

Sea-level rise in relation to international law

Germany welcomes and follows with great interest the Commission's work on the seminal topic "sea level rise in relation to international law." Sea level rise will impact all coastal states, including those with coastal Megacities and instable coastlines, and all other States due to the significant implications for stable international relations, economic prosperity and the enjoyment of human rights. It is in particular the small island states as well as states with low-level coastal areas or large river deltas which will be disproportionately affected by the phenomenon.

As with regard to its root cause, climate change, long-term sea-level rise cannot but be addressed by all States on the basis of cooperation, using the mechanisms, rules, and institutions our multilateral system offers. In this regard, the Commission's work on the topic in Germany's view fulfills a pivotal function in clarifying the role existing international law plays and could play in guiding States' response to sea level rise as a core challenge of our times. Based on the valuable work by the Commission, Germany stands ready to actively address the legal challenges of sea-level rise, taking into account in particular the interests of the most affected States and peoples.

Germany once more thanks the Co-Chairs of the Study Group, Bogdan Aurescu and Nilüfer Oral, for their insightful and profound first issues paper of 2020. The paper raises salient questions, inter alia, on the issue of the preservation of baselines and maritime zones. In this regard, Germany appreciates that, based on the mandate from the General Assembly of 2018, the law of the sea implications of sea level rise are being examined by the ILC Study Group in full respect of the integrity of the United Nations Convention on the Law of the Sea. Germany commits to support the process and work together with others to preserve their maritime zones and the rights and entitlements that flow from them in a manner consistent with the Convention, including through a contemporary reading and interpretation of its intents and purposes, rather than through the development of new customary rules.

Through such contemporary reading and interpretation, Germany finds that UNCLOS allows for freezing of once duly established, published and deposited baselines and outer limits of maritime zones in accordance with the Convention.

UNCLOS does not contain any explicit obligations to update neither normal baselines that have been marked (Article 5 UNCLOS) nor straight baselines that have been marked, published and deposited (Article 16 UNCLOS), as well as no further obligation to update a State's relevant charts and lists of geographical coordinates with regards to the EEZ (Article 75 UNCLOS) and the continental shelf (Article 84 UNCLOS).

However, Germany concludes the concept of fictitious baselines to be already immanent within UNCLOS, in particular when a coastline is highly unstable due to the presence of "a delta and other natural conditions" according to Article 7 para. 2 UNCLOS.

Since this provision has been translated as "delta or other natural conditions" in several translations by EU MS, Germany suggests to examine if a contemporary understanding of the provision could broaden the scope of the exception pursuant to Article 7 para. 2 UNCLOS and provide further legal certainty with regards to States freezing their baselines and outer limits of maritime zones.

Germany commits to close multilateral coordination and cooperation at many levels in order to arrive at such a contemporary interpretation, possibly by working towards a "common understanding of the correct interpretation of the relevant UNCLOS provisions", which could possibly be expressed and endorsed by the States parties to UNCLOS in a SPLOS resolution or by UN member States in an UNGA resolution. We also support further discussions in the 6th Committee of the UNGA with this aim.

With regard to normal baselines, Germany considers that these are ambulatory in the sense that the Coastal State has the option of updating its charts and lists of geographical coordinates in compliance with UNCLOS and, when doing so, must observe the relevant UNCLOS provisions and geographical circumstances.

At the same time, UNCLOS does not seem to stipulate a duty or obligation of the coastal state to keep charts and lists of geographical coordinates under constant review and update them regularly.

Germany therefore considers that once the baselines and lines of delimitation mentioned in Article 16 of UNCLOS have been drawn in accordance with the Convention and their charts and lists of geographical coordinates duly published and deposited with the UNSG, these baselines and lines of delimitation, as well as the charts and geographical coordinates, remain stable until the Coastal State decides to update them again.

Germany also considers that once a coastal State has duly published the outer limit lines and the lines of delimitation of its EEZ and continental shelf in accordance with the Convention and duly published and deposited their relevant charts and lists of geographical coordinates with the UNSG, pursuant to Articles 75 and 84 of UNCLOS, the Convention does not impose a further duty on the Coastal State to keep these under review and/or update them regularly (but the coastal State remains entitled to do so).

Germany specifically points out the need of preserving the integrity of the United Nations Convention on the Law of the Sea as it stands. Germany reiterates that according to the Study Group's mandate, the "topic will not propose modifications to existing international law, such as the 1982 U.N. Convention on the Law of the Sea." Indeed, such suggested proposals could lead to legal uncertainty in the maritime domain and could undermine the authority of UNCLOS as the most significant achievement in modern international maritime law.

Germany urges the Commission to transparently distinguish between findings *de lege lata* and suggestions for a progressive development of international law. This is a concern raised by Germany in relation to many topics on the Commission's agenda. As the present topic involves a mapping exercise of very different legal issues across a variety of legal fields as well as novel questions with regard to which pertinent state practice and *opinio juris* appears to be rather scarce, Germany deems this aspect of particular importance in the context of the present topic.

Germany commends the Commission for its ambitious approach towards this broad yet immensely relevant topic and encourages it to continue implementing its work plan on the subject.

Following the invitation made by the International Law Commission, in chapter III, para. 32 of the report of its seventy-first session (2019), to States to provide examples of their state practice on the subject of sea-level rise in relation to international law, Germany has the honour to present the following comments:

1. Regarding the information the ILC requested in the 71st ILC report, chapter III, para. 32:

With regards to the specification by the International Law Commission, that examples could relate to baselines and where applicable examples from States of their practice that may be relevant (even if indirectly) to sea-level rise or other changes in circumstances of a similar nature; further specifying that such practice could, for example, relate to baselines and where applicable archipelagic baselines, closing lines, low-tide elevations, islands, artificial islands, land reclamation and other coastal fortification measures, limits of maritime zones, delimitation of maritime boundaries, and any other issues relevant to the subject; stating that relevant materials could include:

- a) bilateral or multilateral treaties, in particular maritime boundary delimitation treaties;
No information available.
- b) national legislation or regulations, in particular any provisions related to the effects of sea-level rise on baselines and/or more generally on maritime zones;
No information available.
- c) declarations, statements or other communications in relation to treaties or State practice;
No information available.
- d) jurisprudence of national or international courts or tribunals and outcomes of other relevant processes for the settlement of disputes related to the law of the sea;

Being a coastal state, sea-level rise will also have direct effects in Germany, as has recently been recognized also by the Federal Constitutional Court (Bundesverfassungsgericht) in its landmark decision on Germany's Federal Climate Change Act of 12 December 2019. In its summary of the background facts on the effects of climate change, the Court *inter alia* referred to reports, according to which "over the last 100 years, sea levels [had] risen about 20 cm in the German Bight and around 14 cm on the German Baltic coast." The Court further mentioned findings which indicated that higher sea levels could

increase storms in the North Sea and Baltic Sea and would leave German coastal regions exposed to greater risk of flooding, affecting an area of around 13,900 square kilometres with 3.2 million inhabitants.

In a subsequent decision dated 24 January 2021, the Federal Constitutional Court has mentioned the state's constitutional duty to protect property, such as real estate and agricultural land, affected by the negative effects of climate change, e.g. temporary or permanent flooding (based on Art. 14 par. 1 of the German constitution (Grundgesetz)).

- e) any observations in relation to sea-level rise in the context of the obligation of States parties under the United Nations Convention on the Law of the Sea to deposit charts and/or lists of geographical coordinates of points;

It is generally assumed that in future (up to 2050) sea-level rise along the German coastline will not or will not significantly contribute towards shifting baselines or maritime boundaries, not least because Germany's coasts are secured by coastal protection measures such as dykes, etc.

- f) any other relevant information, for example, statements made at international forums, as well as legal opinions, and studies.

No information available.

2. Regarding the information the ILC requested in the 72nd ILC report, chapter III, para. 27:

In addition to the specific issues on which comments were requested in chapter III of the report of its seventy-first session (2019), and following the invitation made by the International Law Commission, in chapter III, para. 27 of the report of its seventy-second session (2021), to the States regarding the subtopic of sea-level rise in relation to the law of the sea, to provide

- a) examples of practice relating to the updating, and frequency of updating, national laws regarding baselines used for measuring the breadth of maritime zones; practice

relating to the frequency of updating national maritime zone notifications deposited with the Secretary-General of the United Nations;

To date the Federal Maritime and Hydrographic Agency has no experiences to draw on in this area. The straight baselines and the corresponding maritime boundaries were defined and proclaimed in 1994 on the basis of coordinates. The Federal Maritime and Hydrographic Agency proposed an adjustment of the baselines due to the changes in depth in the area of the 0-metre depth contours and the updating of the coordinates system from ED 50 to ETRS 89 / WGS 84.

- b) examples of practice relating to the updating, and frequency of updating, charts on which baselines and outer limits of the exclusive economic zone and of the continental shelf are drawn, as well as lists of geographical coordinates prepared in accordance with the relevant provisions of the United Nations Convention on the Law of the Sea and/or national legislation, including those which are deposited with the Secretary-General of the United Nations and given due publicity; examples of practice relating to updating, and frequency of updating, navigational charts, including for purposes of evidencing changes of the physical contours of the coastal areas;

The maritime boundary charts still reflect the proclamations of 1994. New editions of the latest nautical charts, particularly the detailed large-scale charts, are published regularly. However, changes in the maritime boundaries in these charts only affect the normal baselines (0-metre depth contour) in the areas for which no straight baselines have been defined.

- c) any examples of the taking into account or modification of maritime boundary treaties due to sea-level rise;

No information available.

- d) information on the amount of actual and/or projected coastal regression due to sea-level rise, including possible impact on basepoints and baselines used to measure the territorial sea;

The straight baselines in the German North Sea no longer reflect the actual depth in many cases. The sands and mudflats shift regularly, but no systematic landward shift can be identified.

- e) information on existing or projected activities related to coastal adaptation measures in relation to sea-level rise, including preservation of basepoints and baselines.

No information available.