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Introduction to the International Law Commission's Work on Sea Level Rise in Relation to International Law

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INTRODUCTION TO THE INTERNATIONAL LAW COMMISSION'S WORK ON SEA-LEVEL RISE IN RELATION TO INTERNATIONAL LAW

BOGDAN AURESCU* & NILÜFER ORAL**

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JULY 26, 2022, 12:25 PM ET

BOGDAN AURESCU:

Thank you so much for the presentation. Good morning, good afternoon, and good evening to everybody—in accordance with the respective time that you are speaking. I am very honored to be invited to this conference, and I am also very honored that I am sharing this presentation together with my good colleague and friend, Nilüfer Oral. We are both co-chairs of the Study Group on Sea-Level Rise in Relation to International Law of the International Law Commission, together with the other colleagues, some of them I think are attending this session online, Patrícia Galvão-Teles and Juan José Ruda Santaloria together with Yacouba Cissé, the five proponents of this topic included on the agenda of the International Law Commission. Because the time is very limited—this means that, together with Nilüfer, we have 15 minutes, that means seven minutes and a half for each of us—so our presentation cannot be exhaustive, from an objective point of view. Therefore, I will be, and Nilüfer I think as well, very telegraphic in our presentations.

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But I am really grateful to Claudio Grossman, our colleague in the International Law Commission, because he had the initiative of putting together this conference. As you know, we, in the International Law Commission, have as the main instrument of our work the practice of states. During the preparation of the first issues paper on the law of the sea related issues to sea-level rise,¹ we tried to use the available state practice. We had state practice from the region of the Pacific, from Asia, but not much from the Americas. And I think this conference, from this perspective, is very timely, because we feel like rewarded beneficiaries of this conference of today and tomorrow.

A few words on how this topic was introduced on the agenda of our Commission. First, this is a topic based on real needs because sea-level rise is a phenomenon which is a direct consequence of climate change. It is an undeniable fact already proved by the science.² Second, it is a topic which was introduced as a result of the direct request coming from the UN Member States—the Member States affected by sea-level rise. On our account, there are some seventy states which are directly affected by this phenomenon, and a similar number of states which are likely to be indirectly affected by sea level rise.³ A growing number of states were asking in the Sixth Committee of the General Assembly, starting in 2017, for this topic to be introduced on the agenda.⁴ Year by year, the number of interventions referring to this topic was growing. If in 2017 there were twenty-four states mentioning the topic, in 2018 there were fifty statements mentioning this topic. In 2019 there were fifty-seven delegations which referred to sea-level rise. Then, in 2020, because of the pandemic and because of limited time for organizing the works for the Sixth Committee, there were twenty-five statements.⁵ Last year in 2021, during the Sixth

1. Bogdan Aurescu & Nilüfer Oral (Co-Chairs of the Study Group on Sea-Level Rise in Relation to International Law), *Sea-Level Rise in Relation to International Law: First Issues Paper*, at 3, U.N. Doc. A/CN.4/740 (Feb. 28, 2020) [hereinafter *First Issues Paper*].

2. See J.B. Shukla et al., *Effect of Global Warming on Sea Level Rise: A Modeling Study*, 32 *ECOLOGICAL COMPLEXITY* 99, 99 (Dec. 2017) (explaining the science behind rising temperatures globally).

3. Int'l L. Comm'n, Rep. on the Work of Its Seventieth Session, at 326, U.N. Doc. A/73/10 (2018).

4. *Id.* at 326–27.

5. *First Issues Paper*, *supra* note 1, at 10; Int'l L. Comm'n, Rep. on the Work

Committee works, there were sixty-nine statements referring to sea-level rise.⁶ In 2018, we took the initiative to introduce the topic on the agenda of the Commission, and, together, the five proponents, we have prepared the Syllabus, which was included in the annual report of the Commission of that year.⁷ In that year, the Commission decided to include the topic on the long-term work program of the Commission. Then, in 2019, the decision was taken by the Commission to include the topic in the current work program, and, in 2020, according to the schedule we made within the Study Group, Nilüfer and I presented the first issues paper which was published by the Commission in June 2020.⁸ The initial plan was to have the first debate within the Study Group in 2020, but, because of the pandemic, this was impossible. Therefore, the first debate of the Study Group took place last year, in 2021. The result of the debate, which was a very open, very interesting, and very substantial one, is included in the dedicated chapter to our topic of the last year's report of the Commission.⁹

I will present the part that I have dealt with from the first issues paper in a few words, due to the limited time, and I will refer mainly to the fact that in the first issues paper we have presented the scope, the proposed outcome, the limits of action of the Study Group, and, as a final outcome—as agreed in the Syllabus of 2018—we have mentioned a final report of the Study Group accompanied by a set of conclusions on its work. We will see what this final report will look like, because we are planning to have another complement to the first issues paper next year. We have not decided yet how to call it—an addendum or otherwise.¹⁰ The following year, our colleagues Juan

of Its Seventy-Second Session, U.N. Doc. A/76/10, at 165–66 (2018).

6. Patrícia Galvão Teles & Juan José Ruda Santolaria (Co-Chairs of the Study Group on Sea-Level Rise in Relation to International Law), *Sea-Level Rise in Relation to International Law: Second Issues Paper*, at 10–12, U.N. Doc. A/CN.4/752 (Apr. 19, 2022).

7. Int'l L. Comm'n, Rep. on the Work of Its Seventieth Session, at 326–27, U.N. Doc. A/73/10 (2018).

8. *First Issues Paper*, *supra* note 1, at 3.

9. Int'l L. Comm'n, Rep. on the Work of Its Seventieth Session, at 174–75, U.N. Doc. A/73/10 (2018).

10. Bogdan Aurescu & Nilüfer Oral (Co-Chairs of the Study Group on Sea-Level Rise in Relation to International Law), *Sea-Level Rise in Relation to International Law: Additional Paper to the First Issues Paper (2020)*, U.N. Doc. A/CN.4/761 (Feb. 13, 2023).

José Ruda Santolaria and Patrícia Galvão-Teles will present the complement to the second issues paper, which was debated this year, and then, in the year after that, we will hopefully be able to finalize our work and present the final results of our analysis.

In the first issues paper we examined the very important issue of baselines—the possible legal effects of sea-level rise on the baselines and outer limits of the maritime spaces that are measured from the baselines.¹¹ The preliminary observations we reached were included in paragraph 104 of the first issues paper.¹² I am sure that those who are interested in this topic have studied the respective paragraph, because I think it is already famous, at least for the states which are directly affected by sea-level rise. One of the main observations of that paragraph was that the ambulatory theory regarding baselines and the limits of maritime zones measured from them does not respond to the concerns expressed by the Member States that are affected by sea level rise,¹³ especially in regard to the rights of the coastal states in the various maritime zones and the need to preserve legal stability, security, certainty, and predictability.

This is one of the main conclusions that also brought us to another observation: that perhaps freezing the baselines is one solution that could respond to the concerns of these states. In the first issues paper we also examined the issue of the possible legal effects of sea-level rise on maritime delimitations. From that perspective—and from what Member States have insisted on during their statements in the Sixth Committee regarding the needed stability, security, certainty, and predictability—we have reached the observation that putting into question affected maritime delimitations would create uncertainty, legal insecurity and would increase the risk of disputes if states were to renegotiate their maritime boundaries.¹⁴

We have also analyzed whether sea-level rise represented a fundamental change of circumstances as per Article 62, paragraph 2, of the Vienna Convention on the Law of Treaties.¹⁵ We have reached

11. *First Issues Paper*, *supra* note 1, at 22–23.

12. *Id.* at 40–43 (introducing nine preliminary observations).

13. *Id.* at 41.

14. *Id.*

15. Vienna Convention on the Law of Treaties art. 62, May 23, 1969, 1155

the preliminary observation that states cannot invoke this article to unilaterally terminate or withdraw from a maritime boundary treaty, including because of sea-level rise, since this phenomenon cannot be assimilated with the fundamental change of circumstances. It is not a sudden phenomenon, so it cannot be claimed that it could not be foreseen.

This is, in a nutshell, the observations that we have reached. The first issues paper has eighty pages. We cannot present even half of it in seven minutes. I count on my colleague Nilüfer to continue the presentation in the following minutes and hope that we will not go beyond the time frame which was allotted to us. The debate in the Study Group last year was very interesting, and I want to mention the fact that the first issues paper is the product of the co-chairs of the Study Group, and not of the Study Group as a whole. The debate in the Study Group has shown interesting points of view from the various members, and they are reflected well in the dedicated chapter from the last year's report. Based on those observations, we will continue our work, and next year we will produce another paper, which will complement the work that we have done up until now. But we also need your support, and that is why, again, we need state practice from all regions of the world. That is why this conference, on the impact on the American states, is very relevant for our future work which we are supposed to finalize at the beginning of next year. I will stop here, and if necessary, I will come back on certain issues during the Q&A session. I would kindly ask Nilüfer to continue. Thank you!

NILÜFER ORAL:

Thank you so much Bogdan, and you did very well on the time; there is so much information in those eighty pages to summarize. But first of all, greetings to all. I also have to extend my very sincerest appreciation and thanks to our hosts, and especially to our dear friend and colleague, Professor Claudio Grossman. He always does things with great panache, and this is really a fantastic organization. I thank his wonderful team, the students, the Organization of American States and everyone who is involved—including the distinguished

ambassadors, judges, and colleagues who are with us in this event.

This is a very important period of time as we are in the midst of climate change and sea level rise, which have brought us into what I would call uncharted territory. There is the Law of the Sea Convention, which took many, many years to negotiate, but it was adopted in a pre-climate change era.¹⁶ Now, we are facing climate change and sea level rise, which will vary regionally, and unfortunately the news we keep getting make past predictions conservative.¹⁷ The Americas are certainly vulnerable to climate change and to sea level rise. The fact of the matter is we really do not have clear legal answers to the many issues—some of which my dear colleague and friend Bogdan has mentioned. I will mention a few more.

The Commission through collective work, is making efforts to map these issues and—I will not say find solutions, as I think that is going a bit too far—but highlight areas that need attention and possible solutions; and in this case the role of states is absolutely critical. This is because, ultimately, it will be states that will be making the decisions, responding, and acting, and will choose how we will fill the gaps in the Law of the Sea Convention.

I am going to highlight those gaps that relate to islands and archipelagos, and what this means. Without getting too technical, there is a definition under the Law of the Sea Convention where an island has to be above sea level at high tide, but also must be able to sustain human habitation and an economic life of its own.¹⁸ In this case, the island is entitled to all the maritime zones—exclusive economic zones are particularly valuable, up to 200 nautical miles. When we look at

16. United Nations Convention on the Law of the Sea, *opened for signature* Dec. 10, 1982, 1833 U.N.T.S. 397 (entered into force Nov. 16, 1994) [hereinafter UNCLOS].

17. See Paul Voosen, *Seas Are Rising Faster Than Ever: A New Satellite Will Monitor Coastal Hot Spots, Where Currents Amplify Global Trends*, 370 *SCIENCE* 901, 901 (Nov. 20, 2020) (providing data that the rate of sea-level rise is accelerating).

18. UNCLOS, *supra* note 16, art. 121 (“An island is a naturally formed area of land, surrounded by water, which is above water at high tide Rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf.”).

groups of islands, particularly archipelagic states, this can result in a very large ocean space which is extremely valuable.¹⁹ However, on the other hand, a rock, which is basically an island that cannot sustain human habitation or an economic life of its own, is only entitled to a territorial sea.²⁰ The rock loses the exclusive economic zone and continental shelf, and at low tide elevation, gets nothing.

The Law of the Sea convention tells us how these rights are created, but does not state whether these rights can be lost? Can an island state which currently is entitled to all the maritime entitlements, lose them? For example, due to sea level rise, loss of territory, entry of salt water into its drinking water, and many other possible reasons, people may no longer be able to live on islands. There is no direct answer to this under the Convention or international law in general.

In a very complicated formula, an archipelagic state, if it meets the requirements under Article 46—can draw a line around its outermost islands or drying reefs—and enclose a very large area of maritime space.²¹ But if that formula is altered because one of those outlying islands or drying reefs is submerged, this can have very significant impacts and potentially result in the loss of the right to draw an archipelagic baseline and the maritime zones that come with it. This can result in serious economic, socioeconomic, political impacts.

Very quickly, because I know I am getting close to the time, what does this mean for the landward movement of the baseline or the outer boundaries of the maritime zones because of sea level rise or the island becomes a rock? What once was an exclusive economic zone can become high seas, and thus an open access regime. That is a big difference! In that case, the exclusive economic zone can become territorial sea, which has an impact on navigational rights as well, and the territorial sea falls into internal waters.

The most important point, and I will end here, is what Bogdan mentioned: the whole issue of stability equals certainty. This includes stability of international relations. If we start playing around with established maritime boundaries, it can create very volatile situations.

19. *Id.* arts. 46–48 (defining archipelago and archipelagic baselines).

20. *Id.* art. 121.

21. *Id.* arts. 46–47.

We know that there are economic interests, such as fisheries, that can really provoke problems. That is why at least as co-chairs we take the position, in the first issues paper, of preserving existing rights, and we are looking for ways that can be done.²² Having said that, I also have to say that it is so important to know what the practice is, what the policies are, the vision, and the views from the Americas on these absolutely critical issues. And so, we encourage you to read our first issues paper and also the annual report of the Commission. I will stop here, thank you.

22. *First Issues Paper*, *supra* note 1, at 79.