Niue (associated States) and Tokelau (special territory) have New Zealand cit-

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<sup>107</sup> *Ibidem*.

<sup>108</sup> Pacific climate change-related displacement and migration: a New Zealand action plan, 2 May 2018, <https://apo.org.au/node/213946>. A more detailed version is to be released in 2022.

<sup>109</sup> ILA, Committee on International Law and Sea Level Rise, Resolution 6/2018, Sydney Declaration of Principles on the Protection of Persons Displaced in the Context of Sea Level Rise: <https://disasterdisplacement.org/portfolio-item/sydney-declaration> See also the Nansen Initiative: [https://climate.law.columbia.edu/sites/default/files/content/docs/comments%20and%20legal%20briefs/06052020%20PDD%20submission%20to%20the%20HLP%20\(FINAL\).pdf](https://climate.law.columbia.edu/sites/default/files/content/docs/comments%20and%20legal%20briefs/06052020%20PDD%20submission%20to%20the%20HLP%20(FINAL).pdf).

<sup>110</sup> MCADAM, J., «Disappearing states, statelessness and relocation», in J. MCADAM (ed.), *Climate change, Forced Migration, and International Law*, Oxford, 2012, p. 143.

<sup>111</sup> *Ibidem*.

<sup>112</sup> *Ibidem*.

<sup>113</sup> *Ibid.*, p. 151.

<sup>114</sup> *Supra*.

<sup>115</sup> 1986, Compacts of Free Association. A see, M. GERRARD & G. WANNIER (eds.), *Threatened Island Nations: Legal Implications of Rising Seas and a Changing Climate*, 2013.

izenship. New Zealand also opened a specific visa procedure for nationals of certain Pacific States under the title of «Pacific Access Resident Category Access Visa»<sup>116</sup>. Each year, 75 Kiribati nationals, 75 Tuvalu nationals, 250 Tonga nationals and 250 Fiji nationals are eligible<sup>117</sup>. Also, even if the applicability of the Geneva Convention for «climate refugees» was discarded by New Zealand courts, the exceptional humanitarian protection procedure can deal with situations related to climate change<sup>118</sup>.

In sum, although existing, the legal question that arises with the international human movements due to sea level rise in the Pacific is not so much about obtaining a residence permit on the territory of another State, but rather about the continuity of economic and cultural rights, and, moreover, as far as the Atoll Islands States are concerned, about the continuity of both the right of peoples to self-determination and the survival of the State.

## V. CONCLUSION

The effects of sea level rise in the insular Pacific are more present and documented than anywhere else at a regional scale. Climate change is the main threat to the security of the region, it threatens the very existence of some of these islands, curtains and prevents the guarantee of fundamental rights. According to the IPCC, sea level rise is more rapid and intense in this part of the world, where there is no regional legal system for the protection of human rights, and where many of these States have fragile economies, mainly based on maritime resources.

Representatives of the Pacific States and territories long alerted the international community to the urgency of mitigating and adapting to the ef-

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<sup>116</sup> <https://www.immigration.govt.nz/new-zealand-visas/apply-for-a-visa/about-visa/pacific-access-category-resident-visa>.

<sup>117</sup> However, the procedure was suspended during the covid pandemic, as New Zealand closed its borders.

<sup>118</sup> The protection granted to a family from Tuvalu in 2014 was widely commented. Appealing a refusal to grant them residency, the family had cited, among other grounds, the effects of rising waters on the enjoyment of their rights. However, the New Zealand court granted humanitarian protection on the basis of family ties with other members residing in the country. AD (Tuvalu), 2014, NZIPT 501370, AC (Tuvalu), 2014, NZIPT 800517-520, 4 June 2014: <https://www.ref-world.org/pdfid/585152d14.pdf>. On this decision: MCADAM, J., «The emerging New Zealand jurisprudence on climate change, disasters and displacement», *Migration studies*, vol. 3, serie 1, 2015, pp. 131-142.

fects of climate change. This growing awareness, even too slow, is gradually contributing to the humanization of climate change and pushed for the UN institutions to deal with these challenges.

From the point of view of international law, isolating the legal regional interactions between Pacific and sea level rise can be used to draw more general conclusions. It shows the necessary evolution of international law to guarantee States and individuals rights.

Four major legal perspectives were identified. Firstly, the vulnerability of the insular Pacific in the face of sea level rise questions the place of territory in the Westphalian order, and its role in the continuity of a State. Various theories (quasi-States, «deterritorialized» state, *ex-situ* States...) have been proposed to respond to the scenario, already existent, of the situation of territories, which even before being submerged, become uninhabitable. Obviously, these theories come up against considerable practical obstacles, and they still leave many questions unanswered as to the status guaranteed to the population in a «host state», or to the permanence of the maritime spaces under State jurisdiction formerly generated by a disappeared land territory.

Secondly, the situation of the Pacific States and territories illustrates the shortcomings of the Montego Bay Convention and the necessary evolution of the law of the sea. Such development, mostly aimed to discard the ambulatory nature of maritime boundaries and limits is already underway, as evidenced by the work of the International Law Commission. The cooperation between Pacific States and territories, particularly within the PIF, played and is still playing a decisive role in the progressive recognition of a regional practice towards the preservation of maritime boundaries and limits, which might be recognized as a general practice crystallized into a customary rule of international law. The 2021 PIF Declaration on Preserving Maritime Zones in the Face of Climate Change-Induced Sea Level Rise, was a major step in this.

Thirdly, sea level rise-induced relocations in the Pacific underscore the urgency of better anticipating and protecting human rights. Experiences from the region show that internal displacements generate practical and legal problems that can only be overcome through good cooperation between actors on the ground. Public-private partnership initiatives, notably those promoted by the IOM, deserve particular attention in this regard. They also show that the prospects for better protection probably lie more in the immediate future in the development of soft law rather than hard law.

Fourthly, the prospects of the uninhabitability of certain territories requires to think both about the evolution of International Refugee Law and

Human Rights Law. The UN Human Rights Committee showed the way through the Teitiotia decision on the application of International Refugee Law beyond the inapplicability of the Geneva Convention. Political and legal actors must, however, take into account a delicate dichotomy, whose two branches sometimes come into tension, namely doing everything possible to allow people to remain on their land, through sufficient resources and through recognition of State responsibilities in this regard; but also anticipating, because this may be inevitable, the inter-border movements of people from States whose territory has become uninhabitable, with a human rights and consent focus.

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