***ZOOM OUT***

## *The Question:*

# The implications of sea-level rise for international law

*Introduced by Maura Marchegiani*[*]

The question concerning the effects, implications, and repercussions of the phenomenon of sea level rise, as well as its possible and potential legal consequences, has been at the heart of political, legal, and institutional debates, becoming the subject of several statements by the Secretary-General of the United Nations and of sector studies carried out by specialized organizations. The topicality of the phenomenon was confirmed by the attention paid to the question by the General Assembly, which, in 2018, deliberated the inclusion of the subject of sea level rise on the long-term work program of the International Law Commission (ILC). The latter has decided to set up a working group on this subject to identify the main legal issues raised by the sea-level rise and related issues.[1]

The interconnections between sea-level rise and different areas of international law are therefore rich in suggestions, while presenting some very complex aspects. The present Zoom Out intends to discuss some of the most important contentious issues in this field in order to determine to what extent and in which way international law is able to respond to the problems raised by sea level rise, as well as the possible strategies and solutions that the international legal order could develop in this regard.

A preliminary consideration is in order: while recognizing that sea-level rise may also have an origin other than purely anthropogenic and thus be due to natural causes, such as earthquakes, tsunamis or other

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[1] See ILC, 'Report of the International Law Commission on the work of its seventieth session (30 April-1 June and 2 July-10 August 2018) UN Doc A/73/10, 136. For the most recent report, see ILC, 'Report of the International Law Commission on the work of its 72 Session' (26 April-4 June and 5 July-6 August 2021) UN Doc A/76/10, 75 ff.

natural disasters that could cause significant changes to the coasts, during the preliminary discussion before the ILC most States have converged on the fact that this phenomenon is due, at least for a large part, to climate change and this data can be considered as a scientifically proven and established fact. Recognizing therefore the importance of urgently addressing this issue, as well as the legitimacy of the concerns expressed by the States most affected by this phenomenon, the ILC has decided to focus the analysis on the international legal consequences of sea-level rise.

In this light, among the most pressing challenges to current international law concerning the sea-level rise, one of the main questions concerns the sources of international law to be examined in the context of this subject. A fundamental point of reference is obviously the United Nations Convention on the Law of the Sea (UNCLOS), but there are also many other bilateral and multilateral treaties, dealing with a range of aspects of the law of the sea and concerning the different areas affected by sea-level rise, as well as the impact of the phenomenon on the state condition and on the delimitation of maritime and land borders. Indirectly, this problem concerns, on the one hand, the consequences of sea-level rise for the baselines, the outer limits of maritime zones and maritime formations located off the coasts of the States and, on the other, the effects of sea-level rise on existing maritime boundary delimitation agreements.[2] This question requires the analysis of the possible legal consequences on the rights and jurisdiction of the coastal State and third States in the concerned maritime spaces, as well as the consequences of the sea level rise on the baselines and the outer limits of the maritime spaces and maritime delimitations, whether these have been established by agreement, by judicial decisions or by other legal instruments. While considering the relevance of the principle *pacta sunt servanda*, which would lead to designing maritime treaties and borders that have been the subject of judicial determination as being definitive, it is important to ask whether the rise in sea-level would constitute an unforeseen fundamental change of circumstances within the meaning of Article 62(2) of the 1969 Vienna Convention on the Law of Treaties, namely, for example, a displacement of areas, when a part of the internal waters passes into territorial waters,

[2] See the already available International Law Association (ILA) study on these issues: ILA Resolution 5/2018 (24 August 2018); Final Report of the SLR Committee, International Law Association Report of the Seventy-eight Conference (Sidney 2018) 29.

or part of the territorial waters moves to the contiguous zone or the exclusive economic zone and part of the exclusive economic zone becomes included in the high seas or, also, the case of archipelagic States in which the flooding of small islands could modify archipelagic baselines and potentially cause them to lose their status.

The interpretation of these rules raises questions concerning the meaning to be given to various treaties, which should be interpreted, in particular, in the light of subsequent practice. This practice is still rather heterogeneous and the interpretation needs to be integrated with other rules of international law, which can be relevant in the context of the phenomenon of sea-level rise, such as the principle of stability and intangibility of borders, the principle of *uti possidetis juris*, the obligation to peaceful settlement of disputes, the maintenance of international peace and security, the protection of the rights of coastal and non-coastal States, as well as the principle of permanent sovereignty of peoples over natural resources. Moving baselines inland could result in significant losses for coastal States in terms of sovereign rights and jurisdiction. It could also lead to significant loss of resources and the loss of marine protected areas, which would jeopardize the conservation of biodiversity in areas no longer under the jurisdiction of any State. The resulting legal uncertainty over the delimitation of maritime boundaries would likely be a source of conflict and instability for neighbouring coastal States.

Another problematic aspect is the question of the continuity of statehood of the Small Island States which risk the extinction in the light of the complete disappearance of their land territory as effect of sea-level rise. Many of these States support the idea to freeze baselines and outer limits of maritime zones, as a means of reaffirming their international subjectivity at least through the control of extensive maritime areas and their natural resources, whose entitlement would vanish in the event of complete submergence of the land territory.

The phenomenon of rising sea levels also has enormous effects on the populations living in the affected territories. The mobility of people out of the areas where they live has led to the emergence of new concepts such as ‘climate displacement’, ‘climate refugees’ or ‘climate statelessness’ who have no legal framework in international law. Despite this, there are encouraging indications, particularly at the level of international and state jurisprudence, to identify forms of special protection for these new vulnerable individuals. This practice seems to be a prelude to a

progressive development of international law on the protection of the rights of the individual.

In light of this, the role and contribution of the Security Council to enhance understanding of the phenomenon of sea-level rise is destined to take on increasing importance for its nexus with the preservation of international and regional peace, security and stability. More specifically, the question arises of the appropriateness of initiatives it has taken or will take to address and manage issues related to climate change, as well as, more specifically, to sea-level rise, insofar as this phenomenon can be qualified as a threat to international peace and security. The relationship between climate change and peace and security is complex, so complex as may be to reach a consensus within the Council to enable it to act in particular situations, such as those caused by the rising of sea levels.

Finally, it is impossible not to refer to a certain lack of awareness of the impacts of climate change and the phenomenon of sea-level rise on different types of World Heritage sites. This may derive from the fact that the International Law Commission has not taken this aspect into consideration in its working draft. Developments regarding the vulnerability of different types of World Heritage properties could provide States with references on resilience management and adaptation to climate change. Action plans for the assessment of risks and vulnerability to climate change should aim to improve the resilience of sites, share best practices in their management and ultimately contribute to the global dissemination of knowledge and information.

In conclusion, the sea-level rise represents a theme that raises several interesting questions and which deserve to be addressed urgently and in depth, to contribute to enriching the reflection on certain aspects of the question, with the purpose to determine whether and to what extent international law can respond to the questions raised by the sea-level rise and develop practical solutions in this respect, from several points of view, using the creativity which international law has, on several occasions, demonstrated in order to meet the ever new challenges it faces. As proposed by Alain Jaubert's short film *Palettes: Hokusai – La menace suspendue* (2000), whose vision could provide some suggestions to legal reflection, the perspective from which a certain situation is observed can make the difference.