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Approaches to Sea Level Rise: A Comparative View of Emerging Policy Responses by the African and the American Regions

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APPROACHES TO SEA LEVEL RISE AND INTERNATIONAL LAW: A COMPARATIVE VIEW OF EMERGING POLICY RESPONSES BY THE AFRICAN AND THE AMERICAS REGIONS

CHARLES CHERNOR JALLOH*

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July 27, 2022, 1:05 PM ET

It is a great privilege to be here with all of you tonight. Thank you very much to you, Professor Grossman, the moderator of this panel, and to all the organizers for inviting me to be part of this really important event. I hope this is the first of many such events concerning this really pressing issue for the international community: the issue of sea level rise which is already affecting peoples and States in many different regions of our world.

I. INTRODUCTION

I was asked to see if I could make a contribution to the discussion, which we are having today, on the specific sub-topic of how sea level

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rise is affecting States in Africa and the America's region and their emerging policy responses to the phenomenon. And my first thought was to think of it in a comparative manner. So, I come to the topic, unlike my prior distinguished colleagues, not focusing so much on the law but thinking of the potential policy responses that we are beginning to see from governments in the Africa and Americas regions.

Part of the reason for my interest in these two regions is that I have a sense of duality, having been born and raised in Sierra Leone but now having the good fortune of living in a city that is considered the gateway to Latin America: the city of Miami in Florida in the United States, which in many ways is also directly relevant to the topic that we are discussing today. The reason for that is that Miami—and South Florida generally—is considered in many ways (at least for the United States) as a part of the thin edge of the wedge when it comes to these issues concerning sea level rise.¹ Miami in particular, and Florida more generally, are projected to be the first to experience rising sea levels. That is in fact a reality already. For those of us who live in a community in South Florida, you cannot ignore the local news that is saying, on any given day, that the oceans are creeping up and reclaiming some land at least in certain neighborhoods.² In parts of South Florida, we have more and more flooding and evacuation zones where people actually have been moved away from the homes that they live in because of the risks that are associated with sea level rise. This phenomenon is something that is increasingly frequent in South Florida and very much a reality for some of the local population.³ Of

1. See Richard Luscombe, *Will Florida Be Lost Forever to the Climate Crisis?*, GUARDIAN (Apr. 21, 2020, 6:00 a.m.), <https://www.theguardian.com/environment/2020/apr/21/florida-climate-crisis-sea-level-habitat-loss> (highlighting how the threat of sea-level rise to Florida is existential).

2. See Alex Harris, *New U.S. Sea Rise Projections Are Lower but Still Forecast Grim Future for Florida*, MIAMI HERALD (May 18, 2022 12:13 p.m.), <https://www.miamiherald.com/news/local/environment/article258409363.html> (explaining that floods, storm surges, and high tides all contribute to the risk Florida's coastline faces from sea-level rise).

3. See William Butler et al., *Addressing Climate Driven Displacement: Planning for Sea Level Rise in Florida's Coastal Communities and Affordable Housing in Inland Communities in the Face of Climate Gentrification* (2021), <https://lci.fsu.edu/wp-content/uploads/sites/28/2022/02/Butler-Jackson-Holmes-et-al.-2021-Final-LCI-Report-Climate-Gentrification-Updated-min.pdf> (enumerating

course, on the broader level, the US is part of the Americas region, although I will not focus on it in the discussion here today even though there are other parts of the US such as in Louisiana and Texas in the South where also sea level rise is being felt and both lands and islands have been partially inundated. Indeed, much of the South Coast and the Gulf Coast of the US are feeling the impacts of sea level rise. Worse is that the scientists suggest a measure of acceleration may even be taking place with the mean increase in sea level rise. Needless to say, the US, more than most States, has the capacity to respond at a policy level given its status as the world's richest country.

II. EXISTING INTERNATIONAL LAW

Another aspect of this issue is that this is an area of the law where we may have some hard law, as my colleague Professor Murphy just now has shown in laying out what the 1982 United Nations Convention on the Law of the Sea provides when it comes to questions concerning baselines and law of the sea questions.⁴ On the other hand, if you go back to what Professor Galvão Teles discussed, it is a question of soft law as well.⁵ Then, when you get to Professor Ruda Santolaria, it is a question of the Montevideo Convention, which addresses Statehood issues and is reflective of customary law.⁶ In other words, when you look at the broad range of issues that are implicated by sea level rise, from those that involve movements of populations to those that implicate law of the sea issues to statehood and recognition questions, we have different levels approaches in terms of the possible responses of the law.

some of the issues that arise out of the displacement of persons).

4. See Sean D. Murphy, *Ambulatory Versus Fixed Baselines Under the Law of the Sea in the Context of Rising Sea Levels*, 38 AM. U. INT'L L. REV. 721, 722–25 (2023) (discussing how up until this point international law has viewed baselines as ambulatory).

5. See Patricia Galvão Teles, *The “Human Face” of Sea Level Rise: Protection of Persons Affected*, 38 AM. U. INT'L L. REV. 693, 696–97 (2023) (explaining how the Global Compact for Safe, Orderly, and Regular Migration is a soft law instrument that can inform the international community's discussions on this topic).

6. See Juan José Ruda Santolaria, *Algunas reflexiones sobre la condición de estado en relación con la elevación del nivel del mar*, 38 AM. U. INT'L L. REV. 701 (2023) (discussing how the internationally recognized definition of statehood interplays with this topic).

That said, at the policy level, I was very curious for the purposes of my presentation: if this new issue is confronting the international community, do we see a sense of regional action? Regionalism is of course not new. We see regional and universal interactions in other areas of international law, for example, from the law of peace and security under the United Nations Charter to international trade law and the 1994 WTO Agreements to international human rights law with the International Bill of Rights complemented by regional human rights treaties for Africa, the Americas, and Europe. Regionalism raises and ties into the questions of cooperation, at least at the level of the African Union—which is a collective body of all African states—in the context of Africa, and in the context of the Americas, there is the Organization of American States. Within those, going down into greater detail, one might be able to drill down and identify some similarities and some differences in their responses to climate change and sea level rise. Even though it is, in some respects, still early days yet given that States in the two regions and elsewhere are only now beginning to grapple with the sea level rise problem.

I have limited time for my remarks here today. So I will make three substantive points, starting with a discussion of the relevant science, followed by a comment on the different policy responses that seem to be emerging at the regional levels in Africa and the Americas, and finally ending with some concluding thoughts on the need for enhanced global cooperation and the question of responsibility.

III. INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE PREDICTIONS

As the starting point of this conversation, since there can often be skepticism about the science from some quarters, it is important to address the work of the Intergovernmental Panel on Climate Change (IPCC).⁷ The IPCC work has, to put it simply, reflected a scientific consensus showing that sea level rise is taking place based on the

7. See generally INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE [IPCC], CLIMATE CHANGE 2022: IMPACTS ADAPTION AND VULNERABILITY: WORKING GROUP II CONTRIBUTION TO THE SIXTH ASSESSMENT REPORT OF THE INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE (Hans-Otto Pörtner et al. eds., 2022).

changes taking place as a function of climate change and global warming. There will be impacts throughout the world. In its most recent report, the IPCC lays out that the status development, and impact of sea level rise and climate change, is a global problem that has a direct consequence of warming the climate.⁸ It is very clear that climate change is impacting different parts of the world in slightly different ways, and therefore poses different levels of risk for different States. When you assess where Africa and the Americas are, one would make the statement, as a broad point and I think with some credibility, that these are regions that are both particularly vulnerable to both the direct and indirect impacts of sea level rise.

A. EFFECT ON AFRICA

To illustrate, let me give a couple examples from Africa. In the chapter on Africa, the IPCC Report states that, by 2100, sea levels are projected to rise at least forty centimeters above those in 2000 in a below two-degree centigrade warming scenario, which can possibly reach up to one meter by the end of the century under a four-degree centigrade warming scenario.⁹ For that reason, in the absence of any strong adaptation measures, countries like Egypt, Mozambique, and Nigeria are projected to be among the worst affected by sea level rise in terms of the number of people at risk of flooding annually in a four-degree centigrade warming scenario.¹⁰ When you look at these projections in relation to African cities, the Report predicts that damages caused by sea level rise and coastal extreme events can range from \$65 billion to \$137 billion.¹¹ Finally, the report identifies sea level rise and associated episodic flooding as key drivers of projected net migration of 750,000 people out of this African coastal zone between 2020 and 2050.¹² These are just brief highlights. There is more information in the Report but, for reasons of time, I will stop there.

Before moving on, though, let me make it a little bit personal to

8. Hans-Otto Pörtner et al., *Summary for Policy Makers*, in IPCC, *supra* note 7, at 3, 9.

9. Christopher H. Trisos et al., *Africa*, in IPCC, *supra* note 7, at 1285, 1364.

10. *Id.*

11. *Id.*

12. *Id.* at 1367.

make a point. Take my own home country, Sierra Leone. Sierra Leone is a coastal state with roughly 530 km of coastline.¹³ These are predominantly low-lying areas, dotted with beaches and islands; really, really beautiful. Of course, I am not biased here. The point I want to make, though, is that Sierra Leone is already feeling, in a direct way, the impact of some of the IPCC Report's predictions. In fact, Sierra Leone has also been identified as one of the most vulnerable African coastal States to the rising sea levels. As part of the country's long coastline, Sierra Leone has a number of islands—including Turtle Island, Banana Island, and Plantain Island—some of which have already had at least 500 inhabitants relocated further inland because of the inundation of homes.¹⁴ On Yelibuya Island, over 2,000 people have been moved.¹⁵ In the IPCC Report, Sierra Leone was ranked as third among the most vulnerable countries, after Bangladesh and Guinea-Bissau.¹⁶ The Report predicts that more than two million Sierra Leoneans who are living on the coast—the total population of Sierra Leone is approximately seven million people—are expected to be at direct risk of the impact of sea level rise.¹⁷ Besides relocation, there are also the economic impacts and other equally important types of impacts. There are many people who are already being affected, including those that depend on the oceans for their livelihoods. Not to mention the many in the population who rely on fish and seafood for a good part of the protein in their diets. One of the more unfortunate events, as a consequence of sea level rise, is that UNESCO world heritage sites—including Plantain Island, where slaves were packed to send to the Americas—are potentially going to be inundated.¹⁸ The impact in terms of just that one particular example is quite deep. It is not just economics, or other impacts, it is even the history of a people that is under threat from sea level rise.

Sierra Leone is not unique in this regard; West African nations and

13. See Abdul Brina, *Sierra Leone's Sinking Islands*, CH. DIALOGUE OCEAN (Oct. 6, 2021), <https://chinadialogueocean.net/en/governance/19162-sea-level-rise-sierra-leone-sinking-islands> (describing Sierra Leone's coastline as predominantly low-lying).

14. See *id.* (attributing the relocation inland to repeated floods).

15. See *id.* (attributing the relocation to the sinking of the island).

16. *Id.* (citing the IPCC report).

17. *Id.*

18. *Id.*

other African States especially the coastal States more broadly are in a similarly vulnerable position. The World Bank has warned that flooding and coastal erosion due to sea level rise will cost the region about \$4 billion in damages, and at least 13,000 lives in just one year.¹⁹ Therefore, for the continent of Africa, there is a particular vulnerability—especially considering the continent’s level of development. On top of that, there is the further fact that those States have not contributed much to the global greenhouse gas emissions, and yet they now must bear the brunt of the impact. The situation is not tenable, because those States in Africa and other regions that are the least able are also required to spend millions of dollars for adaptation and mitigation measures. International law has recognized the common but differentiated responsibilities principle, which basically says that all States are responsible to address global environmental destruction but that those with greater ability need to do more. States have to do so not out of generosity, but also out of fairness for how we got here. And the fact that all in the international community will suffer collectively if the international community does not show a willingness to truly work cooperatively to deal with the sea level rise and climate change problems many in various parts of Africa and the world are already directly facing today.

B. EFFECT ON THE AMERICAS

The Americas are also somewhat of a depressing picture. In Central and South America, the IPCC Report points out that the region—North and South America, and Central and South America—is particularly vulnerable.²⁰ The Report also highlights countries such as Venezuela, Guyana, and Suriname as highly vulnerable to climate change.²¹ Additionally, there are parts of the United States and Canada

19. See *id.* (describing how coastal degradation contributes to mortality); Leila Croioru et al. *The Cost of Coastal Zone Degradation in West Africa: Benin, Cote d’Ivoire, Senegal, and Togo*, WORLD BANK GROUP (Mar. 2019), <https://documents1.worldbank.org/curated/en/822421552504665834/pdf/The-Cost-of-Coastal-Zone-Degradation-in-West-Africa-Benin-Cote-dIvoire-Senegal-and-Togo.pdf> (describing flooding and erosion as the main causes of coastal degradation).

20. Edwin J. Castellanos et al., *Central and South America*, in IPCC, *supra* note 7, at 1689, 1691.

21. *Id.* at 1716.

that are going to be experiencing more high water level events and impacts on natural and human systems.²² Then, in Mexico, there are particular islands that are flagged by the Report, and the economic cost again is equally high.²³ I am not going to go too far into detail on this, because I do not think I have to convince anyone here that we have a real problem which needs real solutions. Science has already exposed the problem anyway and we just now need to think, as some States and international organizations are already doing, what to do next. My takeaway point is that, much like Africa, the Americas region is also exposed to the negative direct and indirect impacts of sea level rise.

IV. THE INTERNATIONAL COMMUNITY'S RESPONSE

This all raises the question: if you have these two continents that have particular vulnerabilities, what are the kinds of responses that we are seeing from them? This brings me to my next point, which is to note, very briefly, a couple of responses that we see coming from Africa and the Americas. Here I am not going to focus on the positions of individual African or American states. Instead, I would rather talk a little bit about responses at the regional level. This ties into a point that I want to stress—and I think all of my colleagues have raised this—concerning the work of the International Law Commission, and the importance of state practice.

In many ways, as we already know, countries from the Asia Pacific region have been particularly active in this issue in terms of the topic of sea level rise which is currently being studied by the Commission. We have a number of soft law instruments to supplement the hard law obligations that there are out there. My colleague, Professor Galvão Teles, was among those that spoke about some of these earlier.²⁴ But, these are all norms that are developing, and in many ways, they are in the early phase. And, importantly, largely at the universal or international levels. What you see at the policy level in the African

22. *Id.* at 1963.

23. See generally *id.* 1929–2042; Michelle Mycoo et al., *Small Islands*, in IPPC, *supra* note 7, at 2043, 2043–2123.

24. See Galvão Teles, *supra* note 5 (discussing how soft law instruments should be considered within the context of this topic).

Union (AU), which is the top of the regional African level, is an acceptance and acknowledgment that climate change questions need to be addressed. In the recent thirty-fifth ordinary session of the AU assembly, the AU expressed concern about the challenges posed by climate change—including aspects like desertification and land degradation, natural disasters and flooding, and rising sea levels that threaten the existence of coastal mega deltas and small island developing states.²⁵ This is one of the major policy statements at the highest level of the AU. It flags the significance of sea level rise; expresses deep concern about the increasingly negative and disproportionate impact on African states; and calls for, as part of the African climate change strategy for 2020 to 2030, the AU to take a leadership role in dealing with some of these questions.²⁶ This is just one example of policy positions taken for the question under discussion at the highest level of the African region.

In the Americas, the Organization of American States (OAS), which is also the lead regional body, has also been very active. There are examples of statements by everyone from the Assistant Secretary General of the OAS in October 2015 to island states that are in many ways very close to me in Florida, such as the Bahamas, Guyana, the Dominican Republic, and so on.²⁷ The OAS leadership has pointed out

25. African Union, African Union Climate Change and Resilient Development Strategy and Action Plan 14 (2022), https://au.int/sites/default/files/documents/42276-doc-CC_Strategy_and_Action_Plan_2022-2032_23_06_22_ENGLISH-compressed.pdf (anticipating that by 2050, some parts of Africa will be hotter and more arid, while other parts will be “more prone to flooding, rising sea levels, and related natural disasters”).

26. *See id.*

27. *See* Nestor Mendez, Assistant Sec’y Gen., Org. of Am. States [OAS], Oceans and Climate Change (Oct. 26, 2015); Perry Gladstone Christie (Prime Minister of The Bahamas), The Second National Communication Report of the Commonwealth of the Bahamas Under the United Nations Framework Convention on Climate Change (Sept. 2014); *see, e.g.*, Troy Torrington (Deputy Permanent Representative, Republic of Guy.) Statement to the United Nations at the High-Level Action Event on Climate Change and the Sustainable Development Agenda (Mar. 24, 2017); Climate Change Held a Workshop on NDC-RD 2020 for Journalists from the Northern Region REPÚBLICA DOMINICANA: NAT’L COUNCIL FOR CLIMATE CHANGE (May 22, 2021), <https://cambioclimatico.gob.do/index.php/noticias/item/358-cambio-climatico-realizo-taller-sobre-ndc-rd-2020-para-periodistas-de-la-region-norte> (summarizing the statement made by Max Puig, the Executive Vice President of the National Council for Climate Change in the Dominican Republic).

the need for strong ocean governance and also highlighted both the coral bleaching events that are devastating the Caribbean reef systems through to the need to address protection of the marine ecosystems in order to address the economic and social well-being of those States and people that otherwise depend on the seas. These arguments broadly resonate with and supplement the positions taken by the OAS member States through efforts like the Caribbean Challenge Initiative. The region has been following the issue a bit more closely, perhaps because the Caribbean countries have been particularly vulnerable. What I would like to stress, though, is that these responses are still emerging from the region. My impression so far in looking into this question, albeit very quickly, is that the Americas region is more engaged with what is happening at the regional level, and thinking about cooperative frameworks to address them, compared to the African region.

That said, I do see some opportunities for regional engagement, not only at the level of the OAS in the Americas, or the level of the AU in Africa, but also at the level of the United Nations (UN). It is clear that the UN's soft norms are not the standards for the regions—for example, the Cartagena Protocol, or the African Union Convention for the Protection and Assistance of Internally Displaced Persons (the so-called Kampala Convention), all of which may be addressing different pieces of the puzzle.²⁸ I would like to stop there on that aspect, to make the final set of observations to think about the future.

V. COOPERATION AND RESPONSIBILITY

One area that is quite critical to addressing the element of sea level rise is the element of cooperation, and another issue is the question of responsibility. I have to be very clear, in the context of the International Law Commission's project, on the topic of sea level rise in relation to international law, the Commission did not agree to look

28. See, e.g., Cartagena Protocol on Biosafety to the Convention on Biological Diversity, *opened for signature* Jan. 29, 2000 (entered into force Sept. 11, 2003), [https://beh.cbd.int/protocol?_gl=1*1olx5fs*_ga*NjgxNjE0MTMxLjE2ODI3MDQ5MzE.*_ga_7S1TPRE7F5*MTY4MjcwNDkzMS4xLjAuMTY4MjcwNDk0MC4wLjAuMA](https://beh.cbd.int/protocol?_gl=1*1olx5fs*_ga*NjgxNjE0MTMxLjE2ODI3MDQ5MzE.*_ga_7S1TPRE7F5*MTY4MjcwNDkzMS4xLjAuMTY4MjcwNDk0MC4wLjAuMA;); African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention), *opened for signature* Oct. 23, 2009, 49 I.L.M. 86 (entered into force Dec. 6 2012).

at causation and questions of responsibility.²⁹ It may be the case that this was the right decision, but it may also be the case that at a later stage, this decision needs to be revisited.

Why am I raising the issue of causation and responsibility? For the international community to deal with these questions of sea level rise in a manner that will find consensus, it is very important to recognize the different situations of developing countries and countries that have not contributed significantly to climate change due to their levels of development. Pollution and all the other effects, of course, are very difficult and sometimes sensitive to address, but these are sensitive issues that, as academics and scholars, we can engage with. Because, ultimately, in the backdrop, these will be the issues that could drive whether we are able to make progress on dealing with some of the impacts that would be disproportionate for countries that have done very little to contribute to the situation we are in. I can see that, for a body like the Commission, it has good reason to evade difficult political questions. Primarily political questions should be left to States to address. The reality is that the harder issues that we face when it comes to sea level rise are not so much about the presence, or absence, of an adequate international legal framework. It is more about the policy issues which, we have to transparently admit, are linked to the existing legal framework as well. Law and politics are hard to separate, and in fact, are intertwined. To bury our heads in the sand and say that the law, especially international law, can be clinically isolated from politics, especially international politics, is to ignore reality. While I agree completely that cooperation is critical in this area, especially multilateral cooperation, and equally completely agree that international law has some role to play, what is happening at the regional and international levels—or a combination of all of these, and even at the bilateral level—is the idea of common but differentiated responsibility, and who would be able to carry, in the area of international environmental law, the responsibility to assist in making sure that we are able to find global solutions. That is part of what is required to have solutions to these problems we face today. The Commission has a mandate to assist States with the promotion of the progressive development of international law and its codification. This

29. G.A. Res. A/CN.4/752 (Apr. 19, 2022).

is an opportunity for it to do so if it is able to discharge its mandate faithfully and in a manner that can present credible potential solutions for States especially in the UN General Assembly to consider as possible ways forward. In the end, this is not to suggest that the Commission is a policy body; it is not; it is a legal body that is subsidiary but that has in the past also shown that it can offer bold solutions that are useful to all States in all regions of the world regardless of their size or level of development.

VI. CONCLUSION

That last comment brings me to my last point today. I would be very remiss if I did not end with a plea calling for more engagement into the Commission's work, with a point about practice that has come up quite frequently in the work of the Commission. Already we are very grateful to all the states that are making statements in the Sixth Committee and making written submissions to the Commission. This is a wider challenge for the Commission, but of course—partly, perhaps, because of questions of capacity—countries from Africa have been very silent in their engagement with some of these questions, including on the topic of sea level rise at the ILC. We see similar phenomena, not perhaps as challenging, for countries in the Americas region. I do not want to single out sea level rise as a topic to say that there is a problem of participation; at a systemic level of the Commission, we have challenges that would benefit heavily from receiving state practice and state input from all the different regions of the world, including from Africa, the Americas, and Asia. That input when it is representative of the different regions and legal systems of the world should, on balance, help the Commission to strengthen the practical relevance and utility of its work on this and its other topics. But, well beyond States and regional organizations, civil society including activists, academia and others can play an important role to bring out key issues. We, therefore, need states and experts from different regions and different universities to help contribute to the Commission's work on this topic which attempts to deal with an existential threat to a matter that is truly pressing for the international community as a whole.

I am going to stop there because I do not want to overstay my

welcome. We were told by our moderator that we must stay within the time limit. As a final closing remark, thank you very much Professor Grossman for giving me the floor as moderator and also to all the distinguished diplomats, academic colleagues, and others present here today for your kind attention. I look forward to the discussion afterwards.

* * *