

Rising Sea Levels: Promoting Climate Justice through International Law: The Role of the International Law Commission





**British Institute of
International and
Comparative Law**

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Summary

The British Institute of International and Comparative Law (BIICL) and Landmark Chambers co-organised a webinar series on '[Rising Sea Levels: Promoting Climate Justice through International Law](#)'. The series approached climate-induced rising sea level as a global problem and the possible implications arising from it from the lens of international law and climate justice.

Four separate webinars were held examining the topic from different legal dimensions:

- Webinar 1: Rising Sea Levels: The role of the International Law Commission
- Webinar 2: Rising Sea Levels: A Matter for the ICJ?
- Webinar 3: Rising Sea Levels: Climate Displacement as a Human Right Violation
- Webinar 4: Rising Sea Levels: Climate Change Litigation before Domestic Courts

Participants included government representatives, representatives of international governmental and non-governmental organisations, legal academics and practitioners, and members of the civil society. The webinar series was convened by [Dr Constantinos Yiallourides](#), Arthur Watts Research Fellow in the Law of the Sea, BIICL.

The present report provides a summary of the discussion and synthesises some of the main conclusions of Webinar 1: Rising Sea Levels: The Role of the International Law Commission, held on 3rd March 2021.¹ The panel discussion was chaired by [Sir Michael Wood KCMG](#), Twenty Essex, Member of the ILC. Panellists: [Professor Patrícia Galvão Teles](#) (Autonomous University of Lisbon and Co-Chair of the ILC Study Group on Sea-Level Rise in relation to International Law), [Professor Davor Vidas](#) (The Fridtjof Nansen Institute, Chair of ILA Committee on International Law and Sea-Level Rise), and [Aylin Yildiz](#) (World Trade Institute).

This report is issued on the understanding that if any extract is used, BIICL should be credited, preferably with the date of the event.

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¹ The recording of the event can be found here: <<https://youtu.be/Z-g0x1KRGEg>>.

The work of the International Law Commission – Prof Galvão Teles

1. Professor Patricia Galvão Teles presented the work of the ILC on ‘Sea Level Rise’, how the topic made it to the agenda of the ILC, and what are the expected outcomes going forward.
2. Professor Galvão Teles noted that whilst ‘Sea Level Rise’ became part of the ILC’s agenda only recently, this is something that science has been warning us about for some time. Future projections are not encouraging. The Intergovernmental Panel on Climate Change (IPCC), the main body of reference for scientific purposes, has estimates that are probably conservative with regard to the possible impacts of rising sea levels on a global scale. Some geographic areas will be more severely impacted than others but this is a global problem. It is against this context that the International Law Commission began examining this topic. The idea is to look at what are the various legal effects of sea-level rise with regard to the territory of states, coastal populations, maritime boundary delimitations, and also the survival of some states in some cases. The ILC is carrying out its work by looking ahead to the future, before the most adverse effects are materialised, to prepare the international community with legal solutions for this phenomenon.
3. The inclusion of the topic on ‘Sea Level Rise in relation to International Law’ in the agenda of the Commission received strong support from the United Nations General Assembly from a large number of Member States. One state, the Federated States of Micronesia, made a formal proposal to that effect in 2018. Whilst it is not very common that states make formal proposals to the ILC, in this case, the Federated States of Micronesia submitted a proposal with an outline of the proposed syllabus to the ILC. And this was considered at the same time by members of the ILC.
4. In the summer of 2018, the ILC decided to include in its long-term program of work the syllabus that contains the outline and the mandate of the ILC has for this topic. An open-ended Study Group on the topic was formed subsequently. This is chaired, on a rotating basis, by Mr Aureescu, Prof. Cissé, Prof Galvão Teles, Prof Oral and Prof Ruda Santolaria. The Study Group held one meeting in 2019, at which time it agreed on its composition, methods and programme of work based on the three subtopics identified in the syllabus (A/73/10).²
5. Concerning the legal issues to be examined by the ILC Study Group on Sea Level Rise, Professor Galvão Teles explained:

Different legal issues arise from sea level rise. The ILC Study Group is not pretending to cover all of them. For instance, questions of responsibility or liability for sea-level rise, questions of environmental impacts, questions of peace and security. The International Law Commission decided not to tackle those issues, and they are excluded from the scope of the topic. Rather, the Study Group is focusing on the topics that appear to have an internal linkage: those that have a connection with the idea of the state itself, with the three elements of the state, that is to say, the question of statehood, territory, namely maritime territory, and the question of the population. This includes the issues related to the the Law of the Sea, to the protection of

² ‘2018 Recommendation of the Working-Group on the Long-Term Programme of Work’, available at <https://legal.un.org/ilc/reports/2018/english/annex_B.pdf>. See also <https://legal.un.org/ilc/reports/2019/english/chp10.pdf>.

persons affected by sea-level rise and the to question of the statehood itself, including the question of possible loss of statehood. The ILC's task is to map the possible legal issues arising in these areas and offer possible solutions.

6. On the question, 'how can academics and civil society contribute to the work of the Commission?', Professor Galvão Teles responded:

We are trying to work in a very inclusive manner in the sense that, not only are we trying to be in contact as much as possible with member states, and we have held already several side events, regional workshops, both involving member states. but we are also having contact with key stakeholders in terms of international organizations and have also tried to do outreach activities to inform the academic community about what we are doing. We also have had exchanges with experts that are working in the different fields that are covered and of course, with the International Law Association. ... The idea at this initial stage is to identify and clarify the legal issues and provide some conclusions and recommendations on these three aspects of the topic.

7. Concluding, Professor Galvão Teles commented that the Study Group model of work is different from what the ILC has done in the past in relation to some of the 'more traditional' topics of international law. But this is a good model for new topics that address novel challenges of a global nature.
8. In response to a subsequent question concerning the 'institutional mandate of the ILC to consider the codification of international law as well as its progressive development and how the ILC situates this current topic of sea-level rise within that overall institutional mandate', Galvão Teles explained that there are certain key criteria for the selection of new topics for inclusion in the agenda of the ILC. On the one hand, the topic should reflect the needs of states with respect to the development and codification of international law. The topic should be at a sufficiently advanced stage in terms of state practice to permit progressive development and codification and that the topic is concrete and feasible. On the other hand, the Commission should not restrict itself to traditional topics, but could also consider those that reflect new developments in international law and pressing concerns of the international community as a whole.
9. According to Professor Galvão Teles:

We have an emerging practice that is still forming ... Were we to wait until the practice was fully developed, perhaps it would be too late to propose any solution. ... One of the reasons why it was fundamental to form a Study Group with the idea of producing a study, is also because we thought that that would be the way that it would be more acceptable to states and because of the lack of full maturity of the subject. ... And of course, this is only the first part of the process. Then we will need to see what happens afterwards in terms of whether there is going to be a need to come up with new legal solutions or if there is going to be a need to come up with a revision of certain existing legal solutions and how that is going to be made. That will be the next step, to be decided after we complete the initial study to be carried out by the Study Group.

The work of the International Law Association – Prof Vidas

10. Professor Davor Vidas addressed the work of the International Law Association (ILA) on rising sea levels and international law. He noted that the ILA Committee on International Law and Sea Level Rise has been studying this topic since 2012.³ The Committee now comprises 44 members, including several former and current members of the ILC. Like the ILC Study Group, the ILA Committee is also 'looking ahead' and tries to identify fundamental changes on the horizon, changes for which we must start preparing in advance in a systematic manner. Professor Vidas added:

This way of looking at options for the development of international law is still perhaps a bit unusual, but the facts are changing, inevitably, and the law will have to react to this change. International law will have to adapt and likely also change. This is, in essence, what the work of our Committee is about.

11. The first international committee set to study the international legal implications of sea-level rise was the ILA Committee on Baselines under the Law of the Sea. This was formed in 2008 and completed its work in 2018.⁴ A part of its original mandate was 'to identify, and possibly clarify or develop the existing law concerning normal baselines in response to sea-level rise that has been predicted to accompany the phenomenon of climate change and the effects this may have in particular upon low-lying, small island developing States'. By 2012, the ILA Committee on Baselines stated that 'the loss of States' territory due to rising sea levels is not primarily a baseline or law of the sea issue but a much broader issue, encompassing concerns of statehood, national identity, human rights, refugee status, state responsibility, access to resources and international peace and security'. The ILA then acknowledged that this broad range of issues would require consideration by a committee with a broader mandate to focus specifically on sea-level rise, hence the ILA Committee on International Law and Sea Level Rise was established following a Resolution of the 75th ILA Conference held in Sofia in 2012.

12. The ILA Committee on International Law and Sea Level Rise was tasked with a two-part mandate:

(1) to study the possible impacts of sea-level rise and the implications under international law of the partial and complete inundation of state territory, or depopulation thereof, in particular of small island and low-lying states; and

(2) to develop proposals for the progressive development of international law in relation to the possible loss of all or of parts of state territory and maritime zones due to sea-level rise, including the impacts on statehood, nationality, and human rights.⁵

13. Concerning sea level rise and the legal implications arising from it, Professor Vidas explained that there will be many consequences requiring a systematic study of interlinking several parts of

³ Davor Vidas, David Freestone, and Jane McAdam (eds) *International Law and Sea Level Rise: Report of the International Law Association Committee on International Law and Sea Level Rise* (BRILL 2019) <<https://brill.com/view/title/54753>>.

⁴ Coalter G Lathrop, J Ashley Roach, and Donald R Rothwell, *Baselines under the International Law of the Sea: Reports of the International Law Association Committee on Baselines under the International Law of the Sea* (BRILL 2019) <<https://brill.com/view/title/54750>>.

⁵ International Law Association Sydney Conference (2018) *International Law and Sea Level Rise* <https://www.ila-hq.org/images/ILA/DraftReports/DraftReport_SeaLevelRise.pdf>.

international law. Sea level rise may call into question the conceptual architecture of the maritime zones under today's law of the sea. But the issue of sea level rise may in certain special situations, such as in particular of some low-lying Pacific and Indian Ocean States, 'extend far beyond the law of the sea and the determination of baselines and maritime zones of the coastal states'. This gives rise to fundamental questions regarding aspects of state territory and statehood under international law. The concept of a defined territory is seen as a constituent criterion for statehood. But with the consequences of sea level rise, we may need to look again at this understanding of statehood or indeed of international legal personality. Ultimately, the key factor may be the population rather than the territory itself. Small Island States are likely to become uninhabitable for other reasons long before they become physically submerged. Do people then resettle as individuals only, or as a community? And indeed, when would a state cease to exist, given the criterion of population in defining statehood? According to Professor Vidas:

Most of these considerations still belong to the future. However, that is a future which we are now able to conceive as likely in the coming decades – and virtually certain in the current century. That is, within a human lifetime. We are no longer talking about some abstract 'future generations', we are talking about today's young people.

14. Professor Vidas explained that the ILA Committee on International Law and Sea Level Rise defined, already at its first session at the 76th ILA Conference in Washington DC in 2014, three main issue-areas to be dealt with by the Committee: 1) the law of the sea; 2) forced migration and the rights of affected populations; and 3) issues of statehood and international legal personality. At the outset, the Committee agreed to address these through two main phases. In the first phase, from 2014 to 2018, the Committee focused on priority areas in a relatively shorter-term perspective within the law of the sea and forced migration issues; the results of that phase are contained in the 2018 Report of the Committee and in ILA Resolutions 5/2018 and 6/2018. In the second, and current phase (2019-2022), the Committee focuses on issues emerging in a mid- to longer-term perspective, which involves, in addition to the issues related to the law of the sea and the rights of the affected populations, also the study of statehood questions and, more broadly, of issues concerning international legal personality under circumstances of sea-level rise. All these legal issues are occupying the increasing attention of many states, not just low-lying and small island developing states.
15. On a relevant question posed by Sir Michael Wood concerning the interaction between the ILA Committee and the ILC Study Group on Sea Level Rise, Professor Vidas explained that both groups share the basically same thematic structure of work, organised through the division into three issue-areas of international law, but they belong to 'different segments of international scholarship and as such, they can do different things'. Some of the findings of the ILA Committee, as contained in its 2018 Report and ILA Resolution 5/2018,⁶ have been recently referred to by UN member states in the deliberations of the Sixth Committee of UNGA and in the submissions by several states to the UN upon the invitation by the ILC in late 2019 and early 2020, informing the work within the ILC Study Group thereupon, as contained in the First Issues Paper on the Law of the Sea by its two co-Chairs. This, in turn, has contributed to the latest exchange regarding sea-level rise and the law of the sea at the UN Sixth Committee in November 2020. Professor Vidas stressed the importance of international law scholarship in this process and concluded that through this rotation of findings, recommendations, views of states, new reports and their impact, we can see more clearly how international legal scholarship can influence on and interact with the process towards clarification and development of international law.

⁶ Available at: https://www.ila-hq.org/images/ILA/Resolutions/ILAResolution_5_2018_SeaLevelRise.pdf

'Common concern of humankind' – Aylin Yildiz

16. Aylin Yildiz gave a presentation on 'Sea Level Rise as a Common Concern of Humankind'. Yildiz explained that the concept of 'common concern of humankind' has been a source of inspiration in international law-making and has a particular role to play in environmental protection and development and, more recently, in climate-induced sea level rise.

17. Yildiz pointed to the 1987 Report of the World Commission on Environment and Development which dedicated a chapter to global common concerns.⁷ The 1987 Report noted:

*The enforcement of common interest often suffers because areas of political jurisdiction and areas of impact do not coincide. Energy policies in one jurisdiction cause acid precipitation in another. The fishing policies of one state affect the fish catch of another. No supranational authority exists to resolve such issues, and the common interest can only be articulated through international cooperation.*⁸

18. According to Yildiz, 'common concern' provides the basis for cooperation of all states on matters of similar importance to all nations...it gives attention to the causes of the problems, both for their prevention and for the responses to be given. The 'humankind' reference in common concern encompasses both the present and future generations. Common concern provides 'the normative anchor to a treaty regime and applies equitable sharing of responsibility'. For instance, common but differentiated responsibility applies in the international climate change regime, whilst the comprehensive refugee response framework applies in situations involving large movements of refugees.

19. A conceptual ambiguity still looms, especially with regard to the implications of identifying an issue as a common concern of humankind. The ILC considered this very question during the discussions on the draft guidelines for the protection of the atmosphere in 2015. UN Special Rapporteur Michael Lynk proposed that the atmosphere is a natural resource essential for sustaining life on Earth, human health, and the welfare of aquatic and terrestrial ecosystems, and hence the degradation of atmospheric conditions is a 'common concern of humankind'. However, when this was proposed, ILC members voiced concerns about the use of this designation by the Special Rapporteur and the concept's specific legal content. It was suggested that the international community had abandoned the expression of common concern after 1992 and after this debate, as a compromise, the term 'pressing concern' of the international community was used to articulate the matter. According to Yildiz:

The ILC has now a magnificent opportunity to elaborate on the implications of the legal concept of common concern of humankind in the context of climate-induced sea level rise. There is a sea change in our understanding of really how connected we are. The current pandemic has certainly contributed to making our conviction on that clearer. The ILC Study Group on sea level rise in relation to international law has a chance also to look into this concept for the progressive development of international law. The ILC would not be alone in its endeavours if it were to do that. Here at the World Trade Institute in Switzerland, we have

⁷ Report of the World Commission on Environment and Development (1987) available at <https://sustainabledevelopment.un.org/content/documents/5987our-common-future.pdf>

⁸ Ibid at para 22.

been working on the doctrine of common concern of humankind and articulating its potential applications to different global problems [citing, in particular, the work of Professor Cottier].⁹

20. 'Common concern' in relation to transboundary problems requires collective action among states and meaningful cooperation of everyone involved. One idea that begs our attention is the situation where a state adopts policies that attempt to remedy a problem by maximising its benefits at the cost, however, of its partners, neighbours and others that are impacted. This can worsen the situation of the other parties involved. This is certainly relevant when we think about sea level rise. Another scenario is always a tragedy of the commons where all actors actually act in their self-interest and act independently, and then they ultimately deplete a shared, limited resource. 'Common concern' here really helps us when we engage in situations of this sort and it has the potential to apply to all fields of international law and all levels of governance.
21. Whether a matter is deemed to be of common concern is open to debate, approval or rejection of diplomatic and legal process of law-making. Ideally, states, as well as non-state actors, can contribute to this process by voicing their claims at appropriate international fora, organizing hearings with experts, and finally, reaching a consensus of normative value. The discussions that have been happening at the ILC on the protection of the atmosphere, for instance, and how we can relate to common concern are an example of this. Another example could also be the work that is being undertaken by the ILC and the ILA on sea-level rise. Sea level rise prompts many legal challenges. These are novel challenges of common concern. After all, they do have the potential to threaten international peace and security.
22. In response to a question concerning the practical operation of the 'common concern' concept, Yildiz explained:

Common concern is heading in the direction of becoming a principle of international law. The conceptual framework is pretty clear. The idea is that whenever there is an issue that has transboundary impacts, namely, impacts that are not only constrained within a state but have potential impacts beyond the state's territorial sovereignty, then you get into an issue of a common concern. Not all issues which have transboundary impacts would qualify as a common concern because then that would water down the principle. The idea is that there is a threshold. A threshold would be anything that might have a risk of threatening international peace and security and perhaps also international welfare. Climate change is a common concern of humankind. Climate change is an issue where regardless of the state's behaviour domestically, if a state continues to emit a lot, then it will have ramifications for everybody. And then if there is any issue identified as a common concern, there will be certain legal ramifications, including for instance a duty to cooperate and to ensure compliance.

⁹ Thomas Cottier (ed) *The Prospects of Common Concern of Humankind in International Law* (forthcoming, Cambridge University Press 2021) <<https://www.cambridge.org/core/books/prospects-of-common-concern-of-humankind-in-international-law/D2F64167CC315C630E9D91113402A50F>>.

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