THE SINKING WORLD AND INTERNATIONAL LAW

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ABSTRACT

The paper shall critically analyse the implications of the rise in sea level on maritime space as a consequence of shifting of baselines leading to an inevitable conflict between the United Nations Convention on the Law of the Sea and an emerging custom. The researcher shall suggest ways for modification of the convention for harmonising the obligation under the convention and the practice of the states. Further, the paper shall also discuss the effect sea rise on maritime boundary delimitation agreements, its validity, with regards to the Vienna Convention on the Law of Treaties and discuss the threat on the very existence of a state, which is one of the fundamental aspects of International law and the grave violations of human rights that will ensue. The researcher has also made few suggestions for a way forward to arm ourselves for such unparalleled times whose effects will be very severe on the International community.

***Keywords*:** UNCLOS, VCLT, IHL, Sea level, Baselines, Human Rights, Custom.

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INTRODUCTION

The United Nations Convention on the Law of the Sea (UNCLOS) (the convention), 1982 determines the various maritime zones for a state. Article 5 of the convention defines a normal baseline to be a low water line along the coast as marked on large scale charts officially recognized by the coastal state. It is from this line that the states measure the extent of its maritime entitlements under the International law.[i] It includes territorial sea, contiguous zone, exclusive economic zone (EEZ) and continental shelf.

THE SWALLOWING SEA

In 2018, The United States National Oceanic Atmospheric Administration reported over the last century, the sea level has risen, and the pace has accelerated in recent decades.[ii] The 5th Assessment Report of the Intergovernmental Panel on Climate Change also published a report stating the rise in sea levels as a threat that will remain and endure for hundreds of years.[iii] This rise in sea level will create important challenges for the international community affecting all the states. Accordingly, the law has to consider this issue to find a legal response to adaptation. The paper shall deal with some of the major concerns for international community including the maritime jurisdiction with potential conflict between an emerging custom and the UNCLOS, maritime boundary agreements and, in extreme cases, the survival of Statehood with potential consequences for international human rights.

A. Change in Maritime Zones

Sea level rise is a threat to baselines which are the reference points from which the maritime limits and boundaries are determined, with the absence of provisions in the Convention it becomes a grave threat to the sovereignty and sovereign rights of the coastal States.[iv] The baselines can either retreat or lose base points established on low-tide elevations raising questions about the change in baselines leading to new maritime boundaries and either to adapt them to the potential new ones, thus the baselines being ambulatory or to freeze existing baselines in their current position or to establish a new rule under international law that freezes the existing defined limits of maritime zones[v] thus fixing the baselines allowing the stabilization of the limits and maritime boundary agreement.

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UNCLOS under Article 4 describes the Normal Baseline as the coastal low-water line, as shown in the large-scale maps officially recognised by the coastal State. Although the text of the UNCLOS does not specifically allow for a change of maritime borders with a change of baseline, it may be argued that UNCLOS does not expressly preclude the possibility of one of the two approaches being used by States.

The emerging custom on according legal recognition to the fixed baselines can be traced from the 2018 Delap Commitment on Securing Our Common Wealth of Oceans[vi] by the eight Pacific leaders agreeing to pursue legal recognition to baselines established under the Convention to remain in perpetuity irrespective of the impacts of sea-level rise. Thenceforth, the Sea Level Rise Committee (SLRC) notes several State practices from the Pacific region consciously putting in the effort to pre-empt any arguments with regards to baselines which was later on adopted by the ILA as Resolution 5/2018 in its 78th Conference. Thus, small island countries have begun to develop this practise that may, in the future, be a new rule of customary international law.

The International Law Association in its 75th conference concluded that the maritime zones move as the baselines controlling them shift.[vii] The Baselines Committee also concluded that the legal baseline moves as the actual low-water line moves thus denoting the baseline as ambulatory, moving seaward and landward to reflect changes caused by a land rise or by erosion and sea-level rise respectively. However, under extreme circumstances, the latter category of change could result in total territorial loss causing loss of baselines and the maritime zones. But the existing law of the normal baseline does not offer an adequate solution to this potentially serious problem.

The developed states commonly follow the ambulatory baseline approach and a fixed baseline approach is favoured by the coastal States. This is usually because the rise in sea level and the resulting loss of Exclusive Economic Zone (EEZ) of developed countries do not radically reduce their liberty of navigation and entitlements in the high seas as their deep pockets enable them to do so. Their access to maritime entitlements previously guarded under the EEZ of other States but now forming part of the High Seas remains available to them. On contrary to that, owing to lack of resources and loss of EEZ, the coastal states will essentially limit their

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authority over their maritime entitlements and their offshore economic resources, thereby jeopardising their very survival under international law.

Thus, there is an eventual clash between the two new practises and the convention. No sooner than later the international community will be faced with a situation of making an evolutive interpretation in light of the development of the international law and amending UNCLOS. A treaty is usually amended either through mutual consensus or the subsequent practice of all states that are party to it. These conventional modes of amendments, however, may not be possible since they entail the practice of all states.

In contrast to subsequent practice, subsequent customs do not require the approval of all nations, but only of the relevant ones. Thus, these states can form a custom on the ambulatory baseline approach as a result of rising sea level. Claims have been made, however, that treaties that set boundaries between States should not be altered without obedience to the procedures defined. The Vienna Convention on the law of Treaties specifically bars termination of border treaties albeit it falls under the category of 'fundamental change of circumstances' under Article 62.[viii]

Nevertheless, a new custom does have the authority to alter the obligations under treaties. Although undoubtedly it is a huge burden, there have been instances where delimitation treaties have actually been modified in such a way, the Convention on the Construction of a Ship and National Legislation, the National legislations and Treaties Relating to the Law of Sea[ix] among other such legislations. There have been two instances where a subsequent custom has modified treaty obligations under International law.

First, the treaty prior to the UNCLOS did not have a provision for EEZs but considered all as high seas after the territorial seas. But at the time of the drafting of the UNCLOS, a new custom was emerging, giving each state an EEZ up to 200 nautical miles from their baselines. As this was followed by all the states, it was eventually adopted into UNCLOS. Thus, though the practice of the state violated the convention of the High Seas which was in force then, the EEZ was subsequently adopted in the view of the new customary practice. This has been perceived as evidence of a subsequent custom altering the obligations under established treaties by various scholars.

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Second, there has been a proven tradition of interpreting treaties in consideration of the development of CIL thereafter. The ICJ has highlighted this approach in the case of *Legal consequences for states of continued presence of South Africa in Nambia*[x] stating that a treaty interpretation cannot remain untouched by the subsequent development of law. Likewise, in the case concerning *Gabcikovo-Nagymaros Project*[xi] the court stated that for the application of the Treaty, newly established principles of environmental law must be considered.

Although there has been a long-running disagreement on the interpretation of a treaty in the light of the development of a subsequent custom, there is an academic consensus on the fact that a reasonably dynamic treaty with several objectives and purposes will accept an interpretation in the light of the development of a subsequent custom as its modification under International law.

Thus, bearing in mind these considerations, UNCLOS can be amended by the development of a custom. Moreover, the ambulatory baseline approach will not only be backed by the practices of the developed states but perhaps more so as this practice is in accordance with the objectives of the Convention, which is the optimal utilization of State's resources thus making any interpretation that advances such effectiveness a fair reading. Though it is not to suggest that a fixed baseline approach is not feasible to be developed as a custom to, later on, modify the treaty, an ambulatory baseline custom is more plausible due to the state practice of developed states, and how it will consequently strengthen the existing supremacy of Developed States over coastal states under International Law. [xii]

B. Effect on Maritime Boundary Agreements

The maritime boundary delimitation agreements are negotiated to decide the boundary line between two States (usually by applying the equidistance principle) when there is an overlap of the territorial seas, EEZ or continental shelves. One has to analyse what happens if two neighbouring states negotiate a maritime boundary delimitation agreement but a rise in sea level results in shifting baselines leading to loss of maritime space. What will be its effect on the agreement? Will this amount to a fundamental change of circumstances that will invalidate the consensus on the delimitation of maritime borders?

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VCLT under Article 62(1) States that a treaty can be revoked if there is a fundamental change of circumstances which was the essence of the consensus among the parties and if the effect of such change would radically affect the obligations of the parties under the treaty. However, Article 62(2) specifically excludes the application of this doctrine if the treaty establishes a boundary. This provision reflects the customary international law principle of stability of boundaries.[xiii] Though there have been conflicts in opinion with regards to its application on maritime boundaries, it has become a well-established that the principle of stability applies to maritime boundaries.[xiv] In accordance with this, the Sea Level Rise Committee recommends that the effect of sea-level rise on maritime borders cannot be viewed as a fundamental change in circumstances in the interest in legal clarity and stability.[xv]

Analysis into the travaux preparatoires shows that during the negotiation of the Vienna Convention, several kinds of boundary treaties were referred to.[xvi] As a matter of current law, changes in baselines due to sea rise are unlikely to impact the legitimacy of the existing maritime limits. The continuity of settled maritime border arrangements, however, relies on one fundamental assumption which, in some serious scenarios of sea-level rise, may itself be called into question: the very statehood of the parties to the agreement. In a scenario where sea level rise causes the entire region of a state to be swallowed or become uninhabitable, statehood itself is challenged.

C. The Extinction of a State

The rise in sea level and the physical disappearance of a State is the most dramatic of the possible legal implications and has been a major concern for island-States and archipelagic States such as Kiribati[xvii] and the Maldives[xviii] demonstrating a devastating scale of impact. ILC has recognized that more than 70 States are likely to be directly affected and a large number of States to be indirectly affected, either by displacement of people or a lack of resources.[xix] However, no sooner than later, the entire population may be required to move to other States in which case the threatened State may take over territory from another State by a treaty of cession or immigrate the entire population to one or more other States.

The current international legal world which is still referred to as 'Westphalian' highly depends on geography,[xx] with a core characteristic of international law being state-based territories. This is readily evident from Article 1 of the Montevideo Convention on the Rights and Duties of

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States of 1933,[xxi] which provides the best-known definition of the parameters for the validity of statehood,[xxii] (a) permanent population; (b) established territory; (c) government; and (d) ability to establish relations with other States. Numerous other principles and rules of international law are also terrestrially based in addition to these basic elements. One can observe that while the principles for the formation of a state has been extensively formulated in international law, the exploration relating to the termination of a state, also referred to as 'state extinction', are typically related to the requirements on which the formation of a state is based.[xxiii] The rationale behind this strategy is that comparison to the same criterion by which the survival of a state can be decided would decide the extinction of those states.[xxiv]

In case the threatened state takes over the territory from another state, the State continues to exist as all conditions set by international law for a 'State' are still met[xxv] and the area generated by the disappeared islands may still belong to the State concerned. But, if the entire population immigrates to one or mother other states, the 'population' requirement for the existence of a State is no longer met. Additionally, if the island territory has also vanished it can be concluded that the State no longer exists leading to the lapse of the boundaries of its former sea areas which will now either belong to the high seas or the maritime zones of neighbouring States. The delimitation agreements will also be terminated as one of the parties has ceased to exist.[xxvi] A safer option, however, will be to build a fusion of the 'disappearing' State and another State by way of the treaty and the remaining uninhabitable islands can still create maritime areas for the new State thus enabling the continuation of delimitation agreement.

However, The Sea Level Rise Committee in its 2018 report failed to come to a consensus or make a decision on this topic citing the 'great sensitivity' and the 'political dimensions' of the problems concerning the loss of statehood.[xxvii]

D. Violation of Human Rights

The UNHRC has resolved that *'the adverse effects of climate change have a range of direct and indirect implications for the effective enjoyment of all human rights'*[xxviii] and in the particular right to life, adequate food, health, housing, cultural identity and self-determination. The ILA in 2018 expressed its concern and adopted The Sydney Declaration of Principles on the Protection of persons displaced in the context of Sea level rise.

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Sea level rise continues to threaten the livelihoods of areas currently resting close to sea level. A significant proportion of the land loses would be those that are major food production regions, such as the Nile delta. The many States including Bangladesh will no longer be safe to live in.[xxix] The World Bank predicts that East Africa will be hard hit by climate change, causing more than 10 million people to leave their homes and bolt to other states by 2050.[xxx] This will lead to an increase in migration and displaced persons which will be an issue of particular concern in the context of human rights. In the sense of human rights, this will lead to a rise in displacement and displaced peoples, which will be a matter of special concern. The land presently populated by a community will become inhabitable and cause inhabitants to migrate.[xxxi] The convention on the status of Refugees doesn't grant refugee status to persons displaced as a result of the effects of climate change.[xxxii] This implies that, due to climate change, civilians are expected to relocate but are not given international refugee status under the law.

The UNHCR recently identified the problem of so-called environmental 'refugees' and issued guidance setting out principles for responding to this humanitarian crisis.[xxxiii] However, a more appropriate international law response would be through tailored bilateral or regional agreements such as the Niue Declaration on Climate Change.[xxxiv] Such agreements would be more achievable and better suited for an effective response.

WAY FORWARD

The author would emphasise that structural legal approach must be taken to cope with the consequences of sea level for stabilization of international legal agreements. Major options of recourse include-

a) More efforts have to be engaged in creating a new international legal obligation to help displaced migrants who would be given a legal right to emigrate as refugees with economic rights such as freedom to work in their new homelands, or citizenship rights.

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b) Revising international humanitarian law to shield climate refugees fleeing from rising waters and focusing on other humanitarian laws namely the Geneva Convention and the Universal Declaration of Human Rights, rather than focusing on reforming laws pertaining to the Law of the Sea or sea-level rise. This will improve the ability of the international community to care for climate refugees and those left behind by changing international law codes and provide for help for those escaping sea level rises.

c) Increasing funding for resilience and adaptation activities, especially with regard to the construction of coastal infrastructures such as dams and the development of wetlands and mangrove forests that have been previously destroyed. The Paris Climate Agreement provides a mechanism for raising the funding of these types of programmes, though the expense can rapidly become an enormous amount for them.

d) Increase Support for a comprehensive study on the impacts of sea-level rise. Instead of intervention, which is often contentious, it might be better for participating States to discuss more the about issue. The Paris Climate Agreement provides an opportunity to organise the signatories' research initiatives, creating an opportunity for a global sea-level rise survey to be undertaken. A detailed analysis of the effects of rising sea levels on regions and globally will allow states to respond better to the evolving adverse situation and to prepare their responses.

CONCLUSION

The global focus has been drawn to the importance of rising sea levels as an effect of climate change and has, luckily, been discussed frequently at numerous forums. Until recently, the Paris Agreement of 2015 enshrined international initiatives towards resilience, adaptation and climate change mitigation. Other UN programmes have also offered assistance, with the requisite financing and assistance, to secure such countries. However, international rules for the safety of states and humanitarian reasons need to undergo a fundamental shift in the near future, with more emphasis being put on its enforcement in the coming days. The impact of sea-level rise on international law is imminent. With this, perhaps, international cooperation will ultimately be universalized.

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This situation also provides yet another chance to discuss the widely disputed hierarchy between a custom and a treaty, as there will be a need for modification of the treaty. Therefore, the growth in sea level is a significant problem not only for environmental law but also for various other fields of study. Additionally, fundamental challenges to international law may also surface as some of its core aspects rely on the stability of geographical conditions. According to international law, a given territory and a permanent population are among the basic requirements of Statehood. Nevertheless, critical concerns regarding the continuity of those aspects of international law may emerge in the immediate future. Therefore, it is important to re-examine certain generally recognized paradigms in international law.

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