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Historic Waters Regime: A potential Legal Solution to Sea Level Rise

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ABSTRACT

The legal principle articulating that "the land dominates the sea"[1] constitutes a fundamental legal principle under general international law, which requires coastal states to have sovereignty over the land, from which all of their maritime rights stem. Under current international law of the sea, this principle constitutes the most challenging legal obstacle for coastal states to maintain their entitlement over their maritime zones in the event of losing their territories due to sea level rise. In departing from the current international law of the sea, the author explores the possibility of using the doctrine of historic waters as a legal basis for coastal states to safeguard their sovereignty and sovereign rights over their maritime zones as they stand nowadays, regardless of the disappearance of their landmass. It briefly assesses the doctrine of historic waters and recent international practice, particularly the case law of the International Court of Justice and the United States of America. It identifies the relevant legal requirements that coastal states would have to fulfill in order to be able to claim in the future an historic title[2]over their maritime zones that would have been previously governed by current international law of the sea.

Keywords: Historic Waters, Sea level Rise, International Law of the Sea, the Land Dominates the Sea, Disappearance of Land Territory, Sovereignty, Sovereign Right, International Court of Justice, Maritime Zones, Climate Change, Stability of the Oceans.

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1) *North Sea Continental Shelf,* Judgement of 20.2.1969, ICJ Reports 1969, 3, para. 96.

2) For the purpose of this paper the author will not deal with the continental shelf regime.

1. Introduction

Few modern law of the sea commentators have reflected on the subject of historic waters, mostly because the doctrine of historic waters has been overtaken by the current international law of the sea regime, considering it "as relics of an older and by now largely obsolete regime"[1]. However, it is the view of the author that historic waters might have found its way back to the spotlight as a potential solution to the legal challenges posed by the rising sea level. This view has been explored in the past very lightly and abandoned very quickly[2]. The present article intends to review some of the considerations that would have to be taken into account in order to consider the historic waters regime as a viable solution.

The principle "the land dominates the sea" constitutes a well- recognized principle by the International Court of Justice ("ICJ"). In the *Qatar v. Bahrain* case, the ICJ stated that the "maritime rights derive from the coastal State's sovereignty over the land" and "[i]t is thus the terrestrial territorial situation that must be taken as a starting point for the determination of the maritime rights of a coastal State". More recently, in the *Nicaragua v. Colombia* case, the ICJ emphasized that "[t]he title of a State to the continental shelf and to the exclusive economic zone is based on the principle that the land dominates the sea", and that "the land is the legal source of the power which a State may exercise over territorial extensions to seaward". The implications of this fundamental principle would militate against those States that would lose their territory due to sea level rise, as any claim of those States that is not based on a coastal front would be unfounded.

Over 70 years ago, Gidel stated that a coastal State which makes the claim of historic waters is asking that they should be given exceptional treatment; "such exceptional treatment must be justified by exceptional conditions ···."[3]. Yet, what is more exceptional than the disappearance of the territory of a State? Should a long-standing exercise of sovereignty and sovereign rights over maritime zones be suddenly invalidated in the future due to the disappearance of the land mass? Would that be in conformity with the principles of general international law and the preservation of the international order and stability of the Oceans? The author considers that the answer is in the negative. Maritime boundary disputes are a substantial source of international conflict, if coastal states could challenge settled limits and boundaries on the basis of any shift of the coastlines due to sea level rise, the potential for

1) Blum (1986), "The Gulf of Sidra Incident", American Journal of International Law, 80, pp. 668-677, at p.671

2) *See* A.H.A. Soons (1990), "The effects of a Rising Sea Level on Maritime Limits and Boundaries", Netherlands International Law Review, Volume XXXVII, para. 4.2.4. Professor Soons basically rejected this approach because under his view the doctrine of historic waters (1) causes a great measure of uncertainty with respect to the situation between the shifting of the baselines and the coming into existence of a new legitimate tittle (time factor); (2) the issue of sea level rise differs too much from the original issue for which the doctrine of historic waters was developed and (3) the predictability of the effect of sea level rise calls for a development of a general rule which in similar cases can be applied by all costal States. Ibid.

3) Gilbert Gidel (1934), "Le Droit International Public de la Mer", Vol. III, p. 635.

conflict would be enormous, not least because of the unfairness of the situation for those countries, particularly small developing countries.

This article will examine the potential application of the doctrine of historic waters as a legal basis for safeguarding the sovereignty and sovereign rights of States over their maritime zones as they stand nowadays, regardless of the disappearance of their landmass.

The doctrine of historic waters has been viewed as a deviation from the general rules. Nevertheless, general criteria on the legal requirements for its application exist. The three legal requirements that compose the historic waters doctrine will be briefly explained below: 1) formal claim, 2) effective and continued exercise of the relevant jurisdiction, and 3) international acquiescence. It will be seen that in order for a State to benefit from this regime it would have to comply with these traditional requirements. The author will suggest, when explaining each legal requirement, the potential approach that a coastal State could adopt in order to be able to rely on this doctrine to maintain their pre-existent maritime zones. The article concludes by acknowledging the potential use of the historic waters regime in benefit of those States that have lost territory due to sea level rise.

2. Sea level rise and the loss of territory

Under the provisions of the United Nations Conventions on the Law of the Sea (hereinafter "LOSC"), coastal states may claim a twelve nautical mile territorial sea[4] (hereinafter "TS"), a twenty-four nautical mile contiguous zone[5] (hereinafter "CZ"), and a two-hundred nautical mile exclusive economic zone[6] (hereinafter "EEZ") and continental shelf. These maritime zones are measured from baselines[7] located at land, which under the LOSC, are of an ambulatory nature[8]. In turn, it is only

4) LOSC, article 3.

5) LOSC, article 33, (2).

6) LOSC, article 57.

7) *See* the following articles of the LOSC: article 5 normal baselines; article 6 reefs; article 7 straight baselines; article 9 mouth of rivers ; article 10 bay closing lines; article 9 river closing lines; article 13 low tide elevations; article 47 archipelagic baselines.

8) There are only exceptions addressed in LOSC, deltaic baselines and the limits of the outer continental shelf, leading to the conclusion that in general the others maritime zones are of an ambulatory nature. Most of the Commentators agree that under LOSC baselines (normal baselines) are of an ambulatory nature. See David D. Caron (1990), "When Law Makes Climate Change Worse: Rethinking the Law of Baselines in Light of a Rising Sea Level", 17 ECOLOGY L.Q. 621, 634; A.H.A. Soons (1990), "The Effects of a Rising Sea Level on Maritime Limits and Boundaries", 37(2) NETH. INT'L L. REV. 207, 216-18; Rosemary Rayfuse (2012), "Sea Level Rise and Maritime Zones: Preserving the Maritime Entitlements of 'Disappearing' States", in Threatened Island Nations: Legal Implications of Rising Seas and a Changing Climate (M.B. Gerrard & G.E. Wannier eds., forthcoming); José Luís Jesus (2003),"Rocks, New-born Islands, Sea Level Rise and Maritime Space", in Negotiating for Peace- Liber Amicorum Tono Eitel 599, 602 (Jochen Frowein et al. eds., 2003); Clive Schofield & I Made Andi Arsana (2010), "Imaginary Islands? Options to Preserve Maritime Jurisdictional

logical to anticipate that a considerable rise in the sea level would have a direct impact on baselines and the outer limits of maritime zones. For example, if a feature that generates maritime zones is submerged it would result in the change of status of that feature. A maritime feature that now falls under the "islands" regime or "low-tide elevation"[9] regime can be reclassified into one of the categories of insular formation from which only restricted maritime claims can be made, such as a "rock"[10], or even a fully submerged feature that cannot be used to generate any maritime claim.[11]

In the face of sea level rise and the gradual disappearance of land territory, some authors and States have suggested different approaches that could be adopted by coastal states in order to safeguard their rights and sovereignty over such territory. Although this paper does not intend to analyze the nature of baselines or the maritime zone's outer limits under the LOSC, a quick overview of the approaches involving baselines that have been suggested so far to solve this situation will serve as a background to the argument for historic waters in the search of a possible legal solution to challenges posed by the rising sea level.

Some coastal states consider that artificial conservation of features or the coastline might offer a solution to counter the legal and practical effects of the sea level rise. For example, the Government of Maldives built a 3m high gabion seawall around Malé. Even though it might be true that building artificial infrastructure around features capable of generating maritime zones or reinforcing coastlines could protect from the effects of sea level rise and avoid the reduction or loss of maritime zones, its viability is questionable and might simply not be enough. Artificial conservation constitutes a costly solution, which might be reasonable for developed countries that have the financial and technological means to put it in practice and maintain it; but for Small Island States who are in fact the most affected, the cost of such project would constitute an unbearable task. Clearly, another reminder that small developing countries bear the brunt of climate change despite their marginal contribution to the situation.

Entitlements and Provide Stable Maritime Limits in the Face of Coastal Instability", 6th IHO-IAG ABLOS Conference, 25-27 October 2010, available at http://www.iho.int/mtg_docs/com_wg/ABLOS/ABLOS_Conf6/ABLOS_Conf6.htm ; Moritaka Hayashi (2011), "Sea-Level Rise and the Law of the Sea: Future Options", in The World Ocean in Globalisation 187 (Davor Vidas & Peter Johan Schei eds., 2011). See also the International Law Association Committee on Baselines under the International Law of the Sea, which stated that: "the normal baseline is ambulatory, moving seaward to reflect changes to the coast caused by….sea level rise" (available athttp://www.i-la-hq.org/en/committees/index.cfm/cid/1028)

9) "A low-tide elevation is a naturally formed area of land which is surrounded by and above water at low tide but submerged at high tide. Where a low-tide elevation is situated wholly or partly at a distance not exceeding the breadth of the territorial sea from the mainland or an island, the low-water line on that elevation may be used as the baseline for measuring the breadth of the territorial sea.", article 13 (1) LOSC.

10) *See* article 121 (3), LOSC.

11) Julia Lisztwan (2012), "Stability of Maritime Boundary Agreements", Vol. 37:1, p. 161 (*footnote omitted*).

Another suggested approach[12] has called for the development of rules under international law concerning baselines in anticipation of sea-level rise. For example, the development of a customary rule that would allow for these States to continue having rights over those maritime zones and resources. It is well known, that for a customary rule to be recognized as such it has to fulfill the traditional criteria; a) there should have been sufficient State practice and b) that this should have been accompanied by *opinio juris/opinio juris sive neccesitatis.*[13]The downside of this proposal is that the establishment of "a general recognition among States of a certain practice as obligatory"[14], could be as challenging as a decision among States parties to the LOSC, a revision of the LOSC or the adoption of an implementation agreement or supplementary treaty to this effect, all of which have been suggested at some point.

More importantly, even if a new customary rule of international law emerges this would not necessarily provide a legal answer to coastal states that would lose their entire territory. This situation arises out of the fact that both customary law of the sea and the LOSC contain as a basic rule the *Principle of Domination*. This means that if a coastal State loses the totality of its territory, under the current law of the sea it would not be able to maintain its baselines from which to measure the breadth of its maritime zones and would not have any entitlement at all over its pre-existing maritime zones, as any claim of a State without a costal front would become unfounded. Therefore, if existing provisions were applied as they now stand[15], the surviving population would be left without any resources.

Furthermore, the pre-existing maritime zones of a coastal State would become part of the high seas, leaving it open for exploration and exploitation by other nations, particularly those developed nations that dominate offshore exploration and exploitation of marine resources. This in turn only adds to the already unbalanced state of things when it comes to the sharing of resources and makes the loss of territory and resources a particularly unjust and inequitable result for some States, such as small island developing states.

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12) Another possible approach is the adoption of maritime boundaries agreements between coastal states with opposite or adjacent coasts. The stability given by boundary agreements between states is well recognized by the jurisprudence of the ICJ, which might be enough to counteract geographical changes or the disappearance of land territory (eg.: *"when two countries establish a frontier between them, one of the primary objects is to achieve stability and finality."*(Temple of Preah Vihear (Cambodia v. Thai.), Merits, 1962 I.C.J. 6, 34 (June 15)."

13) Hugh Thirlway (2014), "The Sources of international Law", First Edition, Oxford University Press p. 56-57.

14) Ian Brownlie (2008), "Principles of Public International Law", Seventh Edition, Oxford University Pres.

15) Sea level rise was not generally foreseen when formulating the existing rules of international law. During UNCLOS III not only ''[*t]he prospect of sea-level rise and its effect on maritime space and borderlines [were…] not specifically addressed by the 1982 Convention...*" but "this was not a major concern.'' See more at Jose Luiz Jesus (2003), "Rocks, New-Born Islands, Sea Level Rise and Maritime Space", in Negotiating for Peace—Liber Amicorum Tono Eitel 601 (Jochen Abr. Frowein, Klaus Scharioth, Ingo Winkelmann & Rudiger Wolfrum eds., 2003).

This dim scenario raises some important legal questions and provokes the search for other legal solutions to allow those States that might be affected by the loss of their territory to continue claiming their maritime zones and resources therein. In this respect, it is the view of the author that the doctrine of historic waters might offer such a possibility. Below the author describes briefly the concept of historic waters along with its legal requirements.

3. Historic waters

In the absence of a codified definition of historic waters, it is necessary to rely upon customary international law, and the opinion of jurists and judicial bodies. In this regard, Bouchez has defined historic waters as "waters over which the coastal State, contrary to the generally applicable rules of international law, clearly, effectively, continuously, and over a substantial period, exercises sovereign rights with the acquiescence of the community of States"[16]. The definition made by Bouchez reflects the legal requirements of historic waters: effective and continuous exercise of sovereign rights and international acquiescence. Over two decades ago, Professor Soons also defined historic waters as "waters over which the coastal State, in deviation of the general rules of international law, has been exercising sovereignty, clearly and effectively, without interruption and during a considerable period of time, with the acquiescence of the community of States"[17]. The elements of the definition made by Prof. Soons are the same as the ones expressed by Bouchez and have been supported by other commentators.[18] More recently, these requirements have also been recognized by the Bureau of Oceans and International Environmental and Scientific Affairs of the United States of America in its document "Limits in the Seas No. 143 "Maritime Claims in the South China Sea"[19].

The United Nations, in its "Juridical Regime of Historic waters including bays" (hereinafter *UN Juridical Regime*)[20] upheld these legal requirements, which suggest a general consensus regarding the elements for the establishment of a historic title over maritime zones. The *UN Juridical Regime* summarizes the background of the

16) L.J. Bouches (1964), "The Regime of Bays in International Law", published by A.W. Sythoff, at p. 281. See also Gilbert Gidel (1934), "Le Droit Intermational Public de la Mer", Vol. III, p. 623.

17) A.H.A. Soons (1990), "The Effects of a Rising Sea Level on Maritime Limits and Boundaries", Netherlands International Law Review, 37, para. 4.2.5

18) L.J. Bouchez (1964), "The Regime of Bays In International Law", pp. 200-201. (Leyden: A.W. Sijthoff). See also P.C. Jessup (1927), "The Law of Territorial Waters and Maritime Jurisdiction", p. 382. (New York).

19) (1) open, notorious, and effective exercise of authority over the body of water in question; (2) continuous exercise of that authority; and (3) acquiescence by foreign States in the exercise of that authority. For more see Limits in the Seas No. 143 (December 5, 2014) China "Maritime Claims in the South China Sea" United States Department of State, Bureau of Oceans and International Environmental and Scientific Affairs (footnote omitted).

20) Juridical Regime of Historic Waters, including Historic Bays, Document: A/CN.4/143, 09 March 1962. This document was prepared by the Codification Division of the Office of Legal Affairs at the request of the International Law Commission.

concept of historic waters in a description that would very much fit a situation such as the one under study, that is, a State losing the entirety of its territory, and as a consequence, its maritime zones. According to *UN Juridical Regime* the key element in the development of the notion that waters could be claimed under a historic title, is the fact that States continued to claim and effectively maintained sovereignty over an area that was considered "vital" for their national interests despite the evolution of the law towards other completely opposing notions.[21]

As to the character of the historic waters regime, the ICJ remarked in the *Tunisia/Libya* case the absence within the LOSC of any concept or rules on historic waters and therefore concluded that"[...] the matter continues to be governed by general international law which does not provide for a single regime for historic waters or historic bays, but only for a particular regime for each of the concrete, recognized cases of historic waters or historic bays"[22]. Traditionally, the term historic bays has been more frequently used than historic waters and therefore the case law on the former has been developed, in contrast to the virtually non-existence case law on the more general term of historic waters. However, this reference to the nonexistence of a single regime seem to imply that the doctrine of historic waters is not limited to claims of historic bays, suggesting that there are no reasons for which a State could not claim a historic entitlement over other maritime areas besides bays. [23] Furthermore, the United Nations Memorandum on "Historic Bays"[24] (hereafter the "UN Memorandum of 1957") clarifies that the application of the theory of historic bays "is not limited to bays" and that "[i]t tends to be applied [..] to the various areas capable of being comprises in the maritime domain of a State"[25]. For its part, Sir Gerald Fitzmaurice also noticed that despite the fact that in practice there seem to be more states claiming historic bays, there would be no rule opposing the possibility of claiming other waters on a historic basis.[26]

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21) The Historic waters idea "has its root in the historic fact that States through the ages claimed and maintained sovereignty over maritime areas which they considered vital to them without paying much attention to divergent and changing opinions about what general international law might prescribe with respect to the delimitation of the territorial sea", UN Juridical Regime p.7, para. 38

22) ICJ Reports (1982), at pp. 73/74 para.100. Symmons considers that the source must be found within international customary law because of the lack of treaty law on the doctrine, leaving the formal source to the limited State practice concerning historic waters, supplemented by discussions in the UN documents, US case law (for example Alaska v. US (2005)) and in the works of commentators (for example "Historic Waters in International Law, with Special Reference to the Artic" Pharand, XXI Toronto Law Journal 1(1971). For more *see* Symmons p.8, para.2.2

23) *See* UN Juridical Regime p.2, para. 8. In fact, the only reason why the UN Memorandum of 1957 did not put more emphasis on others maritime areas was because the purpose of the memorandum was "to shed light on the concept of "historic bays"…. and historic claims to other waters were dealt with only incidentally".

24) Memorandum by the Secretariat of the UN, "Historic Bays", Volume I (Preparatory Documents), A/CONF.13.1, September 30th, 1957, available at http://legal.un.org/diplomaticconferences/lawofthesea-1958/docs/english/vol_I/4_A-CONF-13-1_PrepDocs_vol_I_e.pdf

25) *Ibid.,* para. 199.

26) British Year Book of International Law (1954), Vol. 31, p. 381.

If the doctrine of historic waters could also encompass other maritime zones, such as the TS, CZ and the EEZ, in the view of this author it would be conceivable to suggest that in the future, coastal states that lose their territory would be able to rely on this doctrine to safeguard their rights over maritime zones. However, entertaining the possibility of this regime as a basis for States wishing to continue enjoying their rights over those areas would also entail to require these States to comply with the requisites of the doctrine of historic waters.

4. Legal Requirements

These stipulations contemplate the making of a formal claim, the continuous and effective exercise of relevant jurisdiction and international acquiescence.[27]

4.1 Formal claim

A formal claim must be understood as an action that "must emanate from the State or its Organs"[28]. It must be public and must have the notoriety proper of an act of a State. Additionally, in order to be able to claim a historic title over the maritime zones the actions of the coastal State shall be of an authoritative nature, i.e. exercise of sovereignty or sovereign rights over the relevant areas.[29]

Any claim should be made without inconsistencies otherwise those inconsistencies could affect the alleged historic title. There should be consistency in the period of time and area of the claim. This issue was raised in the Tunisia/Libya case, in which Libya argued that the historic rights claimed by Tunisia were contradicted by the numerous changes undergone by the enacted legislation over a period of time, contradicting the supposedly 'immemorial' recognition of such rights.[30] The legislation enacted by Tunisia, such as a 1951 decree and a 1963 law regarding the Gulf of Gabes, showed important discrepancies affecting the size of the area claimed, the methods for establishing that size and other points of interest that made it impossible for Libya to acquiesce the claim of Tunisia [31]. Similarly, in the *US v. Florida* case, there were also arguments against the geographical inconsistency based on the different treatment given to the area by geographers and cartographers over time because the area being claimed by the State of Florida was not always constantly treated as a bay.[32]

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27) This article is based on the assumption that the Coastal State will continue to exist as State under international law even after the disappearing of their territory. For further reading on this subject see Rosemary Rayfuse (2010), "International Law and Disappearing States: Utilising Maritime Entitlements to Overcome the Statehood Dilemma", Univ. N.S.W. Faculty of Law Research Series, Paper 52. The statehood dilemma is beyond the scope of this article.

28) *See* footnote 16 at Symmons p.120.

29) UN Juridical Regime p.13, para. 85.

30) Libya Counter –Memorial, p.194 para. 120 available at http://www.icj-cij.org/docket/files/63/9523.pdf?PHPSESSID..

31) Symmons p.134 (footnote omitted).

Moreover, the claim has to be made in clear an unequivocal terms or else it would be dismissed, as the Supreme Court of the United States did in the *Cook Inlet* case, by concluding that "given the ambiguity of the Federal Government's position, we cannot agree that the assertion of sovereignty possessed the clarity essential to a claim of historic title over inland waters"[33]. The need for clarity in respect to the extent of the historical claim is essential in two ways; (1) it defines the area over which the State should enforce its jurisdiction and (2) it allows for the possibility of a State to acquiesce the claim.

The importance of these two aspects, international acquiescence and consistency of the claim, was highlighted in the Judgement rendered by the ICJ in the case concerning the Gulf of Fonseca between *El Salvador/Honduras,* where the Court took the opportunity to expand on its previous judgment in the Tunisia/Libya case [34]. The Court found that the historic nature of the Gulf was based on the "historic character of the Gulf waters, the consistent claims of the three coastal states, and the absence of protest from other States"[35].

Now, a practical way to reinforce a claim includes not only the enactment of domestic legislation, but also the indication of the historic claims on a map and notification of the international community along with the accompanying chart. This was done by Italy when asserting its 1977 claim on the Gulf of Taranto and has been supported by commentators[36]. Both the issuance of domestic legislation as well as the notification to the international community on the claim could be considered as the fulfilment of the publicity aspect of the formal claim.

In the hypothetical scenario of the loss of territory, another option for making a formal claim - besides enacting legislation - could be the adoption of an agreement among the affected coastal states, giving them the opportunity to state in written clear terms their claims. This could be done at the regional level, for example among the members of the Alliance of Small Island States. [37] As we will see below, the fact that the agreement would be among affected States not only reinforces their demands, because of their special interest, but also diminishes the need of the absence of protests.

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32) Report (1974), at p. 43. *See* Symmons p.134.

33) *See* footnote 61 at Symmons p.129

34) I.C.J. Reports 1982, p.73.

35) Judgment of the ICJ in the case concerning *The Land, and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)* para. 405.

36) For example, Bourquin argued that "[s]overeignty must be effectively exercised; the intent of the State must be expressed by deeds and not merely by proclamations", Maurice Bourquin (1952), "Les baies historiques", dans Melanges Georges Sauser-Hall, p.43.

37) *See* more at http://aosis.org/

4.2 Effective and continued exercise of relevant jurisdiction

4.2.1 Effective exercise of relevant jurisdiction

The formal claim requires an effective exercise of relevant jurisdiction over the maritime zones on the part of the claiming coastal State. In *El Salvador/Honduras* case, El Salvador very rightly observed in its Counter Memorial that "mere paper assertions do not establish rights and the absence of protest against them does not improve the position of the claimant [State]"[38].

One imperative element is that the claim should be in accordance with the exercised jurisdiction. In other words, "if the claimant State exercised sovereignty as over internal waters, the area claimed would be internal waters, and if the sovereignty exercised was sovereignty as over the territorial sea, the area would be territorial sea"[39]. Following this logic, if the sovereign rights exercised were sovereign rights corresponding to those over the EEZ, the claimed area would be EEZ. This way the sovereignty or sovereign rights to be acquired would be commensurate with the actual exercise by the claimant State.[40] Thus, the adoption of any legislation relating to historic waters may form a part of an effective exercise of sovereignty or sovereign rights over the maritime zones, but it also requires actual exercise on the ground. This could merely imply for the State to continue exercising and reinforcing that jurisdiction.[41]

4.2.2 Continuity

The steadiness and repetition in time of the activity undertaken by the State is essential to sustain the claim of an existence of a historical title. However, that activity is not just any activity but it should be understood as an effective exercise of sovereignty.[42] Moreover, the usage must "not only be effective but also prolonged. It must develop into a national usage"[43]; as any sporadic enforcement of relevant jurisdiction over the maritime zones would not be sufficient for the claimant State to support the continuity of its formal claim. This notion establishes a link between the continuity of a claim and the effective exercise of the relevant jurisdiction over the area for a considerable time. The UN Juridical Regime undertook an extensive review of State practice, case law and academic studies, and determined that this link was the dominant view in order to prove the existence of a title to historic waters.[44]

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38) Counter Memorial of the Republic of El Salvador (10 February 1989) p.264, para. 8.29 available at http://www.icj-cij.org/docket/files/75/6587.pdf

39) UN Juridical Regime, p.23 para.164.

40) UN Juridical Regime p.25, para.189.

41) *See* para. 32 below.

42) UN Juridical Regime p.15, paras.103.

43) UN Juridical Regime p.22, para.156.

44) UN Juridical Regime p.15, para.101.

In its reasoning in the Tunisia/Libya case the Court drew attention to the need for 'long usage'[45], but what does this term encompass? The main view is that there is no particular length of time to create a historic title, leaving it to judgment on a case-by-case basis.[46] On the other hand, there have been suggestions that the claim should have at least existed for a 100 years. [47]

In any event, it is important to note that the proposed time lapse becomes less relevant where a formal claim is indisputable and where international acquiescence is undeniable. In this regards, and as Judge Alvarez stated in the Fisheries Case, a comparatively recent usage might be of greater effect that an ancient's usage insufficiently proved.[48]

In a situation where a State has lost its territory, the last two elements [indisputable claim and international acquiescence] should have more weight in the future than the length of time elapsed. Especially, in the hypothetical case where a regional agreement has been concluded between neighbouring affected States with special interest.[49] Thus, the period of time will vary according to the particular conditions involved, and, in particular, upon the attitude of neighbouring States or States with special interest.[50]

In relation to the critical date, for the time to start running the State must be already exercising sovereignty over the area in a public and effective way.[51] In other words, there is a need to establish a critical date that connects the formal claim with the actual exercise of sovereignty, allowing the claimant State to ensure international reaction (acquiescence) and continuity of the claim to a moment in time.

In the case of coastal states that are parties to a regional group, the moment in time could be the date of the adoption of an agreement that declared their areas as historic waters once their land territory has disappeared. If the enactment of legislation has been the chosen option, then the critical date would be that on which the coastal State adopted the legislation. It would be also advisable for the coastal

45) I.C.J. Reports 1982, p.73.

46) UN Juridical Regimep.15, para.104.

47) `*See* also Alaska v. US (2005) where the Special Master stated that "[t]here cases suggest that a period of more than 100 years would suffice. In the Alabama and Mississippi Boundary case, the Court held that a continuous assertion of authority for 168 years made Mississippi Sound a historic bay [….] Special Master Walter E. Hoffman similarly concluded that 192 years was long enough for Vineyard Sound to become a historic bay. [..]. Special Master Albert B. Maris said that 105 years would have sufficed for Florida Bay if other requirements had been met", available at http://www.supremecourt.gov/SpecMastRpt/Orig128_033004.pdf. *See* more in Symmons, p.158-159.

48) International Court of Justice "Fisheries Case (*United Kingdom v Norway*), Judgment of 18th December 1951" Reports of Judgements, Advisory Opinions and Orders, p. 152. (Leyden, 1951).

49) *See* para.42 below.

50) *See* International acquiescence below.

51) UN Juridical Regime, p.18, para.124.

State to deposit its charts before the Secretary General of the United Nations together with the relevant domestic legislation on the declaration of their maritime zone as historic waters for future effect.

To strengthen the coherence between the claim and the effects of sea level rise, the coastal State should, right from the start of the regression of the baseline, continue to exercise sovereignty or sovereign rights in the concerned maritime zone, in the same way as it used to before the rise of the sea level.

The most important aspect of the points indicated above, independently of the adopted mechanism to establish the critical date, is to establish with clarity that the coastal State is declaring its maritime zones as historic waters[52] in the face of the potential loss of territory.

It might be problematic to clarify this legal requirement fully at this moment in time. Especially since the historic waters regime will only become effective at the point of disappearance of the land territory in order to facilitate the continued exercise of the rights of a coastal State beyond that point.[53] As Prof. Soons correctly stated, the qualification of 'historic' implies that the coastal State only acquires a legitimate title after the passing of a certain period of time since the changes in the baseline have occurred. Before that moment, it possessed a legitimate title but after that, a new title has to come into existence, i.e. historic waters regime.[54] This approach shall not be consider as an absurd, especially because it is perfectly possible to foresee which countries will be most affected by the rise of the sea level and the potential legal mechanisms that could be implemented by them.

4.2.3 International acquiescence

International acquiescence requires knowledge by third States, without which there can be no true acquiescence.[55] The *Cook Inlet case* demonstrated that "[i]n the absence of any awareness on the part of foreign governments of a claimed territorial sovereignty over [a body of water] the failure of those governments to protest is inadequate proof of the acquiescence essential to historic rights"[56], thus international acquiescence of the community of States is required.

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52) Kenya claimed a retrospective historic title on Uganwana Bay. The Territorial Waters Act of 16 May 1972, revised in 1977, states, "Uganwana Bay (sometime known as Formosa Bay) shall be deemed to be and always to have been an historic bay."Kenya's claim was in order to safeguard the vital interests of the inhabitants of the coastal region and to confirm the practice which has always existed, which should not be understood far from the aim of Small Island States.

53) The application of the doctrine of historic waters will only become operational when the LOSC could no longer be applicable.

54) *See* A.H. A. Soons (1990), "The effects of a Rising Sea Level on Maritime Limits and Boundaries", Netherlands International Law Review, Volume XXXVII, para. 4.2.4.

55) For more see Symmons, p.213.

56) 422 US, p.200, reference available at http://www.supremecourt.gov/SpecMastRpt/Orig128_033004.pdf p. 132.

As has been indicated above, international acquiescence depends on an adequate publicity of the claim. In order to be considered as such, enough available evidences on the historic claim should exist. One mechanism that could be adopted by the coastal State is the publication of an eventual regional agreement or declaration on the historical character of their maritime zones, as well as the publication of relevant charts of the relevant maritime areas.[57]

The acquiescence and the formality of a claim rely on the degree of international acceptance necessary to generate the international recognition, but how wide the degree of international acceptance must be to validate a historic title? Gidel makes two points; the first one is that an objection by one state would not nullify the claim[58]; and the second one that not all objecting States have the same standing when raising their objections.[59] Just as in the case of acquiescence, other elements are taken into account when evaluating an objection.

In a similar way, when it comes to customary international law it is observed that "if a sufficient number of States manifest their opposition to a developing rule –particularly if they include States with a special interest in the matter-the rule will not come into existence at all"[60].Correspondingly, in the case of historic waters it could be argued that where there is a sufficient number of States with a special interest in the matter, this could generate the necessary international acceptance for international recognition. Once again, the standing is not the same for those States that may not have a great interest and those that do have a great interest in the area, being the latter of greater importance in terms of support and opposition to the claim.

It seems conceivable then to conclude that the degree of international acceptance necessary to generate international recognition will focus on States with special interest in the matter and in the area. Even if other States strangers to the vanishing territories object, the historic titles of the disappearing States could succeed. As previously suggested a consented approach by a group of coastal states, such as the Islands in the Pacific, might constitute a strong recognition of the historical claims and will be of more weight in the face of potential dispute.

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57) *See* paras. 24-32 above. It is important to mention that the UN Juridical Regime seems to have adopted a more simplistic approach on this aspects, that is "*In any case, nobody seems to demand that the coastal State must formally notify each and all of the foreign States that it has assumed sovereignty over the area, before the time necessary to establish a usage will begin to run. If that is so, the notoriety of the situation, the public exercise of sovereignty over the area, would in reality be sufficient". See more in* UN Juridical Regime, p.19 para.128.

58) There is no need for the total absence of opposition, UN Juridical Regime, p. 17 para.116 (footnote omitted).

59) *Ibid.*

60) Hugh Thirlway (2014), "The Sources of international Law", First Edition, Oxford University Press p.86.

5. Conclusions

It is imperative for coastal states to protect their maritime zones in the face of climate change and sea level rise, as it will have serious impacts on their national security and economic activities, among others. This is essential for low-lying Islands, as any rise in sea-level will have substantial and profound effects on their economies and living circumstances; and particularly because of the potential for their complete territory to be submerged under water. Artificial conservation measures might not be a viable possibility for those small States or might not be enough for some low-lying Island States.

Despite the desirability of creating new rules to solve this problem, the slim possibility of that happening does not make it practical to count on that solution on the short term. As a consequence, the historic waters regime might prove to be an option for these States to continue enjoying their rights, without having to depend on the creation of new rules.

The author did not encounter any stipulation in international law that would render it impossible for this regime to be adopted by affected States. It might suffice to comply with the requirements for claiming a historic title over these waters. In practice, this could be done through joint action by neighbouring States or States with similar interests by signing a regional agreement or by enacting legislation in coordination, therefore proving acquiescence of other States. Their claim should be clearly stated and include proof that they have had sole possession over the claimed maritime zones. This possession shall be continuous, peaceful and should have been in place for a considerable period of time, by means of acts of sovereignty or sovereign rights in the form of official regulations over the areas.

Moreover, these States would even have the possibility to build artificial infrastructure in their maritime zones in order to manage their resources and security, without having to worry about the artificiality of the infrastructure, since the basis of their entitlements will be the historic title, and not land or a maritime feature.

The International Law Commission in its Report on the work of its twenty-ninth session concluded that "the topic [the juridical regime of historic waters] did not appear at that time to require active consideration by the Commission in the near future". However, after 37 years, and especially after considering the future scenarios regarding the loss of territory, it seems that the time has come to study the potential of this regime to provide some legal solutions to these challenges. Even though Ambassador Tommy Koh referred to LOSC as a constitution for the oceans[61], the future reality will demand the international community to look beyond the Convention.

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61) Statements made on 6 and 11 December 1982 by Ambassador Tommy Koh at the final session of UNCLOS III, in M.H. Nordquist (ed)(1985), "United Nations Convention on the Law of the Sea 1982, A Commentary", Vol.1, Center for Oceans Law and Policy, University of Virginia, p.11.

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