

2023

Legal Cooperation Issues on Sea Level Rise

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Recommended Citation

Maria Teresa Infante (2023) "Legal Cooperation Issues on Sea Level Rise," *American University Law Review*. Vol. 38: Iss. 3, Article 10.

Available at: <https://digitalcommons.wcl.american.edu/aulr/vol38/iss3/10>

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Legal Cooperation Issues on Sea Level Rise

Abstract

This is a very timely event. Although there have been several cases in which experts—both academics and governments—discuss the connection between sea-level rise and the legal framework, this event is important because it will bring to the forefront the fact that the practice in the Americas and the Caribbean should be analyzed when discussing this pressing topic. This is a very important initiative; I encourage the Inter-American system and the juridical committee to tackle this issue. I hope it will be in connection with the work that is being conducted by the International Law Commission itself.

Keywords

International Law, International Environmental Law, Foreign and Comparative Law, Law of the Sea, International Law Commission

LEGAL COOPERATION ISSUES ON SEA-LEVEL RISE

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I. INTRODUCTION

My reflections are preliminary ones. I believe we should enhance the capacity of the Law of the Sea to address the diverse issues implicated by this phenomenon. In this presentation, from selective perspectives, I will refer to the notion of legal cooperation as one to construct plausible approaches to this matter.

Legal cooperation, which is a broad concept, should consider aspects such as the legal and technical complementarity of already existing norms, as well as the need to look at multidisciplinary studies

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to assess the impact of agreed principles and frameworks. It also means legal developments stemming from different routes, such as the climate change regime itself—which has already been considered by the International Law Commission¹—and other instruments that have an impact on conducting maritime activities. This includes international economic law, environment law, international law of disasters, and the law of dispute settlement. It is a dimension which seeks to look at instruments from the perspective of sea-level rise and the use of existing cooperative tools to collectively oversee various means to foster further levels of interactions.

This is not a new subject at the international or regional level, where orientations are already based on an enhanced combination of domestic and international measures. As a basis for discussion, this means adding to the knowledge and management of the phenomenon itself, ingredients of common interest from a legal perspective—not only of the self-interest of individual states. In circumstances where the idea of requesting an advisory opinion from the International Court of Justice, or addressing questions to the International Tribunal for the Law of the Sea regarding the obligations of states to protect against climate change consequences, it is timely to review materials of which the regional and subregional tools are dealing with problems emerging from climate change and sea-level rise as a matter of common concern.

This is not to forget other dimensions, such as the ones that Juan José Ruda Santolaria highlighted in his contribution during this event: statehood and the problem of devolution of State capacities and resident populations.² These are areas that call for other means of international legal cooperation, as it is only through the internal course through multidimensional instruments, not necessarily compulsory ones, that we will be able to deal with those problems.

1. See, e.g., Int'l L. Comm., Rep. on the Work of Its Seventy-Second Session, ¶¶ 6–7, 10, U.N. Doc. A/76/10 (2021) (considering various international legal regimes concerning the issue of atmospheric protection).

2. See generally Juan José Ruda Santolaria, *Algunas reflexiones sobre la condición de estado en relación con la elevación del nivel del mar*, 38 AM. U. INT'L L. REV. 701 (2023).

II. THE ISSUES IN EXISTING LEGAL DOCTRINES

Regarding the law of the sea, I would like to recall some of the standing issues coming from Goal 14 of the Sustainable Development Goals: its targets and needs.³ It is apparent here that there is a need to consider, in a coherent way, the network of programs and organizational programs involved in the Law of the Sea and oceanic affairs, including the role of soft law to bring new insights to this matter. In the recent United Nations Ocean Conference, states reaffirmed that climate change is one of the greatest challenges of our time.⁴

I would also like to recall the highlights of the Intergovernmental Panel on Climate Change of the Ocean and Cryosphere, which was adopted in 2019.⁵ First, the current agenda regarding the effects of climate change on the ocean and marine life is one of paramount importance. This includes the Law of the Sea, not only measuring the question of ocean temperature, acidification, the oxygenation, and other issues, but also the question of related impacts on islands, coastal communities, and environmental entitlements. A most urgent situation relates to environmental entitlements that are stressed due to the consequences endured by islands that are still above water, but have become uninhabitable, may become uninhabitable, or are totally

3. See G.A. Res. A/70/1, at 23–24 (Oct. 21, 2015); for more information on targets and progress, see generally U.N. Dept. Econ. & Soc. Affs., *Goal 14: Conserve and Sustainably Use the Oceans, Seas and Marine Resources for Sustainable Development* (2022), <https://sdgs.un.org/goals/goal14> (providing an interactive website with sections to review the measuring indicators for each target, and to monitor progress).

4. See U.N. Conference to Support the Implementation of Sustainable Development Goal 14: Conserve and Sustainably Use the Oceans, Seas and Marine Resources for Sustainable Development, *Our Ocean, Our Future, Our Responsibility: Draft Declaration—Note by the Secretariat*, ¶ 5, U.N. Doc. A/CONF.230/2022/12 (June 17, 2022) (reaffirming the concern and pointing to specific issues including sea-level rise).

5. See INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE [IPCC], IPCC SPECIAL REPORT ON THE OCEAN AND CRYOSPHERE IN A CHANGING CLIMATE (2019), <https://www.ipcc.ch/srccl>; see also IPCC, *Summary for Policymakers, in IPCC SPECIAL REPORT ON THE OCEAN AND CRYOSPHERE IN A CHANGING CLIMATE* (Hans-Otto Pörtner et al., eds., 2019), https://www.ipcc.ch/site/assets/uploads/sites/3/2022/03/01_SROCC_SPM_FINAL.pdf (summarizing major trends and concerns, with Section 3.A considering sea-level rise specifically).

inundated. Thus, we have one urgent matter to address, legally and politically, which is not only limited to the case of islands: the issues that arise when habitability and economic life is in jeopardy. Among issues arising from this situation, there is the right to a territorial sea.

Not so long ago, the International Law Association Committee on the Sea-Level Rise issued a report that added another subject — the archipelagic state's practice in connection with climate change, another situation connected with the survival of maritime zones of submerged features.⁶ This issue reminds us of the applicability of the assumption that full maritime entitlements could be lost once a state ceases to have any form of relevant coastal frontages, even if the state itself persisted elsewhere, or has become transformed into some other form of international legal person. I thank Juan José for his very imaginative presentation regarding alternatives for international legal persons.⁷

But is it a correct assumption? That is the question I would like to raise. I believe that it is highly interesting, although it remains highly debatable. These are issues of utmost interest in the Caribbean region. The durability of the existing archipelagic baselines and the consequences for the statehood integrity seems one cause for particular concern in our region. For these reasons, I would like to praise this program for setting up an agenda for Latin America and the Caribbean.

Then, to analyze the Law of the Sea dimensions that may help us delve into the following subjects to dissipate doubts: baselines. We have seen some connotations of this subject, the question of fixed or movable lines,⁸ maritime delimitation, and the need to consider it essential to look at state practice and its influence in the emergence of

6. See INT'L LAW ASS'N, SYDNEY CONFERENCE: INTERNATIONAL LAW AND SEA LEVEL RISE 6–8 (2018) [hereinafter ILA CONFERENCE ON SEA LEVEL RISE] (pointing out the potentially existential threat posed by sea-level rise to archipelagic states specifically).

7. See generally Ruda Santolaria, *supra* note 2.

8. See generally Sean D. Murphy, Address at the American University Washington College of Law Conference: Ambulatory Versus Fixed Baselines Under The Law Of The Sea (July 26, 2022) (considers the conventional understanding that maritime zones are ambulatory and shifts when sea levels rise, and what other solutions may be available to ensure stability in this area).

a set of customary legal principles. Considering baselines, and the consequences on the outer limits of maritime zones, it is extensively predicated that it should not have an ambulatory character. Thus, the concerns of coastal states should prompt a response based on preservation of legal stability and predictability. It should not only be a legal construction, but also a practical one. It does not mean this concept is exempt from being tested. This can be compared to the state practice, where there are cases in which states do agree on the ambulatory nature of the baseline. In fact, as a debate within the International Law Commission indicates, a limited number of states have drawn attention to their acceptance of some degree of ambulatory displacement of the baselines.⁹

The debate between fixed and ambulatory baselines leads to the definition of Article 4 of the United Nations Convention on the Law of the Sea regarding the outer limit of the territorial sea.¹⁰ Article 5 of the same convention deals with normal baselines, except or otherwise provided within the Convention.¹¹ Article 5 says that the normal baseline for measuring the breadth of the territorial sea is the low water line along the coast as marked or indicated on charts officially recognized by the coastal state.¹² In the discussion in the committee of the International Law Association, when this provision was examined and interpreted, there were different views about the final validity of a large-scale chart that officially marked the baselines of the state.¹³

III. PRACTICE OF STATES

Next, we must address the practice of some developed states, maybe even the practice of some developing states as well, that support the ambulatory approach. One question is, looking at the broader

9. See, e.g., Int'l L. Comm., Rep. on the Work of Its Seventy-Third Session, ¶ 26, U.N. Doc. A/77/10 (2022) (requesting information about state practice on the issue of baselines and sea-level rise).

10. United Nations Convention on the Law of the Sea art. 4, *opened for signature* Dec. 10, 1982, 1833 U.N.T.S. 397 (entered into force Nov. 16, 1994).

11. *Id.* art. 5.

12. *Id.*

13. See generally ILC CONFERENCE ON SEA LEVEL RISE, *supra* note 6, at 11–16 (examining problems associated with article 5 of the Convention on the Law of the Sea due to sea-level rise, considering different options to deal with changing baselines, and evaluating benefits and drawbacks to various solutions).

geographical context, does a decision to use this methodology have an impact in the global geographical setting? It is important to address ambulatory lines in a limited context and in a broader geographical context. In this respect, the practice announced and supported by small islands developing states that are in favor of the fixed approach is important.¹⁴ We must look at the development of this political and diplomatic movement, and the way the national law can analyze and respond to it.

In a report given to the International Law Commission regarding the Asian Pacific regional practice, we have read comments cautioning against drawing a definitive conclusion on the emergence of a particular or regional customary rule. But this is something that, even with a lot of caution, we will not avoid in the future because the practice will need clear responses. International law will need to accommodate a position of preservation and a movement of lines in a limited manner when states are subject to those geographical and meteorological constraints. The question arises as to what extent is it plausible to draw conclusions mainly based on the *opinio juris* of states, like statements made by those associations, without distinguishing the clear technical aspects of an approach from the substantive issue of the maritime entitlement itself.

It is important to look at the dimension of setting out new legal and technical rules to address selected aspects that have been pointed out in that respect. Included among these are the legal implications of sea-level rise on matters of delimitation, and the consequences of postulating boundaries as a viable alternative formula to the endurance of them in case of changes in the baselines. This is in addition to the determination of external limits of the maritime spaces of coastal states. These are matters that deserve legal cooperation, either under

14. See, e.g., Ass'n of Small Island States, Statement on Behalf of the Alliance of Small Island States (AOSIS) at the Commemorative Meeting to Mark the 40th Anniversary of Adoption of the Convention on the Law of the Sea (UNCLOS), at 2 (Apr. 29, 2022), https://aosischair.sharepoint.com/sites/aosiscontentpublishing/Published%20Documents/AOSIS%20Statement%20for%20UNSG%20briefing_Website%20User.pdf [hereinafter AOSIS Statement] (“SIDS require their notified baselines and outer limits of maritime zones, and the rights and entitlements that flow from them under UNCLOS, to remain unaffected by rising sea levels due to climate change.”).

bilateral or plurilateral basis—without ignoring the possibility to achieve consensus over a general formula. This is not forgetting the main phenomenon of continuation of a state, which is a separate issue as compared to the question of the law of the sea itself.

I join those views that look at the International Law Commission work as central, not only to clarify what the law is, but to support efforts that are already present at the regional level to foster solutions for states facing geographical constraints. The Inter-American juridical committee would be a good assistant and collaborator in this respect. For the Law of the Sea, it is also relevant to raise questions about the legal means to contribute to enhancing the resilience of coastal erosion and to prevent the consequences of sea-level rise.

I have found the key contributions for the Pacific Islands Forum and the Alliance of the Small Island States very enlightening, and the recently established Commission for Island Developing States on Climate Change and International Law.¹⁵ The agreement set out by the last Commission states that each entity aims to promote and contribute to the definition, implementation, and progressive development of rules and principles of international law concerning climate change, including, but not limited to, the obligation of states relating to the protection and preservation of the marine environment, and the responsibility for injuries arising from international wrongful acts irrespective of a breach of such obligation.¹⁶ A reference to possible access of an advisory procedure for the International Tribunal for the Law of the Sea, regarding the responsibilities of states for emissions, pollution, and other phenomena, was also intended in this agreement.¹⁷

IV. QUESTIONS GOING FORWARD

From these initiatives, a series of key questions arise. Can we

15. See Agreement for the Establishment of the Commission of Small Island States on Climate Change and International Law art. 1, Oct. 31, 2021, Registration No. 56940 (agreement establishing the Commission and establishing its mandate and activities).

16. *Id.*

17. See *id.* art. 2 (“[T]he Commission shall be authorized to request advisory opinions from the International Tribunal for the Law of the Sea (‘ITLOS’) on any legal questions within the scope of the 1982 United Nations Convention on the Law of the Sea.”).

foresee a case for adapting the law on low-lying states and the right to set up baselines under Article 7(2) of the Convention, even if they are not delta states? Do existing provisions of the Convention offer a good short-term response to the threat of sea-level rise? Articles 5, 7(2), and 16 of the United Nations Convention may accommodate interpretations that will allow for the preservation of the baselines and the corresponding right of entitlements, but this must be discussed, and we should be ready to continue developing ideas in this regard.

Which state practice and *opinio juris* provide a sufficient basis from which to reach conclusions regarding the preservation of maritime zones? Are these issues also concerns for other states? Which threats reunite the particularities of this subject with the international community as a whole? We need to further find customary international rules to cope with this phenomenon, which is an essential aspect of our own practice, whatever the uncertainties that may entail and difficulties that may arise.

Finally, what would be the response in the Latin American and Caribbean region? One assumption that seems pertinent at this stage is the following: the existence of the state is a continuous one and its disappearance cannot be inferred. Different questions then arise as to whether baselines can be ambulatory, which will depend on the decision adopted by each individual state. Conversely, if baselines are fixed, what circumstances must be present at the certain moment in which the baselines become fixed? These are questions that should be addressed in the Inter-American juridical context.

V. CONCLUSION

To employ other terms to express a similar idea that was set forth by the alliance of small island state's leaders declaration last year: there is no obligation under the United Nations Convention of the Law of the Sea to keep baselines and outer limits of marine zones under review, nor to update charts or lists of geographical coordinates once deposited with the Secretary General of the U.N.¹⁸ That such maritime zones and rights and entitlements that flow from them shall continue to apply without reduction, notwithstanding any changes connected to

18. See AOSIS Statement, *supra* note 14, at 2.

climate change. Law calls for an attentive look at issues of entitlement and baselines. The Law of the Sea could be of assistance. If we have to develop further rules and principles, we should be open to doing this within the framework of legal cooperation. Thank you very much.

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