



The International Law Commission's Study Group on Sea Level Rise in Relation to International Law and Its Impact on International Law

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1 INTRODUCTION

In recent years, sea levels have risen rapidly, accentuating already existing phenomena of international significance (such as human migration), posing new problems (such as the progressive submergence of the territories of States with low-lying coastlines), and creating conditions for future problems (such as the ultimate complete loss of territory of some particularly vulnerable States, in particular, some Pacific Island States).

Faced with such challenges, the international law of the sea has not changed with the same speed. The International Law Commission (ILC) has taken on the need to promote an acceleration of this change. In the following pages, the working method followed so far by the ILC and, more specifically, by its Study Group on Sea level Rise in Relation to

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International Law will be critically analysed. More precisely, the chapter will identify and discuss two questions: (1) whether suggesting ‘practical solutions’ to States for dealing with the impacts of sea level rise (SLR) on maritime zones (i.e. one of the two main tasks of the Study Group) falls within the ILC’s mandate, and (2) whether the practical solutions suggested by the Study Group have already had an impact on State practice and *opinio juris*.

In analysing these two questions, the chapter will focus on the only sub-topic among those considered by the Study Group which has reached a sufficient level of maturity to make considerations that have at least a minimum level of reliability about it. This topic concerns the extension of maritime zones and boundaries and the impact of SLR on them. Both the Study Group and the United Nations General Assembly (UNGA) Sixth Committee held an intense debate on this subject, in particular, on the Pacific Island States’ claim to retain their rights to maritime areas as they now stand despite SLR.

This chapter is structured as follows. After Sects. 2, 3, and 4 briefly outline the general context of the Study Group’s work, that is, the changing role of the ILC, and describe the relationship between the Study Group’s work and this evolutionary framework, Sect. 5 deals with the question of whether the ILC is competent, under the UN Charter (United Nations, 1945) and the ILC Statute (UNGA, 1947), to fulfil the role it has assigned itself, a question that will be answered positively. Sections 6 and 7 then explore the impact that the work of the Study Group has had. In this respect, the chapter’s main argument is that the impact of the work of the Study Group cannot be attributed to the main ‘practical solution’ indicated by the Study Group, which consists in the idea that the Pacific Island States’ interest in maintaining their sovereignty and jurisdiction over maritime zones could be assured by adopting a teleological interpretation of the articles of the 1982 UN Convention on the Law of the Sea (UNCLOS) (United Nations, 1982)¹ relating to a technical issue, i.e. how to draw the baselines of maritime zones. The Study Group’s main contribution lies, instead, in promoting a process of creating a general rule, though this process has not yet been consolidated. Finally, the chapter ends with some concluding remarks (Sect. 8).

¹ United Nations Convention on the Law of the Sea (UNCLOS), 10 December, 1982, https://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf.

2 THE CHANGING ROLE OF THE INTERNATIONAL LAW COMMISSION

The role of the ILC has changed in recent years. This evolution has been pushed by several factors. Among them, two key elements deserve to be mentioned here. On the one hand, the task of codifying customary law, i.e. its main statutory task,² has largely been fulfilled (Galvao Teles, 2016, p. 215; Murase, 2021, p. 217). From this point of view, it would be hard not to share the view that ‘the Commission has done an excellent job in many respects’ and that ‘much of its output is considered to be the cornerstone of the contemporary international legal order’ (Boisson de Chazournes, 2021, p. 135). On the other hand, the prominence of customary law has diminished due to the consolidation in the international legal order of areas essentially regulated by universal and/or regional treaties. In other words, it would be difficult to present contemporary international law as still characterized by an essentially customary matrix (De Sena & Starita, 2023).

In this new situation, the ILC has been reorganizing its objectives, its tasks, and its methods of work, even in the absence of any formal changes to its mandate. This was achieved through strategic choices concerning the subjects of the Commission’s work. *Firstly*, the Commission has taken on topics with an overt character of progressive development. The examples are many. The work on the Statute of an International Criminal Court, finalized in 1994, with its impact on the Rome Statute concluded four years later, has recently been considered ‘a seminal moment that turned the ILC in this direction’ (Voulgaris, 2022, p. 771). *Secondly*, for some time now the ILC has been working not only on the ‘codification and progressive development of customary international law’, but also on the elaboration of texts intended to function as guidelines addressed to all those called upon to apply international law and, in particular, domestic judges.³ Think, for example, of the *Draft Conclusions on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of*

² Under Article 1 of the Statute, reflecting Article 13 of the UN Charter, ‘the International Law Commission shall have for its object the promotion of the progressive development of international law and its codification’ (UNGA, 1947, ILC Statute).

³ It must be underscored the diversity of the final outputs of the works of the Commission: guidelines, guides to practice, draft declarations, draft principles, draft articles, draft conclusions, resolutions, model rules, and so on.

Treaties and the *Draft Conclusions on Identification of Customary International Law*, both adopted in 2018 (ILC, 2018b, Chapters IV and V; ILC, 2018c). Both of those draft conclusions concern methodological issues and recommend methodological approaches to judges. However, the practice of issuing guidelines started before, as shown by the Guide to Practice on Reservations to Treaties adopted in 2011.⁴ *Thirdly*, in still other cases, the ILC limited itself to research studies, such as in the case of the issue of fragmentation of international law, which it entrusted to a Study Group, and the output of its work was the adoption of the ‘Conclusions of the Study-Group’ on this issue (ILC, 2011, pp. 22–38). This attitude of the ILC has aroused considerable interest among scholars. On the one hand, the Commission’s tendency to finalize new forms of texts, such as guidelines and studies, has been criticized as pushing beyond the original mandate of the Commission. In this perspective, it has been noted that ‘simply clarifying the contents of international law rules is not what is expected of the Commission’ (Murase, 2021, p. 221). In a similar vein, it has been observed that ‘there is a danger that conclusions, including the reports of study groups, or even guidelines and principles, could lead to the classification of the products of the Commission’s work as doctrine of the most qualified publicists of different nations, within the meaning of Paragraph 1(d) of Article 38 of the Statute of the International Court of Justice’ (Kamto, 2021, p. 205).

On the other hand, in the last few years, other scholars have welcomed this attitude of the Commission. As for the guidelines, it has been observed that there is a need today for a ‘restatement’ of international law, stemming also from the increased role of judges in the interpretation and assessment of international law. As in the practice in some common law States (in particular the United States of America), in the international realm as well, restating the law seeks to respond to needs of legal certainty. Both inside and outside the Commission, restating international law has been seen as a useful task for the latter (ILC, 2006, Add.1, para. 504; Peters, 2021, pp. 1391–1392).⁵

⁴ For the guidelines and commentaries constituting the Guide to Practice on Reservations to Treaties, see ILC (2011), Part three.

⁵ Under this approach, the restatement function of the ILC is considered as a strategy to contain the dangers of foreign relations law gaining the upper hand over international law. Furthermore, the feasibility of this strategy would stem from similarities between

According to another, more openly ‘progressive’ approach, the ILC today could not fail to take on the need to identify the new ‘challenges’ of the international community and assist States in responding adequately to the new complexities of the world situation, including by means of new working methods. In this perspective, the ILC ‘should be as inclusive and plural as possible... also because not all States are as vocal as others in commenting [on] the ILC work’ (Galvão Teles, 2016, p. 216). According to yet another view, a considerable part of the work of the ILC is an exercise of ‘legislation’ that is based more on policy considerations than on pre-existing practice and *opinio juris*. Nonetheless, even these final products would fall within the mandate of the ILC, ‘when the ILC is conscious of the question it sets out to answer and the requisite methodology that it employs to do so’ (Voulgaris, 2022, pp. 780–788).

Important though this issue may be, engaging in a deep discussion of these different positions is beyond the scope of this short chapter. Just one quick observation will help the following discussion of the work of the Study Group on ‘Sea level Rise in Relation to International Law’. To put it simply, we argue that the whole issue should be assessed not so much in terms of the Commission’s competence, but in terms of the impact of its action. There are two considerations to be made in this regard.

On the one hand, the position that challenges the competence of the Commission to work on texts other than draft codification articles or draft conventions is difficult to hold from a strictly legal point of view. Indeed, not only is the term ‘progressive development’ characterized by a considerable breadth, with the consequence that the Commission’s new orientation can be brought back to the concept of ‘evolutionary interpretation’ of treaties. Furthermore, there is also a substantial support by States for the Commission’s new trend. Beyond some criticism from individual States, the UN General Assembly has generally endorsed the Commission’s tendency to reshape its role through the constant endorsement—in resolutions that have often been adopted without a vote—of the ILC’s work program.

international law and common law, as both are ‘constituted by case law and thinly codified’. However, in common law systems, in particular in the United States, the practice of restatements of the law is closely connected with the rule of precedent and it could be asked whether international law is really akin to common law *in its entirety or only in certain areas* (De Sena & Starita, 2023, pp. 121–174).

On the other hand, the fact that this new orientation of the ILC represents an evolutionary interpretation of the original mandate without going beyond it, should not distract attention from the necessity of an impact assessment of the ILC's work. In other words, it becomes important to understand whether the array of new products of the ILC, such as guidelines, restatements, really guides the interpretation and application of international law and what authority is granted to them by national judges, international courts, treaty expert bodies, and governments. This is the angle from which the work of the ILC on 'Sea Level Rise in Relation to International Law' will be approached here. Before explaining our position, it seems useful to explain why the work of the Study Group can be placed in this overall context and what nuances it presents in this context.

3 THE STUDY GROUP ON 'SEA LEVEL RISE IN RELATION TO INTERNATIONAL LAW' AS A FURTHER DEVELOPMENT OF THE NEW TRENDS IN THE ILC'S PRACTICE

The work of the ILC on the topic of 'Sea Level Rise in Relation to International Law' fits into the overarching evolutionary context described in the previous Section and is, at the same time, a further development of this evolutionary process.

Firstly, the inclusion of this topic in the long-term program of work was much more based on progressive development than on codification objectives and represents a perfect example of the new policy of the ILC, namely that of addressing some current challenges in the contemporary world somewhat in advance of State practice and *opinio juris*. Not only did the ILC expressly consider State practice as merely 'emerging' and not established, but it also considered it with reference to only some of the many issues raised by sea level rise. Consequently, the ILC let a Study Group, set up internally, ascertain *whether* and in which areas (of the three selected: law of the sea, migration, statehood) the topic may be ripe for codification or progressive development.⁶

⁶ According to the 2018 recommendation of the Working-Group on the long-term program of work (2018 Syllabus), 'there is an emerging State practice with regard to issues related to the law of the sea (such as maintaining baselines, construction of artificial islands, and coastal fortifications) and the protection of persons affected by sea-level rise (such as the relocation of local communities within the country or to other countries, and

Second, the concept of progressive development is used in a sense that does not correspond to what is textually stated in Article 15 of the Statute of the International Law Commission, under which 'the expression 'progressive development of international law' is used for convenience as meaning the preparation of draft conventions on subjects which have not yet been regulated by international law or in regard to which the law has not yet been sufficiently developed in the practice of States' (UNGA, 1947, ILC Statute; UNGA, 1950; UNGA, 1955; UNGA, 1981). While sea level rise is clearly a subject in regard to which the law has not yet been sufficiently developed in the practice of States, the perspective of the preparation of a draft convention has been poorly developed from the outset. The main objectives of the Study Group, instead, are defined as twofold: studying possible legal effects of sea level rise and proposing 'practical solutions' to States.

As for the first aim, according to the 2018 Syllabus, identifying possible legal effects or implications of the phenomenon of sea level rise means performing 'a mapping exercise of the legal questions raised by sea level rise and its interrelated issues' in three areas referred to as key issues (i.e. law of the sea; statehood; and protection of persons affected) (ILC, 2018a, para. 18; ILC, 2020, para. 45). While this first objective would make the work of the Study Group akin to a doctrinal study, the second aim stated in the 2018 Syllabus has a concreteness-oriented nature, since it consists of promoting 'practical solutions in order to respond effectively to the issues prompted by sea level rise'. This second objective should be developed in relation to the above-mentioned three key issues (law of the sea, migration, statehood).⁷

the creation of humanitarian visa categories)...The topic is feasible because the work of the study group will be able to identify areas ripe for possible codification and progressive development of international law and where there are gaps' (ILC, 2018a). In 2019, the Commission recommended the inclusion of the topic in the long-term program of work of the Commission (ILC, 2018c, para. 369). The General Assembly took note of this recommendation in Para. 9 of Resolution 73/265 (UNGA, 2018).

⁷ 'These questions should be examined through an indepth analysis of existing international law, including treaty and customary international law, in accordance with the mandate of the Commission, which is the progressive development of international law and its codification. This effort could contribute to the endeavours of the international community to ascertain the degree to which current international law is able to respond to these issues and where there is a need for States to develop practicable solutions in order to respond effectively to the issues prompted by sea level rise' (ILC, 2018a, para. 5).

It is this idea of pointing out ‘practical solutions’ to States that represents a further development in the broader process of rethinking the tasks of the ILC, with its recent practice being essentially characterized, as noted above, by the drafting of guidelines or restatements whose recipients are mainly judges or quasi-judicial bodies. Although the meaning of the term ‘practical solutions’ is not specified in the Syllabus, it seems difficult to consider them equivalent to restatements or guidelines, i.e. to texts mainly addressed to judges. Developing practicable answers in order to respond effectively to a certain issue (such as sea level rise) seems to be a job for governments and diplomats. Furthermore, it could be reasonably argued that a practical solution does not necessarily correspond to existing legal rules. Such a perspective could assume either the existence of a gap in the legal system (a position that will be developed later in this chapter) or the existence of a rule that no longer corresponds to the needs of international society and should therefore be changed. In both cases, the weight of ethical and political assessments is considerable. In the first scenario, a gap could be filled through agreements between States in a spirit of mutual concession taking into account one or more general principles, as well as on the basis of considerations of equity. But the evolution of existing law also starts from considerations of the same nature before being channelled into the procedures for legal change recognized by the legal system.

It is not surprising, therefore, that in the subsequent work of the Study Group, the practical solutions evocated in the 2018 Syllabus have been interpreted as a tool for social progress and as a policy-oriented exercise. Since the first report of the Co-Chairs, it has been clear that the Study Group attributed much weight to the policy consideration of responding to the needs of local populations particularly affected by (or particularly vulnerable to) the SLR and the inundation of territories. However, it is also interesting to highlight that this political stance of the Study Group has been justified by legal principles.

4 BLENDING POLICY CONSIDERATIONS AND LEGAL PRINCIPLES

In the area of the international law of the sea, the papers delivered by the Study Group mix overt political preferences for the concerns of Member States particularly affected by SLR with legal principles—in particular those protecting legal certainty and stability—and interpretative choices of

UNCLOS based on the said legal principles (Anggadi, 2022). According to the First Issues Paper prepared by the Co-Chairs of the Study Group in 2020, the position that a normal baseline is ambulatory⁸ ‘does not respond to the concerns of the Member States impacted by sea level rise or the need to preserve the legal stability, security, certainty and predictability’ (ILC, 2020, para. 82).

On the contrary, the First Issues Paper maintains that ‘an approach responding adequately to these concerns is one based on the preservation of baselines and outer limits of the maritime zones measured therefrom, as well as of the entitlements of the coastal State’ (ILC, 2020, para. 104, sub. (e)). This consideration, along with the observation that UNCLOS does not prohibit *expressis verbis* such preservation, leads the Co-Chairs to state that ‘nothing prevents Member States from depositing notifications, in accordance with the Convention, regarding the baselines and outer limits of maritime zones measured from the baselines and, after the negative effects of sea level rise occur, [from] stop[ping] updating these notifications in order to preserve their entitlements’ (ILC, 2020, para. 104, sub. (f)). Such a statement, in the Study Group’s perspective, is even more important when one takes into account that the First Issues Paper maintains that no customary norm, either regional or general, has yet been formed (ILC, 2020, para. 104, sub. (i)). In other words, the basic idea of the Study Group is shifting from codification and progressive development of customary international law to interpretation of UNCLOS.

This approach had already been chosen by the International Law Association (ILA). Based on the suggestions of its Committee on ‘International Law and Sea Level Rise’, the ILA Conference stated in Resolution 5/2018 of 24 August 2018 that: ‘on the grounds of legal certainty and stability, provided that the baselines and the outer limits of maritime zones of a coastal or an archipelagic State have been properly determined

⁸ The position that normal baseline is ambulatory was defended by the ILA Committee on ‘baselines under the international law of the sea’, in its final report adopted at the Sofia Conference in 2012. In this report, the ILA Committee concluded that ‘the existing law of the normal baselines applies in situations of significant coastal changes caused by both territorial gain and territorial loss. Coastal States may protect and preserve territory through physical reinforcement, but not through the legal fiction of a charted line that is unrepresentative of the actual low-water line’ (ILA, 2012). As we will see in a moment, this proposition was substantially contradicted a few years later by a subsequent ILA Committee.

in accordance with the 1982 Law of the Sea Convention, these baselines and limits should not be recalculated should sea level change affect the geographical reality of the coastline' (ILA, 2018, p. 29). The underlying idea is that Articles 5 (concerning the 'normal baselines', i.e. the low-water line) and 7 (on the 'straight baselines') of UNCLOS, being silent on the specific problem of the ambulatory or fixed nature of baselines, in principle, accept both interpretations. That being said, the ILA Committee recommended an understanding of the Convention aimed at favouring the preservation of baselines and entitlements to maritime zones. Such an evolutionary interpretation would reduce 'legal uncertainties regarding maritime boundaries and the limits of maritime zones at a time when many coastal States are facing the challenges of SLR impacts' (ILA, 2018, pp. 13/21). The ILA work had a significant impact on State practice. On 6 August 2021, the eighteen States members of the Pacific Islands Forum adopted a declaration on preserving maritime zones in the face of climate change-related sea level rise where they proclaimed 'that our maritime zones, as established and notified to the Secretary-General of the United Nations in accordance with the Convention, and the rights and entitlements that flow from them, shall continue to apply, without reduction, notwithstanding any physical changes connected to climate change-related sea level rise' (Pacific Islands Forum, 2021).

In an Additional Paper adopted in 2023, the Co-Chairs of the ILC Study Group confirmed this approach in the light of a number of submissions and statements presented by Member States to the ILC and/or in the Sixth Committee of the General Assembly. The 2023 Additional Paper underlines three main points: (1) many States referred to the issue of legal stability and stated that it is connected with the solution of fixed baselines (or fixed outer limits of maritime zones measured from them) (ILC, 2023, paras. 83 ff.); (2) a consistent number of States highlighted the need to interpret the United Nations Convention on the Law of the Sea in such a manner as to respond to the effects of sea level rise, mostly in the sense that the Convention does not forbid the freezing of baselines (ILC, 2023, paras. 89 ff.); and (3) only very few States focused on the formation of a new customary rule (ILC, 2023, paras. 95 ff.). In other words, the Co-Chairs find in the debate in the Sixth Committee a clear confirmation of the approach taken three years earlier and restate the 'practical solution' of fixing baselines, a solution driven, as mentioned earlier, both by the need to meet the political and economic interests of

the States most vulnerable to the sea level rise and by legal principles of stability and certainty.

To sum up, the main practical solution proposed by the Co-Chairs is that States should accept the 2021 Pacific Island States' Declaration on maintaining their exclusive rights to their maritime areas despite sea level rise through an evolutionary interpretation of UNCLOS rules on the drawing of baselines (and outer limits), according to which coastal States are left free to 'freeze' baselines (and outer limits).

5 ASSESSING THE ILC'S COMPETENCE TO PROPOSE 'PRACTICAL SOLUTIONS' TO STATES

The Study Group's approach, which marginalizes customary law and emphasizes the interpretation of UNCLOS, raises two questions. The *first* one concerns the Commission's mandate. One could criticize the Study Group's work by arguing that the Commission is a technical body, and not a political one. As we could see, this criticism is not new, since it has already been made—more generally—against the Commission's reorientation of its mandate in its recent work (see Sect. 2). It could be argued, however, that the Study Group wished to play a role that is even more on the borderline with the ILC's mandate. The 'practical solutions' formula employed in the Syllabus, in fact, not only rejects any ambition to codify customary law, but also, one might say, places itself at the very boundaries of the notion of progressive development, as it seems to recall other concepts of reference, from equity to mutual concessions to political expediency.

On closer inspection, this first problem could be solved quite easily. Indeed, at least two considerations clearly point in the direction of the ILC's competence to render practical solutions to States. Firstly, it is backed by States. It is important to remark that in UNGA Resolution 73/265, which was adopted without a vote on 22 December 2018, the UN General Assembly entrusted the topic 'Sea Level Rise in Relation to International Law' to the ILC, taking note of the report of the ILC on the work of its seventieth session, including the approach that the Commission would follow, which was centred on the search for 'practical

solutions’.⁹ It can therefore be said that the Commission is, in a sense, backed by the UN General Assembly as a whole, in this ‘repositioning’ operation within the flexible limits of its mandate. In other words, the overall attitude followed by States in the General Assembly suggests that the Commission is competent both to propose practical solutions, and to decide on the working method best suited to this purpose.

A second element that reasonably leads to tracing the drawing up of practical solutions to States within the ILC’s mandate is derived from the nature of the solutions that were concretely specified by the Study Group in its work. Indeed, it can be argued that the orientation adopted by the Study Group to marginalize customary law and, at the same time, focus on interpretation of UNCLOS, can in some ways be included in the concept of progressive development. The term ‘progressive development’, used in Article 13 of the UN Charter and in the Statute of the ILC, can be considered as sufficiently *generic*¹⁰ to include not only the promotion of a new convention, but also an evolutionary interpretation of conventional law. The evolutionary character of the interpretation proposed by the Study Group stems from an analysis of the general practice of States.¹¹ Neither of the two alternative approaches that would lessen the consequences of sea level rise on the maritime zones of low-lying States—either maintaining baselines, and consequently rendering the internal water landward of baselines larger; or maintaining the outer limits of maritime zones, and consequently rendering the maritime zones

⁹ See UNGA (2018, para. 9), in which the General Assembly ‘takes note of Paragraphs 368 to 370 of the report of the International Law Commission and notes, in particular, the inclusion of the topics ‘Universal criminal jurisdiction’ and ‘Sea level rise in relation to international law’ in the long-term programme of work of the Commission, and in this regard calls upon the Commission to take into consideration the comments, concerns and observations expressed by Governments during the debate in the Sixth Committee’. The syllabus of the topic is annexed to the report of the International Law Commission.

¹⁰ The reasoning of the ICJ in *Navigational and Related Rights* (ICJ, 2009, p. 242) can be used here *mutatis mutandis*: “where the parties have used generic terms in a treaty, the parties necessarily having been aware that the meaning of the terms was likely to evolve overtime, and where the treaty has been entered into for a very long period or is ‘of continuing duration’, the parties must be presumed, as a general rule, to have intended those terms to have an evolving meaning”. For an introduction to the question see Bjorge (2014).

¹¹ The question of the ambulation of baselines in the light of sea level rise caused by climate change has been largely discussed. A selected bibliography can be found in ILC (2023).

measured from the baseline larger—correspond to a well-established practice of the UNCLOS States parties. Consequently, one could agree with the observation that “accepting either of these approaches would require changes in the interpretation of the LOSC rules” (Busch, 2021, p. 318). As emphasized in the ILA 2018 Report, any proposal aimed at maintaining existing entitlements to maritime zones ‘might involve a change in the current interpretation of the rules of UNCLOS as applied to such situations’ (ILA, 2018, p. 13 Starita, 2022). In this perspective, the evolutionary nature of the Study Group’s interpretative proposal can be seen in the circumstance that it would push towards the adoption of a new interpretative practice different from the one prevailing to date. Moreover, even if one were to adopt a different position according to which no clear line of interpretation would emerge from the State practice on the matter, the question of the ILC’s competence would not be affected. Indeed, assuming that this were the case, one could in any case speak of an evolutionary interpretation. The Study Group’s proposal would, in fact, push an ambiguous practice in a specific interpretative direction.

6 ASSESSING THE IMPACT OF THE WORK OF THE STUDY GROUP

The *second* question raised by the ILC Study Group’s approach has to do with the impact of the Study Group’s ‘practical solutions’ on the evolution of international law and the ILC’s ability to effectively play the new role it is carving out for itself. Can it be said that an evolutionary process is underway to reshape the different interests of States in the face of the problems posed by the sea level rise? And if so, how? Through the affirmation of an evolutionary interpretation of existing conventional norms, as suggested by the Study Group, or the emergence of a new customary norm? It seems trivial to note that the more the current developments in the practice of States correspond to the practical solutions suggested by the Study Group, the more the ‘leading’ role of the ILC in proposing a new law to meet the challenges of the contemporary world will be consolidated. Regarding this second question, the following considerations can be made.

It seems important, first of all, to recall that the perspective of favouring fixed baselines through an interpretation of UNCLOS had already been advanced by the ILA in its—undoubtedly pioneering—work on international law and sea level rise (see Sect. 4). It can be said that

there is a sort of continuum between the work of the ILA and that of the Study Group, from a chronological point of view, and a certain overlap between them, from the point of view of content. This should be born in mind in an impact-analysis of this topic. It is hard to deny that the work of ILA had already had an impact on the practice of the States particularly vulnerable to the phenomenon of the sea level rise caused by climate change, in particular by encouraging the adoption of the Pacific Islands Forum ‘proclamation’ of the continued application of maritime zones notwithstanding sea level rise. But it remained to be seen what the attitude of third States was in relation to the Pacific Island States’ claim. It is in this respect that the impact of the Study Group’s work in the development of international State practice and *opinio juris* has been considerable. This impact cannot be seen in a generalized adherence of States to the ‘interpretative’ approach, but rather in promoting the process of the formation of an *ad hoc* customary international norm. Indeed, the debate in the UNGA Sixth Committee proves that the approach of reducing the question of the impact of sea level rise on territories and marine zones to a simple interpretation of a couple of articles of UNCLOS has failed.¹² On the one hand, some States that are not parties to UNCLOS, such as the United States, have explicitly pledged not to challenge the baselines and outer limits as defined by the Pacific Island States under the Declaration, without linking their position to the Study Group’s proposed interpretation of UNCLOS as a legal basis.¹³ On the

¹² Even before the publication of the record of the debate in the Sixth Committee, this author had already criticized the Study Group’s approach. The criticism of such a perspective, which seeks to deny the centrality of customary law in the international law of the sea, is based on three different considerations. Firstly, in the interpretation proposed by the ILA and the Study Group, the conventional rules cannot be imposed on States that are not parties to UNCLOS. Secondly, the game at stake does not consist of small fluctuations (which could be resolved by resorting to the criterion of fixed lines instead of moving lines), but of appreciable expansions of the areas subject to the sovereignty or the jurisdiction of the coastal State. Thirdly, UNCLOS does not establish a ‘closed system’ in which the function of interpreting and applying its rules to disputes between States is exercised by only one court or tribunal. Therefore, an ‘evolutionary understanding of UNCLOS as to the question of the ambulatory/fixed character of baselines (or outer limits of maritime zones), could not happen suddenly, but only by way of a progressive process with the participation of different international tribunals, conciliation commissions, and, above all, States’ (Starita, 2022).

¹³ See in particular the statement made by the representative of the United States which stated that ‘his Government had undertaken not to challenge lawfully established baselines

other hand, not all States parties to UNCLOS have endorsed the interpretative perspective. In a joint statement, for example, the Nordic countries (Denmark, Finland, Iceland, Norway, and Sweden), although favourable towards the basic claim of the atoll States, observed that the concept of legal stability “must be approached with caution, with full respect for the United Nations Convention on the Law of the Sea and taking into consideration all possible implications, including those concerning existing rights and obligations under international law”. Furthermore, the Nordic countries added that “there is no explicit provision in the Convention requiring States parties to update their published baselines and outer limits of maritime zones. However, they had also observed that there was a difference between legally freezing baselines and not updating published baselines”.¹⁴

However, despite the problems posed by the “interpretative approach”, the work of the Study Group did influence the international community by promoting the process of the formation of a new customary rule (though this process has not yet come to an end and will not necessarily come to an end). If there has been an impact of this work, it is, *firstly*, because the ILC’s endorsement of the 2021 Declaration of the Pacific Island States and the Proclamation therein (along with the ILA’s interpretative thesis) has ensured for the 2021 Proclamation an “institutional” space for discussion; *secondly*, because it gave it a greater political-legal weight than it would probably have had ‘by its own force’; *thirdly*, because it has allowed a large number of endorsements of the Pacific Island States’ proclamation to emerge, and has also provided usable arguments at least among the States Parties to UNCLOS; and, *fourthly*, because it has enhanced the probing value of the lack of reaction by some States to the 2021 Proclamation as a form of acquiescence to it.

First, the reports of the Study Group have had an ‘institutionalizing’ effect on the process of acceptance by third States of the legitimacy of the Pacific Island States’ proclamation. In other words, despite their interlocutory nature, the reports of the Study Group on the topic of sea level rise and international law, and the proposals for ‘practical

and maritime zone limits that were not updated despite sea-level rise caused by climate change’ (UNGA, 2023b, p. 12).

¹⁴ See the statement of the representative of Denmark, speaking on behalf of the Nordic countries (UNGA, 2023a, pp. 12–13).

solutions' therein, provided a basis for the discussion of States in the Sixth Committee of the UN General Assembly. As a consequence, the Sixth Committee (as well as the direct dialogue with the ILC through comments on the Study Group's reports) has been the privileged place for States to express public statements as to whether the Pacific Island States' claim is permitted or prohibited by international law. While it is true that the Sixth Committee has always been the main public space where governments comment on the Commission's work, it must be observed that usually these comments concern the correspondence of the ILC's proposals to customary law or progressive lines of development. In this case, however, since the Study Group's proposals are closely related to a specific element of State practice (i.e. the Pacific Island States' proclamation), the debate in the Sixth Committee on the ILC report essentially proved to be the main forum for States to take a position on that specific element of practice (Vidas & Freestone, 2022, pp. 26–28). Consequently, while other forms of evidence may not be of particular assistance in ascertaining the legal convictions of States,¹⁵ the debating in the UNGA¹⁶ has afforded the most valuable and accessible evidence of the legal positions of States.

Second, the impact of the Study Group's work went beyond this institutional aspect. More importantly, the Study Group has worked as an 'accelerator' of *opinio juris*, pushing States to react to the 2021 Proclamation. To understand the importance of the Study Group's endorsement of the low-lying States' claim, one could compare the 2021 Proclamation with an even more famous proclamation for the international law of the sea, i.e. the 1945 Truman Proclamation on the Continental Shelf (Truman, 1945). The latter, which came from a Great Power and intercepted the political and economic interests of a large number of coastal States, had its own intrinsic power to reshape the customary international law of the sea. The 2021 Proclamation presents almost the opposite characteristics: it comes from a group of small States—both in size and in economic/political strength—and it responds to a phenomenon posing

¹⁵ See ILC, Draft Conclusions on Identification of International Customary Law, Conclusion 10 (Forms of evidence of acceptance as law [*opinio juris*]), with related commentary (ILC, 2018b, pp. 140–142).

¹⁶ Dialoguing with the ILC itself by submitting information and comments on the Study Group's papers has been less relevant, given that only a few States have been vocal in that dialogue.

an existential (immediate and serious) threat to only a few States particularly vulnerable to sea level rise. According to the Intergovernmental Panel on Climate Change, 'satellite measurements of the height of the ocean surface relative to the centre of the Earth (known as geocentric sea level) show differing rates of geocentric sea level change around the world. For example, in the western Pacific Ocean, rates were about three times greater than the global mean value of about 3 mm per year from 1993 to 2012' (IPCC, 2013, p. 173).¹⁷

However, the Study Group endorsed the 2021 Proclamation and introduced a number of arguments into the public debate to strengthen its legitimacy, which required States to take a position on them. Thus, the 'institutionalized' discussion in the Sixth Committee (and in the dialogue with the ILC) revolved around the 2021 Proclamation, as well as the Study Group's 'practical solutions' and the apparatus of values and principles that the latter placed at the basis of its proposals (climate justice, certainty of legal relations, certainty of maritime borders, and the vital interests of local populations).

Third, the just cause of the low-lying States ended up benefiting from the position taken by the Study Group. Indeed, the main takeaway from the debate in the Sixth Committee is the emergence of a broad block of States that consider the 2021 Proclamation and the resulting legislation of the atoll States legitimate either under international law or under equity and policy considerations.¹⁸ This block includes both States parties to UNCLOS and States that have not ratified it yet. In particular, the United States not only recognized 'that trends are developing in the practice and views of States, but also noted its own commitment not to challenge established baselines and maritime zone limits that are not subsequently updated despite sea level rise caused by climate change' (UNGA, 2023b, p. 12). Furthermore, this block also includes States with strong economic interests that have fishing fleets operating in the Pacific and therefore need to purchase fishing licences from the claimant States. In addition to

¹⁷ The Co-Chairs' First Issues Paper refers to the non-uniform impact of sea level rise, as scientifically ascertained by the IPCC (2013), p. 16.

¹⁸ Some States referred to equity (see, among the others, the statements of Peru, South Africa, and Cameroon, (UNGA, 2023c, pp. 10/14/17; others to justice (UNGA, 2023b, p. 5, statement of Austria); others to necessity (UNGA, 2023c, p. 16, statement of Cuba); and others to the general principle of stability and certainty (see, among others, UNGA (2023c), pp. 13/15, statements of Thailand and Viet Nam).

the United States, consider Japan, which ‘officially adopted the position that it is permissible to preserve the existing baselines and maritime zones established in accordance with UNCLOS, notwithstanding the regression of coastlines caused by climate change’ (UNGA, 2023c, p. 4, Statement of Japan).

Fourth, the institutionalization of the debate and the acceleration of *opinio juris* among States could play a role also in the way in which the ‘silence’ held by some States (i.e. their failure to publicly react to the 2021 Proclamation) should be assessed. While the lack of objections to the State practice emerging among low-lying, Small Island Developing States is worth noting (Vidas & Freestone, 2022, p. 40), it is well known that the legal significance of silence is very difficult to assess.¹⁹ However, it is also accepted that, depending on the circumstances, silence can take on the value of acquiescence. This can be said particularly when a State, which is the bearer of specific interests, has obtained knowledge of a practice of other States that is likely to affect its interests and has had sufficient time to react. Qualified silence can be relevant in the process of formation of customary international law, as evidence of *opinio juris*,²⁰ in the

¹⁹ On the difficulty of evaluating silence when identifying the constituent elements of custom and on the importance to be given to the specific context, see, in general, ILC (2018b).

²⁰ See Conclusion No. 10, Para. 3: ‘failure to react over time to a practice may serve as evidence of acceptance as law (*opinio juris*), provided that States were in a position to react and the circumstances called for some reaction’. The ILC explains that ‘for such a lack of objection or protest to have this probative value, however, two requirements must be satisfied [...] First, it is essential that a reaction to the practice in question would have been called for. This may be the case, for example, where the practice is one that affects – usually unfavourably – the interests or rights of the State failing or refusing to act. Second [...] the State concerned must have had knowledge of the practice and [...] it must have had sufficient time and ability to act’ (ILC, 2018c).

process of the formation of a non-written bilateral agreement, as evidence of a tacit consent,²¹ or as evidence of acquiescence to historic titles.²²

From this point of view, it seems indisputable that the work of the ILC influenced the issue of awareness with the consequence that, for example, it would not even be conceivable today for a State to claim that it had no knowledge of the national legislation adopted in the execution of the 2021 Proclamation. Similarly, it could be reasonably argued that the work of the ILC is also influencing the 'time element', as it speeds up the time within which a State can assert its dissent. We are not saying that the silence kept by States so far necessarily reflects a particular position on the Pacific Island States' claim. From this point of view, some States, such as China and the United Kingdom, have expressly suggested that the ILC should take a cautious approach to this.²³ However, it is not far-fetched to consider that an element related to time, that is, the conclusion of the work of the Study Group and the elaboration of a position of the ILC

²¹ Under article 3 of the Vienna Convention on the Law of Treaties (United Nations, 1969), 'the fact that the present Convention does not apply to... international agreements not in written form, shall not affect: 3 (a) the legal force of such agreements'. The International Law Commission had already stated in its work on the law of treaties that, despite the exclusion of tacit agreements from the scope of its work, 'an international agreement not in written form or a unilateral declaration or any other form of international act is excluded from the application of the present articles [and] shall not be understood as affecting in any way such legal force as these agreements or acts may possess under general international law' (ILC, 1962, p. 35). The International Court of Justice, for its part, acknowledged the possibility of tacit agreements in a case concerning a maritime dispute between Nicaragua and Honduras, while requiring that the 'evidence of a tacit agreement must be compelling' (ICJ, 2007, p. 80). Moreover, in a subsequent case concerning a maritime dispute between Peru and Chile, the Court considered that the Parties 'acknowledged in a binding international agreement that a maritime boundary already exists' (ICJ, 2014, p. 39). For a discussion of the ICJ's jurisprudence on the topic see D'Aspremont (2015).

²² For a concise and rather recent explanation of the problems posed by acquiescence to historic titles see Gioia (2018). For a discussion of the topic that is still exemplary in terms of clarity and depth, see Verhoeven (1975), pp. 340 ff.

²³ See the following statements: United Kingdom: 'The fact that the Study Group's preliminary observations in the First Issues Paper, or other points it had raised in various strands of its work had not been contested should not be interpreted as agreement with them' (UNGA, 2023a, p. 20). China: 'the silence of affected States on the issue of sea level rise did not necessarily reflect a particular position on the interpretation of the United Nations Convention on the Law of the Sea, or endorsement of or opposition to a particular rule' (UNGA, 2023d, p. 13). See also the summary of the exchange of views among the members of the Study Group reported in Report of ILC (2018a), p. 91.

on the Study Group's final report, can be relevant in assessing the legal meaning of a State's prolonged silence.

One might reasonably assume that once a final text has been submitted, silence, at least on the part of a State with specific counter-interests (such as, as noted earlier, the presence of a fishing fleet in the Pacific), would amount to its acquiescence to the claim of the Pacific Island States. It seems to us that this argument is confirmed by the statements of some States that have not expressed a clear and definitive position. These States asked that no particular legal significance be attached to their silence or imprecise position given the still interlocutory stage of the Study Group's work.²⁴ This kind of reasoning does not rule out that the presumption be rebutted if the State qualifies its silence with an opposite meaning. One might add that the reduction in the time available to react is justified by the urgency of responding to the sea level rise and is compensated for by: (1) the publicity and transparency of the procedure in the Sixth Committee²⁵; (2) the completeness of the information made available to States; and (3) the possibility of discussing the issue simultaneously in other international fora. Suffice it to say that the Security Council has held meetings devoted to the issue of the relationship between rising sea levels and international peace and security.²⁶

Finally, in terms of a more general plan, the Study Group succeeded in ensuring a certain level of institutionalization of the customary law formation process in this specific matter. In other words, the four points above

²⁴ The statements of the United Kingdom and China end with the following words: 'This was particularly the case in the light of the Study Group's mandate and the stage its work had reached' (United Kingdom); 'it might be that the State concerned had not yet developed the relevant *opinio juris*' (China). In the debate held at the Security Council, the Russian Federation emphasized 'that legal experts have not yet reached a consensus, and the results will be presented only after the thorough consideration of each of the three sub-topics, namely, issues pertaining to the law of the sea, statehood and the protection of persons affected by sea level rise. The topic is also being dealt with in the Sixth Committee of the General Assembly. We therefore believe that it is premature to discuss the issue, particularly in the Security Council, which is not a dedicated platform for the topic' (UNSC, 2023, p. 25).

²⁵ 'The more publicity is given to this practice, without causing any protests, the quicker the customary rule can come into being' (Soons, 1990, p. 225).

²⁶ The Security Council held open debates on the implications of sea level rise for international peace and security (See Chapter 3 in this volume). On the role that debating sea level rise in the Security Council can have, see the critical observations of Palchetti (2022).

must be read together *within* the process of the formation of a new norm of general international law. Although this perspective already emerges from what has been said so far, some clarification is still appropriate since a generalized consensus among States is not necessarily reflected in customary law, as the debate in the Sixth Committee shows. In the following section, the reasons for such a position will be explained, albeit briefly.

7 LOOKING FOR 'THE MOST APPROPRIATE FORM': CUSTOMARY LAW?

The question of which outlet this emerging consensus will take was clearly posed by some States during the debate in the Sixth Committee. Hungary, for example, while agreeing with the Study Group that there exists no obligation for regular updating of baselines, added that 'further thought should be given to finding the most appropriate form to reflect this conclusion' (UNGA, 2023b, p. 9). Similarly, India stated that 'all States should commence deliberations on finding the solution to this' (UNGA, 2023c, p. 7).

Four options have been considered in the debate. Firstly, some States advanced the idea of a meeting of the States parties to UNCLOS which would come to a 'shared interpretation' or an interpretative declaration.²⁷ The second possible solution mentioned in the debate in the Sixth Committee is the making of an international treaty establishing the principle of stability of baselines and/or outer limits despite sea level rise. As to its form such a treaty could be conceived as an interpretative agreement of UNCLOS.²⁸ The third possible solution is based on the consideration

²⁷ See, for example, the statements of Italy (UNGA, 2023a, p. 20); Sierra Leone (UNGA, 2023d, p. 6); and Argentina (UNGA, 2023e, p. 3). Other States declared that they favor a declaration on the LOSC, but it is not clear whether the author of such a declaration should be the States Parties or the ILC. See, among others, Romania (UNGA, 2023c, p. 3). Other States do not rule out unilateral declarations of States or small groups of States (see, in particular, Denmark speaking on behalf of the Nordic countries (UNGA, 2023a)).

²⁸ See, for example, the statement of Ireland calling for a 'decision' of States parties to UNCLOS that 'would constitute a subsequent agreement between the States parties regarding the interpretation of the Convention or the application of its provisions, as contemplated by article 31, Paragraph 3 (a), of the Vienna Convention on the Law of

that the growing consensus among States would produce an interpretative agreement by itself without the need for a written text reflecting its content. In this perspective, the emerging consensus would be relevant as a ‘subsequent practice in the application of the treaty’.²⁹ However, States adopting this position generally do not clarify whether this practice should be conceived as establishing an ‘authentic means of interpretation’ under Article 31, Para. 3 (b) or as establishing a ‘supplementary means of interpretation’ under Article 32 of the 1969 Vienna Convention (United Nations 1969).³⁰ While the realization of the first sub-option would need a convergent practice of all States parties to UNCLOS, a practice of a significant group of States parties could be considered under Article 32.³¹

Treaties’ (UNGA, 2023c, pp. 8–9). See also the statement of Jordan (UNSC, 2023, p. 28).

²⁹ The representative of Australia stated that its government thought it ‘was encouraging to see that the Declaration had garnered support beyond the Pacific region, thus contributing to the progressive development of international law and State practice on the interpretation of the Convention’ (UNGA, 2023a, p. 15). The Representative of the United Kingdom sees in the proposed ‘adaptive interpretation’ a possible ‘change in interpretation’ and a possible ‘emergent consensus’ (UNGA, 2023a, p. 19). The representative of Germany referred to an ‘ever-increasing convergence of States’ on a ‘contemporary reading and interpretation of the Convention’ (UNGA, 2023b, p. 10), while the USA ‘recognizes that new trends are developing in the practice and view of States’ (UNGA, 2023b, p. 12); and the Philippines ‘noted that there was a growing consensus among Member States that the Convention did not forbid or exclude the option of fixing baselines’ (UNGA, 2023c, p. 12).

³⁰ But see the representative of Chile, who stated that ‘there seemed to be agreement among the parties as to the interpretation of the Convention; therefore, subsequent practice existed for the purposes of article 31 of the Vienna Convention on the Law of Treaties’, and added that ‘if that practice was not considered sufficiently uniform for the purposes of article 31 of the Vienna Convention, in accordance with the Commission’s conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, it might meet the requirements of article 32 (Supplementary means of interpretation)’ (UNGA, 2023b, p. 16).

³¹ The difference between these two sub-options was emphasized by the ILC, *Draft Conclusions on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties*. See Conclusion 2, Para. 4 (‘Recourse may be had to other subsequent practice in the application of the treaty as a supplementary means of interpretation under article 32’) and Conclusion 4, Para. 1 (‘A subsequent agreement as an authentic means of interpretation under article 31, Paragraph 3 (a), is an agreement between the parties, reached after the conclusion of a treaty, regarding the interpretation of the treaty or the application of its provisions’) and par. 4 (‘A subsequent practice as a supplementary means of interpretation under article 32 consists of conduct by one or more parties in the application of the treaty, after its conclusion’) (ILC, 2018b).

However, none of these three propositions would provide a final and objective solution to the question. On the one hand, interpretative declarations are not binding and ‘could only be considered as a supplementary means of interpretation under Article 32 of the 1969 Vienna Convention’. On the other hand, any new agreement would only bind the States parties to it and only an agreement between *all* the States parties would have a general scope of application. Finally, the interpretative practice solution presents the same limit as the first two: i.e. depending on the circumstances, either the non-binding character of an interpretative declaration, or the limited scope of application given the general rule regarding third States. Last but not least, we find it misleading, as discussed above, to approach the issue as if it were only a question of drawing baselines (see Sect. 6, note 12, Starita (2022)).

Like it or not, one cannot avoid passing through customary international law, i.e. the fourth possibility discussed by States in the Sixth Committee (UNGA, 2023b, p. 7, Statement of Poland; UNGA, 2023c, p. 9, Statement of Peru; UNGA, 2023c, p. 9, Statement of El Salvador).³² In this perspective, shared declarations by States parties, resolutions by international organizations, and interpretative agreements could be useful, but more for their indirect relevance in the formation of such a rule than for their direct legal effects.

As far as this general law-making process is concerned, it cannot be said that the rule in question has already been formed. Although the situation is still fluid, the main elements for and against the formation of a new custom—as well as their weight—can be identified. Starting with the elements against the formation of the norm, we could mention, first of all the fact that, as stated before, the silence of some States cannot be interpreted as acquiescence at this stage of the Study Group’s work.³³

³² Brazil stated that ‘current State practice is not sufficient to identify a clear rule’, adding that ‘it is crucial that any future rule on the topic be established on the basis of State consent’ (UNGA, 2023a, pp. 16–17), while Croatia underlined that the ILC ‘should also take a cautious approach, as State practice and *opinio juris* on the issue were non-existent’ (UNGA, 2023d, p. 11). See also China, which stated that ‘[t]he Study Group should also give adequate consideration to the rules of general international law when analysing the Convention’ (UNGA, 2023d, p. 13). Finally, the statement of India that ‘all States, whether they were currently affected or not, should commence deliberations on finding a solution’ indirectly refers to general international law (UNGA, 2023c, p. 7).

³³ The representative of the Netherlands expressly stated that ‘[h]is Government had not yet taken a position on that question’ (UNGA, 2023b, p. 11). If one only reads the

Moreover, one cannot deny that other States have taken a cautious stance, pointing out that equity is not an ‘overarching principle’ (UNGA, 2023b, p. 7, Statement of Poland), while still other States observed that a solution must be found that would take into account not only the principle of stability and legal certainty and the requirements of climate justice, but also the legitimate interests of third states (UNGA, 2023b, pp. 3/19–20, Statement of Islamic Republic of Belarus and Iran; UNGA, 2023c, pp. 5/6, Statement of Slovakia and Czechia; UNGA, 2023d, pp. 8/16, Statement of Colombia and Türkiye).

Furthermore, some States seem to favour the formation of a special regime for the Pacific,³⁴ while others would be open to a rule encompassing, in general, all cases of sea level-rise caused by climate change.³⁵ Finally, the increasing polarization and conflict in international society may reduce the chances of reaching a general consensus among States.

At the same time, other elements point in the direction of a consolidation of the customary rule—at least to the benefit of the Pacific Island States—in the near future.

statements made in the Sixth Committee, he/she could also count other States among those States that did not take a clear position on the issue, such as France (UNGA, 2023a, p. 18), Portugal, Israel (UNGA, 2023b, pp. 14/18), Malta and Malaysia (UNGA, 2023d, pp. 7/10).

³⁴ Many States referred to the particular situation of small island States in the light of their specific vulnerability to sea level rise and their underdeveloped economic conditions. See, among others, the statements (all cited above) of India, Indonesia, Singapore, and Türkiye. The Republic of Korea noted that ‘as sea level rise posed substantially divergent challenges to different States, the Commission might wish to take a more flexible approach that considered States’ differing circumstances’, adding that ‘in May 2023, acknowledging the special circumstances faced by Pacific islands and their related concerns, her Government had expressed its support for the Declaration on Preserving Maritime Zones in the Face of Climate Change-related Sea Level Rise’ (UNGA, 2023c, p. 5).

³⁵ Malaysia warned of the risk of ‘measures designed to enlarge coastlines under the pretext of sea level rise’ (UNGA, 2023d, p. 10). Germany stated that it is supporting an interpretation of UNCLOS as allowing ‘for the stabilization of baselines in coastal areas affected by climate-change induced sea level rise’ (UNGA, 2023b, para. 54). The United Kingdom noted that ‘any emergent consensus... should not apply... for reasons not connected with sea level rise’ (UNGA, 2023a, para. 120). Germany, South Korea, and the USA limited their commitment not to challenge fixed baselines and maritime zone to situations of sea level rise caused by climate change. See also Romania (UNGA, 2023c, paras. 11 ff.). More generally, those States justifying their positions in favor of the 2021 Proclamation by referring to equity and justice seem to implicitly back solutions with a limited scope of application. However, it is not clear how limited this scope should be.

One is the fact—on which we have already dwelt—that several maritime powers with economic and political interests in the Pacific have already committed themselves not to challenge baselines and outer limits of maritime zones. A second, specular element is that the silence of some states can also be explained by the fact that they do not have particularly deep-rooted interests in the Pacific region (Conforti, 1957, p. 288).³⁶ Third, a prolonged silence, i.e. a prolonged failure to react to the 2021 Proclamation, could end up constituting the given States' acquiescence to it, with the Study Group having assured a certain degree of institutionalization of the debate (as discussed above in Sect. 6).

Finally, as far as one can tell from reading the reports of the debates in the Sixth Committee (as well as in the other institutional fora where the issue was discussed), no State has openly contested the international legality of the 2021 Proclamation. Even those States that declared that the consolidation of a new general norm is necessary tend to deny that the 2021 Proclamation is contrary to existing international law on the (explicit or implicit) grounds that there would be a vacuum in the legal system without it, and that sea level rise is a new issue and, as such, is not yet regulated.³⁷ From this point of view, it is difficult to deny that in the absence of an applicable rule, no State conduct in this regard can be considered unlawful. When there is a gap in the legal system, in short, it is the underlying principles of the system itself that come directly into play by providing the yardstick for assessing State behaviour. Among the various potentially relevant principles, those of legal certainty and security of maritime borders seem to dominate the debate, while principles that could push in a different direction have very rarely been mentioned in the

³⁶ In the 1950s, Conforti (1957) made a similar point in assessing the silence of some states regarding the spread of the continental shelf practice.

³⁷ An argument of a gap in international law in this regard has been developed or at least mentioned by some Governments. See, among others, Romania ('the legal dimension of sea level rise and its effects... many of which were unprecedented'), Ireland ('The Convention assumed stable sea level. Such an assumption is no longer valid'), Cuba ('The LOSC provides no answer to the questions raised by sea level rise'), and Türkiye ('The United Nations Convention on the Law of the Sea did not address the current challenges, as sea level rise had not been contemplated at the time of its negotiation'). Croatia warned that the principle of self-determination does not concern the sea level rise. More generally, it seems to us that the argument of a gap in international law is implicit in statements highlighting the need to find a balance between States' interests (or rights and obligations). The perspective of gaps in the international legal order had already been advanced in legal analysis (Boré Eveno, 2019).

debate in the Sixth Committee on the ILC reports on sea level rise. The principle that the territory dominates the sea, for instance, was recalled only rarely in the 2023 debate and was never used to clearly qualify the Pacific Island States' proclamation as unlawful, but was rather essentially seen as a principle to consider in a law-making process.

8 CONCLUDING BUT PROVISIONAL REMARKS

The ILC Study Group on Sea Level Rise in Relation to International Law has strongly championed the cause of the countries most vulnerable to sea level rise caused by climate change. It has done so by, among other things, promoting the idea that island States in danger of progressively losing their territory may legitimately maintain their rights over maritime zones that develop from baselines as they stand today. The only condition imposed is that the baselines and outer limits of the maritime zones must be determined in accordance with international law. The Study Group, like the ILA, took forward the idea that the desired result could be achieved without considering customary law, but it did so through an interpretation of the LOSC (in particular Articles 5 and 7), according to which each State would be free to consider its baselines fixed (and not ambulatory).

The argument developed in this chapter reverses this perspective. Although the debate in the Sixth Committee shows that the 'interpretative' perspective put forward by the Study Group did not gain a general acceptance by the States, the work of the Study Group has had an impact on the process of the formation of a general rule. By endorsing the Pacific Island States' Proclamation of 2021 and the reasons—legal and political—behind it, the Study Group pushed all States to react to this claim. The Study Group has also ensured for customary law—a source lacking a proper legal procedure—a certain level of institutionalization, while at the same time favouring an acceleration in its process of formation.

However, the consolidation of a customary rule allowing States to maintain their rights over maritime areas despite the effects of sea level rise caused by climate change cannot be said to be complete yet. Several elements, however, suggest that an evolution of the international law of the sea in this direction is likely. Out of these elements, the one that is especially worth mentioning is the widespread conviction that there is a vacuum of regulation in this area due to the novelty of the phenomenon. This means that the 2021 Proclamation and the State legislation adopted

on its basis are not necessarily contrary to pre-existing law, and tend to be evaluated not so much within the context of a process of *changing* an existing norm, but rather within that of *creating* a new norm. In such a context, the role played by general principles and considerations of ethics or justice inevitably expands.

Should the customary process not be concluded, the legal situation of the maritime zones of the Pacific Island States would remain uncertain. The rights claimed by these States would not be the subject of a generalized acquiescence, and thus of an objective norm, but only of unilateral recognitions, albeit numerous ones. Some recognitions have already been formalized. This is the case of those States that have already officially committed not to challenge the 2021 Proclamation and of those States parties to UNCLOS that have expressly adhered to the interpretative approach.

REFERENCES

- Anggadi, F. (2022). What States Say and Do About Legal Stability and Maritime Zones, and Why It Matters. *International and Comparative Law Quarterly*, 71(4), 767–798. <https://doi.org/10.1017/S002058932200032X>
- Bjorge, E. (2014). The Evolutionary Interpretation of Treaties. *Oxford University Press*. <https://doi.org/10.1093/acprof:oso/9780198716143.001.0001>
- Boisson de Chazournes, L. (2021). The International Law Commission in a Mirror: Forms, Impact and Authority. In The United Nations (Ed.), *Seventy Years of the International Law Commission: Drawing a Balance for the Future* (pp. 133–153). Brill/Nilhoff. https://doi.org/10.1163/9789004434271_016
- Boré Eveno, V. (2019). Les impacts de l'élévation du niveau de la mer sur les limites maritimes: Du flou juridique aux éclairages de la pratique. *Annuaire du Droit de la Mer Tome*, 24, 59–67.
- Busch, S. V. (2021). Law of the Sea Responses to Sea Level Rise and Threatened Maritime Entitlements: Applying an Exception Rule to Manage an Exceptional Situation. In E. Johansen, S. V. Busch & I. U. Jakobsen (Eds.), *The Law of the Sea and Climate Change: Solutions and Constraints* (pp. 309–335). Cambridge University Press. <https://doi.org/10.1017/9781108907118.014>
- Conforti, B. (1957). *Il regime giuridico dei mari*. Jovene.
- D'Aspremont, J. (2015). The International Court of Justice and Tacit Conventionality. *Questions of International Law*, 2, 296–310.
- De Sena, P., & Starita, M. (2023). *Corso di diritto internazionale*. Il Mulino.
- Galvao Teles, P. (2016). The Work of the International Law Commission in the Present Quinquennium (2012–2016) and Possible Future Topics: How

- to Remain Relevant in the 21st Century. *Anuario de Direito Internacional*, 2014–2015, 215–223.
- Gioia, A. (2018, November). *Historic Titles*. Max Planck Encyclopedia of Public International Law. <https://opil.ouplaw.com/display/https://doi.org/10.1093/law:epil/9780199231690/law-9780199231690-e705?rsk=1&pr=OPIIL>
- Intergovernmental Panel on Climate Change (IPCC). (2013). *Fifth Assessment Report: Summary for Policymakers*. <https://www.ipcc.ch/report/ar5/wg1/>
- International Court of Justice (ICJ). (2007). Territorial and Maritime Dispute Between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras), Judgment of 8 October 2007. *ICJ Reports* 2007, 1–109. <https://www.icj-cij.org/sites/default/files/case-related/120/120-20071008-JUD-01-00-EN.pdf>
- International Court of Justice (ICJ). (2009). Navigational and Related Rights (Costa Rica v. Nicaragua), Judgment of 13 July 2009. *ICJ Reports* 2009, 213–272. <https://www.icj-cij.org/sites/default/files/case-related/133/133-20090713-JUD-01-00-EN.pdf>
- International Court of Justice (ICJ). (2014). Maritime Dispute (Peru v. Chile), Judgment of 27 January 2014. *ICJ Reports* 2014, 3–73. <https://www.icj-cij.org/sites/default/files/case-related/137/17928.pdf>
- International Law Association (ILA). (2012). *Sofia Conference: Baselines under the International Law of the Sea*. <https://ilareporter.org.au/wp-content/uploads/2015/07/Source-1-Baselines-Final-Report-Sofia-2012.pdf>
- International Law Association (ILA). (2018). *Sydney Conference Report*. https://www.ila-hq.org/en_GB/documents/conference-report-sydney-2018-7
- International Law Commission (ILC). (1962). *Yearbook of the International Law Commission: Documents of the Fourteenth Session Including the Report of the Commission to the General Assembly, Volume 2 (A/CN.4/SER.A/1962/Add.1)*. United Nations. https://legal.un.org/ilc/publications/yearbooks/english/ilc_1962_v1.pdf
- International Law Commission (ILC). (2006, April 13). *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law. Report of the Study Group of the International Law Commission (A/CN.4/L.682)*. United Nations. <https://documents.un.org/doc/undoc/ld/g06/610/77/pdf/g0661077.pdf>
- International Law Commission (ILC). (2011). *Yearbook of the International Law Commission. Report of the Commission to the General Assembly on the Work of Its Sixty-Third Session, Volume 2 (A/CN.4/SER.A/2011/Add.1 (Part 2))*. United Nations. https://legal.un.org/ilc/publications/yearbooks/english/ilc_2011_v2_p2.pdf
- International Law Commission (ILC). (2018a). *Annex B: Sea Level Rise in Relation to International Law: First Issues Paper by Co-Chairs Bogdan Aurescu*

- and Niliüfer Oral. United Nations. https://legal.un.org/ilc/reports/2018/english/annex_b.pdf
- International Law Commission (ILC). (2018b). *Report of the International Law Commission, Seventieth Session (A/73/10)*. United Nations. <https://documents.un.org/doc/undoc/gen/g18/252/67/pdf/g1825267.pdf>
- International Law Commission (ILC). (2018c). *Yearbook of the International Law Commission. Report of the Commission to the General Assembly on the Work of Its Seventieth Session, Volume 2 (A/CN.4/SER.A/2018/Add.1 (Part 2))*. United Nations. https://legal.un.org/ilc/publications/yearbooks/english/ilc_2018_v2_p2.pdf
- International Law Commission (ILC). (2020, February 28). *First Issues Paper: Study Group on Sea Level Rise in Relation to International Law (A/CN.4/740)*. United Nations. <https://documents.un.org/doc/undoc/gen/n20/053/91/pdf/n2005391.pdf>
- International Law Commission (ILC). (2023, February 13). *Sea Level Rise in Relation to International Law: Additional Paper to the First Issues Paper. Study Group on Sea Level Rise in Relation to International Law (A/CN.4/76/Add.1)*. United Nations.
- Kamto, M. (2021). The Working Methods of the International Law Commission. In The United Nations (Ed.), *Seventy Years of the International Law Commission: Drawing a Balance for the Future* (pp. 198–214). Brill/Nijhoff.
- Murase, S. (2021). Concluding Remarks. In The United Nations (Ed.), *Seventy Years of the International Law Commission: Drawing a Balance for the Future* (pp. 215–223). Brill/Nijhoff.
- Pacific Islands Forum. (2021, August 6). *Declaration on Preserving Maritime Zones in the Face of Climate Change-Related Sea Level Rise*. <https://forumsec.org/>
- Palchetti, P. (2022). Débattre des changements climatiques au Conseil de sécurité: Pour quoi faire? *Questions of International Law, Zoom Out*, 91, 39–50.
- Peters, A. (2021). The American Law Institute's Restatement of the Law: Bastion, Bridge and Behemoth. *European Journal of International Law*, 32(4), 1377–1397. <https://doi.org/10.1093/ejil/chab095>
- Soons, A. H. A. (1990). The Effects of a Rising Sea Level on Maritime Limits and Boundaries. *Netherlands International Law Review*, 37(2), 207–232. <https://doi.org/10.1017/S0165070X00006513>
- Starita, M. (2022). The Impact of Sea Level Rise on Boundaries: A Question of Interpretation of the UNCLOS or Evolution of Customary Law? *Questions of International Law, Zoom Out*, 91, 5–21.
- Truman, H. S. (1945, September 28). *Proclamation 2667: Policy of the United States of America With Respect to the Natural Resources of Subsoil and Sea Bed*

- of the Continental Shelf*. The American Presidency Project. <https://www.presidency.ucsb.edu>
- United Nations. (1945). *Charter of the United Nations*. <https://www.un.org/en/about-us/un-charter>
- United Nations. (1969, May 23). *Vienna Convention on the Law of Treaties*. https://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf
- United Nations. (1982, December 10). *United Nations Convention on the Law of the Sea*. https://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf
- United Nations General Assembly (UNGA). (1947, November 21). *Resolution Adopted by the General Assembly: Hundred and Eighteenth Plenary Meeting (A/RES/174(II))*. <https://documents.un.org/doc/resolution/gen/nr0/038/81/pdf/nr003881.pdf>
- United Nations General Assembly (UNGA). (1950, December 12). *Resolution Adopted by the General Assembly: Fifth Session (A/RES/485(V))*. <https://documents.un.org/doc/resolution/gen/nr0/060/83/pdf/nr006083.pdf>
- United Nations General Assembly (UNGA). (1955, December 3). *Resolution Adopted by the General Assembly (A/RES/984(X)/A/RES/985(X))*. <https://documents.un.org/doc/resolution/gen/nr0/104/64/pdf/nr010464.pdf>
- United Nations General Assembly (UNGA). (1981, November 18). *Resolution Adopted by the General Assembly: 62nd Plenary Meeting (A/RES/36/39)*. <https://documents.un.org/doc/resolution/gen/nr0/406/65/pdf/nr040665.pdf>
- United Nations General Assembly (UNGA). (2018, December 22). *Resolution Adopted by the General Assembly: Seventy-Third Session (A/RES/73/265)*. <https://documents.un.org/doc/undoc/gen/n18/464/93/pdf/n1846493.pdf>
- United Nations General Assembly (UNGA). (2023a, December 11). *Summary Record of the 23th Meeting: Seventy-Eighth Session (A/C.6/78/SR.23)*. United Nations. <https://documents.un.org/doc/undoc/gen/n23/314/40/pdf/n2331440.pdf>
- United Nations General Assembly (UNGA). (2023b, December 11). *Summary Record of the 24th Meeting: Seventy-Eighth Session (A/C.6/78/SR.24)*. United Nations. <https://documents.un.org/doc/undoc/gen/n23/314/46/pdf/n2331446.pdf>
- United Nations General Assembly (UNGA). (2023c, December 11). *Summary Record of the 25th Meeting: Seventy-Eighth Session (A/C.6/78/SR.25)*. United Nations. <https://documents.un.org/doc/undoc/gen/n23/314/52/pdf/n2331452.pdf>
- United Nations General Assembly (UNGA). (2023d, December 11). *Summary Record of the 27th Meeting: Seventy-Eighth Session (A/C.6/78/*

- SR.27). United Nations. <https://documents.un.org/doc/undoc/gen/n23/314/64/pdf/n2331464.pdf>
- United Nations General Assembly (UNGA). (2023c, December 11). *Summary Record of the 28th Meeting: Seventy-Eighth Session (A/C.6/78/SR.28)*. United Nations. <https://documents.un.org/doc/undoc/gen/n23/314/70/pdf/n2331470.pdf>
- United Nations Security Council (UNSC). (2023, February 14). *9260th Meeting: Seventy-Eighth Year (S/PV.9260)*. United Nations. <https://documents.un.org/doc/undoc/gen/n23/044/11/pdf/n2304411.pdf>
- Verhoeven, J. (1975). *La reconnaissance internationale dans la pratique contemporaine*. Pedone.
- Vidas, D. & Freestone, D. (2022). Legal Certainty and Stability in the Face of Sea Level Rise: Trends in the Development of State Practice and International Law Scholarship on Maritime Limits and Boundaries. *The International Journal of Marine and Coastal Law*, 37, 1–53. <https://doi.org/10.1163/15718085-bja10106>
- Voulgaris, N. (2022). The International Law Commission and Politics: Taking the Science Out of International Law's Progressive Development. *European Journal of International Law*, 33(3), 761–788. <https://doi.org/10.1093/ejil/chac051>

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