

The Sea Dominates the Law: Rise in Sea Level as a Grotian Moment

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Matter commented on: Sea level rise and law of the sea

The global rise in sea level has manifested a challenge to international law and opened a Pandora box of legal questions prompting the [International Law Commission](#) to include it in its long-term program of work. One such question pertains to the change in maritime jurisdiction and sovereignty of States, especially the low lying coastal and island States. Article 5 of the [UN Convention on the Law of the Sea, 1982](#) [hereinafter, alternatively the Convention or UNCLOS] stipulates that a State's maritime zones are determined by the normal low water-line along its coast i.e. *baseline*. Further, pursuant to article 47(1) of the Convention, the outermost geographical features are used as coordinates or *basepoints* to draw baselines of archipelagic States. With the help of these baselines and basepoints, all other maritime entitlements of a State are demarcated on the sketch board of maritime delimitation.

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The principle was recognized by the International Court of Justice in the [North Sea Continental Shelf Cases](#) where it made it abundantly clear that “*the land is the legal source of the power which a State may exercise over territorial extensions to seaward*” (paragraph 96). Simply put, the maritime claims of a State are contingent upon its geographical claims. It is on this premise of reciprocity that sovereignty or [land disputes are necessarily catered to before entertaining maritime disputes](#) (p. 32). The baselines have also been deemed [ambulatory](#) i.e. non-static pursuant to this principle (p. 31). A human-induced extension of the baseline by means acquiring of new territory or, building of artificial islands expands the maritime jurisdiction of the State, and as a corollary, loss of territory due to inundation or disappearance of basepoints triggers contraction. Further, article 121 of the Convention which codifies a rule of [customary international law](#) (paragraph 185), stipulates that all natural islands generate maritime zones. Furthermore, under the succeeding clause, rocks which are incapable of sustaining human habitation or economic life of adequate quality over a certain span, do not generate any exclusive economic zone or continental shelf. Therefore, the sea-level rise and inundation of territory, by the virtue of the aforementioned principle, can have an adverse impact on maritime entitlements, especially of archipelagic States which use islands and rocks as basepoints. The existing corpus of codified international law does not seem to offer any adequate solution to the same.

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Two [solutions de lege ferenda](#) have been proposed so far (p. 12). *First*, that the existing entitlements be maintained by freezing of baselines. *Second*, that the coastal States opt to maintain the outer limits of their maritime entitlements, without necessarily freezing the baselines. To give effect, the States would have to duly deposit charts showing, or lists indicating the geographical coordinates of the baselines and lines of delimitations (UNCLOS, arts 16(2), 75(2), 47(9)), as well as, the outer limits of the maritime zones (UNCLOS, art 75(1)), with the UN Secretary General and, duly publish and publicize the same (UNCLOS, arts 16(2), 75(2), 47(9)). In both instances, the shifting of the baseline or disappearance of basepoints will not impede the maritime jurisdictional claims. However, both these solutions are deemed to be in contravention to the principle of ‘the land dominates the sea’ and attempt to fixate the State’s claims even if the geographical circumstances do not correspond to them, which is a necessary condition-precedent. Nevertheless, it is arguable that the aforementioned principle is being challenged by the competing principle of ‘the sea dominates the land’ that is inching towards crystallization as a customary international law norm.

Axioms of Customary International Law

State practice and *opinio juris*

State practice can be [evidenced](#) by the legislative and administrative acts of States [Draft Conclusion 6, paragraph 2]. *Opinio juris* can be evidenced by the government legal opinions of States and their conduct at international and intergovernmental conferences [Draft Conclusion 10, paragraph 2]. More and more coastal States are endorsing the idea of permanently establishing their baselines notwithstanding sea levels. The Polynesian Leaders Group signed the [Taputapuataea Declaration](#) in 2018 and called for a permanent freezing of their respective baselines. Similarly, the [Pacific Island Forum](#) urged its member States to delineate their maritime zones and fulfill the due deposition, publication and publicity requirement. Perpetual continuation of the baselines as currently defined was also agreed upon by the State parties to the [Nauru Agreement](#). Moreover, these States are enacting [domestic legislations](#) to unilaterally declare their maritime baselines and boundaries. Simultaneously, maritime tribunals have chosen to significantly deviate from the principle of ‘the land dominates the sea’, eroding its importance. Citing practical considerations of an equitable solution, the International Tribunal for the Law of the Sea in the [Bangladesh-Myanmar dispute](#), summarily disregarded St. Martin’s Island, a permanently inhabited island administered by Bangladesh, as a circumstance not relevant to warrant an adjustment of the equidistant line

delimiting the exclusive economic zones and continental shelves (paragraph 318). The [South China Sea arbitration](#) most befittingly captures the departure from ‘the land dominates the sea’ principle (paragraph 621). The Court [looked at the geographical features](#) and determined whether they could generate maritime entitlements as rocks or islands, in light of the overarching object and purpose behind the introduction of exclusive economic zones which is to disable and limit the manufacturing of artificial entitlements. In other words, the nature of the maritime areas and the acceptability of claims thereto, and not the nature of the geographical areas were the basis of the Court’s decision. The approach adopted by the tribunals is thus, implicitly embrative of ‘the sea dominates the law.’

Doctrine of specially-affected States

Admittedly, the State practice and opinion juris is attributable to selective nations, which are all coastal States. Can the principle of ‘the sea dominates the land’ crystallize into a customary international law norm? Perhaps yes, upon application of the doctrine of specially-affected States. Widespread and representative participation, including that of States whose interests are [specially-affected](#) can sufficiently create customary international law (paragraph 73). However, it has been an Achilles heel, especially for the [International Law Commission](#) which has debated the efficacy of the doctrine in assessment of the generality of state practice and the qualitative weight that must be given to it (p. 95). With respect to climate change and sea-level rise, it is undisputed that the same will adversely affect coastal States more, since they will experience a sea-level rise which is [greater than the global mean](#) (p. 1140). Coastal States are threatened by deprivation of territory, dislocation of peoples and loss of their very Statehood *in toto*. Hence, the practice of these States should accord them with greater say in custom formulation. [Shaw suggests](#) that the States which are specially affected by the subject-matter can independently give birth to a customary norm, notwithstanding the support of other non-specially affected States (p. 207). Alternately, it is likely that the State practice and *opinio juris* of the specially-affected States, particularly in the Pacific can create a [regional custom](#) [Draft Conclusion 16]. The practice of coastal States and the contemporary rulings of maritime tribunals in unison manifest the support for a reversal of the principle of dominance in maritime delimitation due to sea-level rise. In any case, the strong dissent of specially-affected States to the general principle of ‘the land dominates the sea’ [will not permit it to enjoy customary status](#) for long, notwithstanding the political support it receives from the Global North (p. 237).

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The doctrine of specially-affected States also [dispenses with the temporal requirement](#) i.e. passage of considerable period of time for a practice to form a customary norm (paragraph 73). [Michael Scharf](#) coins the term to refer to a fundamental change in international order that gives birth to customary international law in a fast-track manner (p. 332). Sea-level rise can be considered the latest such instance which by virtue of the geographical and geopolitical changes, can rapidly elevate ‘the sea dominates the land’ as a new customary international law norm in maritime delimitation due to sea-level rise, albeit not instantly.
