

## SEA-LEVEL RISE IN RELATION TO INTERNATIONAL LAW

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**Introduction**

1. Sea-level rise has become in recent years a subject of increasing importance for a significant part of the international community—more than 70 States are or are likely to be directly affected by sea-level rise, a group which represents more than one third of the States of the international community. Indeed, as is well known, this phenomenon is already having an increasing impact upon many essential aspects of life for coastal areas, for low-lying coastal States and small island States, and especially for their populations. Another quite large number of States is likely to be indirectly affected (for instance, by the displacement of people or the lack of access to resources). Sea-level rise has become a global phenomenon and thus creates global problems, impacting on the international community as a whole.

2. In 2015, in the 2030 Agenda for Sustainable Development, the United Nations General Assembly recognized that: “Climate change is one of the greatest challenges of our time and its adverse impacts undermine the ability of all countries to achieve sustainable development. Increases in global temperature, *sea level rise*\*, ocean acidification and other climate change impacts are seriously affecting coastal areas and low-lying coastal countries, including many least developed countries and small island developing States. The survival of many societies, and of the biological support systems of the planet, is at risk.”<sup>1</sup>

3. Thus, among the several impacts of climate change is sea-level rise. According to scientific studies and reports, such as the Fifth Assessment Report of the Intergovernmental Panel on Climate Change, this phenomenon is likely to accelerate in the future.<sup>2</sup> As a result, the inundation of low-lying coastal areas and of islands will make these zones less and less habitable or uninhabitable, resulting in their partial or full depopulation.

4. These factual consequences of sea-level rise prompt a number of important questions relevant to international law. For instance, what are the legal implications of the inundation of low-lying coastal areas and of islands for their baselines, for maritime zones extending from those baselines and for delimitation of maritime zones, whether

by agreement or by adjudication? What are the effects upon the rights of States in relation to those maritime zones? What are the consequences for statehood under international law should the territory and population of a State disappear? What protection do persons directly affected by sea-level rise enjoy under international law?

5. These questions should be examined through an in-depth analysis of existing international law, including treaty and customary international law, in accordance with the mandate of the Commission, which is the progressive development of international law and its codification. This effort could contribute to the endeavours of the international community to ascertain the degree to which current international law is able to respond to these issues and where there is a need for States to develop practicable solutions in order to respond effectively to the issues prompted by sea-level rise.

6. There has been a high level of interest and support for the topic by States. Fifteen delegations in the Sixth Committee during the seventy-second session of the United Nations General Assembly requested its inclusion in the work programme of the Commission,<sup>3</sup> while nine other delegations mentioned, in their national statements, the importance of the problem.<sup>4</sup> Furthermore, during an informal meeting held on 26 October 2017, in New York, at the Permanent Mission of Romania, 35 States which attended showed a positive interest for the Commission to undertake this topic.

7. Furthermore, the Government of the Federated States of Micronesia put forward a proposal dated 31 January 2018 for inclusion of a topic in the long-term programme of work of the Commission entitled “Legal implications of sea-level rise”, which was taken into account in the preparation of the present syllabus.

**A. Previous references to this topic in the work of the International Law Commission**

8. The topic was referred to in the fourth report on the protection of the atmosphere,<sup>5</sup> examined during the

<sup>3</sup> Indonesia, Peru, Romania, Tonga and the Pacific small island developing States (Fiji, Kiribati, Marshall Islands, Micronesia (Federated States of), Nauru, Palau, Papua New Guinea, Samoa, Solomon Islands, Tuvalu and Vanuatu). See <http://statements.unmeetings.org/media2/16154559/marshall-islands-on-behalf-of-pacific-small-island-developing-states-.pdf>.

<sup>4</sup> Austria, Chile, India, Israel, Malaysia, New Zealand, Republic of Korea, Singapore and Sri Lanka.

<sup>5</sup> *Yearbook ... 2017*, vol. II (Part One), document A/CN.4/705, paras. 66–67.

<sup>1</sup> General Assembly resolution 70/1 of 25 September 2015, para. 14.

<sup>2</sup> The Fifth Assessment Report of the Intergovernmental Panel on Climate Change estimates that the global mean sea-level rise is likely to be between 26 cm and 98 cm by the year 2100. See IPCC, *Climate Change 2013: The Physical Science Basis—Contribution of Working Group I to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change*, Cambridge, Cambridge University Press, 2013, p. 25.

sixty-ninth session of the Commission, in 2017. As a result of the debates during the session, the Commission decided under that topic to provisionally adopt, *inter alia*, a paragraph of the preamble<sup>6</sup> and a paragraph of a draft guideline<sup>7</sup> where sea-level rise is mentioned. On that occasion, several members of the Commission suggested that the issue of sea-level rise be treated in a more comprehensive manner, as a matter of priority, as a separate topic of the Commission.

9. With regard to the topic “Protection of persons in the event of disasters”, completed by the Commission in 2016,<sup>8</sup> the draft articles were considered in the commentary to be applicable to different types of “disasters”,<sup>9</sup> including with regard to “sudden-onset events (such as an earthquake or tsunami) and to slow-onset events (such as drought or sea-level rise), as well as to frequent small-scale events (floods or landslides)”.<sup>10</sup>

### B. Consideration of the topic by other bodies

10. The topic of sea-level rise was initially examined by the International Law Association Committee on Baselines under the International Law of the Sea, whose final report was considered at the Sofia Conference (2012).<sup>11</sup> The 2012 report recognized that substantial territorial loss resulting from sea-level rise is an issue that extends beyond baselines and the law of the sea, and encompasses consideration at a junction of several parts of international law.

11. As a consequence, the International Law Association in 2012 established a new Committee on International Law and Sea Level Rise. That Committee decided to focus its work on three main issue areas: the law of the sea; forced migration and human rights; and issues of statehood and international security. An interim report of that Committee, which was presented at the Johannesburg Conference in 2016,<sup>12</sup> focused on issues regarding the law of the sea and migration/human rights. Another report

<sup>6</sup> “Aware also, in particular, of the special situation of low-lying coastal areas and small island developing States due to sea level rise” (sixth preambular paragraph, *ibid.*, vol. II (Part Two), para. 67).

<sup>7</sup> “3. When applying paragraphs 1 and 2, special consideration should be given to persons and groups particularly vulnerable to atmospheric pollution and atmospheric degradation. Such groups may include, *inter alia*, indigenous peoples, people of the least developed countries and people of low-lying coastal areas and small island developing States affected by sea-level rise” (paragraph 3 of draft guideline 9, *ibid.*).

<sup>8</sup> The draft articles were adopted by the Commission at its sixty-eighth session, in 2016, and submitted to the General Assembly as a part of the report covering the work of that session, *Yearbook ... 2016*, vol. II (Part Two), para. 48.

<sup>9</sup> The term “disaster” is defined in draft article 3 (a) as “a calamitous event or series of events resulting in widespread loss of life, great human suffering and distress, mass displacement, or large-scale material or environmental damage, thereby seriously disrupting the functioning of society” (*ibid.*).

<sup>10</sup> *Ibid.*, p. 29, para. 49, para. (4) of the commentary to draft article 3.

<sup>11</sup> International Law Association, *Report of the Seventy-fifth Conference held in Sofia, August 2012*, pp. 385–428. This report stated that “the existing law of the normal baseline applies in situations of significant coastal change caused by both territorial gain and territorial loss. Coastal states may protect and preserve territory through physical reinforcement, but not through the legal fiction of a charted line that is unrepresentative of the actual low-water line” (*ibid.*, p. 424).

<sup>12</sup> International Law Association, *Report of the Seventy-seventh Conference held in Johannesburg, August 2016*, pp. 842–875.

was considered at the Sydney Conference, which completed the Committee’s work on law of the sea issues.<sup>13</sup> Further, the 2018 report proposed a set of principles with commentary comprising a Declaration of Principles on the Protection of Persons Displaced in the Context of Sea Level Rise.<sup>14</sup> The mandate of the Committee is expected to be extended to continue the study of the statehood question and other relevant issues of international law.

### C. Consequences of sea-level rise

12. As already mentioned, sea-level rise produces the inundation of low-lying coastal areas and of islands, which has consequences in three main areas: (a) law of the sea; (b) statehood; and (c) protection of persons affected by sea-level rise.

13. These three issues reflect the legal implications of sea-level rise for the constituent elements of the State (territory, population and government/statehood) and are thus interconnected and should be examined together.

### D. Scope of the topic and questions to be addressed

14. This topic deals only with the legal implications of sea-level rise. It does not deal with protection of environment, climate change *per se*, causation, responsibility or liability. It is not intended to provide a comprehensive and exhaustive scoping of the application of international law to the questions raised by sea-level rise, but to outline some key issues. The three areas to be examined should be analysed only within the context of sea-level rise notwithstanding other causal factors that may lead to similar consequences. Due attention should be paid, where possible, to distinguishing between consequences related to sea-level rise and those from other factors. This topic will not propose modifications to existing international law, such as the 1982 United Nations Convention on the Law of the Sea. Other questions may arise in the future requiring analysis. Having in mind the above considerations, the Commission could analyse the following questions related to the legal implications of sea-level rise.

15. *Law of the sea issues:*

(a) possible legal effects of sea-level rise on the baselines and outer limits of the maritime spaces which are measured from the baselines;

(b) possible legal effects of sea-level rise on maritime delimitations;

<sup>13</sup> International Law Association, *Report of the Seventy-eighth Conference held in Sydney, 19–24 August 2018*, pp. 866–915. The Committee recommended that the Association adopt a resolution containing two “*de lege ferenda*” proposals: (a) “proposing that States should accept that, once the baselines and the outer limits of the maritime zones of a coastal or an archipelagic State have been properly determined in accordance with the detailed requirements of the 1982 Law of the Sea Convention, ... these baselines and limits should not be required to be readjusted should sea level change affect the geographical reality of the coastline”; and (b) proposing “that, on the grounds of legal certainty and stability, the impacts of sea level rise on maritime boundaries, whether contemplated or not by the parties at the time of the negotiation of the maritime boundary, should not be regarded as a fundamental change of circumstances” (*ibid.*, pp. 888 and 895).

<sup>14</sup> *Ibid.*, pp. 897–915.

(c) possible legal effects of sea-level rise on islands as far as their role in the construction of baselines and in maritime delimitations is concerned;

(d) possible legal effects of sea-level rise on the exercise of sovereign rights and jurisdiction of the coastal State and its nationals in maritime spaces in which boundaries or baselines have been established, especially regarding the exploration, exploitation and conservation of their resources, as well as the rights of third States and their nationals (e.g., innocent passage, freedom of navigation, fishing rights);

(e) possible legal effects of sea-level rise on the status of islands, including rocks, and on the maritime entitlements of a coastal State with fringing islands;

(f) legal status of artificial islands, reclamation or island fortification activities under international law as measures for responding/adapting to sea-level rise.

#### 16. *Statehood issues:*

(a) analysis of the possible legal effects on the continuity or loss of statehood in cases where the territory of island States is completely covered by the sea or becomes uninhabitable;

(b) legal assessment regarding the reinforcement of islands with barriers or the erection of artificial islands as a means to preserve the statehood of island States against the risk that their land territory might be completely covered by the sea or become uninhabitable;

(c) analysis of the legal fiction according to which, considering the freezing of baselines and respect for the boundaries established by treaties, judicial judgments or arbitral awards, the continuity of statehood of island States could be admitted due to the maritime territory established as a result of territories under their sovereignty before the latter become completely covered by the sea or uninhabitable;

(d) assessment of the possible legal effects regarding the transfer—either with or without transfer of sovereignty—of a strip or portion of territory of a third State in favour of an island State whose terrestrial territory is at risk of becoming completely covered by the sea or uninhabitable, in order to maintain its statehood or any form of international legal personality;

(e) analysis of the possible legal effects of a merger between an island developing State whose land territory is at risk of becoming completely covered by the sea or uninhabitable and another State, or of the creation of a federation or association between them regarding the maintenance of statehood or of any form of international legal personality of the island State.

#### 17. *Issues related to the protection of persons affected by sea-level rise:*

(a) the extent to which the duty of States to protect the human rights of individuals under their jurisdiction applies to consequences related to sea-level rise;

(b) whether the principle of international cooperation can be applied to help States cope with the adverse effects of sea-level rise on their population;

(c) whether there are any international legal principles applicable to measures to be taken by States to help their population to remain *in situ*, despite rising sea levels;

(d) whether there are any international legal principles applicable to the evacuation, relocation and migration abroad of persons caused by the adverse effects of sea-level rise;

(e) possible principles applicable to the protection of the human rights of persons displaced internally or that migrate due to the adverse effects of sea-level rise.

#### E. Method of work of the Commission on this topic

18. The format of a study group would allow for a mapping exercise of the legal questions raised by sea-level rise and its interrelated issues. The study group would analyse the existing international law, including treaty and customary international law, in accordance with the Commission's mandate, which is to perform codification of customary international law and its progressive development. This effort could contribute to the endeavours of the international community to respond to these issues and to assist States in developing practicable solutions in order to respond effectively to the issues prompted by sea-level rise.

19. The work of the study group would be based on papers that would address the different issues raised by the topic, namely with regard to: (a) law of the sea, (b) statehood and (c) protection of persons affected by sea-level rise. This approach would allow for sufficient flexibility and would be able to actively involve members of the Commission in the work on this topic. It is to be recalled that the Commission has used this method successfully in the past, a relevant example being the Study Group on fragmentation of international law (2002–2006).<sup>15</sup>

20. The work of the study group would be based on the practice of States, international treaties, other international instruments, judicial decisions of international and national courts and tribunals, and the analyses of scholars—all these in a systemic and integrative approach.

#### F. The topic satisfies the requirements for selection of a new topic

21. In order to select new topics for inclusion in its programme of work, the Commission is guided by the criteria that it had agreed upon at its fiftieth session (1998),<sup>16</sup> namely that: (a) the topic should reflect the needs of States in respect of the progressive development and codification of international law; (b) the topic should be at a sufficiently advanced stage in terms of State practice to permit progressive development and codification; (c) the

<sup>15</sup> Followed by the Study Group on treaties over time (2009–2012) and the Study Group on the most-favoured-nation clause (2009–2015).

<sup>16</sup> *Yearbook ... 1998*, vol. II (Part Two), para. 553. See also *Yearbook ... 2017*, vol. II (Part Two), para. 32.

topic should be concrete and feasible for progressive development and codification; and (d) the Commission should not restrict itself to traditional topics, but could also consider those that reflect new developments in international law and pressing concerns of the international community as a whole.

22. *First*, the topic “Sea-level rise in relation to international law” reflects the needs of States: more than a third of the existing States of the international community are likely to be directly affected by sea-level rise and are keenly interested in this topic. Moreover, there may be broader impacts on the international community at large, since another large number of States are likely to be indirectly affected by sea-level rise (for instance, by the displacement of people or the lack of access to resources). Sea-level rise has become a global phenomenon, and thus creates global problems, impacting in general on the international community of States as a whole. This interest is shared by a variety of States in very different geographic locations, including landlocked countries, which shows the amplitude of States’ interest.

23. *Second*, there is an emerging State practice with regard to issues related to the law of the sea (such as maintaining baselines, construction of artificial islands, and coastal fortifications) and the protection of persons affected by sea-level rise (such as the relocation of local communities within the country or to other countries, and the creation of humanitarian visa categories). In addition, relevant practice exists, *inter alia*, in relation to

governments in exile as examples of maintaining statehood in the absence of control over territory. The consequences of sea-level rise, which may be defined as affecting the very existence of a number of the States concerned, and, in any case, essential parameters of statehood such as territory, population and governance, as well as the enjoyment of the essential resources for the prosperity of these nations, call for an early analysis of its legal implications.

24. That is why, *third*, the topic is feasible because the work of the study group will be able to identify areas ripe for possible codification and progressive development of international law and where there are gaps. At the same time, the aspects to be examined have a high degree of concreteness, as shown above in sections C and D.

25. *Fourth*, it is beyond any doubt that this topic, in the light of the arguments presented, reflects new developments in international law and pressing concerns of the international community as a whole.

## G. Conclusion

26. The final outcome would be a final report of the study group on “Sea-level rise in relation to international law”, accompanied by a set of conclusions of the work of the study group. After the presentation of the final report of the study group, it could be considered whether and how to pursue further the development of the topic or parts of it within the Commission or other forums.

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