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Implications of Sea Level Rise for Maritime Limits

RESILIENCE OF THE UN CONVENTION ON THE LAW OF THE SEA: 40 YEARS
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I. Background

- Negative effects of anthropogenic GHG emissions on marine areas and the marine environment include, but are not limited to:
 - ocean acidification
 - ocean warming
 - impacts on the development of fish stocks
 - alterations in the distribution of marine species
 - marine habitat degradation,
 - ... and **sea level rise**

I. Background

- LOSC was not concluded with global warming in mind
 - → To what extent are its provisions, as far as its effects on maritime limits and the marine environment are concerned, applicable to climate change?
- LOSC has not established a static regime, but must be understood in terms of a ‘living instrument’, reflecting its nature as a ‘constitution for the ocean’ (T.B. KOH)
 - It is capable of further **evolution** through:
 - ... the incorporation of external rules (potentially, depending on the relevant *renvois*, including soft law)
 - ... implementation agreements
 - ... its interpretation in line with subsequent developments (*cf.* Art. 31 (3) VCLT)

II. Context

- ‘Sea level rise and international law (of the sea)’ **not really a new topic, but has recently attracted considerable attention:**
 - *ILA Committee on International Law and Sea Level Rise*
 - established in November 2012
 - 40 Members and five Alternates from 22 regional and national ILA branches, in addition to the ILA HQ branch (Chair: Davor Vidas; Co-Rapporteurs: Elisa Fornale and David Freestone)
 - Term of the Committee was initially extended to November 2022 and later to 2024

II. Context

- Output:
 - 2018 Committee Report on International Law and Sea Level Rise presented at the 78th ILA Conference in Sydney
 - ILA Resolution 5/2018 on maritime limits and boundaries
 - ILA Resolution 6/2018 (containing ‘Sydney Declaration of Principles on the Protection of Persons Displaced in the Context of Sea Level Rise’)
 - 2022 Interim Report presented at the 80th ILA Conference in Lisbon

II. Context

- *ILC Study Group ‘Sea-level rise in relation to international law’*
 - 2019 decision to include topic in the ILC’s programme of work
 - So far two ‘issues papers’ on:
 - ... possible legal effects of sea-level rise on baselines and outer limits, maritime delimitations, the exercise of sovereign rights and jurisdiction of the coastal State and its nationals, status of islands, including rocks, and on maritime entitlements of a coastal State with fringing islands (2021)
 - ... subtopics of Statehood and the protection of persons affected by sea-level rise (2022)

II. Context

- *Rapidly emerging State practice (2021/2022)*
 - 2021 Pacific Island Forum (PIF) Declaration on Preserving Maritime Zones in the Face of Climate Change-related Sea-Level Rise
 - Co-ordinated domestic legislation of Pacific Island States
 - Since 2018 initial evidence of emerging State practice in the Pacific region regarding the intent of some island States to maintain their maritime entitlements in the face of sea level rise

II. Context

- Since 2021, several States from other regions have expressed support for the efforts of coastal States particularly affected by sea level rise to maintain their maritime entitlements in the context of climate change-related sea level rise
- In 2019/2020, a number of States responded to an invitation by the ILC to UN Member States to submit examples of State practice that may be relevant to sea level rise in relation to the law of the sea
- Recent statements made by a number of States during the 26th and 27th meeting (2021/2022) of the UN GA's Sixth Committee

II. Context

- Topic of ‘sea level rise and international law (of the sea)’ is **not at all limited to maritime limits**
 - See broad mandates of ILC study group and ILA Committee
 - See also recent (potential) developments in international jurisprudence:
 - ITLOS Case No. 31: Request for an Advisory Opinion Submitted by the Commission of Small Island States on Climate Change and International Law
 - → Focus on specific obligations of LOSC parties to prevent, reduce and control pollution of, and to preserve, the marine environment in relation to the deleterious effects that result or are likely to result from climate change

II. Context

- Potential request for an advisory opinion of the ICJ:
 - Decision on UNGA resolution to be taken in the second half of March; hopes have been expressed that even a consensus decision on **‘Vanuatu Initiative’** may be possible
 - → Broad focus (based on final draft resolution uploaded February 20th):
 - (1) What are the obligations of States under international law to ensure the protection of the climate system and other parts of the environment from anthropogenic emissions of greenhouse gases for States and for present and future generations;
 - (2) What are the legal consequences under these obligations for States where they, by their acts and omissions, have caused significant harm to the climate system and other parts of the environment, with respect to: (a) States, including, in particular, small island developing States, which due to their geographical circumstances and level of development, are injured or specially affected by or are particularly vulnerable to the adverse effects of climate change? (b) Peoples and individuals of the present and future generations affected by the adverse effects of climate change?”

III. Implications for Maritime Limits

- Points of departure:
 - Strong evidence in State practice, *opinio juris* and international jurisprudence that **baselines**, no matter whether normal, straight or archipelagic (cf. Arts. 5, 7, and 47 LOSC), are **generally ambulatory**
 - See conclusions of 2012 and 2018 reports of ILA Committee on Baselines under the International Law of the Sea
 - Thus, unless established by way of fixed coordinates as agreed in bilateral maritime boundary delimitation treaties, a shift of the low-water line along the coast likely impacts the outer limits of the coastal State's maritime zones

III. Implications for Maritime Limits

- **Physical measures taken for coastal defense and reinforcement** can be an effective tool to prevent baselines from shifting
- As far as **maritime boundaries established by treaties** are concerned, there is strong evidence that such boundaries are **not affected** by sea level rise
 - According to the dominating view, Art. 62 (2) (a) VCLT (fundamental change of circumstances cannot be invoked if a treaty establishes a boundary) applies
 - See ILC Issues Paper 2021, paras. 105 et seq., concluding in para. 138 that “an overview of conventional practice reinforces the general conclusion (...) that there is a large body of State practice favoring legal stability, security, certainty and predictability of the maritime delimitations effected by agreement or by adjudication”

III. Implications for Maritime Limits

- Specific case of sea level rise:
 - Widespread view that ambulatory character of baselines should **NOT** apply in relation to sea level rise
 - Rather, baselines **and/or** outer limits should, in the context of sea-level rise, be considered to be **permanent** ('frozen')
 - Evidence of **emerging State practice**, particularly in, but not limited to, the South Pacific region, indicating that small island States intend to maintain the baselines **and** outer limits of their maritime zones
 - See, e.g., submission of Antigua and Barbuda to ILC: "baselines established in accordance with UNCLOS may remain fixed despite sea-level rise and, additionally, States have no obligation to revise maritime baselines because of sea-level rise"

III. Implications for Maritime Limits

- 2021 PIF Declaration ...
 - ... recognizes in its preamble “the principles of legal stability, security, certainty and predictability that underpin the [LOS] Convention and the relevance of these principles to the interpretation and application of the Convention in the context of sea-level rise and climate change”
 - ... holds that “maintaining maritime zones established in accordance with the Convention, and rights and entitlements that flow from them, notwithstanding climate change-related sea-level rise, is supported by both the Convention and the legal principles underpinning it”
- Increasing use of **geographic coordinates specifying points on the baseline and outer limits** instead of using nautical charts

III. Implications for Maritime Limits

- Have these developments already resulted in an adapted interpretation of the LOSC, or given rise to the development of a new rule of customary international law?
 - Amongst the arguments brought forward to support a positive reply are:
 - LOSC is allegedly based on the **stability and certainty of maritime zones and entitlements** → uncertainty about maritime zones and entitlements would thus defeat the purposes of the LOSC
 - Interests of States that are **‘specially affected’** by sea level rise should enjoy particular attention
 - **No specific objection** by any State has been raised to the emerging State practice

III. Implications for Maritime Limits

- Contemporary reading and interpretation of the LOSC “allows for freezing of once duly established, published and deposited baselines and outer limits of maritime zones in accordance with the Convention” (Written Statement of Germany in response to 71st and 72nd ILC reports)
- At the same time, *opinio juris* does not appear to be uniform, as other States have argued that:
 - Sea level rise is a new phenomenon that goes beyond the current scope of the law of the sea
 - Commonly accepted international law concepts need to be re-evaluated
 - Need of progressive development of international law and approaches *de lege ferenda*

IV. Conclusions

- Increasingly wide and strong support among States that the LOSC does not require coastal States to update their national charts to reflect changes in their coastlines brought about by sea level rise
- Evidence of evolving State practice, and a certain level of its consolidation, in relation to freezing baselines and the preservation of maritime zones within their established and notified limits
 - However: How to distinguish between the effects of sea level rise and other natural impacts on the baselines? Or should baselines not be considered as being ambulatory anymore?

IV. Conclusions

- Whether the scope of evolving practice is sufficient in order to meet the criteria of Art. 31 (3) (b) VCLT is debatable
- Criteria for the development of a new rule of customary international law are arguably not (yet) met.
- Strong evidence in relation to the finality of maritime boundary agreements and of decisions of international courts and tribunals on boundary delimitation (incl. their binding nature vis-à-vis third States)