The impact of sea-level rise on baselines: A question of interpretation of the UNCLOS or evolution of customary law?

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1. *Introduction*

In the framework of the broader question of the adverse impact of sea-level rise (hereinafter: SLR) on low-lying coastal and archipelagic States, the specific question of the effects on baselines has been receiving increasing attention in the international debate. The question is whether, once a State has determined its baselines by a legislative or administrative act, these lines are *fixed* and will not be altered by any subsequent physical change due to the SLR. In other words, could baselines be opposable to other States regardless of a substantial change in the configuration of the coasts? Or, on the contrary, are baselines *ambulatory* so that in case of inundation of coastal areas, the baselines will move in a landward direction? To put it differently, might third States challenge the discrepancy between the *charted* and *actual* baselines?

Under the cover of a strictly technical veil, the issue shows several political, socio-economic, and ethical facets. Firstly, it has broad consequences on States' jurisdiction over those maritime spaces measured from the baselines and consequently on the allocation of the sea's resources. Secondly, many low-lying coastal and archipelagic States which will suffer in the following years from the adverse effects of the SLR do not have any responsibility (neither under international law nor on a moral plan) in human-induced climate changes. By applying the principle of fixed baselines, these States could at least preserve their rights over the coasts as internal waters or territorial seas in case of inundation.

However, such an approach could also be seen from a different perspective. One could argue that it would have the effect of extending the

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rights of coastal States over the territorial sea and the exclusive economic zone (EEZ) well beyond the limits of 12 and 200 nautical miles, in contrast to Article 3 and Article 57 of the United Nations Convention on the Law of the Sea (UNCLOS). Such an effect occurs where the baselines move back and, at the same time, the current external limits of the territorial sea and the EEZ are kept stable. However, a similar effect occurs where normal baselines are maintained fixed, notwithstanding their physical retreat. In this case, internal waters might be considered excessively extended. Indeed, all these maritime spaces (territorial sea, EEZ, internal waters) are measured from the baselines.

But such an extension would mean calling into question the balance of rights between the coastal States and third States laboriously arrived at in the Third Conference of the law of the sea. By acknowledging the ambulatory nature of baselines (and outer limits of the maritime zones measured therefrom), the existent 'agreement' between States would be respected.

Therefore, it does not come as a surprise that the question has been seen as central to recent works of codification and progressive development of international law in this field, both public and private. The topic was studied by the Baselines Committee of the International Law Association (ILA) from 2008 to 2012 and by the Committee on 'International law and sea-level rise' (hereinafter: SLR Committee) of the same Association from 2012 to 2018. Then, from 2019, the International Law Commission (ILC) has been considering the issue under the topic 'Sea-level rise in relation to international law' (hereinafter: SLR-SG).

Based on the suggestions of the SLR Committee, the ILA Conference stated in its Resolution 5/2018 0f 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 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'.[1]

[1] For the text of Resolution 5/2018 see Final Report of the SLR Committee, International Law Association Report of the Seventy-eight Conference (Sidney 2018) 29.

Also, the First issues paper prepared in 2020 by the two Co-Chairs of the ILC SLR-SG (First Issues Paper) made a similar proposal to the ILC:

> 'An approach responding adequately to those concerns – ie, the concerns of Member States that are prompted by the effects of SLR – is one based on the preservation of baselines and outer limits of the maritime zones measured therefrom'.[2]

But what is interesting to note is the legal reasoning developed by both the ILA Committee and the Co-Chairs of the ILC Study Group. The basic concept is considering the question as essentially *a question of interpretation* of a limited number of UNCLOS provisions, mainly of Articles 5 (concerning the 'normal baselines', ie, the low-water line) and 7 (on the 'straight baselines'). The First Issues Paper argues that:

> 'The question is whether the provisions of the Convention could be interpreted and applied so as to address those effects of SLR on the baselines, outer limits of maritime zones and entitlements in those zones'.[3]

In its Final Report, the SLR Committee emphasized that:

> 'it considered whether any proposal it might take on the issue could be influential in the contemporary interpretation of the text of the UNCLOS'.[4]

This paper argues that the 'interpretative approach' is not convincing. Considering the issue of the impact of SLR on the baselines as essentially a question of interpretation of written rules, mainly of two UNCLOS articles, is too narrow. The paper suggests that the perspective of general international law cannot be underestimated. If one considers the issue from this perspective, State practice and *opinio juris* seem to favour the ambulatory character of baselines, as the ILA Baselines Committee initially stated in 2012. However, the paper finally argued that an evolutionary process in State practice had started and this process could

[2] ILC, 'First Issues Paper by Bogdan Aurescu and Nilüfer Oral, Co-Chairs of the Study Group on sea-level rise in relation to international law' (20 February 2020) UN Doc A/CN.4/740, 41.

[3] ibid 28.

[4] Final Report of the SLR Committee (n 1) 18.

have led to the establishment of a new rule of customary law favouring fixed baselines 'threatened' by the sea-level rise.

2. *SLR and baselines in the works of the ILA: From a customary law perspective to an interpretative approach*

In six years, the ILA has reversed its approach to the question of the impact of SLR on baselines.

2.1. *The Baselines Committee and the 'existing law approach'*

The ILA Baselines Committee did not consider the topic a question of interpreting written rules. In its works, the central question was 'identifying the existing law.' Even though in its efforts to attempt this identification, the Committee dealt with the interpretation of UNCLOS Articles 5 and 7, this question was included in a broader discussion with other elements such as international jurisprudence, national legislation, national judicial decisions, and scholarship. Furthermore, in discussing State practice, the Committee gave attention also to: *i*) legislation preceding the adoption of the UNCLOS; *ii*) legislation of States that are not parties to this Convention. This methodology shows that the Committee's objective was identifying the applicable customary law. The evaluation of all these elements conducted the Committee to conclude in 2012 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 trough the legal fiction of a charted line that is unrepresentative of the actual low-water line'.[5]

And that:

[5] That report is available on-line at ILA Baselines Committee webpage at <www.ila-hq.org/index.php/committees>.

> 'the normal baseline is ambulatory, moving… landward to reflect changes caused by erosion and sea level rise'.[6]

2.2. *The SLR Committee and its initial 'evolutionary approach'*

Resolution 1/2012 marks *a first change* in the ILA approach. The 75th ILA Conference, taking note of the conclusions of the Baselines Committee, acknowledged that:

> 'substantial territorial loss from SLR is an issue that extends beyond baselines and the law of the sea, and encompasses consideration at a junction of several parts of international law, including such fundamental aspects as elements of statehood under international law, human rights, refugee law, and access to resources, as well as broader issues of international peace and security'.[7]

Hence, the SLR Committee was established to address this broad array of issues. The mandate of the Committee also included international law of the sea issues, but from the perspective of elaborating proposals 'for the progressive development of international law'.[8]

In 2016, the Committee considered that 'this was an appropriate issue on which to make proposals for progressive development of international law.' Hence, it discussed two possible solutions to preserve maritime entitlements: freezing the baselines or the outer limits of maritime zones. The Committee expressed preference for the second option, but it must be emphasized here that it was perfectly aware that both proposals aimed to change the existing law.[9]

[6] ibid. For a discussion of the question of the ambulation of baselines, see K Trümpler, 'Article 5' in A Proelss (ed), United Nations Convention on the Law of the Sea. A Commentary (München 2017) 54-55, 59-60; CG Lathrop, 'Baselines' in DR Rothwell, AG Oude Elferink, KN Scott, T Stephens (eds), The Oxford Handbook of the Law of the Sea (OUP 2015) 76-78; D Müller, 'Les limites extérieures des espaces marins' in M Forteau. J-M Thouvenin (eds), Traité de droit international de la mer (Pedone 2017) 532-534.

[7] ibid para 7.

[8] For the Committee's mandate as approved by the Executive Council see ILA SLR Committee, Minutes of the Closed Session (I) (9 April 2014) 2.

[9] Some members noted that this change might produce 'possible unintended negative consequences'; others raised the question of the respect due to the 'fundamental

The approach aimed at evolving customary law remained in the intersessional meeting of 2017, in which Professor Caron emphasized that:

> 'the option of freezing baselines implied *breaches of the law of the sea* on the landward side of the territorial sea whereas the option of freezing the outer limits of maritime zones implied breaches on the seaward side of the territorial sea'.[10]

2.3. *The affirmation of an 'interpretative approach' in the SLR Committee*

Only in 2018, the Committee adopted an 'interpretative approach.' In its final report, it did not assume any of the two options discussed earlier, whose aim was changing existing law, but an interpretation under which

> 'once the baselines and the outer limits of the maritime zones of a coastal or an archipelagic State have been properly determined in accordance with the detailed requirements of the 1982 Law of the Sea Convention, that also reflect customary law, these baselines and limits should not be readjusted should sea-level change affect the geographic reality of the coastline'.[11]

The Committee justified this shift with two policy arguments, i.e. concerning the effects that its proposals might have on States' behaviour and international adjudication. On the one hand, the Committee seems to be aware that it risked not to be 'influential' in the development of international relations. From this point of view, the Committee noted that the options discussed in the previous years concerning the evolution of existing customary law involved

> 'considerable legal and political complexities… considered the mechanics of the evolution of a new rule of customary international law'.[12]

international law of the sea principle holding that the land dominates the sea' See ILA SLR Committee, Interim Report (Johannesburg 2016) 14 ff.

[10] See ILA SLR Committee, Intersessional Meeting (Lopud 2017) 14.

[11] Final Report of the SLR Committee (n 1) 19.

[12] ibid 15.

On the other hand, the Committee expressed its awareness that its recommendations

> 'must have practical utility and clarity for coastal and island States facing the impacts of sea-level rise and for international courts and tribunals that might in the future be called upon to decide disputes arising out of such changes'.[13]

However, even the interpretation proposed by the Committee has an evolutionary character. As a matter of fact, the 2018 Report emphasized that any proposal aimed at maintaining existing entitlements to maritime zones 'might involve a change in the current interpretation of the rules of the LOSC as applied to such situations'.[14] However, changing current interpretation is a more fluid process. The moral and legal arguments at stake may be more easily discussed and balanced in this different framework. Hence, in its 2018 Report, the Committee identifies some 'key interpretative arguments' *in favour* and other *against* the approach aimed at maintaining existing baselines (or outer limits of maritime zones) despite physical changes brought about by SLR.[15]

The underlying idea is that UNCLOS Articles 5 and 7, which are silent on the specific problem of the ambulatory or fixed nature of baselines, accept in principle both groups of key interpretative arguments. Finally, the Committee recommended an understanding of the Convention aimed at favouring the preservation of baselines and entitlements to maritime zones. The Committee based its decision on two primary arguments. *First*, a teleological argument: such an 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'. This approach would follow two main objectives of the UNCLOS: the principle of legal certainty and the aspiration to contribute to the strengthening of peace.[16] *Secondly*, this interpretation would align with an emerging State practice within the Pacific region. In 2015, in advance of the twenty-first session of the Conference of the Parties to the UN Framework Convention on Climate Change, a group of

[13] ibid 15.
[14] ibid 13.
[15] ibid 13-15.
[16] ibid 13, 21.

Polynesian leaders declared that they acknowledged the 'permanently established' character of their baselines without considering the SLR. In the following years, several Pacific States have passed new legislative acts adopting a fixed baselines approach. Furthermore, in 2018 in the framework of the Pacific Island Forum, the Pacific Island Countries and Territories adopted a strategy document aimed at developing 'a unified regional effort that establishes baselines and maritime zones so that areas could not be challenged or reduced due to climate change and SLR'. This practice was considered by the SLR Committee as 'subsequent practice' according to Article 31(3)(b) of the 1969 Vienna Convention on the Law of the Sea.[17]

3. *SLR and baselines in the works of the ILC*

The SLR Committee works had a strong influence on the 'First Issues Paper' of the Co-Chairs of the ILC's Study Group on SLR. However, the discussion held by the Study Group in 2021 suggests that the ILC will not necessarily adopt this approach.

3.1. *The 'interpretative approach' in the First Issues Paper*

The First Issues Paper adopts a 'radical' interpretative approach. The view expressed by the Co-Chairs is that the question *is* a question of interpretation.[18] Against this theoretical backdrop, they emphasized that the wording of Articles 5 and 7 is silent on the specific problem of the ambulatory or fixed nature of baselines. Indeed, 'the Convention was drafted at a time when the SLR was not perceived as a problem that needed to be addressed by the law of the sea'. In light of this factor, the Co-Chairs stressed that 'the Convention does not indicate *expressis verbis* that new baselines must be drawn, recognized or notified by the coastal State when coastal conditions change'.[19] Therefore, 'nothing prevents Member States from depositing notifications, in accordance with the Convention, regarding baselines and outer limits of maritime zones

[17] ibid 16-19.
[18] First Issues Paper (n 2) 28.
[19] ibid 28, 41.

measured from the baselines and, after the negative effects of SLR occur, to stop updating these notifications in order to preserve their entitlements'.[20]

The CO-Chairs favoured this interpretation, emphasizing the two interpretative arguments already used by the ILA SLR Committee. Firstly, the Co-Chairs noted that interpreting the UNCLOS as prescribing an ambulatory character for baselines 'does not respond to the concerns of the Member States prompted by the effect of the SLR and the consequent need to preserve the legal stability'.[21] While the Co-Chairs did not explicitly consider the principle of stability as an objective of the UNCLOS, it seems that they implicitly recognized it. Secondly, the Paper developed the subsequent practice argument. The Co-Chairs noted the practice of the Pacific and South-East Asia regions, already discussed by the ILA Committee. Furthermore, they also underscored a more general 'strong degree of convergence in the position expressed by the Members States… as to the need for preserving legal stability, security, certainty, and predictability in connection with the present topic'.[22]

3.2. *The Study Group's discussion in 2021: A ticket back to customary law?*

Various ILC members raised concerns during the Study Group's discussion held at the ILC's seventy-fourth session. Some of them were concerned by the methodological approach adopted in the Paper. On the one hand, some members reminded the differences between the ILA's and ILC's perspectives. While the first one decided to adopt a resolution containing *de lege ferenda* proposals, the ILC 'employs a different methodology… which includes a close relationship with the Sixth Committee'. On the other hand, some members emphasized that 'while the UNCLOS was a key source for its State parties, other sources should also be analysed further. It was also recognized that, according to the Preamble of the Convention, matters not regulated by the Convention continued to be governed by the rules and principles of general international law'. The

[20] ibid 80.

[21] ibid 29, 41.

[22] ibid 29. The Co-chairs add that the Pacific and South-East States practice is not sufficient to show the emergence of a regional customary rule given that 'the existence of the opinio juris is not yet that evident' (ibid 80-81).

Study Group finally identified the issues of 'Sources of law', 'Principles and rules of international las', 'Practice and opinio juris' as 'areas for further in-depth analysis'. Its purposes will be determining 'the *lex lata* in relation to baselines' and examining 'the interrelation between State practice and sources of law by assessing whether such practice is relevant to customary law or whether it is pertinent to treaty interpretation'.[23]

4. *The reasons for the attraction of interpretation*

The main reason for adopting the 'interpretative approach' in the ILA's works and the Co-Chairs Paper is the scepticism about customary international law being able to secure the interests of island-States and archipelagic States in maintaining their entitlements to maritime zones after climate change-induced inundations.

As we noted above, based on an in-depth analysis of State practice, the ILA Baselines Committee found that baselines are ambulatory under existing (customary) law. Furthermore, as noted by the SLR Committee, 'considerable legal and political complexities' are involved in the *evolution* of customary law. Arguably, the Committee members might have in mind two kinds of 'complexities'.

On the one hand, one might think at the (putative) slow nature of the process of formation of customary rules; or at the difficulties in showing evidence of its twin fundamental elements; on the other hand, one could have in mind the significant role of the major powers in the process of formation of customary rules.[24]

[23] ILC, 'Report of the International Law Commission on the work of its 72 Session' (26 Aril-4 June and 5 July-6 August 2021) UN Doc A/76/10, 75 ff.

[24] For a recent discussion of the problem see BS Chimni, 'Customary International Law: A Third World Perspective' (2018) 112 AJIL 1. In 2000 the ILA Committee on Formation of Customary (General) International Law noted that 'customary systems are rarely completely democratic: the more important participants play a particularly significant role in the process. And certainly, the international system as a whole is far from democratic'. The Committee added that 'the overall process of formation of customary rules should be in touch with political reality'. (ILA, Committee on Formation of Customary (General) International Law, 'Final Report of the Committee. Statement of Principles Applicable to the Formation of General Customary International Law' (London 2000) 26.

In any case, it is hardly surprising that the world of treaty interpretation appeared attractive to the Committee and to the ILC Study Group Co-Chairs. Indeed, while interpretation is regulated by Articles 31-33 of the Vienna Convention on the Law of Treaties, only apparently these articles organize these criteria in a hierarchical order. On the contrary, they leave a large margin of manoeuvre to the interpreter. Furthermore, this margin is even more significant where the text of a written rule is silent on the specific question at issue, as in the case of the alternative between ambulatory and fixed baselines. Finally, as is well known, international courts and tribunals have been following evolutionary interpretation in the last decades.[25]

5. *Is the 'interpretative approach' a misleading shortcut?*

Notwithstanding the reasons for the interpretative approach's attractiveness, some doubts may be raised about it. This approach sounds like a shortcut for getting quicker to the compensatory justice objective of minimizing the adverse impact of SLR on 'victim' States, mainly island-States and archipelagic States. However, the shortcut might show itself to be misleading. The reasons for caution with the examined approach lie in two main features of the international law of the sea, respectively, concerning the organization of the procedures for the settlement of disputes and the configuration of the sources of law in this field.

5.1. *The 'interpretative approach' and the settlement of disputes under the UNCLOS*

From the first point of view, it is pertinent to recall that the 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. In other words, the UNCLOS 'does not grant the monopoly of such exercise to one adjudicating body'. [26] Indeed,

[25] On this subject see E Bjorge, *The Evolutionary Interpretation of Treaties* (OUP 2014).

[26] T Treves, 'Article 287' in A Proelss (ed), *United Nations Convention on the Law of the Sea. A Commentary* (Nomos 2017) 1850.

notwithstanding the fact that under UNCLOS Part XV, section 2, States parties are obliged to accept compulsory procedures entailing binding decisions, it must be borne in mind that, under Article 287:

> 'When signing, ratifying or acceding to this Convention or at any time thereafter, a State shall be free to choose… one or more of the following means for the settlement of disputes concerning the interpretation or the application of this Convention: (a) the International Tribunal for the Law of the Sea; (b) the International Court of Justice; (c) an arbitral tribunal constituted in accordance with Annex VII; (d) a special arbitral tribunal constituted in accordance with Annex VIII for one or more categories of disputes specified therein).'

Furthermore, the UNCLOS also leaves a broad space to dispute settlement procedures that do not arrive at a binding decision, in the form of a conciliation procedure (see Articles 284, 297, and 298), and direct negotiations between the parties to a dispute (see Article 283).

The dense web of dispute settlement procedures in the field of the law of the sea seems to have at least two consequences on the 'interpretative approach' proposed in the works discussed above. First, it poses the risk that the interpretation offered by the ILA and the ILC Study Group might not be uniformly accepted in international jurisprudence and practice. Secondly, an evolutionary understanding of the UNCLOS, as to the question on 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.

5.2. *The interpretative approach and the sources of the international law of the sea*

Addressing the impact of SLR on baselines by focusing on the interpretation of the UNCLOS, marginalizing the customary general law seems at odds with the framework of the sources of law in the international law of the sea. While in other parts or systems of international law (ie, the international law of human rights), today customary law plays a limited role, the same does not happen in the international law of the

sea.[27] This role can be seen from at least three different perspectives. *First*, concerning the UNCLOS' applicability *ratione personae*, one has to bear in mind that notwithstanding its enormous success there are still a group of States, including Great Powers or Regional Powers, not parties to the UNCLOS.

Secondly, custom is still applicable even in the relationships between States parties to the Convention. Preamble 8 of the UNCLOS states that:

> 'matters not regulated by this Convention continue to be governed by the rules and principles of general international law'.

Thirdly, on a different but interrelated plan, customary law can influence the interpreting process itself. The international jurisprudence broadly accepts the interpretative function of customary law.[28] In 2015 the arbitral tribunal in the *Arctic Sunrise* case held, with specific regard to the UNCLOS:

> 'In the case of some broadly worded or general provisions, it may also necessary to rely on primary rules of IL other than the Convention in order to interpret and apply particular provisions of the Convention'.[29]

The interpretative function of customary law seems further justified where the provisions of the UNCLOS do not represent progressive development, as in the case of Article 5, whose text is identical to Article 3 of the 1958 Geneva Convention on the territorial sea and the contiguous zone, which in turn is habitually considered to reflect customary law.[30]

[27] See R Bernhardt, 'Custom and Treaty in the Law of the Sea' (1987) 205 Recueil des Cours de l'Académie de droit international 247; T Treves, 'Codification du droit international et pratique des Etats dans le droit de la mer' (1990) 223 Recueil des Cours de l'Académie de droit international 9; M Woods 'Le rôle contemporain du droit international coutumier' in M Forteau, J-M Thouvenin (eds), *Traité de droit international de la mer* (Pedone 2017) 68.

[28] See *Amoco International Finance Corporation v Iran* (1987) 15 Iran-USCTR 189: 'the rules of customary law may be useful in order to fill in possible lacunae of the treaty, to ascertain the meaning of undefined terms in the text or, more generally, to aid interpretation and implementation of its provisions' (para 112).

[29] *Arctic Sunrise Arbitration (Netherlands v Russian Federation)* Award on the Merits (14 August 2015) available at <https://pcacases.com/web/sendAttach/1438> para 191.

[30] See F. Latty, 'Du droit coutumier aux premières tentatives de codification' in M Forteau, J-M Thouvenin (eds), *Traité de droit international de la mer* (Pedone 2017) 49.

To put it in a summary form, one could say that the ILA and the ILC Study Group Co-Chairs, notwithstanding their awareness of the legal and political complexities of the process of evolution of customary law, underestimated those enshrined in the interpretative option they finally suggested.

5.3. *A postmodern evolution of customary law?*

Putting customary law at the centre of the discussion could be seen as a 'conservative' move. As we mentioned above, sustaining the interest of developing island and low-lying coastal States through a change in customary international law can be seen as a difficult task. On the one hand, as the ILC noted in its Draft Conclusions on identification of customary international law, State practice must be 'general', ie, 'sufficiently widespread and representative'.[31] On the other hand, the whole process seems to be 'inherently undemocratic and unjust', mainly owing to the 'absence and neglect of third world nations' practice.[32]

However, it is important to stress that a process of evolution of customary law *is* ongoing and that until now, it has shown at least two interesting features. *First*, the evolutionary process has been triggered by the recent behaviour and declarations of Pacific and South-East Asian States.[33] This is quite an intriguing perspective if we consider the above-mentioned marginalization of the practice of developing States in the process of formation of customary international law.[34]

S*econd*, the weight given in public discussions at all levels to ethical reasons concerning justice in international relations and the common

[31] 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.

[32] BS Chimni, 'Customary International Law: A Third World Perspective' (n 24).

[33] See above section 2.3.

[34] It has to be noted that these States have been using the interpretative arguments favored by the ILA and the ILC Study Group's Co-Chairs. In the 2021 Declaration on preserving maritime zones in the face of climate change-related SLR, the Pacific Islands Forum Members affirmed 'that the Convention imposes no affirmative obligation to keep baselines and outer limits of maritime zones under review nor to update charts or lists of geographical coordinates once deposited with the Secretary-General of the United Nations' available at <www.forumsec.org/2021/08/11/declaration-on-preserving-maritime-zones-in-the-face-of-climate-change-related-sea-level-rise/>. This suggests that interpretative arguments, while not sufficient *per se* to arrive at developing the international rules on baselines, can help evolving customary law in this field.

good of the international community as a whole. As we have seen, both the ILA SLR Committee and the ILC SLR-SG's Co-Chairs insisted on arguments concerning compensative justice. The same reasons have also been represented in other international fora. In 2019, during the UN General Assembly Sixth Committee debate, some States stressed 'equity' arguments[35]. During the 2021 works of the United Nations Open-ended Informal Consultative Process on Oceans and the Law of the Sea, many delegations posed the question of the *disproportionate* impacts of SLR on low-lying and island developing States and urged the need for *redistribution* among all nations.[36] Finally, in a resolution adopted (almost unanimously) on 9 December 2021 on the topic 'Oceans and the law of the sea', the UN General Assembly noted that 'owing to the interconnected nature of the oceans, ensuing impacts cannot be overcome by any single State and, in particular, given the grave implications for cannot be overcome by any single State'.[37]

In other words, the initial phase of the ongoing process of evolution of the customary rule on baselines seems to come close to postmodern ideals and theories of customary international law developed in recent years, that stress the relevance of developing State practice and 'deliberative reasons.'[38] This does not mean that 'pure' State interests will not

[35] The New Zealand delegate noted that 'it would be inequitable for those countries to have their rights to maritime zones eroded because of a phenomenon that they had done little to cause'. Also the Cuban delegation emphasized that small island developing States 'had done the least to contribute to climate change'. In a similar vein see also the Belarus delegation statement. UNGA Sixth Committee (74th session) 'Summary Record of the 24th meeting' (11 November 2019) UN Doc A/C.6/74/SR.24.

[36] See 'Report on the work of the United Nations Open-Ended Informal Consultative Process on Oceans and the Law of the Sea at its twenty-first meeting' (16 July 2021) UN Doc A/76/171 paras 15 ff. According to the Co-Chairs summary, 'many delegations expressed concern over the disproportionate impacts of SLR and other threats caused by climate change on coastal regions, low-lying area and developing countries, in particular small island developing States, and their ecosystems'. Others noted that 'while SLR posed particular challenges to islands and archipelagic nations, many challenges must be dealt with by all nations'. For the text of the statements at the plenary meeting of 14 June 2021, available at https://www.un.org/depts/los/consultative_process/icp21/statement21.htm.

[37] UNGA Res 76/72 (9 December 2021) UN Doc A/RES/76/72 para 212.

[38] See GJ Postema 'Custom, Normative, Practice, and the Law' (2012) Duke L J 707; BS Chimni, 'Customary International Law: A Third World Perspective' (n 24). See also, from a natural law perspective, *Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v India)* Dissenting Opinion of Judge Cançado Trinidade [2016] ICJ Rep 321.

influence the final outcome of the evolutionary process. Ethical arguments must be weighed against contrary indications emanating from these States. As a matter of fact, the number of States expressly referring to counter-deliberative arguments is scarce and so far concerns have been raised on the legal-technical plan, instead.[39] As for the rest, we can only read between the lines of some States' statements a hesitation to express their acceptance of the principle of the fixed lines. This hesitation could be explained by the relevance of States' individual interests more than deliberative reasons.

6. *Conclusions*

Focusing on the interpretation of the UNCLOS to favour the evolution of the law of the sea that would address the island and low-lying developing States' claims of justice might miss the target. The feasibility of law change through interpretation depends on factors such as an organization of dispute settlement mechanisms in which one international court has the monopoly of the interpretative function and a framework of the sources of law in which the relevance of custom is scarce. But the international law of the sea does not present any of these two features.

However unescapable, reliance on the evolution of customary law has inherent complexities. On the one hand, there are good reasons to be sceptical about customary international law being able to address developing States' claims. On the other hand, the active role of developing States 'specially affected' by the phenomenon sought to be regulated marks the ongoing evolutionary process in this area of law. Moreover, those states put 'deliberative reasons' at the centre of the debate.

[39] During the works of the United Nations Open-Ended Informal Consultative Process on Oceans and the Law of the Sea, Iceland expressed hesitation 'about any deviation or novel interpretation of the provisions of UNCLOS' (available at <www.un.org/depts/los/consultative_process/icp21/ICP21_item%203_Iceland_English.pdf>). During the debate in the seventy-fourth session of the UN General Assembly Sixth Committee, Israel noted that 'any product of the Study Group should be based on the application of existing principles of customary international law, rather than of developing new legal principles'. See UNGA Sixth Committee (74th session) 'Summary Record of the 24th meeting' (n 35) para 27.

How those features will finally combine with the interests of the leading maritime powers is uncertain. What is certain is that the question of the alternative between fixed or ambulatory baselines (and/or outer limits of maritime zones) will show itself as a battlefield in which traditional and postmodern theories of customary international law will measure their strength.