

Submission by the Principality of Liechtenstein to the International Law Commission on the topic “Sea-Level Rise in relation to International Law”

Introduction

Liechtenstein welcomes the decision of the International Law Commission to include the topic “Sea-level rise in relation to international law” in its programme of work and the creation of a study group on that topic. Liechtenstein wishes to put on record its support for the ILC’s efforts to address the topic of sea-level rise, given the Commission’s important role in encouraging the progressive development of international law and its codification. The ILC can be assured of Liechtenstein’s continued support.

In the Report of the ILC of its seventy-first session, the study group requested “any information related to statehood and the protection of persons affected by sea-level rise, as outlined in the syllabus of the topic”.¹ The study group has laid out the scope of the topic in the Report of the ILC of its seventieth session.²

The topic of sea-level rise has wide ramifications for international law, and efforts made by the ILC to address it are befitting of its urgency. In particular, Liechtenstein sees the ILC’s decision to include sub-topics on the protection of persons affected by sea-level rise and on statehood as indicative of the importance of a human rights perspective in addressing questions of sea-level rise. These sub-topics constitute the focus of the present submission.

Observations by Liechtenstein on sub-topics of protection of persons affected by sea-level rise and statehood

The primacy of self-determination

Liechtenstein sees a fundamental role for the right of self-determination in addressing the issues raised by sea-level rise for the protection of persons affected by sea-level rise and for statehood. Common Article 1 of the ICESCR and ICCPR notes that “[a]ll peoples have the right to self-determination”, and that it is by virtue of the right of self-determination that peoples may “freely determine their political status and freely pursue their economic, social and cultural development.” The right to self-determination is thus not only foundational but inalienable, including the expression of that right through statehood. On this basis there is a presumption for continued statehood, including, and in particular, for those States whose land territory is most likely to be inundated by rising sea-levels, and whose populations may as a result be relocated. Instead, the right to self-determination, including the possibility of expressing that right through statehood, continues to belong to the peoples concerned in such a scenario. In this respect Liechtenstein supports the position of the International Law Association’s Committee on International Law and Sea Level Rise, that “there should be a presumption of continuing statehood in cases where land territory was lost”.³

¹ Official Records of the General Assembly, Seventy-third Session, Supplement No. 10 (A/74/10), para. 33

² Official Records of the General Assembly, Seventy-third Session, Supplement No. 10 (A/73/10), annex B, section V.

³ ILA Committee on International Law and Sea Level Rise, Final Report (Sydney, August 2018), p.25-26

The novel nature of the challenge

Liechtenstein stresses the novelty of the implications of sea-level rise for understandings of statehood. Legal challenges to the persistence of particular states have in the past arisen in situations in which a particular State no longer retains control over territory or the population belonging to that State or residing in that territory; instead, a different government assumes control of the aforementioned territory and population. The challenge to State persistence thus rests on the failure of the first State to fulfil the 'Montevideo Criteria' of a permanent population, a defined territory, and a government. Situations of territorial inundation due to sea-level rise differ in this respect, as the territory and the population residing therein does not fall under the control of a different government. Instead, in situations of sea-level rise, it is presumed that the original population and government both continue to persist post-inundation.

While Liechtenstein acknowledges that the 'Montevideo Criteria' set out certain criteria for statehood, any discussion of the implications of rising sea levels on statehood should also encompass the exercise of sovereignty in the international context. It is worth noting that in cases where the 'Montevideo Criteria' have not been met, ceasing to meet these criteria has not resulted in itself in challenges to State persistence. As noted by the eminent, late James Crawford, "[a] State is not necessarily extinguished by substantial changes in territory, population, or government, or even, in some cases, by a combination of all three".⁴ Instead, there is in practice a strong presumption of the continuity and disfavours the extinction of an established state, including its rights and obligations under international law, for example in situations of belligerent occupation, or where a protectorate with some degree of international personality may preserve the legal identity of a State. Discussing statehood in the context of rising sea levels should include all aspects of State sovereignty, domestically and internationally, including as a consequence of a State's membership in international organizations, as well as upholding civil and political, and economic and social rights as expressions of self-determination.

Liechtenstein advocates an approach which acknowledges the novel nature of the challenge created by rising sea-levels, and emphasizes the continued existence of a people who retain their right to self-determination even in a situation of the inundation of their territory, including the expression of that right through continued statehood. It is worth noting in this respect that sea-level rise is predominantly caused by human action, to which States most immediately affected have made limited contributions.⁵ In addition – and on the question of territory in particular – Liechtenstein emphasizes the need to ground legal understandings of statehood in the perceptions of those most immediately affected, many of whom see their States as 'large ocean states', rather than 'small island states'.⁶ Liechtenstein is of the view that the ILC should find its basis for deliberations on the present sub-topics in the right to self-determination and the expression of this right, including through continued statehood or any other political status freely determined by the relevant people.⁷ In Liechtenstein's view, the full or partial inundation of State territory, or the relocation of its people, should not change the presumption that the relevant people should determine the expression of their right to self-determination. The international community may have a role in assisting that process. Instead, a people that has already expressed its right to self-determination

⁴ J. Crawford, *The Creation of States in International Law* (Clarendon Press, 2nd rev. ed. 2006), p.700

⁵ For example, see Climate Watch, "Historical GHG Emissions"; <https://www.climatewatchdata.org/ghg-emissions?end_year=2018&start_year=1990>, retrieved 7 September 2021.

⁶ For example, see N. Chan, "Large Ocean States": Sovereignty, Small Islands, and Marine Protected Areas in Global Oceans Governance, *Global Governance* 24 (2018) pp.537–555

⁷ See UN Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations; A/RES/2625(XXV)

through statehood would need to explicitly seek another form of expression of the right for statehood to cease.

Expressions of self-determination of immediately affected States

Liechtenstein supports previous and ongoing actions by the most immediately affected States and countries to express their right to self-determination, in particular those that have the explicit aim of ensuring their persistence beyond a situation of inundation. While not a state party to UNCLOS, Liechtenstein notes efforts under this legal framework to institutionalize the 'fixing' of maritime zones, so that these could not be challenged or reduced as a result of sea-level rise, as has been put forward within the Pacific Islands Forum.⁸ In addition, the colonial status of relevant peoples should not be an impediment to joining these or other such efforts.

⁸ See Pacific Islands Forum, "Declaration on Preserving Maritime Zones in the face of Climate Change-Related Sea-Level Rise", 6 August 2021; <<https://www.forumsec.org/wp-content/uploads/2021/08/Declaration-on-Preserving-Maritime.pdf>>, retrieved 8 September 2021. This being said, Liechtenstein would not support efforts to generate maritime zones solely on the basis of artificial islands that had been created where no (above sea-level) territory had previously existed. As described in Article 60(8) of UNCLOS, artificial islands "have no territorial sea of their own, and their presence does not affect the delimitation of the territorial sea, the exclusive economic zone or the continental shelf."