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Sea-Level Rise and State of Necessity: Maintaining Current Baselines and Outer Limits of National Maritime Zones

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Abstract

For some coastal States, the rise in sea levels may cause the baselines and national maritime spaces to regress towards the coast. From a legal point of view, the question arises as to whether, in the event of such phenomenon occurring, the States concerned would be able to maintain their current baselines and outer limits of national maritime spaces. According to some authors, this would be prohibited by the existing rules of the international law of the sea. If this were the case, one would nevertheless still have to consider whether the States affected by sea-level rise could invoke a state of necessity in order not to apply, without committing an internationally wrongful act, any rules of international law stipulating that baselines are ambulatory. In order to answer that question, this essay examines and applies to the present case all the cumulative conditions laid down in Article 25 of the Draft Articles on State Responsibility adopted in 2001 by the International Law Commission.

Keywords

sea-level rise – baselines – outer limits of national maritime zones – state of necessity

1 Introduction

Following the inclusion in 2018 of the topic "Sea-level rise in relation to international law" in the programme of work of the International Law Commission

("ILC"),[1] differences of opinion have emerged among the members of the ILC and within the Sixth Committee of the UN General Assembly.[2]

The most controversial point, which stems from gaps in the existing legal framework,[3] concerns the ambulatory or fixed nature of baselines. It is not our intention here to return to this central question, which has already been analysed by several authors.[4] However, two points should be noted: firstly, that the answer to this question has also important consequences both for the extent of internal or archipelagic waters and for the determination of the external limits of the national maritime spaces; secondly, that the ambulatory or fixed nature of baselines puts at stake "essential interests" of coastal States.

Indeed, if one were to conclude that only the ambulatory nature of baselines is consistent with the United Nations Convention on the Law of the Sea[5]

1 Official Records of the General Assembly, Seventy-fourth Session, Supplement No. 10 (A/74/10), paras. 265–273.

2 For a summary of these discussions, see Official Records of the General Assembly, Seventy-sixth Session, Supplement No. 10 (A/76/10), paras. 265–273.

3 In this vein, BORÉ EVENO, "Les impacts de l'élévation du niveau de la mer sur les limites maritimes: du flou juridique aux éclairages de la pratique", ADMer, 2019, p. 57 ff., p. 61.

4 See, *inter alia* and in addition to the essays quoted in further notes, STOUTENBURG, "Implementing a New Regime of Stable Maritime Zones to Ensure the (Economic) Survival of Small Island States Threatened by Sea-Level Rise", The International Journal of Marine and Coastal Law, 2011, p. 263 ff.; RAYFUSE, "Sea Level Rise and Maritime Zones: Preserving the Maritime Entitlements of 'Disappearing' States" in GERRARD and WANNIER (eds.), *Threatened Island Nations*, Cambridge, 2013, p. 167 ff.; LAL, "Legal Measures to Address the Impact of Climate Change-Induced Sea Level Rise on Pacific Statehood, Sovereignty and Exclusive Economic Zone", Auckland University Law Review, 2017, p. 235 ff.; BUSCH, "Sea Level Rise and Shifting Maritime Limits: Stable Baselines as a Response to Unstable Coastlines", Arctic Review on Law and Politics, 2018, p. 174 ff.; JOHNSEN, "Protecting the Maritime Rights of States Threatened by Rising Sea Level: Preserve Legacy Exclusive Economic Zone", Berkeley Journal of International Law, 2018, p. 166 ff.; SEFRIOUI, "Adapting to Sea Level Rise: A Law of the Sea Perspective", in ANDREONE (ed.), *The Future of the Law of the Sea: Bridging Gaps Between National, Individual and Common Interests*, Cham, 2018, p. 3 ff.; REYNOLDS, "A Sinking Feeling: The Effect of Sea Level Rise on Baselines and Statehood in the Western Pacific", Australian Yearbook of International Law, 2018, p. 169 ff.; ÁRNADÓTTIR, *Climate Change and Maritime Boundaries. Legal Consequences of Sea-Level Rise*, Cambridge, 2021; LANOVOY, "Climate Change and Sea-Level Rise: Is the United Nations Convention on the Law of the Sea up to the Task?", International Community Law Review, 2021, p. 133 ff.; MA, "Water Rising: Possible Effects of Sea Level Rise on the Legal Regime of Baselines and Delineation of Maritime Zones", in BLOKKER, DAM-DE JONG and PRISLAN (eds.), *Furthering the Frontiers of International Law: Sovereignty, Human Rights, Sustainable Development*. Liber Amicorum *Nico Schrjver*, Leiden, Boston, 2021, p. 184 ff.; STARITA, "The Impact of Sea-Level Rise on Baselines: A Question of Interpretation of UNCLOS or Evolution of Customary International Law", *Questions of International Law*, 2022, p. 5 ff.

5 United Nations Convention on the Law of the Sea, 10 December 1982, entered into force 16 November 1994.

("UNCLOS") and other existing norms of international law, the States vulnerable to sea-level rise would be further negatively affected by those rules.[6] As observed in the ILC's First issues paper on

> "Sea-level rise in relation to international law", in cases where "the baseline shifts landward due to the inundation of base points [...], the maritime zones will also shift landward [...]. The extent of change or loss of maritime entitlements will vary, but in some cases could be significant, especially in the case of baselines drawn from small island features susceptible to disappearing due to rising sea levels. For example, in the case of the loss of an island that is located 24 nautical miles from a baseline, the territorial sea could decrease by 1500 km^2".[7]

Now, assuming that the existing rules do require baselines to be ambulatory, what could coastal States destined to suffer such "loss of maritime entitlements" do? Could they fail to apply these rules without committing a wrongful act?[8] In particular, could coastal States claiming that an essential interest of theirs is affected invoke necessity as a circumstance precluding wrongfulness?

As is well known, under Article 25 of the 2001 Draft Articles on Responsibility of States for Internationally Wrongful Acts, adopted by the ILC,[9]

> "1. Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act: (a) is the only way for the State to safeguard an essential interest against a grave and imminent peril; and (b) does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole. 2. In any case, necessity may not be invoked by a State as a ground for preclud-

6 According to BLANCHETTE-SÉGUIN, "Elévation du niveau de la mer et frontières maritimes: les Etats possèdent-ils des droits acquis sur leur territoire submergé?", Revue québécoise de droit international, 2013, p. 1 ff., p. 8, "[l]a mouvance des lignes de base engendrera vraisemblablement des coûts supplémentaires pour les Etats côtiers".

7 ILC, Seventy-second Session, *First issues paper by Bogdan Aurescu and Nilüfer Oral, Co-Chairs of the Study Group on sea-level rise in relation to international law,* Official Records of the General Assembly (A/CN.4/740), para. 172.

8 As observed by Professor Caron, in the framework of the Committee on International Law and Sea Level Rise of the International Law Association ("ILA") (on that Committee, see *infra* note 81), Intersessional Meeting (Lopud, 15–16 September 2017), https://www.ila-hq.org/index.php/committees, p. 15: "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".

9 ILC, Draft Articles on Responsibility of States for Internationally Wrongful Acts, 2001, Art. 25.

ing wrongfulness if: (a) the international obligation in question excludes the possibility of invoking necessity; or (b) the State has contributed to the situation of necessity".

In order to answer the questions posed above, it must then be ascertained whether the cumulative conditions required by Article 25 – which can be considered reflective of the customary international law principle of necessity[10] – are met. In other words, it must be established that the preservation of the existing outer limits of their maritime zones constitutes an essential interest of those States which are vulnerable to the rise of the sea-level (Section 2); that this essential interest must be protected against a grave and imminent peril (Section 3); that the stability of the baselines and outer limits of maritime zones does not seriously impair an essential interest of third States, or of the international community as a whole (Section 4); that international obligations relating to baselines do not exclude the possibility of invoking necessity (Section 5); that the States affected by sea-level rise have not themselves contributed to the occurrence of this phenomenon and that the preservation of the current outer limits of their maritime zones is the only means of protecting their essential interests (Section 6).

2 The Essential Interest

The first element to be analysed is therefore the existence of an essential interest of a coastal State vulnerable to sea-level rise to preserve the current outer limits of its maritime zones.

In this regard, it should first be recalled that the International Court of Justice ("ICJ"), in its *Gabčikovo-Nagymaros* Judgment considered "that the state of necessity is a ground recognized by customary international law for precluding the wrongfulness of an act not in conformity with an international obligation".[11] Furthermore, the ICJ, after having stressed the relevance of the

10 See *infra* note 11.

11 *Gabčikovo-Nagymaros Project* (*Hungary v. Slovakia*), Judgment of 25 September 1997, ICJ Reports, 1997, p. 7 ff., para. 51. See also, International Tribunal for the Law of the Sea ("ITLOS"), *M/V "SAIGA" (No. 2)* (*Saint Vincent and the Grenadines v. Guinea*), Judgment of 1 July 1999, ITLOS Reports, 1999, p. 10 ss. para. 134; ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004, ICJ Reports, 2004, p. 136 ff., para. 140; *CMS Gas Transmission Co. v. Republic of Argentina*, ICSID Case No. ARB/01/8, Award of 12 May 2005, paras. 315, 331. In the literature, CONFORTI and IOVANE, *Diritto Internazionale*, 12th ed., Napoli, 2021, pp. 431–432, express doubts as to the existence of a general principle of international law concerning the state of necessity.

requirement of protection of the essential interest – also required by Article 33 of the previous version of the Draft Articles of the ILC – [12]classified the protection of the natural environment as an essential interest.[13]

That said, it is undeniable that coastal States have interests not only in the territorial sea, which is subject to their sovereignty, but also in the maritime areas where they enjoy sovereign rights or exercise jurisdiction. In the latter areas, of course, the interest cannot be considered as "less essential".

For the purposes of this section, only the exclusive economic zone ("EEZ") will be considered, as it is a zone that can extend up to 200 nautical miles from the baselines and where significant freedoms of other States are guaranteed. While the rights recognised in favour of third States are extremely relevant, the purpose of this very broad zone – as observed in the *South China Sea* Award – "that emerges from the history of the Convention was to extend the jurisdiction of States over the waters adjacent to their coasts and to preserve the resources of those waters for the benefit of the population of the coastal State".[14]

The fundamental objective – i.e. the essential interest – of preserving natural resources for the benefit of local populations, which still underpins the proclamation of each EEZ, is also reflected in Article 121(3) UNCLOS, relating to islands. According to this article, "[r]ocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf". According again to the arbitral tribunal in *South China Sea*: "[…] the meaning attributed to the terms of Article 121(3) should serve to reinforce, rather than counter, the purposes that the exclusive economic zone and Article 121(3) were respectively intended to serve. […] this is best accomplished by recognising the connection between the criteria of 'human habitation' and the population of the coastal State for the benefit of whom the resources of the exclusive economic zone were to be preserved".[15]

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12 The text of Art. 33 of Part I of the Draft Articles on State Responsibility adopted on first reading by the ILC at its thirty-second session, in 1980, is reproduced in YILC, 1980, Vol. II, Part Two, p. 33 and in *Gabčíkovo-Nagymaros Project*, *cit. supra* note 11, para. 50.

13 *Gabčíkovo-Nagymaros Project*, *cit. supra* note 11, para. 53.

14 PCA, *South China Sea Arbitration* (*The Republic of the Philippines v. The People's Republic of China*), Award of 12 July 2016, para. 513.

15 *Ibid.,* paras. 516–517. At the same time, the two criteria indicated in Art. 121(3) aim "à préserver la haute mer (zone de liberté) et la zone internationale de fonds marins (patrimoine commun de l'humanité), de revendications abusives d'Etas qui souhaiteraient étendre leurs droits souverains autour de la moindre formation maritime leur appartenant, alors même qu'aucune population locale ne pourrait en bénéficier". In this vein, among others, BORÉ EVENO, "L'interprétation de l'article 121 de la Convention des Nations Unies sur le droit de la mer par la Cour Internationale de Justice", in DEL VECCHIO and VIRZO (eds.), *Interpretations of the United Nations Convention on the*

Furthermore, it should be noted that some provisions of UNCLOS, such as, for example, Articles 59, 62(3) and 221, refer to the "interests" of the coastal State in the EEZ or, generally, beyond the territorial sea.

Indeed, in Article 59[16] the reference to the interests of the coastal State – interests which may be additional to the rights and jurisdiction already conferred on it in the EEZ by Article 56[17] – is undetermined. This is because the purpose of Article 59 is to indicate the criteria to be followed for the settlement of conflicts concerning residual jurisdiction in the EEZ and arising between a coastal State and one or more third States. However, the generality of the reference to "interests" does not affect their essentially legal nature. As one author has rightly pointed out, in order for a coastal State to exercise residual powers on the basis of Article 59, the interests referred to therein must be seen as "de véritables droits obéissants aux règles habituelles (a priori strictes) régissant leur établissement, leur preuve, leurs limites et, last but not least, les conditions même de leur exercice".[18]

In contrast, the types of interests mentioned in Article 62(2) UNCLOS are much more defined. This provision contains an illustrative list of "relevant factors", which the coastal State takes into account in the event that its capacity to exploit the EEZ's living resources is less than the total allowable catch ("TAC") set by itself[19] and it grants access to the remainder to other States.

The first factor cited by the provision is "the significance of the living resources of the area to the economy of the coastal State concerned and its other national interests". First, this paragraph clarifies that national economy is an interest of the coastal State. This interest cannot but assume the rank of "essential", in the light of the above-mentioned reasons underlying the establishment of an EEZ and, even more so, of the preamble of the Convention

Law of the Sea by International Courts and Tribunals, Cham, 2019, p. 59 ff., p. 72. See also CARACCIOLO, "Les espaces maritimes des îles", in SFDI, *Îles et droit international*. Journée d'études de Paris, Paris, 2020, p. 83 ff.

16 The article in question, entitled "Basis for the resolution of conflicts regarding the attribution of rights and jurisdiction in the exclusive economic zone", reads as follows: "In cases where this Convention does not attribute rights or jurisdiction to the coastal State or to other States within the exclusive economic zone, and a conflict arises between the interests of the coastal State and any other State or States, the conflict should be resolved on the basis of equity and in the light of all the relevant circumstances, taking into account the respective importance of the interests involved to the parties as well as to the international community as a whole".

17 See DEL VECCHIO, *Zona economica esclusiva e Stati costieri*, Firenze, 1984, pp. 115–185.

18 KARAGIANNIS, "L'article 59 de la Convention des Nations Unies sur le droit de la mer (ou les mystères de la nature juridique de la zone économique exclusive", Revue Belge de Droit International 2004, p. 325 ff., p. 387.

19 See Art. 61 UNCLOS.

– where "the economic and social advancement of all peoples of the world" is solemnly enshrined as one of the purposes of UNCLOS. In the case of some Small Island Developing States ("SIDS"), where the EEZ "is, on average, 28 times the country's land mass",[20] it would be more correct to speak of vital interests. "[F]or many SIDS the majority of the natural resources they have access to comes from the ocean. Factors like small population size, remoteness from international markets, high transportation costs, vulnerability to exogenous economic shocks and fragile land and marine ecosystems make SIDS particularly vulnerable to biodiversity loss and climate change because they lack economic alternatives".[21]

Secondly, it seems that other national interests may exist with regard to the EEZ's biological resources. In particular, at present and in view of the increasing ecological sensitivity of coastal populations, it can be assumed that these other interests are mainly of an environmental nature.

In this regard, it should be recalled again that the ICJ identified a concrete example of "essential interest" ("within the meaning given to that expression"[22] by the ILC in the Draft Articles on Responsibility) precisely in the protection of the natural environment.[23]

Needless to say such an essential interest is also pursued through the protection of biological resources. Indeed, the interest of coastal States in the conservation of biological resources and the protection of the ecosystem of their maritime spaces has been taken into account by international jurisprudence. First, ITLOS – which can be considered an environmental friendly tribunal – [24] in the *Southern Bluefin Tuna* cases found that "the conservation of the living resources of the sea is an element in the protection and preservation of the marine environment"[25] and ordered certain urgent provisional measures in order "to preserve the rights of the parties and to avert further deterioration of the southern bluefin tuna stock".[26] Furthermore, in the Advisory Opinion on the *Request submitted by the Sub-Regional Fisheries Commission*, the Hamburg Tribunal reaffirmed that "living resources and marine life are part of the marine

20 See *About Small Island Developing States*, by the UN High Representative for the Least Developed Countries, Landlocked Developing Countries and Small Island Developing States, https://www.un.org/ohrlls/content/about-small-island-developing-states.

21 *Ibid*. See also STOUTENBURG, *cit. supra*, note 4, p. 271.

22 *Gabčikovo-Nagymaros Project*, *cit. supra*, note 11, para. 53.

23 *Ibid*.

24 In this vein, DUPUY and VIÑUALES, *International Environmental Law*, 2nd ed., Cambridge, 2019, p. 304.

25 ITLOS, *Southern Bluefin Tuna Cases* (*New Zealand v. Japan* and *Australia v. Japan*), Provisional Measures, Order of 27 August 1999, ITLOS Reports, 1999, p. 280 ff., para. 70.

26 *Ibid.*, para. 80.

environment"[27] and, as will be discussed in Section 4, conferred international law effects on laws and regulations adopted by the coastal State for the conservation of the living resources of its EEZ.[28]

This line of ITLOS jurisprudence was explicitly followed by the *South China Sea* arbitral tribunal,[29] which further relied on another award based on UNCLOS[30] to stress that protection of the marine environment does not merely imply the implementation of "measures aimed strictly at controlling marine pollution".[31] It is also necessary to preserve the marine ecosystem, especially if it is rare and fragile, as required by Article 194(5) UNCLOS. On this point, the Tribunal resorted to the hermeneutic principle of systemic integration,[32] codified in Article 31(3)(c) of the Vienna Convention on the Law of Treaties.[33] It observed: "An 'ecosystem' is not defined in the Convention, but internationally accepted definitions include that in Article 2 of the CBD [Convention on Biological Diversity],[34] which defines ecosystem to mean 'a dynamic complex of plant, animal and micro-organism communities and their non-living environment interacting as a functional unit'."[35]

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27 ITLOS, *Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission*, Advisory Opinion of 2 April 2015, ITLOS Reports, 2015, p. 4 ff. para. 216, where the Tribunal cites para. 70 of the *Southern Bluefin Tuna Cases* Order, *cit. supra* note 25. See also para. 120.

28 *Ibid.*, para. 102.

29 *South China Sea Arbitration*, *cit. supra* note 14, para. 956, where the Tribunal cites para. 70 of the Order in the *Southern Bluefin Tuna Cases*, *cit. supra* note 25: "'The conservation of the living resources of the sea is an element in the protection and preservation of the marine environment', and the Tribunal considers that the general obligation to 'protect and preserve the marine environment' [...] include a due diligence obligation to prevent the harvesting of species that are recognised internationally as being at risk of extinction and requiring international protection".

30 PCA, *Chagos Marine Protected Area Arbitration* (*Mauritius v. United Kingdom*), Award of 18 March 2015, paras. 320 and 538. See also BOYLE "Protecting the Marine Environment from Climate Change. The LOSC Part XII", in JOHANSEN, BUSCH and JAKOBSEN (eds.), *The Law of the Sea and Climate Change. Solutions and Constraints*, Cambridge, 2020, p. 82 ff., pp. 100–101.

31 *South China Sea Arbitration*, *cit. supra* note 14, para. 945.

32 See VIRZO, "The 'General Rule of Interpretation' in the International Jurisprudence Relating to the United Nations Convention on the Law of the Sea", in DEL VECCHIO and VIRZO (eds.), *cit. supra* note 15, p. 15 ff., pp. 28–29. For the application of the principle of systemic integration in the field of marine environmental protection see PINESCHI, "Inter-Legality and the Protection of the Marine Ecosystem", in KLABBERS and PALOMBELLA (eds.), *The Challenge of Inter-Legality*, Cambridge, 2019, p. 188 ff.

33 Vienna Convention on the Law of Treaties, 23 May 1969, entered into force 27 January 1980.

34 Convention on Biological Diversity, 5 June 1992, entered into force 29 December 1993.

35 *South China Sea Arbitration*, *cit. supra* note 14, para. 945.

The judgments, orders and opinions of ICJ, ITLOS and UNCLOS arbitral tribunals thus create a "glissement de jurisprudence internationale". Instead of being a mere reiteration, every successive decision innovates with discretion the previous one and progresses slowly along the same line of jurisprudence. It in no way contradicts the innovative value of the previous decision, but clarifies it by adding further elements and consolidating the jurisprudential evolution.[36] Thus, the ICJ recognises the essential interest in the protection of the natural environment, the ITLOS specifies that "the conservation of the living resources of the sea is an element in the protection and preservation of the marine environment"[37] and, finally, the *South China Sea* arbitral tribunal adds that the protection must extend to the entire marine ecosystem.

Furthermore, the fact that the activity of maritime fishing and, therefore, the protection of marine living resources and the ecosystem in which they interact is an interest of the coastal State, is also affirmed in the last of the above-mentioned provisions, i.e., Article 221 on "[m]easures to avoid pollution arising from maritime casualties". With reference to this well-known article of UNCLOS, suffice it to note here that the basis for the adoption by coastal States of measures that may be treated as exceptions to the obligations established by the Convention – measures, of course, proportionated to the damage actually suffered or threatened by these States – is precisely the existence of a situation of necessity.[38]

In summary, it can be concluded, first, that there are different types of essential interests of the coastal State in its marine areas. Secondly, that there is "no difficulty in acknowledging"[39] that even the stability of the outer limits of marine areas, including the EEZ relate to "essential interest[s]"[40] of a coastal State affected by sea-level rise. Concerning the EEZ, it should be noted that, although it can be up only to 200 nautical miles even if the baseline is moved back,[41] the increase in internal or archipelagic waters and the stability of the baselines, as well as the *current* outer limits of its marine spaces, allow the

36 For further considerations on the *glissement de jurisprudence*, which can sometimes lead to a "nuanced" and unbroken *revirement*, see VIRZO, "Les typologies de revirement dans la jurisprudence du Tribunal international du droit de la mer", in LE FLOCH and LEMEY (eds.), *Le revirement de jurisprudence en droit international*, Paris, 2021, p. 109 ff., pp. 116–117.

37 *Southern Bluefin Tuna Cases* Order, *cit. supra* note 25, para. 70.

38 In this vein, TREVES, "La nécessité en droit de la mer", in SFDI, *La nécessité en droit international.* Colloque de Grenoble, Paris, 2007, p. 227 ff., p. 241.

39 As used in *Gabčikovo-Nagymaros Project*, *cit. supra* note 11, para. 53.

40 *Ibid.*

41 This perspective of course leans towards the ambulatory theory.

State affected by sea-level rise to continue to safeguard a number of essential interests within the *current* nautical miles, including the protection of the marine ecosystem and the conservation and exploitation of natural resources for the benefit of the local populations.[42]

3 The Existence of a Grave and Imminent Peril

The existence of a grave and imminent peril is probably the least straightforward requirement under Article 25 of the 2001 Draft Articles of the ILC for the State invoking necessity as a ground for excluding an international wrongful act. Indeed, the ICJ considers it a complex operation[43] and abuse must be avoided. "Il va de soi, en effet, qu'un Etat ne peut agiter des fantômes pour justifier une violation du droit international".[44]

By contrast, in this case, it seems that (unfortunately) for States vulnerable to sea-level rise, the task of demonstrating that many of their vital interests are at risk from inundation or worse, submergence, is relatively simple. Indeed, many scientific reports providing worrying data on this subject are now available.[45] Assessing the seriousness of the threat is also easy, even on the basis of a cautious appraisal, given that for some island States "c'est leur existence même qui se trouve parfois menacée de disparition".[46]

With regard to the imminence of peril test, it should be noted that, in general, under the "effet combiné" of ICJ case law and ILC commentaries on its draft articles on responsibility,[47] it has become significantly more flexible and even "quelque peu dilué".[48] According to the ICJ, this temporal criterion is

42 Whether and to what extent these essential interests of the coastal State coincide with those of the international community as a whole will be discussed in Section 4.

43 *Gabčikovo-Nagymaros Project*, *cit. supra* note 11, para. 54.

44 CHRISTAKIS, "*'Nécessité n'a pas de loi'?* La Nécessité en droit international", in SFDI, *La nécessité en droit international*, *cit. supra* note 38, p. 11 ff., p. 23.

45 See MAYER "Climate Change and Legal Effects of Sea-Level Rise: An Introduction to the Science", in HEIDER (ed.) *New Knowledge and Changing Circumstances in the Law of the Sea*, Leiden-Boston, 2020, p. 343 ff.

46 BORÉ EVENO, "Les impacts", *cit. supra* note 3, p. 59, who refers, in particular, to the Barbados Declaration, in the *Report of the Global Conference on the Sustainable Development of Small Island Developing States*, Bridgetown, 6 May 1994, available at: <https://digitallibrary.un.org/record/198168>. See also TORRES CAMPRUBÍ, *Statehood under Water: Challenges of Sea-Level Rise to the Continuity of Pacific Islands States*, Leiden-Boston, 2016; MBATIA, "The Threat of a Rising Sea Level: Saving Statehood trough the Adoption of *Uti Possidetis Juris*", Strathmore Law Review, 2020, p. 65 ff.

47 CHRISTAKIS, *cit. supra* note 44, p. 24.

48 *Ibid.*

relevant even when it is not close to being met. In the Court's view, it "does not exclude […] that a 'peril' appearing in the long term might be held to be 'imminent' as soon as it is established, at the relevant point in time, that the realization of that peril, however far off it might be, is not thereby any less certain and inevitable".[49] According to the ILC, "[…] a measure of uncertainty about the future does not necessarily disqualify a State from invoking necessity, if the peril is clearly established on the basis of the evidence reasonably available at the time".[50] In the light of this interpretation, one can only consider that also the perils linked to the constant annual rise in sea level are now "imminent".

It should be added here that, given the flexibility of the interpretation of the temporal factor, some authors argue that, especially in international environmental law, the character of imminence can be coordinated with the precautionary principle.[51] In cases involving situations of grave but not immediate peril, the use of the precautionary approach, as formulated, for example, in Principle 15 of the 1992 Rio Declaration on Environment and Development,[52] would reduce the discretion and margin of appreciation of the State invoking the necessity.[53]

4 Weighing the Interests of Third States or of the International Community as a Whole

The next step is to ascertain whether the condition relating to any conflict of interest that may arise between the State in a situation of necessity and

49 *Gabčikovo-Nagymaros Project*, *cit. supra* note 11, para. 54.

50 Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries, UN Doc. A/56/10, YILC, 2001, Vol. II, Part Two, p. 31 ff., p. 83, Commentary to Art. 25, para. 16.

51 In this vein, for example, TREVES, *cit. supra* note 38, p. 246 and PUSTORINO, "Lo stato di necessità alla luce della prassi recente", Rivista di diritto internazionale, 2009, p. 409 ff., pp. 420–421.

52 Rio Declaration on Environment and Development, UN Doc. A/CONF.151/26 (Vol. I), 14 June 1992, Principle 15: "In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation".

53 According to some authors, it is more precisely an "environmental necessity": MONTINI, *La necessità ambientale nel diritto internazionale e comunitario*, Padova, 2001; DUPUY, "L'invocation de l'état de nécessité écologique. Les enseignements tirés d'une étude de cas", in SFDI, *La nécessité en droit international*, *cit. supra* note 38, p. 223 ff.; FITZMAURICE, "Necessity in International Environmental Law", Netherlands Yearbook of International Law, 2010, p. 159 ff.

other States or the international community as a whole is met. As the ILC has emphasised, "the interest relied on must outweigh all other considerations, not merely from the point of view of the acting State but on a reasonable assessment of the competing interests, whether these are individual or collective".[54]

In this case, the question is whether the stability of the outer limits of the maritime zones of States affected in their essential interests by sea-level rise does not seriously impair an essential interest of third States, or of the international community as a whole.

In the case of third States, it is difficult even to argue that one of their essential interests would be seriously compromised in maritime areas which, immediately prior to the flooding of the base points, were subject to the sovereignty or jurisdiction of the State affected by that phenomenon. All the more so, in our view, the interest in enjoying the freedom of fishing and the other freedoms of the high seas, which any third State might have in the nautical miles removed from an EEZ, cannot be considered essential.

Indeed, no real sacrifice of existing interests of third States can be seen here. On the contrary, it is the latter that would gain a new advantage from the rise in sea level, while coastal States would suffer a loss of their essential interests due to the retreat of the outer limit of each of their maritime zones. In other words, if such a conflict of interests[55] were to be resolved by some kind of comparison between the interests at stake, one could only conclude that the interest/benefit likely to be gained by the third State is less than the one the coastal State invoking the state of necessity wishes to safeguard.[56]

With regard to the essential interests of the international community other than those related to the seabed, which will be discussed below in this Section, it can be argued that they are even better protected in the marine spaces of coastal States than on the high seas. Rather, it seems to us that it is the possible subjection of a certain number of nautical miles to the legal regime of the

54 Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries, *cit. supra* note 50, p. 84, para. 17.

55 On the conflict of interest that arises when necessity is invoked as a ground for exclusion of the international wrongful act, see, in depth, CASSELLA, *La nécessité en droit international*, Leiden-Boston, 2011, pp. 269–309.

56 As observed by CASSELLA, *cit. supra* note 55, p. 275, note 4, "la référence à une comparaison entre intérêts conflictuels était claire" in Draft Art. 33(1), formulated by Roberto Ago in the ILC: "The international wrongfulness of an act of a State not in conformity with what is required of it by an international obligation is precluded if the State had no other means of safeguarding an essential State interest threatened by a grave and imminent peril. This applies only in so far as failure to comply with the obligation towards another State does not entail the sacrifice of an interest of that other State comparable or superior to the interest which it was intended to safeguard". See AGO, Addendum to the Eighth Report on International Responsibility, UN Doc. A/CN.4/318/Add.5-7,YILC, 1980, Vol. II, Part One, p. 14 ff., p. 51.

freedoms of the high seas – as a result of the coastward shift of the outer limit of the EEZ and the retreat of the baselines – that may undermine the essential interests of the international community.

In essence, one can share the opinion of those who argue that coastal States, in their marine spaces, can also pursue and protect the interests of the international community.[57] The same applies to the EEZ, which, as has been said, because of its extension, is particularly important for the purposes of our enquiry.

This is a view often supported by the case-law of international courts and tribunals. Some of the most significant paragraphs in this regard are to be found in the Advisory Opinion on the *Request submitted by the Sub-Regional Fisheries Commission*. As already mentioned, the ITLOS has conferred international law effects on norms and regulations adopted by the coastal State for the purpose of protecting the marine environment and living resources of the EEZ. For the ITLOS, these domestic legislative or regulatory acts eventually become part of the "legal order for the seas and oceans", solemnly recalled in the preamble to the Convention:

> "One of the goals of the Convention, as stated in its preamble, is to establish 'a legal order for the seas and oceans which . . . will promote' *inter alia* 'the equitable and efficient utilization of their resources, the conservation of their living resources, and the study, protection and preservation

57 In this vein, for example, Yoshifumi Tanaka, who draws on Georges Scelles' theory of "dédoublement fonctionnel". See, in particular, TANAKA, "Protection of Community Interests in International Law: The Case of the Law of the Sea", Max Planck Yearbook of United Nations Law, 2011, p. 329 ff.; ID., "The Institutional Application of the Law of Dédoublement Fonctionnel in Marine Environmental Protection: A Critical Assessment of Regional Regimes", German Yearbook of International Law, 2014, p. 143 ff.; ID., *The International Law of the Sea*, 3rd ed., Oxford, 2019; ID. "Changing Paradigms in the Law of the Sea and the Marine Arctic", The International Journal of Marine and Coastal Law, 2020, p. 439 ff. It should also be recalled that in 1983, PICONE, "Obblighi reciproci ed obblighi *erga omnes* degli Stati nel campo della protezione dell'ambiente marino dall'inquinamento", in STARACE (ed.), *Diritto internazionale e protezione dell'ambiente marino*, Milano, 1983, p. 15 ff., p. 123, referring to the protection of the marine environment in the EEZ, stated "non può escludersi che una determinata attività materiale o normativa dello Stato costiero a tutela dell'ambiente possa, a seconda degli aspetti e dei profili che vengano in rilievo, configurarsi come un diritto (di tale Stato, operante *uti singulus*, verso gli altri Stati, anch'essi *singolarmente* considerati), un dovere (dello Stato stesso nei confronti della Comunità internazionale, e quindi della collettività degli Stati operanti *uti universi*), o un potere-dovere, nel senso indicato (e cioè un potere dello Stato costiero, operante *uti universus*, di esercitare determinate funzioni, nei confronti degli Stati, *uti singoli*, per conto della Comunità internazionale)".

> of the marine environment'. Consequently, laws and regulations adopted by the coastal State in conformity with the provisions of the Convention for the purpose of conserving the living resources and protecting and preserving the marine environment within its exclusive economic zone, constitute part of the legal order for the seas and oceans established by the Convention and therefore must be complied with by other States Parties whose ships are engaged in fishing activities within that zone".[58]

It follows from this paragraph that non-compliance by vessels flying the flag of third States with the "laws and regulations adopted by the coastal State in conformity with the provisions of the Convention" not only entails a classical violation of the domestic legal acts applicable in the EEZ as a marine space where the said coastal State enjoys sovereign rights and exercises jurisdiction. It also violates the "legal order for the seas and oceans" established by UNCLOS and, ultimately, international law.

The precondition for this particular effect can only be that the protection of the EEZ's marine environment and its living resources is also an interest of the international community. Indeed, the coastal State contributes to the progressive formation of said legal order and can "meet its responsibilities"[59] if it also acts on behalf of the international community.[60] So much so that it has a real obligation to ensure compliance with its laws and regulations and to "take such measures, including boarding, inspection, arrest and judicial proceedings".[61] Thus, the coastal State can safeguard the "legal order for the seas and oceans", simultaneously defending its own interests and those of the international community.

This happens even when the coastal State, going beyond its purely individual interests, establishes marine protected areas in the EEZ with either

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58 *Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission*, *cit. supra* note 27, para. 102.

59 *Ibid.*, para. 104.

60 To use an expression of PICONE, *cit. supra* note 57, p. 113.

61 *Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission*, *cit. supra* note 27, para. 105. It may be added that if a coastal State fails to take adequate enforcement measures, it commits an internationally wrongful act. In this vein, *South China Sea Arbitration*, *cit. supra* note 14, para. 964: "[…] There is no evidence in the record that would indicate that China has taken any steps to enforce those rules and measures against fishermen engaged in poaching of endangered species. […] The Tribunal therefore has no hesitation in finding that China breached its obligations […] to take necessary measures to protect and preserve the marine environment, with respect to the harvesting of endangered species from the fragile ecosystems at Scarborough Shoal and Second Thomas Shoal".

prohibitions on fishing and extractive activities or limitations on freedom of navigation. These are areas that respond to needs felt primarily by the international community and whose protection constitutes a common interest.[62] But, of course, as a member of the international community, the coastal State also benefits.

The different types of marine protected areas[63] – which seem to contribute to slowing down the process of sea-level rise[64] – will not be analysed here. We will only briefly mention the Particularly Sensitive Sea Areas ("PSSAs"), which are established by the coastal State with the authorization of the International Maritime Organization ("IMO").

Once a PSSA, "because of its significance for recognized ecological, socio-economic, or scientific attributes where such attributes may be vulnerable to damage by international shipping activities",[65] receives final designation by the IMO, there is another situation in which the coastal State simultaneously acts in the interest of the international community.

Indeed, under the relevant IMO Resolution, it is required to "ensure that any associated protective measure is implemented in accordance with international law as reflected in the United Nations Convention on the Law of the Sea".[66] However, among the provisions of UNCLOS applicable in this case, Article 211(6) relating to special areas established in the EEZ "through the competent international organisation" (IMO), must be taken into consideration.[67] According to this article, "the coastal States may, for that area, adopt laws and regulations for the prevention, reduction and control of pollution from vessels implementing such international rules and standards or navigational practices

62 On the relationship between common interests and necessity, see CASSELLA, *cit. supra* note 55, pp. 287–291. According to AGIUS, "The Invocation of Necessity in International Law", Netherlands International Law Review, 2009, p. 95 ff., p.106, "[a]ction can be justified under necessity only if does not seriously impair an essential interest of the international community as a whole, which indicates the importance of drumming up political support for the action: it is clear that the weight of the relevant interest can never be judged out of the social context of the international community".

63 See in particular, DUX, *Specially Protected Marine Areas in the Exclusive Economic Zone (EEZ): The Regime for the Protection of Specific Areas of the EEZ for Environmental Reasons under International Law*, Münster, 2011.

64 In this vein, for example, JAKOBSEN, "Marine Protected Areas and Climate Change", in JOHANSEN, BUSCH and JAKOBSEN (eds.), *cit. supra* note 30, p. 234 ff., p. 235.

65 IMO, Resolution A.982(24) of 1st December 2005, *Revised Guidelines for the Identification and Designation of Particularly Sensitive Sea Areas*, Annex, para. 1.2.

66 *Ibid.*, para. 9.2.

67 According to the prevailing literature, the competent international organisation to which certain UNCLOS provisions generically refer is the IMO. In this vein, for example, OXMAN,

as are made applicable, through the organization, for special areas".[68] This is another example of coastal State laws and regulations which, to quote the Preamble of UNCLOS and the 2015 ITLOS Advisory Opinion, "form part of the legal order for the seas and oceans".

In this case, the interests of the coastal State and the international community coincide, the former being included in the latter. Therefore, not only is there no conflict, but the infringement of the coastal State's interests may harm the marine environment, biodiversity and, more generally, the ecosystem of fragile areas, often characterised by uniqueness or scarcity,[69] which also the international community as a whole is bound to safeguard.[70] The coastal State in its EEZ can best fulfil this important international function of protecting the marine environment by having normative, regulatory and enforcement powers. However, as has been observed, the coastal State "ne pourrait plus exercer celles-ci dans l'hypothèse où tout ou partie de cette zone tomberait sous le régime de la haute mer. [...] il perdrait aussi sa capacité à maintenir l'intégrité des aires marines protégés créées dans ces espaces et ferait tomber la responsabilité de protéger et de préserver le milieu marin sous la juridiction exclusive de l'Etat du pavillon".[71]

Finally, there is the question of whether the interests of the international community as a whole are adversely affected if the existing outer limit of the continental shelf is preserved. Two different situations may arise when this boundary is not displaced towards the coast by the disruptive effect of sea-level rise.

"Environmental Protection in Archipelagic Waters and International Straits. The Role of the International Maritime Organization", The International Journal of Marine and Coastal Law, 1995, p. 467 ff., p. 481.

68 On the cooperation between the IMO and the coastal State in the special areas referred to in Art. 211, para. 6 UNCLOS and in the PSSAs, see VIRZO, "Les compétences de l'Etat côtier en matière de sécurité de la navigation maritime", in DEL CASTILLO (ed.), *Law of the Sea, from Grotius to the International Tribunal for the Law of the Sea.* Liber Amicorum *Judge Hugo Caminos*, Leiden-Boston, 2015, p. 377 ff., pp. 382–387.

69 IMO, Resolution A.982(24), *cit. supra* note 65, para. 4.4.1.

70 According to MCCREATH "Community Interests and the Protection of the Marine Environment within National Jurisdiction", International and Comparative Law Quarterly, 2021, p. 569 ff., p. 570, "the rise and escalation of global environment threats has led to worldwide growth in environmental consciousness, and [...] accordingly community interests have emerged in the protection of the marine environment within national jurisdiction. In other words, the international community has an interest in the protection of the marine environment as a whole".

71 BORÉ EVENO, "Les impacts", *cit. supra* note 3, pp. 70–71. See also *First issues paper by Bogdan Aurescu and Nilüfer Oral, cit. supra* note 7, para. 183.

Firstly, it may happen that the coastal State, before being affected by sea-level rise, has managed to extend the outer limits of the continental shelf beyond 200 nautical miles. As is well known, this extension is not done unilaterally, but through a binding procedure, provided for by UNCLOS and involving the Commission on the Limits of the Continental Shelf.[72] In summary, following the submission of a request for extension, accompanied by all relevant maps and information, the Commission makes recommendations to the requesting State. It is only on the basis of these recommendations that the State concerned can set the limits of the extended continental shelf. However, since, according to Article 76(8) UNCLOS, these limits "shall be final and binding", it can reasonably be argued that, despite a flooding of the base points and the subsequent landward displacement of the maritime areas, the preservation of the outer limit of the continental shelf within 200 nautical miles and that of the extended continental shelf (beyond 200 nautical miles) is in full compliance with the Convention. Thus, with regard to this first situation, there is no question of the applicability of the state of necessity or any other circumstance precluding wrongfulness.

The second situation is that of a State which, before being affected by the negative effects of the rise of sea level, has not initiated or completed the procedure under UNCLOS to establish an extended continental shelf. In theory, there could be a conflict of interest with the international community, which would take advantage of the coastward shift of the outer limit of the continental shelf to extend the regime of the common heritage of mankind – to which the Area is subject – over other miles of seabed. This would in any case be a new advantageous situation and not a serious infringement of *already existing* essential interests of the international community as a whole. Therefore, the considerations relating to the alleged interests of third States in the nautical miles of a pre-existing EEZ that they would like to subject to the regime of the high seas would also apply to this hypothetical conflict of interests.

Moreover, the interests at risk of greater compromise would be those of the State that would lose maritime rights related to the continental shelf. For example, according to the above mentioned ILC's First issues paper, the transformation of a portion of the continental shelf into the Area "could mean the loss of valuable offshore revenue from natural resources that are being exploited, and

72 For more details on the continental shelf extension procedure and the Commission on the Limits of the Continental Shelf, see, in particular, TASSIN, *Les défis de l'extension du plateau continental. La consécration d'un nouveau rapport de l'Etat à son territoire*, Paris, 2013; ØYSTEIN, *The Commission on the Limits of the Continental Shelf: Law and Legitimacy*, Leiden-Boston, 2014.

call into question the continuation of contracts with private companies in relation to the exploration and/or exploitation of natural resources".[73] Obviously, the infringement would be even more serious for SIDS and would undermine one of the ideas that permeates the entire legal regime of the Area in UNCLOS to which they would have to cede a certain number of nautical miles of continental shelf. Suffice it to recall here Article 140(1): "Activities in the Area shall [...] be carried out for the benefit of mankind as a whole [...] and taking into particular consideration the interests and needs of developing States".

Furthermore, as rightly pointed out in the ILC First issues paper, "that scenario seems unlikely"[74] in light of what UNCLOS provides. Indeed, UNCLOS also provides for the permanence of the outer limits of the "ordinary" continental shelf, i.e., within 200 "standard" nautical miles.[75] According to Article 76(9), "[t]he coastal State shall deposit with the Secretary-General of the United Nations charts and relevant information, including geodetic data, permanently describing the outer limits of its continental shelf. The Secretary-General shall give due publicity thereto".[76]

This makes even more hypothetical a conflict of interest in which, in any case, the "weight of interest"[77] of the coastal State vulnerable to sea-level rise should outweigh those that the international community as a whole might have in the new miles of Area withdrawn from the continental shelf.[78]

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73 *First issues paper by Bogdan Aurescu and Nilüfer Oral, cit. supra* note 7, para. 190.

74 *Ibid.*, para. 178.

75 In this vein, PANCRACIO, *Droit de la mer*, Paris, 2010, p. 207.

76 According to the *First issues paper by Bogdan Aurescu and Nilüfer Oral, cit. supra* note 7, para. 178, "an important reason for the insertion of paragraph 9 in article 76 was to ensure the certainty of the boundary of the Area and protect the costly investments by States in their continental shelves". In the same vein, already SOONS, "An Ocean under Stress: Climate Change and the Law of the Sea": Addendum to "Climate Change: Options and Duties under International Law", in E. HEY et al., Mededelingen van de Koninklijke Nederlandse Vereniging voor Internationaal Recht, Vol. 145, p. 71 ff., p. 100.

77 Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries, *cit. supra* note 50, p. 89, para. 17.

78 Moreover, it is precisely the rise in sea levels that is likely to seriously affect the essential interests of the international community. Indeed, "même si un tiers seulement des Etats sont directement touchés, c'est qui est déjà considérable, c'est au final l'ensemble de la communauté internationale qui est, même indirectement, concernée" (BORÉ EVENO, "Les impacts", *cit. supra* note 3, p. 60).

5 The Exclusion of the Possibility of Invoking the State of Necessity by "Primary" International Obligations

It is now necessary to verify whether the international obligations relating to baselines, in conjunction with those relating to the outer limits of maritime spaces, exclude the possibility of invoking the state of necessity. This concerns the application to the present case of the condition required by Article 25(2)(a), of the 2001 Draft Articles of the ILC, a condition which can be considered as a "barrière extrinsèque".[79] Indeed, it is in no way linked to the measures put in place by the State invoking the necessity, to the essential character of each of the interests in conflict or to the assessment of the gravity and imminence of the danger threatening such interests. Nor does it depend on the act of the State, deriving solely from the "primary" international obligation with which that act is not in conformity.

The primary obligation may expressly or implicitly exclude the possibility of invoking the state of necessity.[80] In the latter case, the interpreter of the norm must exercise his or her role with great care, even caution, in order not to artificially extend the obstructive effect in question. In other words, interpretation in good faith implies not circumventing the barrier. At the same time, the interpreter must not build new ones.

However, the provisions of UNCLOS relating to baselines – which, moreover, as has been pointed out, do not provide a definite answer as to whether these baselines are ambulatory or stable[81] – do not contain any express or implicit limitation on the possibility of invoking necessity. It should be noted that one of these provisions, i.e. Article 7(2), even provides for a case in which the coastal State is not automatically obliged to move back the baselines despite

79 In this vein, CHRISTAKIS, *cit. supra* note 44, p. 19.

80 Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries, *cit. supra* note 50, p. 89, para. 19.

81 It may be appropriate to note that the ILA favours the thesis of baseline stability. The subject was examined by an *ad hoc* committee established in 2012 (see FREESTONE, VIDAS, TORRES CAMPRUBÍ, "Sea Level Rise and Impacts on Maritime Zones and Limits. The Work of the ILA Committee on International Law and Sea Level Rise", Korean Journal of International and Comparative Law, 2017, p. 5 ff.). In Resolution 5/2018, adopted in Sydney on 24 August 2018, the ILA Conference endorsed the recommendation made by the Committee in its 2018 Report. The Conference endorsed "the proposal of the Committee 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 required to be recalculated should sea level change affect the geographical reality of the coastline".

the occurrence of a given natural event.[82] It is true that some authors, interpreting the provision in a restrictive way, claim that the stability of straight baselines concerns quite circumscribed hypotheses.[83] However, even such an interpretation of Article 7(2), (unless the intention is to add a new barrier) does not exclude the possibility of invoking the state of necessity.

Furthermore, it does not appear that such an exclusion operates under the UNCLOS articles on the outer limits of national maritime spaces applied in conjunction with those on baselines. An example is Article 57, which clearly states that the EEZ does not extend beyond 200 nautical miles. However, this width is measured from baselines drawn in accordance with Articles 5, 6 or 7 which, as has just been said, do not preclude the possibility of invoking the state of necessity. Thus, the current outer limit of an EEZ, which is not more than 200 nautical miles wide, may remain unchanged despite the landward displacement of base points due to sea-level rise. This is, of course, provided that the baselines remain stable.

The same applies to Article 3 UNCLOS, concerning the outer limit of the territorial sea, applied in conjunction with Articles 5, 6 or 7. Indeed, the breadth of the territorial sea, over which the coastal State extends its sovereignty, will not exceed 12 nautical miles measured from baselines. Rather, it is the latter that are kept stable despite the retreat of the coastline as a result of sea-level rise. Thus, maintaining the current outer limit of the territorial sea does not

82 More specifically, Art. 7 provides: "Where because of the presence of a delta and other natural conditions the coastline is highly unstable, the appropriate points may be selected along the furthest seaward extent of the low-water line and, notwithstanding subsequent regression of the low-water line, the straight baselines shall remain effective until changed by the coastal State in accordance with this Convention".

83 See, for example, CARON "When Law Makes Climate Change Worse: Rethinking the Law of Maritime Boundaries", Ecology Law Quarterly, 1990, p. 621 ff., p. 635; PRESCOTT and BIRD, "The Influence of Rising Sea Levels on Baselines from Which National Maritime Claims Are Measured and an Assessment of the Possibility of Applying Article 7(2) of the 1982 Convention on the Law of the Sea to offset any Retreat of the Baseline", in GRUNDY-WAR (ed.), *International Boundaries and Boundary Conflict Resolution. Proceedings of the 1989 IBRU Conference*, Durham, 1990, p. 279 ff., p. 279, and TRÜMPLER, "Article 7" in PROELSS (ed.), *United Nations Convention on the Law of the Sea. A Commentary*, München-Oxford-Baden-Baden, 2017, p. 67 ff., pp. 76–77. *Contra*, BLANCHETTE-SÉGUIN, *cit. supra* note 6, p. 5, according to whom "cette thèse aboutit à un résultat inéquitable. Un État ayant une côte extrêmement instable en raison, par exemple, de la présence d'un delta pourra bénéficier de structures physiques éphémères pour fixer des lignes de base avantageuses et conserver à long terme un certain territoire maritime tandis que d'autres États, dont les côtes sont plus stables, perdraient graduellement un territoire maritime longtemps justifié".

interfere with the prohibition in Article 89,[84] which states that "[n]o State may validly purport to subject any part of the high seas to its sovereignty" and which, in turn, could preclude the use of necessity.

Finally, it is interesting to note that in the *South China Sea* Judgment, the arbitral tribunal held that the "inherent capacity" of an island for human habitation does not disappear as a result of factors such as war, pollution and environmental damage, which cause its depopulation.[85] In the light of this decision, it can then be concluded that the state of necessity can also be invoked under Article 121(3) UNCLOS,[86] which we have briefly discussed in Section 2.

6 The Criteria of Contribution to the Occurrence of the Situation of Necessity and "The Only Way for the State to Safeguard an Essential Interest"

According to Article 25(2)(b) of the 2001 Draft Articles of the ILC, the State that commits an act not in conformity with an international obligation must not have "contributed to the situation of necessity".

The burden of proof associated with this requirement may be particularly difficult for the State invoking necessity to overcome. For example, in the *Gabčikovo-Nagymaros Project* Judgment, the ICJ concluded that "even if it had been established that there was, in 1989, a state of necessity […], Hungary would not have been permitted to rely upon that state of necessity in order to

84 *Contra*, COGLIATI-BANTZ, "Sea-Level Rise and Coastal States' Maritime Entitlements: Cautious Approach", Journal of Territorial and Maritime Studies, 2020, p. 86 ff., p. 100.

85 *South China Sea Arbitration*, *cit. supra* note 14, para. 549: "[…] the Tribunal should consider whether there is evidence that human habitation has been prevented or ended by forces that are separate from the intrinsic capacity of the feature. War, pollution, and environmental harm could all lead to the depopulation, for a prolonged period, of a feature, that, in its natural state, was capable of sustaining human habitation […]". See also KAYE, "The Law of the Sea Convention and Sea Level Rise after the South China Sea arbitration", International Law Studies Series, US Naval War College, 2017, p. 423 ff.

86 Furthermore, according to FREESTONE and SCHOFIED, "Sea Level Rise and Archipelagic States: A Preliminary Risk Assessment", Ocean Yearbook, 2021, pp. 340–387, p. 354, "[the] farseeing interpretation of the entitlements of island communities on the basis that the Tribunal was 'conscious that remote island populations often make use of a number of islands, sometimes spread over significant distances, for sustenance and livelihoods' [§ 547], will likely be welcomed by many communities particularly in low-lying islands in the Pacific, and else-where, threatened by sea level changes".

justify its failure to comply with its treaty obligations, as it had helped, by act or omission to bring it about".[87]

Therefore, in order to avoid this condition being used as a basis to radically prevent the use of necessity,[88] the ILC itself "a apporté une légère nuance".[89] In the Commentary to the 2001 Draft Articles, the Commission clarified that the contribution to the occurrence of the state of necessity must be "substantial and not merely incidental or peripheral".[90]

Admittedly, classifying the type of contribution remains difficult.[91] However, for most SIDS vulnerable to sea-level rise, one is quite inclined to consider that if the state of necessity is ultimately invoked, their contribution to the occurrence of the situation of necessity can only be "incidental or peripheral". As confirmed by the statistics[92] of the Conference of the Parties to the United Nations Framework Convention on Climate Change[93] ("UNFCCC"), these countries "ne contribuent [...] que très peu au réchauffement climatique".[94]

Nor can one believe that the requirement of Article 25(2)(b) is affected in this case by the principle of common but differentiated responsibilities. As is

87 *Gabčikovo-Nagymaros Project*, *cit. supra* note 11, para. 57. See on this point BODEAU-LIVINEC "Circumstances Precluding Wrongfulness", in FORLATI, MOÏSE MBENGUE and MCGARRY (eds.), *The* Gabčikovo-Nagymaros *Judgment and Its Contribution to the Development of International Law*, Leiden-Boston, 2020, p. 131 ff., at 139.

88 See in this respect the critical considerations of BENVENUTI, "Lo stato di necessità alla prova dei fatti", in SPINEDI, GIANELLI and ALAIMO (eds.), *La codificazione della responsabilità internazionale degli Stati alla prova dei fatti. Problemi e spunti di riflessione*, Milano, 2006, p. 108 ff., p. 144.

89 CHRISTAKIS, *cit. supra* note 44, p. 29.

90 Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries, *cit. supra* note 50, p. 84, para. 20.

91 The varying jurisprudence of ICSID tribunals on the issue of economic necessity invoked by Argentina with reference to the 2001 financial crisis demonstrates the difficulty of any such classification. See, for example, *CMS Gas Transmission Co. v. Republic of Argentina*, *cit. supra* note 11, para. 329; *LG & E v. Republic of Argentina*, ICSID Case No. ARB/02/1, Decision of 3 October 2006, para. 256; *EDF International SA, SAUR International SA and Léon Participaciones Argentinas SA* v. *Republic of Argentina*, ICSID Case No. ARB/03/23, Award of 11 June 2012, paras. 1173–1176. On this issue, ORZAN, "Il caso *CMS Gas Transmission Company* e lo stato di necessità economica nel diritto internazionale", Diritto del commercio internazionale, 2007, p. 237 ff.; VIÑUALES, "State of Necessity and Peremptory Norms in International Investment Law", Law and Business Review of the Americas, 2008, p. 79 ff.; VALENTI, "Lo stato di necessità nei procedimenti arbitrali ICSID: due soluzioni contrapposte", Rivista di diritto internazionale, 2008, p. 114 ff.; TANZI, "Necessity, State of", Max Planck Encyclopedia of Public International Law, 2021, paras. 8–12, 18.

92 Available at: <https://di.unfccc.int/time_series>.

93 United Nations Framework Convention on Climate Change, 9 May 1992, entered into force 21 March 1994.

94 BORÉ EVENO, "Les impacts", *cit. supra* note 3, p. 60.

well known, in the 1992 Rio Declaration on Environment and Development, Principle 7 states that:

> "States shall cooperate in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth's ecosystem. In view of the different contributions to global environmental degradation, States have common but differentiated responsibilities. The developed countries acknowledge the responsibility that they bear in the international pursuit of sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command".

It goes without saying that the common (but differentiated) responsibilities of all States of the international community, including SIDS, do not concern the common "contribution" to the occurrence of the situation of global environmental degradation, to which the phenomenon of sea-level rise is linked. On the contrary, the criterion of the "different contributions to global environmental degradation", provided for by Principle 7 of the Rio Declaration, implies that if one really wanted to determine the responsibility for such occurrence, for example in terms of reparation, it would appear that it is mainly the "developed countries" that have contributed to the degradation of the global environment.

The common but differentiated responsibilities, to which this principle refers, must then be interpreted in a proactive sense. They are a precondition for the obligations to *act* and cooperate in "a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth's ecosystem", or – if one considers, instead of Rio Principle 7, the Paris Agreement of 2015 – [95] "the global response to the threat" posed by climate change (Article 2(1)).

Rather, the proactive nature of the principle of common but differentiated responsibilities could affect the last condition contained in Article 25 of the 2001 Draft Articles of the ILC which remains to be examined. This is the condition that the act not in conformity with an international obligation "is the only way for the State to safeguard an essential interest against a grave and imminent peril".

In this respect, it should be recalled once again that, according to the ICJ, the temporal criterion of the imminence of the danger is characterised by a relative flexibility. In the Court's view, it is not excluded that "a 'peril' appearing

95 Paris Agreement on Climate Change, 12 December 2015, entered into force 4 November 2016.

in the long term might be held to be 'imminent' as soon as it is established, at the relevant point in time, that the realization of that peril, however far off it might be, is not thereby any less certain and inevitable".[96]

Thus, unlike force majeure, which may be linked to the occurrence of an unforeseen event, the State invoking necessity has the burden of demonstrating that it was unable to use other appropriate means to deal with the "certain peril". In other words, means consistent with the international obligation may also be available[97] and, especially where there is sufficient time, the use of these different means must be attempted.[98]

However, in this historic phase, States vulnerable to sea-level rise are actively engaged in putting in place a number of measures consistent with international environmental law. These are primarily measures to avoid or delay the dangerous coastal retreat which, if it were to eventually occur, would "force" these States to maintain current baselines, in order to safeguard their essential interests.

Some measures, such as the planting of mangroves[99] or the creation of MCPAs,[100] can be considered in line with the precautionary approach[101] and the implementation of environmental prevention obligations.[102]

96 *Gabčikovo-Nagymaros Project*, *cit. supra* note 11, para. 54.

97 BENVENUTI, *cit. supra* note 88, p. 131; CASSELLA, *cit. supra* note 55, p. 275.

98 One should not be tempted to protect an essential interest by opting for a single means, especially when this may result in an internationally wrongful act. In the *"SAIGA"* case, ITLOS did not consider that the state of necessity invoked by Guinea was present and added that "however essential Guinea's interest in maximizing its tax revenue from the sale of gas oil to fishing vessels, it cannot be suggested that the only means of safeguarding that interest was to extend its customs laws to parts of the exclusive economic zone". *M/V "SAIGA"* (*No. 2*), *cit. supra* note 11, para. 134. See also ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, *cit. supra* note 11, para. 140. See also ARCARI, "La responsabilità internazionale" in SCOVAZZI (ed.), *Corso di diritto internazionale*, 2nd ed., Milano, 2015, pp. 258–259.

99 ORAL, "International Law as an Adaption Measure to Sea-level Rise and Its Impacts on Islands and Offshore Features", International Journal of Marine and Coastal Law, 2019, p. 415 ff., pp. 418–419, recalls that "the Carteret Islands in Papua New Guinea [...] are taking adaption measures, such as planting mangroves and building sea-walls to hold the rising tides back".

100 *Supra*, Section 4.

101 *Supra*, Section 3.

102 See, in general, GERVASI, *Prevention of Environmental Harm under General International Law*, Napoli-Baden-Baden, 2021, who describes environmental prevention "as a general principle of international law, aimed at protection of the environment per se, as a community interest" (p. 399).

Other measures, such as those involving the construction of artificial islands or the fortification of natural island formations – [103] which require large sums of money and high technological capabilities – are feasible if economic aid and technical assistance are provided by developed States, international funds or intergovernmental organisations. They are therefore an example of measures based on the principle of common but differentiated responsibilities. In other words, they are measures that, in the context of common responsibility, require efforts from both SIDS and developed countries. At the same time, these efforts are differentiated, taking into account the respective capacities.

Moreover, it is interesting to note that these examples of measures to contain the phenomenon of sea-level rise contribute – in the words of the ILC in the draft directives on the protection of the atmosphere – "to give rise to a single set of compatible obligations, in line with the principles of harmonization and systemic integration".[104]

7 Concluding Remarks

The examination conducted shows that all the conditions required by Article 25 of the 2001 Draft Articles of the ILC can be met by States affected by sea-level rise that wish to invoke state of necessity to justify the maintenance of the current baselines and outer limits of their maritime spaces.

Nevertheless, another observation is in order. It is precisely because – as has been said on several occasions – it is not fully established that existing norms required baselines to be ambulatory, that in recent years many States vulnerable to sea-level rise have argued strongly against it. This has also occurred in the Sixth Committee of the General Assembly, where many vulnerable States have made legal arguments in favour of maintaining baselines and other maritime boundaries.[105] In particular, they relied on a teleological interpretation of UNCLOS, whose preamble considers that the achievement of the Convention's

103 ORAL, *cit. supra* note 99, p. 418. See, also, CALIGIURI, "Sinking States: The Statehood Dilemma in the face of Sea-Level Rise", Questions of International Law, 2022, p. 23 ss., p. 32.

104 ILC, Text of the Draft Guidelines on the Protection of the Atmosphere (version of 8 August 2021), Guideline 9, para. 1. It should be noted that in para. 3 of the same guideline the ILC recommends that States pay "special consideration […] to persons and groups particularly vulnerable to atmospheric pollution and atmospheric degradation. Such groups may include, *inter alia*, indigenous peoples, people of the least developed countries and people of low-lying coastal areas and small island developing States affected by sea-level rise".

105 *First issues paper by Bogdan Aurescu and Nilüfer Oral, cit. supra* note 7, paras. 14–15.

objectives "will contribute to the realization of a just and equitable international economic order which takes into account the interests and needs of mankind as a whole and, in particular, the special interests and needs of developing countries".

It is also known that by creating a constant and repeated practice over time, accompanied by a clear *opinio juris*, these States aspire to the formation of a regional custom. The latter should provide for the application of the rule of stability of baselines drawn in accordance with UNCLOS despite coastal retreat due to sea-level rise. A recent example of such a practice is the Declaration adopted by the Pacific Islands Forum ("PIF") on 6 August 2021:

> "We, the Leaders of the Pacific Islands Forum
>
> [...]
>
> Declare that once having, in accordance with the Convention, established and notified our maritime zones to the Secretary-General of the United Nations, we intend to maintain these zones without reduction, notwithstanding climate change-related sea-level rise".[106]

Regardless of the possible creation of such a regional custom, it is arguable that States vulnerable to sea-level rise are, even in this way, fulfilling one of the requirements of Article 25 of the 2001 Draft Articles.[107] Indeed, they are trying

106 Available at: <https://www.forumsec.org/2021/08/11/declaration-on-preserving-maritime-zones-in-the-face-of-climate-change-related-sea-level-rise/>. According to GIRAUDEAU, "Is the Pacific Shaping the Future of Maritime Limits and Boundaries?", ASIL Insights, 19 October 2021, available at: https://www.asil.org/insights/volume/25/issue/23, "[b]ecause such a declaration on preservation of maritime entitlements is presented and supported both by the general principles underpinning the convention [UNCLOS] and by its dispositions, it could be an important element for the recognition of a regional customary law. It details how the Pacific Practice is 'undertaken with a sense of legal right of obligations'. While that is not sufficient evidence *per se*, it could be an important element to assess the existence of *opinion juris* ". See also ANGGADI "Establishment, Notification, and Maintenance: The Package of State Practice at the Heart of the Pacific Islands Forum Declaration on Preserving Maritime Zones", Ocean Development & International Law, 2022, p. 19 ff.

107 Moreover, the invocation of the state of necessity in order not to apply an existing rule that no longer reflects the needs of certain members of the international community, may contribute to the gradual process of forming a regional customary rule or to the conclusion of new treaties. According to CANNIZZARO, *Diritto internazionale*, 5th ed., Torino, 2020, p. 433: "[c]omportamenti astrattamente contrari a regole pre-esistenti, ma che nondimeno riflettano un nuovo e più accettabile assetto di valori sociali, sono sovente giustificati inizialmente con il ricorso allo stato di necessità per poi gradualmente condurre alla formazione di nuove regole giuridiche. Nell'ordinamento internazionale, quindi, lo stato di necessità svolge anche una importante funzione come fattore di ricambio del diritto".

to establish the conformity with international law of the measures aimed at preserving the existing baselines and marine area boundaries.[108] This would exempt them – in the event of actual coastal retreat due to sea-level rise – from invoking the state of necessity to justify the adoption of such measures as "the only way for the State to safeguard an essential interest".[109]

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108 According to ORAL, *cit. supra* note 99, p. 439 "international law must itself adapt and provide adaptive means for States to respond to serious challenges created by sea-level rise". See also, ORAL and BEKTAS, "Sea Level Rise and the Law of the Sea: Filling the Gaps through Informal Lawmaking", in KLEIN (ed.), *Unconventional Lawmaking in the Law of the Sea*, Oxford, 2022, p. 334 ff.

109 Moreover, as DUPUY, *cit. supra* note 53, p. 224, observes "[l]'invocation de la nécessité écologique [...] est déjà par elle-même, de la part de celui qui l'invoque, un aveu d'impuissance à rester dans le droit".