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Abstract

Thank you so much, Professor Grossman. I will not take time from my presentation to do a long thank you or introduction, but I really wanted to thank you warmly, Claudio, for putting together these two days of conversation so that we can connect with the Americas and also have your contributions and your experiences to our work, which you, Claudio, have committed to and are delivering on your promise to help us to navigate through what is going on in the Americas concerning sea-level rise. This is very important because, as it was mentioned, the Commission works based on practice, and we are making good effort to have as representative a practice as possible, so this is a very welcome opportunity, certainly from the Co-Chairs of the Study Group, but I think from the whole Study Group and the whole Commission—we appreciate your efforts and all your contributions.

Keywords

International Law, International Human Rights, International Environmental Law, Environmental Law, Law of the Sea, Sea-Level Rise

THE “HUMAN FACE” OF SEA-LEVEL RISE: PROTECTION OF PERSONS AFFECTED

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JULY 27, 2022, 12:05 PM ET

Thank you so much, Professor Grossman. I will not take time from my presentation to do a long thank you or introduction, but I really wanted to thank you warmly, Claudio, for putting together these two days of conversation so that we can connect with the Americas and also have your contributions and your experiences to our work, which you, Claudio, have committed to and are delivering on your promise to help us to navigate through what is going on in the Americas concerning sea-level rise. This is very important because, as it was mentioned, the Commission works based on practice, and we are making good effort to have as representative a practice as possible, so this is a very welcome opportunity, certainly from the Co-Chairs of the Study Group, but I think from the whole Study Group and the whole Commission—we appreciate your efforts and all your contributions.

My task today is to speak to you about the protection of persons affected by sea-level rise. This is one of the sub-topics that the Commission is dealing with—yesterday you heard a lot about the law of the sea issues, and the First Issues Paper.¹ And this year, there is a new issues paper, the Second Issues Paper, which was prepared by myself and my very dear colleague and Co-Chair, Mr. Juan José Ruda Santolaria, who will speak to you next on the sub-topic of statehood, which composes the three sub-topics that the Commission is looking

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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*, ¶¶ 13–14, U.N. Doc. A/CN.4/740 (Feb. 28, 2020) [hereinafter *First Issues Paper*].

at.² Of course, what we are going to present to you has to do with the stage of the work that we are at, with regard to the two sub-topics of statehood and protection of persons, which form part of the Second Issues Paper and that are at an earlier stage than the law of the sea issues discussed in the First Issues Paper, which had a full discussion in the Commission and also had feedback from States in the Sixth Committee.³ We are still in an earlier stage, and we are to adopt our own report on the discussions of the Study Group and then the Sixth Committee will also make its comments. What we are presenting is certainly more preliminary in nature than what was discussed yesterday.

On the topic of the protection of persons affected by sea-level rise, I call it the “human face” of sea-level rise. This is, as we all know, a phenomenon that has multifold dimensions and has the potential, on the human dimension, not only to affect the enjoyment of human rights, but it can also lead to significant internal or international movement of persons. This is something that came out very clearly from our paper and research that there is not a dedicated legal framework or a distinct legal status for persons affected by sea-level rise.⁴ That is the starting point of our paper, and in the paper, we proceeded to do a mapping of the potentially applicable legal frameworks pertaining to the protection of sea-level rise, from human rights law to humanitarian law, refugee law, and law concerning migrants, disasters, and climate change.⁵ We have tried to do this mapping exercise, and I refer you to the paper, more in a descriptive than a prescriptive nature, and also taking into account that in many cases this potentially applicable legal framework is of a soft law character—I will come back to some of the examples.

2. 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*, ¶¶ 1–2, 12, U.N. Doc. A/CN.4/752 (Apr. 19, 2022) [hereinafter *Second Issues Paper*] (covering the two subtopics of statehood and the protection of persons affected by sea-level rise).

3. *Id.*

4. *First Issues Paper*, *supra* note 1, at 3–5 (noting that discussion around sea-level rise in relation to international law only formally began appearing in the Commission and General Assembly work in 2017 and 2018).

5. *Second Issues Paper*, *supra* note 2, at 59, 64, 66, 70–71.

When we did the mapping exercise, we looked at human rights law first. It is the obvious place to start, as several Human Rights Council resolutions have recognized that climate change in general, including sea-level rise, does not per se violate human rights, but it can have an adverse impact on the enjoyment of human rights.⁶ When the human rights regime was developed there was no special thinking on climate change effects or sea-level rise effects, but we can look at the number, which we have done in our paper, of human rights that can be potentially affected. We have come to the conclusion that a number of human rights—from civil and political rights to economic, social and cultural rights, and also procedural rights—could be affected. This also includes the right to life, prohibition of cruel, inhuman and degrading treatment, right to food, right to adequate housing, right to water, right to take part in the cultural life and respect for cultural identity, right to a nationality and the prevention of statelessness, rights of children, right of public participation, access to information and access to justice, and also the right to self-determination and rights of indigenous peoples. This is probably not a complete list, but these are the rights whose enjoyment could most obviously be affected by sea-level rise.

We then turn to refugee law. In public opinion those impacted are usually described as climate refugees, but if one looks carefully at the existing instruments, especially the 1951 Geneva Convention on Refugees, the prerequisites do not cover climate change.⁷ Again, this was a Convention that was negotiated well before states were concerned with climate change and sea-level rise. The existing legal framework for refugee protection does not consider any effects of climate change as meeting the criteria for refugees, although they could coincide in circumstances where the requirements of persecution are met in the context of adverse impacts of climate

6. See, e.g., Human Rights Council Res. 10/4, U.N. Doc. (Mar. 25, 2009) (noting that "climate change-related impacts have a range of implications . . . for the effective enjoyment of human rights including . . . the right to life, the right to adequate food, the right to the highest attainable standard of health, the right to adequate housing, [and] the right to self determination").

7. Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137.

change.⁸ The category that we normally hear in public opinion, in the press, and even in some academic articles of climate refugees does not exist *per se*, and we would probably say the same concerning migrants. There is also a lot of discussion of this eventual existing category of climate migrants, and there has been a close relationship and a recognition—including in the New York Declaration for Refugees and Migration and also in the Global Compact on Migration that was negotiated under the umbrella of the General Assembly—of a link between migration, the environment, and climate change.⁹ But that does not mean that there is a special legal category for that purpose. The International Organization for Migration (IOM), for example, recognizes environmental migrants as people or groups that, for compelling reasons of sudden or progressive changes in the environment that adversely affect their lives or living conditions, are obliged to leave their habitual homes, or choose to do so either temporarily or permanently, and move within the country or abroad.¹⁰ There is a recognition, especially in the Global Compact for Safe, Orderly and Regular Migration, that disasters and climate change, including sea-level rise, can be drivers of cross-border mobility, and this instrument, for example, which is soft law, provides guidance to states on how to deal with this phenomenon.¹¹

International law concerning disasters is also an interesting potentially applicable legal framework, and one that the Commission has worked on. In the articles that the Commission adopted concerning the protection of persons in the event of disasters, which the ILC adopted in 2016, sea-level rise is clearly recognized as a type of

8. See U.N. High Comm'r for Refugees, *Legal Considerations Regarding Claims for International Protection Made in the Context of the Adverse Effects of Climate Change and Disasters* (Oct. 1, 2020) (noting that climate change and disasters combined with social vulnerabilities may compel people to leave their countries).

9. G.A. Res. 71/1, *New York Declaration for Refugees and Migrants* (Sept. 19, 2016); G.A. Res. 73/195 (Dec. 19, 2018) [hereinafter *Global Compact on Migration*].

10. WALTER KÄLIN & SANJULA WEERASINGHE, *ENVIRONMENTAL MIGRANTS AND GLOBAL GOVERNANCE: FACTS, POLICIES AND PRACTICES*, 1 (2017) (providing a full definition of environmental migrants in the first footnote).

11. *Global Compact on Migration*, *supra* note 9.

disaster.¹² The provisions regarding cooperation among states may prove especially applicable; I will be very interested to see what Judge María Teresa Infante Caffi will say about the issue of cooperation, which I think is a key issue. However, the articles on disasters are more focused on the immediate consequences, while sea-level rise may cause long term and irreversible effects. Therefore, we may also need to look at some of the specificities of sea-level rise to see if we need to adapt or to better the framework that the Commission has already designed.

There are other interesting soft law instruments like the Sendai Framework for Disaster Risk Reduction, as well as the Nansen Initiative, that made an Agenda for the Protection of Cross-Border Displaced Persons in the Context of Disasters and Climate Change, which has important principles and examples of effective state practice and two blocks that provide states with options for action in case of cross-border displacement or internal displacement caused by sea-level rise.¹³

Although we do not have a special, specific, legal regime for persons affected by sea-level rise, there are a number of potentially applicable hard law and soft law instruments. And the last one I would point to is in the framework of the climate change legal regime, the Paris Agreement, which mentions the question of human rights in the context of climate change.¹⁴ In the discussions of the framework of climate change the concept of human mobility has emerged, not as a legal concept, but as an interesting concept that would cover all types

12. Int'l L. Comm'n, Rep. on the Work of Its Sixty-Eighth Session, U.N. Doc. A/71/10 (2012) (defining "disaster" 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").

13. See THE NANSEN INITIATIVE, AGENDA FOR THE PROTECTION OF CROSS-BORDER DISPLACED PERSONS IN THE CONTEXT OF DISASTERS AND CLIMATE CHANGE 9, 17 (2015) (describing the initiative as a "state-led, bottom-up consultative process intended to identify effective practices and build consensus on key principles and elements to address the protection and assistance needs of persons displaced across borders in the context of disasters, including the adverse effects of climate change"). G.A. Res. 69/283, Sendai Framework for Disaster Risk Reduction (June 3, 2015).

14. Paris Agreement to the United Nations Framework Convention on Climate Change, Dec. 12, 2015, T.I.A.S. No. 16-1104 (entered into force Nov. 4, 2016).

of situations of mobility of persons, such as migration displacement. The concept also covers planned relocation, which is normally the first action for protection of persons affected by sea-level rise, who would have to be moved from their homes and relocated to a nearby village, or to another part of the country. Many countries are already doing this planned relocation and it is interesting to see what principles are emerging from that.

In the Second Issues Paper we have mapped the potentially applicable legal frameworks and, probably the most interesting aspect for us, we also tried to map the existing state practice and the relevant international organizations and other entities.¹⁵ What we see is that although this phenomenon is already happening, it is still a relatively new phenomena, and its acceleration has different impacts in different parts of the world. The timing also varies, as we saw that some areas of the world are quite advanced already in terms of having national plans of action dealing with climate change including with sea-level rise—that is certainly the case in the Pacific.¹⁶ We have received information from the Pacific Island Forum (PIF) Secretariat with practice from the Pacific island countries regarding the protection of persons affected by sea-level rise.¹⁷ There is also a lot of practice from relevant international organizations with mandates in this area like the IOM, UNHCR, the Office of the High Commissioner for Human Rights, the GA, and other entities that work in the field of disaster protection and climate change, including the International Federation of the Red Cross and the Platform on Disaster Displacement.¹⁸ We see

15. *Second Issues Paper*, *supra* note 2.

16. See Pacific Islands Forum, Submission to the International Law Commission on the Sub-Topics of Sea-Level Rise in Relation to Statehood and to the Protection of Persons Affected by Sea-Level Rise, at 3, 12, 21, 27 (Dec. 31, 2021), https://legal.un.org/ilc/sessions/73/pdfs/english/slr_pif.pdf (discussing the action plans adopted by the Cook Islands, Palau, Tuvalu, and Samoa).

17. See Pacific Islands Forum, Declaration on Preserving Maritime Zones in the Face of Climate Change-Related Sea-Level Rise, at 2, 3 (Aug. 6, 2021), <https://www.forumsec.org/wp-content/uploads/2021/08/Declaration-on-Preserving-Maritime.pdf> (highlighting the importance of the rights associated with the maritime zones established in accordance with the U.N. Convention on the Law of the Sea on States affected by sea-level rise and climate change).

18. See, e.g., Ben Farrell, *Pacific Islanders Face the Reality of Climate Change . . . and of Relocation*, UNHCR (Dec. 14, 2009), <https://www.unhcr.org/en-us/news/latest/2009/12/4b264c836/pacific-islanders-face-reality-climate-change->

that from the Pacific Islands there is a lot going on in terms of preparing, taking measures, creating national plans, changing legislation, and we also see concern from relevant international organizations.

In terms of state practice, we still are missing information. It is likely because this practice is developing—from other areas of the globe and in particular from Africa and the Americas—and that is why this initiative is very, very timely. We raise this issue so we can explain a bit what we are doing, and hopefully there will be more information, engagement, interaction, informally and formally through submissions to the Commission, and practice, especially from the Caribbean states that we know are highly affected. Yesterday I heard the presentation by the Ambassador of Belize, who I had just met in Lisbon during the Oceans Conference, and I was very struck by the fact that he mentioned that in Belize three percent of the population will probably have to be relocated due to sea-level rise.¹⁹ This is the kind of information that we are looking for, data, but also information on what states are doing. We certainly have more information from the Pacific, which indirectly will have an impact in the United States because there are a number of free association agreements between the Pacific Island states and the United States. These types of agreements are very interesting for the question of mobility and anticipating the effects of sea-level rise. In our paper, we also mention the White House report that was published in October 2021 on climate change and migration, where it is said that the United States should explore the possibilities of, for example, granting temporary protected status in the United States to persons that are affected by climate change and must migrate.²⁰

relocation.html; *Migration, Environment, Climate Change (MECC), and Oceans*, ENV'T MIGRATION PORTAL, <https://environmentalmigration.iom.int/migration-and-oceans> (last visited Feb. 8, 2023); INT'L FED'N OF RED CROSS & RED CRESCENT SOC'Y, *DISPLACEMENT IN A CHANGING CLIMATE: LOCALIZED HUMANITARIAN ACTION AT THE FOREFRONT OF THE CLIMATE CRISIS*, 9–10 (Oct. 28, 2021).

19. See Carlos Fuller, *Address at the American University Washington College of Law Conference: Climate Change and Sea Level Rise: Assessing Their Impacts on Belize* (July 26, 2022) (outlining the various threats to livelihood due to climate change in Belize, none of which included delimitation).

20. See WHITE HOUSE, *REPORT ON THE IMPACT OF CLIMATE CHANGE MIGRATION*, 1, 18–19 (2021) (stating that temporary protected status may be

We see also that it is not only directly impacted states but also third-party states that might be on the receiving end of climate change and sea-level rise, as is the case for the United States. During our discussions in the Study Group, some members of the GRULAC, our colleagues from Brazil and from Ecuador, informed us about practice and legislation on the issuance of humanitarian visas and also pointed us to instruments of an a regional nature, such as the Cartagena Declaration on Refugees and the Brazil Declaration, that do take account of climate change disasters as a cause for movement of persons in need of protection.²¹

My last point is to echo what Claudio said in the beginning, and I am sure other colleagues will also make the point, that it would be very useful to have information and to find a way to get that information from Latin America, Caribbean states, and also Northern American states, for example, with regard to the protection of persons affected by sea-level rise. Moving forward with our paper, there will be a formal request to states for information regarding measures relating to risk reduction specific to the mitigation of the adverse impacts of sea-level rise, human rights implications from adverse impacts of sea-level rise, regulation of displacement caused by sea-level rise, prevention of statelessness, and issues of international cooperation regarding humanitarian assistance to persons affected by sea-level rise.

I think I am right on the time that was allocated to me, so I will stop here, and I will look very much forward to the discussion. Thank you.

designated “due to conditions in the country that temporarily prevent the country’s nationals from returning safely, which may include climate-related factors”).

21. Cartagena Declaration on Refugees arts. 1, 3, Nov. 22, 1984, https://www.oas.org/dil/1984_cartagena_declaration_on_refugees.pdf; Brazil Declaration: A Framework for Cooperation and Regional Solidarity to Strengthen the International Protection of Refugees, Displaced and Stateless Persons in Latin America and the Caribbean, at 3, 18, Dec. 3, 2014, <http://www.refworld.org/docid/5487065b4.html>.