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Legal Implications of Rising Sea Levels

Paper by the Commonwealth Secretariat

This paper presents a number of the most important legal implications of rising sea levels. Rising sea levels raise questions principally in public international law, and particularly in the law of the sea, as well as areas of domestic law. The paper notes important developments in global academic opinion in this area and makes recommendations for action in response to these developments.

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1. Introduction

1. Rising sea levels resulting from climate change present a number of challenges to international law and to various domestic legal areas. These challenges are of particular concern to small island developing states. Rising sea levels will have consequences affecting maritime jurisdiction and boundaries and, in extreme cases, the survival of statehood. People will be displaced, both within and across borders, with potential consequences for international human rights and environmental law.

2. At their meeting in London on October 2016, law ministers and attorneys general noted a number of emerging legal issues that may be associated with the consequences of climate change, and requested the Secretariat to produce a research paper to be submitted to the next Law Ministers and Attorneys General of Small Commonwealth Jurisdictions Meeting (LMSCJ)

8. The question of whether or how sea level rise will affect the extent and nature of coastal states' maritime jurisdictions or zones arises because those maritime zones are determined by direct reference to shorelines or coastlines, which are expressed in the law of the sea as

of archipelagic baselines: If a geographical feature forming a base point is submerged, does that baseline cease to exist?

- Accept that climate change and its adverse impacts are a threat to territorial integrity, security and sovereignty and in some cases to the very existence of our islands because of the submersion of existing land and the regression of our maritime heritage.

- Acknowledge, under the [Convention], the importance of the Exclusive Economic Zones for Polynesian Island States and Territories whose areas is calculated according to emerged lands and permanently establish the baselines in accordance with the [Convention], without taking into account sea level rise.¹³

21. Eight Pacific leaders, including the leaders of five Commonwealth members, signed 'The Delap Commitment on Securing Our Common Wealth of Oceans' on 2 March 2018, by which they agreed '[t]o pursue legal recognition of the defined baselines established under the [Convention] to remain in perpetuity irrespective of the impacts of sea level rise'.¹⁴

22. In 2010, several years before the above agreements were signed, the Pacific Islands Forum developed a strategy document called 'Framework for a Pacific Oceanscape'.¹⁵ That document urges all Pacific countries to deposit charts delineating their maritime zones with the United Nations, 'in their national interest', and states:

Once the maritime boundaries are legally established, the implications of climate change, sea level rise and environmental change on the highly vulnerable baselines that delimit the maritime zones of Pacific Island Countries and Territories should be addressed. This could be a united regional effort that establishes baselines and maritime zones so that areas could not be challenged and reduced due to climate change and sea level rise.¹⁶

23. A 'consensus on the importance and prior

(in 2016),¹⁸ Kiribati (2014)¹⁹ and Tuvalu (2012)²⁰ have legislated to unilaterally declare and publicise their maritime jurisdictional baselines, archipelagic zones and the outer limits of their exclusive economic zone boundaries. The Sea Level Rise Committee is of the view that this appears to be a conscious effort to pre-

maritime boundaries, agreed by treaty between nation states. Where the territorial seas, exclusive economic zones or continental shelves of two states overlap, the boundary line between them falls to be decided by a negotiated maritime boundary delimitation agreement or by international third-party dispute resolution. The Commonwealth Secretariat, through the work of its Oceans and Natural Resources Section, has provided assistance to many Commonwealth members in negotiating these maritime boundary delimitation agreements.

29. The challenge of rising sea levels in this context is as follows: If two neighbouring states negotiate a maritime boundary delimitation agreement based on an equidistant line between their respective coastal baselines (the most common basis for agreement), what is the effect on that agreement of a landward shift in one of those baselines due to sea level rise? Would this amount to a fundamental change of circumstances which

Vienna Convention.²⁷ As a matter of existing law, it is probable that changes in baselines due to sea level rise do not affect the validity of established maritime boundary.

32. However, the stability of settled maritime boundary agreements depends on one underlying presumption that may itself be challenged under certain extreme scenarios of sea level rise: the very statehood of the parties to the agreement. In a case where sea level rise results in a state's entire territory being submerged or becoming uninhabitable, statehood itself comes under question.

VI. Sea level rise and statehood

33. Customary international law stipulates four objective criteria of statehood. A state must possess a defined territory, a permanent population, a government and a certain measure of independence. The loss of any one of these four characteristics would theoretically result in a loss of statehood. In reality, the viability of each characteristic is closely linked to the others, with the link between territory and population particularly relevant. The complete inundation of the territory of a small island state and the relocation of its population would be catastrophic in human and

Organisation and the UNHCR. The task force agreed on draft workplan for its activities, bundled under four desired impacts:

- i. national and subnational policies/practice to avert, minimise and address displacement;
- ii. international and regional policies to recognise the adverse impact of climate change on displacement;
- iii. data and assessment; and
- iv. framing and linkages.

48. The workplan expands on these impacts and sets out the expected deliverables, which include various mapping reports and analysis papers.⁴² The task force is expected to finalise its recommendations to the Warsaw International Mechanism before the end of 2018. States with populations threatened by displacement due to rising sea levels have an obvious interest in the ongoing work and recommendations of this task force.

VIII. The Sydney Declaration of Principles on the Protection of Persons Displaced in the Context of Sea Level Rise

49. Having considered the issue of human displacement since its establishment in 2012, the Sea Level Rise Committee published a Sydney Declaration of Principles on the Protection of Persons Displaced in the Context of Sea Level Rise (Sydney Declaration) in its 2018 Report.⁴³ The ILA adopted the Sydney Declaration at its August 2018.⁴⁴ These principles constitute a comprehensively r Tm4F(le)3(s)-54(c)-4(o)ciples cons anamprehensively r Tm

Commonwealth Secretariat
Marlborough House
Pall Mall
London SW1Y 5HX

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XI. ANNEX

Sydney Declaration of Principles on the Protection of Persons Displaced in the Context of Sea Level Rise

Extracted from: Annex to ILA, Resolution 6/2018: Committee on International Law and Sea Level Rise, adopted at the 78th Conference of the ILA, held in Sydney, Australia, 19-24 August 2018

Purpose: The purpose of the present Declaration of Principles is to provide guidance to States in averting, mitigating, and addressing displacement occurring in the context of sea level rise, based on and derived from relevant international legal provisions, principles, and frameworks.

Scope: The present Declaration of Principles applies to all forms of human mobility arising in the context of sea level rise.

Definitions: For the purposes of the present Declaration of Principles, the following definitions shall apply:

(a) 'disaster' means a serious disruption of the functioning of a community or a society at any scale, due to climatic events interacting with conditions of exposure, vulnerability, and capacity, leading to human, material, economic, and/or environmental losses and impacts.

(b) 'displacement' means the movement of persons who are forced or obliged to leave their homes or places of habitual residence due to sudden-onset natural hazards and/or slower, cumulative pressures occurring in the context of sea level rise. Displacement may take place within a country and/or across internationally-recognized borders.

(c) 'evacuation' means the rapid movement of persons away from the immediate threat or impact of a disaster to a safer place of shelter, in order to ensure their security, safety, and well-being. Evacuations are usually short-term (hours to weeks) and may be voluntary or forced. They usually take place within the same country.

(d) 'human mobility' means all relevant forms of the movement of persons in the context of sea level rise, including displacement, migration, planned relocation, and evacuation.

(e) 'migration' means predominantly voluntary cross-border movement, which, in the context of disaster- and climate change-related impacts, is more likely to occur in anticipation of future harm. It is usually planned, less sudden than displacement, and occurs over a longer period of time.

(f) 'planned relocation' means a planned process in which persons move or are moved away from their homes or places of temporary residence, are settled in a new location, and are provided with the conditions for rebuilding their lives. Planned relocation is carried out under the authority of the State, and is undertaken to protect persons from risks and impacts related to disasters and environmental change in the context of sea level rise. It ca3(e)9(a108.02 19/eit15005

v. support recovery, including durable solutions, for internally displaced persons;

(b) efforts to ensure that persons moving across borders are admitted and received with respect for their safety, dignity, and human rights, including the creation or harmonization of more predictable domestic or regional legal frameworks, and durable solutions to displacement are found; and

(c) technical and financial support by the international community and donor countries and their multilateral and bilateral financing mechanisms to support affected countries and regions.

Principle 5 | Evacuation of Affected Persons

1. States affected by sea level rise shall take all necessary measures to facilitate, without discrimination, the evacuation of persons facing a serious and imminent risk linked to the effects of sea level rise, and provide support to those unable to evacuate themselves.

2. Where evacuations are not voluntary, they shall only be undertaken if they are provided for by law and are necessary to protect the life and health of affected persons, and less intrusive measures would be insufficient to avert the harmful consequences of the threat. Competent authorities should ensure that evacuation orders are enforced only for as long as strictly necessary to fulfil such purpose.

3. Evacuations, whether voluntary or forced, shall be carried out with full respect for the life, dignity, liberty, and security of evacuees.

Principle 6 | Planned Relocations of Affected Persons

1. States affected by sea level rise shall only undertake planned relocations (whether within their territories or across international borders) when so requested by affected persons and communities, or when conducted with their full, free, and informed consent.

2. Where, despite the provision of adequate information and consultation, such consent cannot be obtained, planned relocations must only be undertaken as a measure of last resort to safeguard the lives and safety of those affected. They must be based on national law and implemented in accordance with relevant international legal standards.

3. Planned relocations shall be implemented in ways that safeguard the human rights and dignity of those who move, including the principle of family unity, as well as the human rights and dignity of those who have to receive relocated persons.

4. Given their significance for indigenous peoples, States undertaking planned relocation shall respect and protect their rights to self-determination, culture, identity, land, and resources.

5. Persons affected by a planned relocation, including those who have to receive relocated persons, must be informed, consulted, allowed, and enabled to participate in all relevant decision-making processes.

6. At a minimum, persons' pre-relocation living standards must be restored post-relocation.

Principle 7 | Migration of Affected Persons

1. States should recognize that temporary, circular, or permanent migration across borders can be an important means for persons to adapt to climate change and cope with the adverse effects of sea level rise.

