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Imaginary Coastlines

Analysing Baseline Fixation under the Law of the Sea

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Summary

As a consequence of climate change, global sea-level rise is expected to increase significantly in the coming years, posing potentially catastrophic threats to coastal states. This raises critical questions in international law, including that of the potential loss of maritime zones and associated entitlements for coastal states. Under the UN Convention on the Law of the Sea (UNCLOS), the seaward limits of maritime zones and the associated maritime entitlements are measured from the baseline which, according to Article 5 of the Convention, is defined as the low-water line along the coast.

Under the current interpretation of the law of the sea, baselines as defined in UNCLOS are ambulatory, shifting with the accretion and recession of the actual coastline. This means that land inundation caused by sea-level rise would require the outer limits of maritime zones to move landwards, resulting in the loss of associated rights. To protect the existing rights of coastal states, the ILC has suggested preserving current maritime entitlements through the fixation of baselines. Given that a formal revision of UNCLOS appears politically unfeasible, the ILC suggests that this fixation could be achieved through a reinterpretation of existing UNCLOS provisions, particularly Article 5. I describe the attempt towards such a solution the *interpretative approach* of the ILC.

The process of treaty interpretation is governed by Articles 31-33 of the Vienna Convention on the Law of Treaties (VCLT). These articles form a coherent system of rules while at the same time allowing a degree of flexibility for the interpreter to adapt the interpretation to relevant circumstances. However, the interpretative approach of the ILC could potentially risk stretching the meaning of the treaty terms to a degree which might go beyond the intended margins of flexibility laid out in the VCLT articles. This could have negative implications for the practice of treaty interpretation as well as for the status and predictability of UNCLOS.

I argue however that a solution might be found in the potential reference to separate legal regimes emerging in the area, through a dynamic application of Article 31(3)(c) VCLT. Whether by means of a treaty or as a rule of customary international law, for such a regime to impact the interpretation of UNCLOS, it would need to be applicable to all treaty parties, which could be achieved by its acceptance as an objective regime with effects on third parties. However, while an embryonic customary rule of law is emerging among some states, the current state practice and accompanying opinio juris are still insufficient to establish it as a rule of law. Until a customary law norm or other relevant rule of international law is identified and widely accepted among the treaty parties, alleging the permissibility of baseline fixation through an expansive interpretation of UNCLOS should be regarded as a proactive approach of the ILC.

The difficulties in reaching a swift solution to the issue of sea-level rise should not hinder efforts to protect the rights of vulnerable states. Solutions should however meet the requirements regulating the process of treaty interpretation. Through international efforts to recognise the rights for vulnerable states to maintain existing rights and obligations, preferably though the emergence of customary or treaty law, practical solutions can be presented which are in line with this legal framework.

Sammanfattning

Som en följd av klimatförändringarna förväntas den globala havsnivåhöjningen att stiga avsevärt under de kommande åren, vilket medför potentiellt katastrofala hot mot kuststater. Detta väcker kritiska frågor inom folkrätt, inklusive den om den potentiella förlusten av maritima zoner och tillhörande rättigheter för kuststater. Enligt FN:s havsrättskonvention (UNCLOS) mäts havszonernas yttergränser och de tillhörande maritima rättigheterna från baslinjen som, enligt artikel 5 i konventionen, definieras som lågvattenlinjen längs kusten.

Under den nuvarande tolkningen av havsrätten är baslinjerna som definieras i UNCLOS ambulatoriska, vilket innebär att de ändras med förflyttningen av den faktiska kustlinjen. Detta innebär att översvämning orsakad av havsnivåhöjning skulle kräva att havszonernas yttre gränser flyttas inåt landet, vilket resulterar i förlust av tillhörande rättigheter inom dessa zoner. Mot bakgrund av detta har ILC föreslagit att nuvarande maritima rättigheter kan fixeras på sina nuvarande positioner. Med tanke på att en formell revision av UNCLOS verkar politiskt ogenomförbar, föreslår ILC att denna fixering kan uppnås genom en omtolkning av befintliga UNCLOS-bestämmelser, särskilt artikel 5. Jag beskriver försöket till en sådan lösning som ILC:s tolkningsansats.

Tolkningen av traktater styrs av artiklarna 31-33 i Wienkonventionen om traktaträtten (VCLT). Dessa artiklar bildar ett sammanhängande system av regler samtidigt som de tillåter en viss flexibilitet för tolkaren att anpassa tolkningen till relevanta omständigheter. Emellertid kan ILC:s tolkningsansats potentiellt riskera att utsträcka den tänkta meningen av fördragsvillkoren till en grad som kan gå utöver de avsedda marginalerna för flexibilitet som fastställs i VCLT-artiklarna. Detta kan ha negativa konsekvenser för fördragstolkning i stort, såväl som för statusen och förutsägbarheten hos UNCLOS.

Jag menar att en lösning kan hittas i den potentiella hänvisningen till separata rättsliga regimer som uppstår inom området, genom en dynamisk tillämpning av artikel 31(3)(c) VCLT. Oavsett om det sker genom ett fördrag eller som en internationell sedvanerättsregel, måste en sådan regim, för att påverka tolkningen av UNCLOS, vara gällande för alla fördragets parter, vilket kan uppnås genom dess acceptans som en objektiv regim med effekter på tredje part. Men även om det finns indikationer mot att en sedvanerättslig regel håller på att växa fram bland vissa stater, är den nuvarande statspraktiken och tillhörande opinio juris fortfarande otillräckliga för att etablera den som en rättsregel. Tills en sedvanerättslig norm eller annan relevant internationell rättsregel identifieras och allmänt accepteras bland fördragets parter, bör påståendet om tillåtligheten av baslinjefixering genom en expansiv tolkning av UNCLOS ses som ett proaktivt angreppssätt från ILC.

Svårigheterna att snabbt nå en lösning på problemet med havsnivåhöjningen bör inte hindra ansträngningarna att skydda de utsatta staternas rättigheter. Lösningar bör dock uppfylla kraven för regleringen av traktatstolkningen. Genom internationella ansträngningar att erkänna rättigheterna för utsatta stater att behålla befintliga rättigheter och skyldigheter, med fördel genom framväxten av ny sedvanerätt eller traktaträtt, kan praktiska lösningar presenteras som är i linje med detta rättsliga ramverk.

Preface

My interest in the legal dimension of sea-level rise began during my internship at the Swedish mission to the UN in New York in the autumn of 2023, where I was given the opportunity to take part in the work of the sixth committee of the UN General Assembly. I remain grateful for all the valuable insights and experiences I acquired during this period. I also want to extend my warm thanks to my supervisor Ulf Linderfalk for his guidance and encouragement throughout the writing of this thesis.

Johan Holst, Stockholm, 21 May 2024

Abbreviations

CLCS	Commission on the Limits of the Continental Shelf
EEZ	Exclusive Economic Zone
ICJ	International Court of Justice
ILA	International Law Association
ILC	International Law Commission
ILR	International Law Reports
IPCC	Intergovernmental Panel on Climate Change
NOAA	National Oceanic and Atmospheric Administration (U.S.)
SIDS	Small Island Developing States
SLR	Sea-level rise
UNCLOS	United Nations Convention on the Law of the Sea
VCLT	Vienna Convention on the Law of Treaties
YBILC	Yearbook of the International Law Commission

1 Introduction

1.1 Background

1.1.1 Scientific findings on sea-level rise

According to the Intergovernmental Panel on Climate Change (IPCC), global warming as a result of human activity is established as a fact.[1] The concentration of carbon dioxide in the earth's atmosphere is estimated at the highest levels in over two million years.[2] As a result, the global mean sea level is rising and will unavoidably continue to rise for millennia to come, affecting coastlines globally.[3] If the emission of greenhouse gases continue at very high levels, the IPCC deems it likely that the global mean sea level rise could approach two meters by the year 2100, compared to 2014 levels. With lower emissions, the projected likely rise in sea levels stands at between 28 and 101 cm by the year 2100.[4] As a result, several islands and low elevation coastal areas risk becoming uninhabitable and, in extreme cases, risk complete and permanent inundation.[5] Furthermore, the states most vulnerable to sea-level rise, such as those situated in low elevation coastal areas and small island developing states (SIDS) have been shown to be those least responsible for current and historical greenhouse gas emissions.[6]

1.1.2 Baselines and maritime delineation under UNCLOS

In the UN Convention on the Law of the Sea (hereinafter: UNCLOS or the Convention) coastal states are granted rights over maritime areas extending a given distance from the baseline along the coast. The area directly adjacent to the baseline is known as the territorial sea, extending 12 nautical miles (M) from the baselines. Within the territorial sea, the coastal state exercises sovereign jurisdiction, including in the corresponding airspace above it and in the subsoil and seabed beneath it.[7] Beyond the territorial sea, the state also has partial jurisdiction over the Contiguous Zone up to 24 M measured form the baseline, in which it may exercise the control necessary to prevent infringements of its customs, fiscal, immigration or sanitary laws and regulations within its territory.[8]

Also beyond the territorial sea, measuring at most 200 M from the baseline, the coastal state has jurisdiction over the Exclusive Economic Zone (EEZ).[9] The jurisdiction over this zone grants the coastal state, *inter alia*, sovereign

[1] IPCC (2023), p. 42.
[2] Ibid.
[3] Ibid., p. 77.
[4] Ibid., p. 80.
[5] IPCC (2019) p. 27.
[6] IPCC (2023) p. 44, 51.
[7] United Nations Convention on the Law of the Sea [hereinafter: UNCLOS], Art. 2.
[8] Ibid., Art. 33.
[9] Ibid., Art. 55, 57.

rights to the exploration and exploitation of living and non-living natural resources, as well as the rights to other economic activity in the zone, such as power production from wind and water sources.[10] Beyond the EEZ, the coastal state can have jurisdiction over its so called continental shelf, extending up to the end of its continental margin. The determination of the limits of this continental margin is however rather more technically demanding than for other maritime zones, defined either by the gradient of the continental slope, or by a line drawn up from points at which the thickness of sedimentary rocks is at least 1 per cent of the shortest distance from such point to the foot of the continental slope.[11] In this area, the coastal state assumes sovereign rights for the exploration and exploitation of non-living natural resources.[12] Areas outside national jurisdiction are referred to as the high seas, which is open to all states, both coastal and landlocked, and may not be subject to claims of sovereignty by any state.[13]

As evident from the above passage, the baseline is of vital importance for the delineation of maritime zones and, as such, for the rights to state entitlements in these zones. The normal baseline is defined in Article 5 UNCLOS and forms the standard rule for baseline determination. The article reads:

> Except where otherwise provided in this Convention, the normal baseline for measuring the breadth of the territorial sea is the low-water line along the coast as marked on large-scale charts officially recognized by the coastal State.[14]

There are exceptions to the normal baseline rule, allowing for other means of establishing a baseline in cases where the geographical circumstances are less suited for establishing the baseline in this way. These special rules apply in a variety of circumstances, such as with bays, ports, roadsteads, mouths of rivers, deeply indented coastlines and fringing reefs.[15] For the latter two categories applies so called straight baselines, which are determined by choosing appropriate points, while following the general direction of the coast. All waters on the landward side of the baseline, including river, canals and small bays, form the internal waters of the state. Here the state exercises full jurisdiction, while still under the obligation to provide rights to innocent passage in accordance with the Convention.[16]

1.1.3 Framing the problem

Sea-level rise poses a grave risk to many states. The gradual nature of sea-level rise means however that the effects of sea-level rise are differentiated,

[10] UNCLOS, Art. 56.
[11] Ibid., Art. 76.
[12] Ibid., Art. 77.
[13] Ibid., Art. 86, 89.
[14] Ibid., Art. 5.
[15] Ibid., Art. 6-7, 9-11.
[16] Ibid., Art. 8.

differing based on both geographic and socioeconomic conditions. For the most vulnerable states the threat is urgent, with the potential of severe territorial loss in the near future. The question of baselines represent one of the most pressing legal issues facing coastal states. In large part, the question facing the legal community is whether the maritime zones measured from the baseline of a costal state must follow a receding coastline in the event of sea-level rise, with a resulting loss of state entitlements to, *inter alia*, fishing and other natural resources. Such an outcome would likely be considered both immoral and unjust toward those states most affected by, and least responsible for, the adverse effects of sea-level rise.

The underlying legal problem can be reframed as whether the baseline under UNCLOS must be regarded as ambulatory, following the position of the actual low-water line along the coast, or if it could instead be fixed, locked in place to preserve the current maritime delineation regardless of subsequent land inundation. Allowing the fixation of current baselines would require either an interpretation of relevant UNCLOS provisions allowing for such a fixation, or a formal revision of the UNCLOS articles to allow the fixation. This dichotomy of course depends on whether we require the issue to lie within the scope of UNCLOS at all. As discussions on the integration of baseline fixation in the scope of the Convention are ongoing, a regional practice has begun to emerge among Indo-Pacific states whereby states express their intent to avoid revising their baselines regardless of changes to their geographic coastlines. The potential effects of this emerging practice of states is discussed below in relation to the theory and practice of treaty interpretation as it relates to UNCLOS.

The baseline question was first picked up by the ILA and is currently under consideration by a study group of the ILC. Despite the ILA having concluded that baselines under existing UNCLOS provisions are decidedly ambulatory, the ILC have opted to recommend an interpretation of UNCLOS allowing for fixed baselines in line with the emerging norm of customary law, without the need for formal revision of the Convention.

Approaches for dealing with the issue of baselines under international law has created a need for clarification of the legal reasoning surrounding them. Such a clarification has as of yet not been attempted, which is the underlying rationale for this thesis. In this essay, I analyse the efforts towards allowing the fixation of baselines under the law of the sea, with an emphasis on what I call the interpretative approach of the ILC. This analysis is made from the perspective of the theory of treaty interpretation and the general theory of public international law.

1.2 Purpose

The purpose of this thesis is to clarify the interpretative approach of the ILC on the question of allowing the fixation of baselines following sea-level rise, in order to lay the foundation for further critical examination and discussion concerning the development of international law.

1.3 Research questions

The research questions to be answered in this thesis are the following:

1. How are baselines under the UN Convention on the Law of the Sea affected by sea-level rise?

2. What is the ILC:s interpretative approach to the question of fixation of baselines, and how does it relate to the theory of international law concerning the interpretation of treaties?

1.4 Delimitations

The effects of sea-level rise are broad and give rise a wide array of issues of relevance to international law. In the interest of providing a more focused and thorough examination, the scope in this essay is narrowed to consider only those issues of relevance to baselines under the international law of the sea. Thus, issues relating to, for instance, statehood or human rights aspects, both subject to separate ongoing studies by the ILC, will not be addressed here.

When referring to *baselines* throughout this essay, what is indicated is the normal baseline as defined in Article 5 of UNCLOS, as it forms the standard rule for establishing the borders of maritime zones. When straight baselines are discussed, this will be expressly stated. Questions concerning other exceptions to the normal baselines rule, including the maritime delineation for archipelagic states and the role of offshore islands and low tide elevations, will similarly not be specifically addressed in the thesis.

In the interest of streamlining, certain principles of international law such as the principle of *uti possidetis juris* and the principle of *rebus sic stantibus* will be left out of consideration here. Both these principles are however brought up for discussion in the additional paper to the first issues paper by the ILC. For this reason, a short explanation is warranted to briefly explain both what they mean, as well as why I choose to exclude them from the further consideration. The *uti possidetis juris* principle originally derives from Roman law but reemerged, first in Latin America in the 19th century and later in the 1960's in Africa, in the context of decolonialization.[17] In modern international law, the principle establishes a norm determining that borders and administrative divisions established during colonial rule should be maintained after

[17] Nesi (2018) paras. 1-3.

independence.[18] It is primarily rooted in the need to prevent border disputes between states, as well as to prevent the potential exploitation of weaknesses and disorder in newly founded states, which are often challenged by secessionist attempts.[19] As the principle's applicability to maritime borders are disputed, and since it concerns itself with questions of delimitation rather than delineation,[20] it lies outside the scope of the primary focus for this thesis and will consequently not be addressed here.

The principle of *rebus sic stantibus* refers to Article 62(1) in the 1969 Vienna Convention on the Law of Treaties (VCLT) stating that a fundamental change of circumstances, as a general rule, does not permit the withdrawal from or termination of a treaty, regardless of whether the change was unforeseen by the parties to the treaty. The exception to this standard rule is if the fundamental change of circumstances places an undue burden on a party, provided that the strict requirements of Article 61(1) are met.[21] However, Article 61(2)(a) VCLT expressly prohibits the applicability of its use if the question concerns international borders. Given that the principle has few applications in case law, and since it is unlikely to be applicable to questions concerning either maritime delineation or delimitation, it too will not be revisited further in this essay.[22]

1.5 Method and material

The research questions and purpose of this thesis calls for the application of a legal doctrinal method. While doctrinal methods are by far the most used in studies of international law, the specific contents of these methods can sometimes vary and is often implicit rather than expressly described in scholarly works.[23] The legal doctrinal method can be described as the search to "identify and understand the body of practices and ideas that emerge from recognized legal materials".[24] It emphases the application of a theoretical framework to apply to the studied material, rather than focusing on empirically testing the validity of observed facts.[25] By contrast, the empirical approach following from sociological research approaches utilizes qualitative and quantitative methods in order to understand "how law obtains meaning, is practised and changes over time".[26] The legal doctrinal approach instead assumes a normative standpoint, in which logical reasoning plays an important role in

[18] Ibid., para. 4.
[19] Nesi (2018) para. 9.
[20] A commonly used distinction is made here between the concepts of delineation and delimitation. While the former is concerned with establishing the seaward limits of a coastal state, the latter concerns the lateral relationship between neighbouring coastal states. For a further discussion on these concepts, see Liao (2021) pp. 100-160.
[21] Heintschel Von Heinegg (2021) para. 25.
[22] ILC (2023a) para. 125(c).
[23] Venzke (2015) p. 185f.
[24] Varuhas (2023) p. 72.
[25] Dominicé (1997) paras. 5-10.
[26] Deplano and Tsagourias (2021) p. 2f.

analysing the formation and application of law through a theoretical framework.[27] Another way of describing this is that the application of a legal doctrinal method requires that one takes "an internal point of view, whereby one understands the law on its own terms".[28] However, as Dominicé points out, this does not mean that the legal doctrinal method amounts to a *normative science*:

> Law itself is normative because it prescribes what has to be, but legal science, like any other science, aim at the acquisition of knowledge. Its subject is the study of rules and, generally, of the legal phenomenon, but it is not a normative science.[29]

Importantly, the legal doctrinal focus on the theory and principles of international law allows the researcher to discuss and analyse the interrelations between norms of general and special international law.[30] The emphasis on logical reasoning and fundamental concepts of law also enables the researcher to draw conclusions on how hypothetical new norms would fit into the existing system of rules and principles of international law. As Varuhas describes, while the doctrinal method can be applied by judges and practitioners to resolve disputes or advise clients, the aims of *doctrinal scholarship* is threefold: "to facilitate access to law, to enhance understanding of the law, and to critique the law and legal decision-making".[31]

In applying the doctrinal method, a common starting point is Article 38 of the ICJ-statute, as it provides a generally accepted list of means for the determination of international law.[32] The article lists conventions, international customary law and general principles of law as primary means for the determination of international law, and judicial decisions and doctrine as secondary means. Accordingly, this thesis will take as its starting point the interpretation of Article 5 UNCLOS and a discussion of the application of Articles 31-32 VCLT, constituting the authoritative provisions respectively for the determination of baselines and the interpretation of treaties. While also being part of the authoritative provisions for the interpretation of treaties, Article 33 VCLT will not be considered in this thesis as its focus on different language versions of treaties falls outside the scope of this work.

This essay will employ a critical examination of the proposals and conclusions of the ILC on the baseline question. The term *critical examination* refers here to the process of assessing, from a legal doctrinal perspective, the reasoning of the ILC in its efforts towards allowing the fixation of baselines. I emphasise that this does not indicate that the thesis relies on the post-modern

[27] Deplano and Tsagourias (2021) p. 2.
[28] Varuhas (2023) p. 72.
[29] Dominicé (1997) para. 4.
[30] Ibid., para. 8.
[31] Varuhas (2023) p. 73.
[32] Statute of the International Court of Justice, 18 April 1946, UNTS 993, Article 38.

discourse analysis known as "critical international law".[33] The term *critical* is instead used to describe the scrutiny to which the ILC argumentation will be subjected in order to properly examine its coherence and potential.

For the purposes of this thesis, the material used will primarily be made up of two main pillars. First, the relevant works of the ILC and ILA will be used as the basis for discerning the legal reasoning behind the development of international law on the question of the effects of sea-level rise on baselines. These consist primarily of the works leading up to the adoption of the ILA Sydney Declaration of 2018, as well as the first issues paper and additional paper to the first issues paper of the ILC Study Group. Second, a theoretical framework will be constructed using relevant legal doctrine in order to provide an in-depth and extensive body of work with which the studied material can be analysed. The framework is built around the above mentioned relevant articles of the VCLT and UNCLOS. Where relevant, case law from international courts will be referenced to complement the literature. The brief layout of the present scientific situation with regard to sea-level rise relies in its entirety on recent publications by the IPCC, in particular the Synthesis report of March 2023.

[33] Carty (1991) p. 2.

2 The works of the ILA and ILC on the issue of baselines

2.1 Overview of the chapter

This chapter aims to provide a description of the considerations of the question of baselines in the works of the International Law Association and in the International Law Commission. This description will mainly concern itself with the progression of the approaches taken to the baselines question, as well as how the existing law on baselines is interpreted. The chapter follows a chronological structure, first exploring the works of the ILA with regards to sea-level rise, beginning with the works of the ILA *Committee on Baselines under the International Law of the Sea* (hereinafter the Baselines committee) of 2008 leading up to the 2012 Sofia conference. Focus will then shift to the works of the ILA *Committee on international law and sea-level rise* (hereinafter the SLR-Committee), beginning its work in 2012 and concluding with the 2018 Sydney conference. The chapter then turns to the works of the ILC *Study Group on sea-level rise* in relation to international law (hereinafter the Study Group), beginning its work in 2019 and continuing to the present day.

2.2 The works of the ILA

2.2.1 The Baselines committee

The issue of the legal status of baselines following sea-level rise was first brought to the attention of the ILA in 2008. At this point, the Baselines committee was established with a four-year mandate to, first, "identify the existing law on the normal baseline" and, second, to "assess if there is a need for further clarification or development of that law".[34] The mandate of the committee was, in other words, one of identifying and assessing the existing law on the subject of baselines, rather than providing proposals toward the development or change of international law.

The findings of the committee was presented in the report of the 2012 Sofia Conference. The committee noted that normal baselines are defined in Article 5 of UNCLOS, which provides that:

> Except where otherwise provided in this Convention, the normal baseline for measuring the breadth of the territorial sea is the low-water line along the coast as marked on large-scale charts officially recognized by the coastal State.[35]

Based on this seemingly straightforward definition, the Baselines committee found that two different interpretations and applications had emerged.

[34] ILA (2012a) p. 1.
[35] UNCLOS Art. 5.

According to the first, the normal baseline is the *charted* low-water line, that is, "the low-water line depicted on the charts officially recognized by the coastal State".[36] The alternative is to view the normal baseline as the *actual* low-water line, or, "the low-water line along the coast at the vertical, or tidal, datum indicated on the charts officially recognized by the coastal State".[37] The Baselines committee thus found that "[t]he question before the Committee is, in essence, whether the Article 5 normal baseline is a line on a chart (the charted low-water line) or a line on the 'ground' (the actual low-water line)".[38]

Under normal circumstances (as is also pointed out by the Baselines committee) the practical difference of applying either method would be negligible in most cases.[39] However, in the case of significant landward shifts of the low-water line, the difference could potentially become greatly increased. In such an event, if the charted low-water line were found to determine the normal baseline *and* the charts officially recognized by the coastal states did not reflect the change of the low-water line along the coast, the normal baseline would be retained at the position outlined in the last version of the chart. In other words, if the charted low-water line determines of the normal baseline, the chart itself is the primary legal source for their determination and thus could, in theory, maintain a completely fictitious baseline as legal in accordance with UNCLOS.

The Baselines committee underscored the significance of the legal clarification of baselines. Since states' interests tend to lean toward establishing their baselines generously, that is, as far seaward as possible, the committee pointed out the underlying conflict of interest that is likely to occur in the delineation and delimitation of maritime boundaries. In the context of differing state interests, the committee also noted that low-lying, small island developing states (SIDS) have been found to be particularly vulnerable to sea-level rise and the potential landward shift of the baseline and outer maritime zones. Furthermore, it stated that "[i]t is possible that some of these States could lose the entirety of their territory to the sea, and thereby the basic qualifications of statehood itself."[40]

2.2.1.1 Interpretation of Article 5 UNCLOS

In order to derive the existing law on normal baselines, the Baselines committee "applied the rules of treaty interpretation to Article 5 of the 1982

[36] ILA (2012a), p. 3.
[37] Ibid.
[38] Ibid.
[39] Ibid.
[40] Ibid. p. 7.

Convention, including a review of its predecessor provision – Article 3 of the 1958 Convention – and the relevant *travaux préparatoires*."[41]

Pointing to the relevance of applying supplementary means of interpretation, actualized in the situation where an interpretation based on Art. 31 VCLT "leaves the meaning ambiguous or obscure; or leads to a result which is manifestly absurd or unreasonable",[42] the committee described two situations in which the results would be considered absurd or unreasonable for either a charted or actual low-water line as basis for the normal baseline. If the normal baseline were the *charted* one, this could occur if the baseline significantly deviated from the physical realities of the coast. This would result in maritime zones which no longer corresponded to the longstanding principle in international law that maritime rights are derived as subsidiary rights to territorial title – often exemplified in the legal maxim that *land dominates the sea*. If instead the *actual* low-water line was found to be the normal baseline, a similarly absurd or unreasonable result could occur if every minute change of the physical coastline required alteration of the baseline and the outer limits of maritime zones measured therefrom. The Baselines committee points out that in this sense, nautical charts plays an important stabilizing role, ensuring that an unreasonable amount of time and resources will not be devoted to matters of minimal practical importance (*de minimis non curat lex*).

The Baselines committee's interpretation included a study of the historical progression of the wording of Article 5 in the 1982 UNCLOS. It found that the referral to nautical charts in earlier versions of the article dated back to the 1930's Draft articles on baselines considered in preparation for the 1930 Hague Codification Conferences. The early emphasis on nautical charts was found to stem from the need to establish a vertical datum representing the physical reality of the coastline to be used in nautical charts, especially due to the difficulties of countries applying differing measurements of the nominal low-water line. In other words, reliance on nautical charts was grounded in its practical function to establish a systematic representation of the actual low-water line, rather than growing out of a view of charts as being the original source of the legal low-water line as such. The inherent difficulties in finding a simultaneously factual and practical definition of low-water lines continued in much the same way in the work in the 1950's, leading up to the adoption of 1958 Convention on the Law of the Sea. In Article 3 of this convention, which was later adopted nearly verbatim in Article 5 of the 1982 UNCLOS, the wording "as indicated on charts officially recognised by the coastal states" was thus introduced to alleviate these issues. In the words of the Baselines committee:

> As noted above, Article 3 was adopted verbatim in the text of Article 5 of the 1982 Convention. To the extent that the wording of

[41] Ibid.
[42] VCLT Art. 32.

> Article 5 is vague, the [Baselines] Committee considers that this was deliberate, and was intended to 'paper over' the practical difficulties resulting from the absence of a universally agreed vertical datum for defining low water. The insertion of the reference to charts was intended to address these difficulties, *and was not intended to give primacy to the charted line*.[43]

Following an analysis of relevant judicial proceedings in international courts where the issue of baselines was considered, the Baselines committee could identify that in proceedings where maritime delimitation was discussed, a common issue was the discussion of the accuracy of the charted lines, and considering charts as representations not only of the actual low-water lines but of the legal demarcations as well.

The Baseline committee also found that, while not universally held in the field of legal experts, "[t]he preponderance of the scholarship in this area appears to support the view that charts are not determinative of the naturally ambulatory normal baseline".[44]

2.2.1.2 Conclusions of the Baselines committee

The central question for the Baselines committee was one of identifying existing law. While focusing on an interpretation of the relevant articles of UNCLOS, it also considered the applicable customary international law on the subject. The result of this approach was that the committee could conclude in 2012 that:

> [t]he existing law of the normal baseline applies in situations of significant coastal change caused by both territorial gain and territorial loss. Coastal states may protect and preserve territory through physical reinforcement, but not through the legal fiction of a charted line that is unrepresentative of the actual low-water line.[45]

The committee subsequently went on to conclude the following:

> The Committee concludes that the legal normal baseline is the actual low-water line along the coast at the vertical datum, also known as the chart datum, indicated on charts officially recognized by the coastal State. [...] The charted low-water line illustrates the legal normal baseline, and in most instances and for most purposes the charted low-water line provides a sufficiently accurate representation of the normal baseline [...] However, where significant physical changes have occurred so that the chart does not provide an accurate representation of the actual low-

[43] ILA (2012a) p. 12 [emphasis added].

[44] Ibid. p. 22.

[45] Ibid. p. 30.

> water line at the chosen vertical datum, extrinsic evidence has been considered by international courts and tribunals in order to determine the location of the legal normal baseline."[46]

The Baselines committee thus concluded that normal baselines in existing law, that is, according to Article 5 of UNCLOS, are the *actual* low-water line along the coast. This conclusion was found to have support throughout the legal doctrine, in rulings by international courts and tribunals, as well as in the practice of states.[47] This also means that in the view of the Committee, the normal baseline is ambulatory, moving seaward to reflect changes to the coast caused by accretion, land rise, and the construction of human-made structures associated with harbour systems, coastal protection and land reclamation projects, and also landward to reflect changes caused by erosion and sea level rise.[48] Under extreme circumstances the latter category of change could result in total territorial loss and the consequent total loss of baselines and of the maritime zones measured from those baselines.[49] Importantly, the Baseline committee also found that the existing law of the normal baseline does not offer an adequate solution to this potentially serious problem.[50]

The conclusion is clear that, irrespective of whether the change in the physical realities of the coastline are caused by natural or human-made phenomena, the existing law of the normal baseline finds it to be ambulatory, following the actual low-water line along the coast. As shown in the above quotes, the committee realises and expresses the problem that this entails for coastal states. This however does not change its overall conclusion. For this reason, the committee recommended a Committee charged with addressing the wide range of concerns raised.

2.2.2 The SLR-Committee

After the Sofia conference of 2012, the Baselines committee had fulfilled its mandate and put forth its position on the ambulatory nature of baselines in existing law. However, no answers had been presented as to how the potential consequences of sea-level rise on baselines (and the maritime zones of coastal states) would be addressed. Naturally, this had not been part of the mandate of the committee. Instead, a proposal by the Baselines committee to establish a new ILA Committee on international law and sea-level rise (SLR-Committee) was endorsed by the Executive Council.[51]

2.2.2.1 Mandate of the SLR-Committee

The Sofia conference marked a change in the approach taken by the ILA on the issue of sea-level rise, evident in Resolution 1/2012 of the same

[46] Ibid., p. 25.
[47] Ibid.
[48] Ibid., p. 28.
[49] Ibid., p. 30.
[50] Ibid., p. 31.
[51] ILA (2014) p. 1.

conference. In it, the ILA noted "[t]he implications of the existing law of the normal baseline in situations of territorial loss resulting from sea-level rise" as well as the recognition that:

> […] substantial territorial loss resulting from sea-level rise is an issue that extends beyond baselines and the law of the sea, and encompasses consideration at a junction of several parts of international law, including such fundamental aspects as elements of statehood under international law, human rights, refugee law, and access to resources, as well as broader issues of international peace and security.[52]

As a result, the SLR-Committee was established with a twofold mandate: first, to study the possible impacts of sea-level rise and the implications under international law of the partial and complete inundation of state territory, or depopulation thereof, in particular of small island and low-lying states; and, second, to develop proposals for the progressive development of international law in relation to the possible loss of all or of parts of state territory and maritime zones due to sea-level rise, including the impacts on statehood, nationality, and human rights. The development of proposals for the progressive development of law of course mirrors in part the general mandate of the ILC, established in Art. 13(1)(a) of the Charter of the United Nations. Which is to "initiate studies and make recommendations for the purpose of [...] encouraging the progressive development of international law and its codification".[53]

The SLR-Committee initially maintained the framing of the issue of baselines as requiring a change in international law. In the interim report of 2016 presented in Johannesburg, the committee pointed out that the issue of baselines effected by sea-level rise was "an appropriate issue on which to make proposals for progressive development of international law".[54] The committee discussed two potential solutions of *de lege ferenda* character to ensure the preservation of maritime entitlements for affected states, namely the proposal of a new rule freezing either the outer, seaward limits of maritime zones or the existing baselines in their current positions.[55] Importantly, while it expressed a preference for the former option, the Committee was at this point entirely aware that both of the suggested proposals were aimed at changing existing law. This is evident from the discussion in the interim report which consistently regards the proposals made as being of a character *de lege ferenda*.[56] Several members also suggested that the changes may produce unforeseen negative consequences, including the potential breach of the longstanding legal principle that the land dominates the sea.[57] In addition, the

[52] ILA (2012b) Resolution No. 1/2012.
[53] UN Charter, Art. 13(1)(a).
[54] ILA (2016) p. 14.
[55] Ibid.; ILA (2018a), p. 12.
[56] ILA (2016) p. 3, 6.
[57] Ibid. p. 15ff.

SLR-Committee was of the understanding that its mandate in this sense stood in contrast to the identification of existing law which was the mandate of the Baselines committee. Repeating the Baselines Committee's view that baselines under existing law were in fact ambulatory and applied also in situations of extreme changes to the coastline, the SLR-Committee stated that:

> The Baselines Committee had recommended 'that the issue of impacts of substantial territorial loss resulting from sea level rise be considered further by a Committee established for the specific purpose of addressing the wide range of concerns it raises'. This, therefore, was the wider issue and the finding *de lege lata* that the Baselines Committee passed on to this Committee for further study and for the formulation of proposals *de lege ferenda*.[58]

At the 2016 Johannesburg Conference, the SLR-Committee emphasized the need for further discussion of the issue. For this reason, an extended discussion took place in the intersessional meeting in Lopud in 2017. From the minutes of the meeting, it is clear that there was a prevailing view that a freezing of either baselines or the outer limits of maritime zones would both constitute breaches of the existing law of the sea. For instance, Professor Caron pointed out that: "the option of freezing baselines implied breaches of the law of the sea on the landward side of the territorial sea whereas the option of freezing the outer limits of maritime zones implied breaches on the seaward side of the territorial sea."[59]

Subsequently, at the Singapore intersessional meeting of March 2018, it was suggested that the use of the term 'freezing' was misleading, and that the preferred terminology would be "maintaining existing entitlements" to maritime zones.[60]

2.2.2.2 Shifting to an interpretative approach

In its 2018 report presented at the 78th ILA Conference in Sydney, the SLR-Committee expanded on the conclusions laid down in the 2016 Johannesburg report. It stated that "[t]his Report follows up and elaborates on the 2016 Interim Report and presents proposals by the Committee for the development of international law".[61] The Committee also reiterated once more that "[i]n particular, sea level rise has the potential to impact significantly the spatial extent of national claims to maritime jurisdiction".[62] Specifically, the 2018 report was meant to consider progressive *de lega ferenda* proposals on the

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[58] ILA (2018a) p. 11.
[59] ILA (2017) p. 15.
[60] ILA (2018a) p. 12.
[61] Ibid., p. 6.
[62] Ibid., p. 9.

possible ways in which international law could address the impacts of sea-level rise on baselines and maritime boundaries. [63]

In the 2018 report, the SLR-Committee pointed out the preliminary indications for an emerging rule of customary law allowing the preservation of baselines, concluding that:

> there is at least *prima facie* evidence of the development of a regional State practice in the Pacific islands – many of which are the most vulnerable to losses of territory and, consequently, baseline points from sea-level rise. […] The emergence of a new customary rule will require a pattern of State practice, as well as *opinio juris*.[64]

In 2018, the committee again changed its approach to baselines under the law of the sea. Rather than maintaining the acknowledgement that the issue was one of changing existing law, this new approach instead focused on the possibility of interpreting existing provisions of UNCLOS to allow for maintaining existing maritime rights for coastal states.

At its 2018 Sydney conference, the ILA endorsed the proposal by 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".[65]

2.3 The work of the ILC

2.3.1 The ILC Study group on sea-level rise

In 2018, during its seventieth session, the ILC decided to include the topic *sea-level rise in relation to international law* in its long-term programme of work.[66] The UN General Assembly in its seventy-third session consequently took note of the inclusion of the topic on 22 December 2018 in resolution 73/265, calling on the ILC to take into consideration the comments, concerns and observations expressed by Governments during the debate in the Sixth Committee.[67] At its seventy-first session in 2019, the ILC formally included the topic in its current program of work and established the open ended *Study Group on sea-level rise in relation to international law* (henceforth 'the Study

[63] ILA (2018a) p. 11.
[64] ILA (2018a) p. 18.
[65] ILA (2018b).
[66] YBILC (2018) II, para 369.
[67] United Nations General Assembly (2018) A/RES/73/265, operative paragraph 9.

Group'). In its first issues paper, the Study Group notes the previous work by the ILA on the topic of baselines:

> the work of the International Law Association is duly acknowledged, and will be taken into account; however, the methodology of the Commission is specific and different to that of the International Law Association.[68]

The ILC Study Group was established to examine three subtopics. The first subtopic, the consideration of issues relating to the law of the sea, was delegated to the co-chairs Ms. Oral and Mr. Auresco, while the second and third (issues relating to statehood and to the protection of persons respectively) fell under the co-chairpersonship of Ms. Galvão Teles and Mr. Ruda Santaloria. As only the first subtopic deals with the question of baselines, the latter two will not be considered in this thesis.

2.3.2 First issues paper

In 2020, the first issues paper issues relating to the law of the sea was presented by the Study Group and included in the seventy-second session of the ILC. The paper determines first that sea-level rise can result in a change in the coastal configuration of a state and that, as a consequence, its baselines may change. It also outlines several of the adverse consequences facing coastal states if baselines were to follow the receding coastline as a result of sea-level rise. For instance, it finds that coastal states would risk losing rights to fisheries and to the exploration and extraction of natural resources in waters currently within the bounds of their maritime zones.[69]

Following these observations, the Study Group suggests an approach to deal with the issue of sea-level rise on baselines, outer limits of maritime zones and entitlements in these zones. It specifies that "[t]he question is whether the provisions of the Convention could be *interpreted and applied so as to address those* [adverse] *effects*".[70] Notably, the study group points out that UNCLOS was "drafted at a time when sea-level rise was not perceived as a problem that needed addressing by the law of the sea, which has meant that the convention has been interpreted as prescribing an ambulatory character for baselines".[71] Furthermore, as the only provisions referring to permanency are those concerning the continental shelf and the straight baselines resulting from deltas and unstable natural conditions in Article 7(2), "this has led to the Convention being interpreted to the effect that the outer limits of the territorial sea, contiguous zone and exclusive economic zone are ambulatory".[72] However, the Study Group suggests, in line with the suggestion of the ILA in 2018, that these established interpretations might be circumvented in the case of

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[68] ILC (2020), p. 9 para 17.
[69] ILC (2020), para. 172-190.
[70] Ibid. para 78 [emphasis added].
[71] Ibid. para 104 (a).
[72] Ibid. para 78.

normal baselines, as UNCLOS does not expressly demand the continued revision and notification of changes in coastal conditions:

> Nevertheless, it is quite important to underline that the Convention does not indicate *expressis verbis* that new baselines must be drawn, recognized (in accordance with article 5), or notified (in accordance with article 16) by the coastal State when coastal conditions change; the same observation is valid also with regard to the new outer limits of maritime zones (which move when baselines move).[73]

As evident from this quote, the Study Group finds regarding the relationship between the normal baseline and the outer limits of maritime zones, notwithstanding the continental shelf seaward limit and the provisions for straight baselines in Article 7 UNCLOS, that if the former is found to be ambulatory, so must also be the case for the latter. In other words, if baselines must move inward as a result of land inundation, the outer limits of maritime zones simultaneously move landward the same distance. Additionally, it finds that UNCLOS does not allow an interpretation establishing permanency of the outer limits of maritime zones with the exception being the permanency of the continental shelf seaward limits.[74]

The subject of straight baselines as defined in Articles 7(2) plays a vital role in the conclusions of the Study Group relating to the object and purpose of UNCLOS. Straight baselines according to this provision are applicable in cases where the coastline is highly unstable due to the presence of deltas and other natural phenomena. These baselines may be determined by selecting "the appropriate points […] along the furthest seaward extent of the low-water line", and shall remain effective "notwithstanding the subsequent regression of the low-water line", until changed by the coastal state in accordance with the convention.[75] In the view of the Study Group, the permanency of the continental shelf seaward limits and of straight baselines provide exceptions to the conventional interpretation assuming the ambulatory nature of baselines as the standard rule.[76] The Study Group does not however view these provisions themselves as solutions to the issue of legal effects of sea-level rise on normal baselines:

> These two exceptions cannot be used, however, to address the effects of sea-level rise (neither by an extensive interpretation, nor by analogy); nor can the use of straight baselines (as suggested by some scholars) be efficient when there is a substantial rise in sea level.[77]

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[73] Ibid.
[74] Ibid., para. 72.
[75] UNCLOS Article 7(2).
[76] ILC (2020), para 78-79.
[77] ILC (2020), para. 104 (c).

While not the solution to the baseline problem, the Study Group in their first issues paper nevertheless considers the straight baseline provisions important, as they display a vital aspect of the underlying intentions of UNCLOS. Namely, it shows that the convention shows a degree of pragmatic flexibility in cases where changes in the natural environment was predictable:

> These two exceptions (and especially the [straight baseline provisions]) show that the Convention was not rigid in cases where it was possible to foresee the occurrence of natural conditions that could affect legal stability, security, certainty and predictability.[78]

Hence, the Study Group concludes that the provisions for permanency was included in situations where changes to the natural environment could be predicted to have effects on the objects and purposes of the treaty. Accordingly, the teleological case could be made that the legal status of the normal baseline should also be considered in this context, despite the fact that the issue of sea-level rise was not a predictable occurrence at the time when the treaty was concluded.

2.3.2.1 The Continental shelf and the CLCS

The First issues paper also discusses article 76 of UNCLOS, pointing to the provisions determining the processes for determining the limits of the continental shelf. It underscores that if a state establishes limits to the continental shelf extending beyond 200 nautical miles beyond the baseline in accordance with a previous recommendation from the Commission on the Limits of the Continental Shelf (CLCS), this delineation is to be *final and binding*.[79] As provided by UNCLOS, charts and geodetic data *permanently* describing the outer limits of a state's continental shelf shall also be deposited with the Secretary-General.[80] The question then becomes if the rules providing permanency of the continental shelf could serve as analogy for the interpretation of UNCLOS Article 5.

It is worth noting that the rules governing the normal baseline and those relating to the continental shelf are based on very different preconditions. In particular, the rules providing for the permanency of once established outer limits of the continental shelf are greatly influenced by the inherent challenges in determining the location of the continental shelf itself. The CLCS currently faces a considerable backlog of submissions from states.[81] The substantial financial and technical undertakings involved in legally establishing jurisdiction over the continental shelf pertaining to a certain state, would rule out the feasibility of the notion that these delineations could be subject to continuous revision based on regularly updated data. Furthermore, the

[78] Ibid. para 104 (b).
[79] Ibid., p. 24 para. 67.
[80] Ibid.
[81] CLCS (2024) p. 2.

geological stability that naturally characterises the actual continental shelf, suggests that the final and binding nature of the legal delimitation of the continental shelf is grounded in an attempt to reduce the likelihood of legal challenges and disputes. This could also be understood as a means of safeguarding legal stability and friendly relations between states with reference to the objects and purposes of UNCLOS. From this follows that one probably ought to be cautious when implying analogies between those UNCLOS articles governing the continental shelf and those governing baselines or the outer limits of maritime zones.[82]

2.3.3 Additional paper to the First issues paper (2023)

The ILC Study Group issued its additional paper to the first issues paper in April 2023. The additional paper was adopted by the ILC in August 2023 and included in the report of its seventy-fourth session. The report was circulated as part of the material for the deliberation of the agenda item *Sea-level rise in relation to international law* in the Sixth Committee of the UN General Assembly during its 78th session in the autumn of 2023.[83] The principal aim of the Additional paper was to address the statements and questions posed by UN member states relating to the concepts laid out in the First issues paper, as well as to provide a more detailed exploration of legal concepts at the request of states. In this chapter I will briefly summarise some key aspects and conclusions of the paper. As the principal concepts relevant to the approach of the ILC on the issue of baseline fixation was developed in the First issues paper, this section will be of a supplementary character, focusing on the concept of legal stability and equity, as well as the emergence of a practice of states toward baseline preservation.

2.3.3.1 Legal stability

The additional paper to the First issues paper develops further the concept of legal stability as one of the fundamental aims of UNCLOS. The Study Group summarises the views of states on the issue and concludes that the majority of states views the concept of legal stability in a concrete sense, as a goal aimed at maintaining and preserving existing maritime entitlements.[84] However, a number of states viewed the concept as a more general notion attached to the Convention, rather than attributing it to the strive toward a particular result in the relations between states.[85]

It was also noted that while the concept of legal stability was found to be encapsulated within the UNCLOS framework, it should be applied with caution as it was difficult to separate from other legal concepts. It was also noted that, while relevant to maritime boundaries, its application to allow the

[82] ILC (2020) para. 72.
[83] United Nations General Assembly (2023) A/78/100, p. 120f.
[84] ILC (2023a) para. 84.
[85] Ibid.

freezing of baselines along with a consequent lack of an obligation to report on updated baselines, could pose hazards to the safety of navigation.[86]

2.3.3.2 Equity

The Study Group emphasises in its Additional paper the well-established existence of equity as a guiding principle in international law. Equity is described as providing for methods of interpretation and allowing for flexibility even where strict application of existing rules may produce inequitable results.[87] In the context of the law of the sea, especially as concerns UNCLOS, the principle of equity has sometimes been shown to be favoured by the ICJ and other tribunals before the application of rules for maritime delimitation, such as the equidistance rule.[88] The principle is furthermore evident in several UNCLOS provisions. According to the Study Group, the principle of equity should not be limited to matters of maritime delimitation, but should also be considered in the context of sea-level rise affecting the most vulnerable states disproportionately compared to other states, which might otherwise produce an inequitable result from the strict application of the Convention.[89] While it is admitted that, in case law concerning the law of the sea where the principle has been applied, non-geographical factors have not been applied by courts, the Study Group nonetheless suggest that the principle should be applied to support an interpretation of UNCLOS which allows for the preservation of existing maritime entitlements to protect the interests of the most vulnerable states.[90]

2.3.3.3 The emergence of regional practice of states

As we have seen, the embryonic emergence of a practice of states aimed at preserving maritime zones was identified first by the SLR-Committee of the ILA and reiterated by the ILC in the First issues paper of the Study Group. In the Additional paper, the Study Group outlines this development more comprehensively. Apart from statements by UN member states, particular focus is directed at the collective action taken by states in the form of the Declaration on Preserving Maritime Zones in the Face of Climate Change-related Sea-Level Rise, issued by the 18 Pacific Islands Forum Leaders on 6 August 2021.[91] In the operative paragraphs of this declaration, the parties state that they:

> **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

[86] ILC (2023a) para. 143-144.
[87] Ibid., para. 183.
[88] Ibid.
[89] Ibid., para. 183(b)
[90] ILC (2023a) para. 181, 183(d)
[91] Pacific Islands Forum (2021) p. 1-2.

> without reduction, notwithstanding climate change-related sea-level rise,
>
> **Further declare** that we do not intend to review and update the baselines and outer limits of our maritime zones as a consequence of climate change-related sea-level rise,[92]

In connection to this development among states, the ILC Study Group notes that, while the majority of doctrine has found the baselines, and consequently the maritime zones measured therefrom, to be ambulatory:

> the views of many States favour a rather different, more pragmatic approach, in an attempt to respond to the concerns prompted by the negative effects of sea-level rise.[93]

As such, the Study Group has found that there is a strong degree of convergence among states in expressing the need for preserving legal stability, security, certainty and predictability.[94] Additionally, the Study Group notes that states had generally been open to the conclusion that UNCLOS did not expressly demand the continuous revision of the position of baselines.[95] At the same time, the Study Group points out that there is little support to suggest that a rule of customary law has emerged as of yet, noting that "views [among states] referring to the issue of the formation of customary law are limited and quite cautious".[96] It is thus worth noting that the general support for the practice of baseline fixation is not yet established among all parties to UNCLOS. For instance, the US expressly states that "[t]he U.S. normal baselines are ambulatory and subject to changes as the coastline accretes and erodes."[97]

2.3.4 Summary of the conclusions of the ILC

The Study Group establishes in its first issues paper and the additional paper to the first issues paper, an approach to the subject of the effects of sea-level rise on baselines which focuses on an interpretation of UNCLOS allowing for fixed baselines. The need for such an approach is primarily grounded in what the ILC regards as the moral need to preserve the rights of states to their maritime entitlements, which in turn is justified by the underlying objects and purposes of UNCLOS, and in particular the need to ensure legal stability, security, certainty and predictability.

The option of maintaining existing rights to maritime zones and ensuring legal stability by amending the Convention (UNCLOS) was suggested both by UN member states and internally within the study group. However, this idea is not discussed at length in any of the ILC reports, and is instead summarily

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[92] Ibid.
[93] ILC (2023a) para. 89.
[94] ILC (2020), para 83.
[95] ILC (2023a)., para. 84.
[96] Ibid., para. 96.
[97] NOAA (2024).

dismissed, with the Study Group simply stating that it "was deemed difficult".[98]

An interpretation of UNCLOS allowing for the fixation of baselines is defended primarily on the following grounds. First, the Study Group is of the opinion that, according to the wording of the relevant provisions, the Convention does not *expressly forbid* the situation in which new baselines are not drawn, notified or recognized by the coastal state in the event of sea-level rise-induced landward shifts of the coastline.[99] Second, the Convention shows a degree of flexibility in situations where it has been possible to predict an instability of the coastline due to the presence of deltas and other natural phenomena, evident from provisions allowing for the relative permanency of straight baselines. Although this right is not by analogy or interpretation extendable to include normal baselines, it is according to the Study Group indicative of the flexible and pragmatic character of the treaty in situations which can include the effects of sea-level rise to baselines.

Third, while not sufficient to identify either a regional or general rule of customary international law, the ILC finds that a regional practice of states has begun to emerge. This practice can be summarised in that several coastal states, primarily in the Indo-Pacific region, displays a conscious intention not to revise their baselines despite land inundation due to sea-level rise. In addition, this emerging practice is not yet accompanied by sufficient *opinio juris*. Nonetheless, the Study Group regards the emerging practice as able to support a particular interpretation of UNCLOS.[100] Fourth, the Study Group emphasises the broad support for a pragmatic solution to maintain existing maritime entitlements evident from UN member states as well as in line with principles of, *inter alia*, equity and the need to preserve legal stability. While a limited number of hesitant or critical states have made statements to the contrary, a significant number of states has made clear that an interpretation of UNCLOS which allows for the fixation of baselines is desirable.

[98] ILC (2023b), p. 92, para 148.
[99] ILC (2020) para 78.
[100] ILC (2023b) para. 152.

3 Theoretical framework

3.1 Treaty interpretation according to the VCLT

The interpretation of treaties is governed by the provisions laid out in Articles 31-33 of the 1969 Vienna Convention on the Law of Treaties (VCLT). Articles 31-33 are broadly recognised to reflect customary international law, widening their scope of application to the interpretation of all treaties.[101] The character of the articles as reflecting customary international law has led the ICJ to apply them, despite the prohibition to retroactive application in Article 4 VCLT, to the interpretation of treaties concluded prior to the entry into force of the VCLT.[102] Articles 31 and 32 of the VCLT, comprising the general rule and supplementary means of interpretation respectively, are reproduced below in their entirety. As mentioned above, Article 33, which deals with treaties authenticated in two or more languages, will not be explored further.

Article 31

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

    (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
    (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

    (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
    (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
    (c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

Article 32

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

(a) leaves the meaning ambiguous or obscure; or
(b) leads to a result which is manifestly absurd or unreasonable.[103]

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[101] Herdeger (2020) para. 7.
[102] Lekkas, Merkouris & Peat (2023), p. 323.
[103] VCLT, Articles 31-33.

The VCLT articles on interpretation have had a big impact in international law, remedying at least to a degree the fragmentation and uncertainty that previously persisted on the question of interpretation in international law. Famously, McNair stated in 1961 that "[t]here is no part of the law of treaties which the text-writer approaches with more trepidation than the question of interpretation".[104] Nevertheless, Articles 31-33 VCLT have been the subject of some scholarly debate, themselves having proven to be in need of the interpretation which they are set out to guide.[105] However, the universal applicability of the articles for treaty interpretation is not contested, nor that they form a holistic regime of interpretation.[106]

A common occurrence in the writings on treaty interpretation is to say – with reference to a quote from the 1966 Commentaries to the draft articles on interpretation – that treaty interpretation is "to some extent an art, not an exact science".[107] In this vein, several scholars propagate a flexible approach to the theory and practice of treaty interpretation. Others put greater emphasis on the technical legal instructions that the articles provide, maintaining that the process of interpretation is in fact a scientific process which can provide us with a legally correct outcome free of political considerations.[108] However, suggestions that put undue emphasis on treaty interpretation as an inherently free political exercise should be taken with some caution. In fact, it is clear that the VCLT Articles 31-33 offer a system of legal rules which governs the treaty interpretation process.[109] The authority of the VCLT articles, as well as their status of reflecting customary international law, has been confirmed in both the practice and doctrine of international law.[110] This being said, arguing that the articles consists of a perfect system of legal instructions with a fixed solution to all operative interpretation, fails to appreciate the interpreter's freedom in applying the means of interpretation provided by the articles.

Treaty interpretation according to the VCLT Articles is a process aiming to establish the legally correct meaning of the treaty. In doing so, the starting point is to establish the ordinary meaning of the terms.[111] In this sense, however the process of interpretation is framed, it relies at its outset on establishing the ordinary meaning ascribed to the terms in conventional language.[112]

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[104] McNair (1961) p. 364.

[105] Merkouris (2019) p. 127.

[106] Orakhelashvili (2008) p. 310.

[107] YBILC (1966) II, p. 218, para. 4, *in fine*.

[108] The extremes of these positions have been termed by Linderfalk the *radical legal scepticism* and the *one-right-answer-thesis* respectively. Linderfalk, (2007) p.4.

[109] Orakhelashvili (2008) p. 310.

[110] Herdegen (2020) para. 7.

[111] Jacobs (1969) p. 322.

[112] Linderfalk, 2007, p. 62.

There are nevertheless some important questions left unanswered by the VCLT Articles 31-33. Not least, this is true for the question of temporality. In essence, this issue can be boiled down to whether interpretation should be *static*, conducted using only the international law and knowledge available to the parties at the time of the conclusion of the treaty, or *dynamic*, considering the evolution of international law up to and including the time of interpretation. I will discuss the temporal question further on in this chapter, primarily in relation to Article 31(3)(c).

The practical reason for the consideration of subsequent developments in the interpretation process is normally to clarify and illuminate vague or ambiguous elements of the treaty text. Often, such clarification concerns the meaning of terms used in conventional language, in order to establish the ordinary meaning given to the terms of the treaty in their context. As language use changes over time, establishing the conventional meaning of treaty terms requires an understanding of both temporal and intercultural variations. For instance, the intended meaning of the phrase 'official statements of state officials' in a treaty written in the 1950's would likely be different from the intended meaning today, when new technologies have dramatically changed the character of international communication. While the term might previously have had a meaning strictly limited to prepared statements approved by official governmental departments, the same official standards of state communication might arguably not apply to the private and hastily scribbled late night social media posts of some state officials today.

Similarly, the objects and purposes of a treaty can evolve and change over time as a treaty finds its place and character in the international legal system. Dynamic approaches to interpretation can in these cases be relevant in order to interpret a treaty in its intended form and in line with its intended character today. I argue that the VCLT Articles on interpretation, including via the provision in 31(3)(c), are consciously intended to allow for such a flexibility for the interpreter. The discussion on the theme of dynamic interpretation and intertemporality will be continued further on in this chapter.

3.2 Different approaches to interpretation

A common recurrence in the legal literature is the view that different schools of thought have emerged around the application of the VCLT Articles 31-33.[113] As the argument goes, the reference in Article 31 to ascertain the ordinary meaning of the terms of the treaty text represents the *objective* approach to interpretation. The second school meanwhile would represent the *subjective* approach, aiming to establish the subjective intention of the parties that drafted the treaty. Third, the *teleological* school of thought expands the scope

[113] Rose (2022) p. 69.

of interpretation beyond the objective and subjective dichotomy to consider mainly the objects and purposes of the treaty in the interpretation process.[114]

It should be noted that Article 32, identifying the supplementary means of interpretation, holds a distinctly secondary role to Article 31. While interpreters *may* have recourse to supplementary means of interpretation, these can only be applied in order to either confirm the meaning resulting from the application of article 31, or when such an interpretation (a) leaves the meaning ambiguous or obscure, or (b) leads to a result which is manifestly absurd or unreasonable. In other words, if the subjective approach is synonymous to utilising the supplementary means of interpretation as provided by article 32, then the subjective approach must be subsidiary to the objective approach.

While the separate approaches to the VCLT interpretation articles emphasise different perspectives to treaty interpretation, the conflict should likely not be overestimated. In reality, there is a general agreement in the literature that the different elements should be applied together, forming a coherent system of interpretation.[115] This view is supported by Shaw, stating that:

> any true interpretation of a treaty in international law will have to take into account all aspects of the agreement, from the words employed to the intention of the parties and the aims of the particular document. It is not possible to exclude completely any of these components.[116]

Indeed, one evident observation regarding the VCLT interpretation articles is that they are simultaneously authoritative (they *shall* be applied, regardless of the type of treaty in question) as well as the result of a compromise, intended to encapsulate the core elements of different approaches to interpretation including, *inter alia*, textual primacy, consideration of context and party intention as well as teleological considerations. It is generally agreed that the articles were consciously intended to provide a degree of flexibility and discretion to the interpretation process, whilst at the same time constituting a coherent system for treaty interpretation.[117]

3.3 The intention of the parties

As described in the VCLT, the fundamental goal of treaty interpretation is to establish the legally correct meaning of a treaty. It is generally held by scholars of international law that this legally correct meaning equates to the intention of the parties, sometimes called the "common intention" or the "communicative intention" of the parties, that is, "the meaning that the parties

[114] Shaw (2008), p. 932f.
[115] Orakhelashvili (2008) p. 310.
[116] Shaw (2008) p. 933.
[117] Jennings and Watts (1996) p. 1272.

intended the treaty to express".[118] This perspective is clearly visible in the VCLT articles, not least in Article 31(4), stating that a special, i.e. not ordinary, meaning should be given to a term if it can be established that the parties so intended. In addition, the recurring references made in the articles to *the parties* clearly portrays the underlying assumption that the communicative intention the parties is the meaning to be inferred in the interpretation of the treaty.[119] When referring to "the parties" the Vienna Convention refers to *all*[120] "states which have consented to be bound by the treaty and for which the treaty is in force".[121]

For the purposes of interpretation, the treaty text must be assumed to be the expression of this communicative intention of the parties. This is an understanding evident in the 1966 VCLT Commentaries:

> The article as already indicated is based on the view that the text must be presumed to be the authentic expression of the intention of the parties; and that, in consequence, the starting point of interpretation is the elucidation of the meaning of the text, not an investigation *ab initio* into the intentions of the parties.[122]

While one should not overly emphasize the authority of the 1966 Commentaries, they clearly support the view that the interpretation process must presume that the text is an authentic expression of the communicative intention of the parties, understood as the meaning that the parties intended the meaning to convey.

3.4 Temporal issues in treaty interpretation

As clear from the general rule of interpretation in VCLT Article 31, a treaty shall be interpreted "in good faith in accordance with the ordinary meaning to be given to the terms". This entails that treaty interpretation is, as a starting point, textual in nature, with the text of the treaty understood as the expressed communicative intention of the parties. However, one question not expressly answered by the VCLT articles is how this ordinary meaning of the terms should be understood in a temporal sense. In other words, should the interpreters limit their consideration to the law and context available to the parties only at the time of the conclusion of the treaty, or is there room in the interpretation process to consider subsequent developments in law and language?

This question forms the basis of the debate concerning static versus dynamic approaches to treaty interpretation. The proponents of the static approach would argue that in order to determine the communicative intention of the

[118] Linderfalk (2015) p. 169; Orakhelashvili (2008) p. 306.
[119] Linderfalk (2007) p. 31.
[120] Ibid., p. 167. See also Villiger (1986) p. 344.
[121] VCLT art 2 §1(g).
[122] YBILC (1966) II, p. 220.

parties to a treaty, contemporary interpreters would have to disregard subsequent changes to international law or language.[123] To claim otherwise would, according to this view, run counter to the fundamental principle of consent in international law. Of course, the subsequent evolution of law naturally could not have constituted the basis for the parties' intended meaning of said term at the time of conclusion, since it would have been unknown to the parties at the time. In this sense, the static approach could be said to have support in the requirement of interpretation in good faith in Article 31 VCLT. This approach is also reflected in the so called principle of contemporaneity, identified by Sir Gerald Fitzmaurice. According to this principle:

> [t]he terms of a treaty must be interpreted according to the meaning which they possessed, or which would have been attributed to them, and in the light of current linguistic usage, at the time when the treaty was concluded".[124]

On the other hand, supporters of the dynamic approach argues that while the ultimate aim of treaty interpretation is to establish the communicative intention of the parties, this does not necessarily exclude the possibility to consider changes of law or language that has followed since the conclusion of the treaty. For instance, the ILC suggested in 2018 in its draft conclusions relating to subsequent agreements and subsequent practice with regards to treaty interpretation (Article 31(3)(a-b) VCLT), that such agreements and practice under the VCLT interpretation articles "may assist in determining whether or not the presumed intention of the parties upon the conclusion of the treaty was to give a term used a meaning which is capable of evolving over time.".[125] Additionally, so called *generic terms* in a treaty provision can in some cases be assumed to be intended to follow the evolution of law.[126] In the *Aegean Sea Continental Shelf* Case, the ICJ concerned itself with a reservation made by Greece in 1934 to the *1928 General Act for the Pacific Settlement of International Disputes*.[127] This reservation excluded from the jurisdiction of the court the settlement of disputes relating to "the territorial status of Greece". The court found that this expression was intended as a generic term, and therefore that the reservation included Greece's jurisdiction over the continental shelf, even if the very concept of the continental shelf was alien to international law at the time when the reservation was made.

> Once it is established that the expression 'the territorial status of Greece' was used in Greece's instrument of accession as a generic term […] the presumption necessarily arises that its meaning was intended to follow the evolution of the law and to correspond with the meaning attached to the expression by the law in force at any

[123] Djeffal (2016) p. 22.
[124] Fitzmaurice (1957a) p. 212.
[125] YBILC (2018) II, para. 51-52.
[126] Fitzmaurice and Mercouris (2020) p. 136ff.
[127] ICJ Reports (1978).

> given time. This presumption, in the view of the Court, is even more compelling when it is recalled that the 1928 Act was a convention for the pacific settlement of disputes designed to be of the most general kind and of continuing duration, for it hardly seems conceivable that in such a convention terms like 'domestic jurisdiction' and 'territorial status' were intended to have a fixed content regardless of the subsequent evolution of international law.[128]

Apart from the concept of generic terms, the quote above touches on an important point relating to the character of the treaty itself, namely that the character of a treaty also influences its interpretation in the intertemporal sense. In particular, it is generally held that treaties of a *constitutional character* to a higher degree are intended to follow the development of international law, thus giving interpreters a larger freedom of action to apply a dynamic approach.[129] In the ILC Draft Articles on subsequent agreements and subsequent practice in relation to international law, it was noted that while the VCLT Articles 31-32 did not mention the character or nature of the treaty specifically:

> [t]he jurisprudence of different international courts and tribunals nevertheless suggests that the nature of the treaty may sometimes be relevant for the interpretation of a treaty [...] It is, in any case, difficult to distinguish the 'nature of the treaty' from the object and purpose of the treaty.[130]

Common examples of such constitutional treaties include the VCLT[131], the Charter of the United Nations[132] and, indeed, UNCLOS.[133] This view rests largely on the teleological perspective, as treaties of a constitutional nature, compared to treaties of a more contractual nature between a few states, are intended to remain in force for a long time and serves to establish a legal framework in a legal area. As such, they can more generally be presumed to be created with the intention to follow the evolution of international law.

On this point, it is however important to stress that the wording of Article 31(1) does not permit for the object and purpose to be applied nether independently nor as a first step in the interpretation process. Rather, the article makes clear that the object and purpose of a treaty must be considered in relation to the conventional language, i.e. the ordinary meaning of the terms. Only when the ordinary meaning of a treaty provision is either vague or ambiguous should recourse be taken to the object and purpose of the treaty.

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[128] ICJ Reports (1978) p. 33, at 77.
[129] Djeffal (2016) p. 33.
[130] YBILC (2018) p. 29f., para. 15.
[131] Orakhelashvili (2008) p. 317.
[132] Jacobs (1969) p. 320.
[133] Barnes (2012) p. 459.

> The idea of using the object and purpose is that it will serve as […] a supplement. Where the ordinary meaning of a treaty provision is vague, using the object and purpose will make the meaning of the provision more precise. Where the ordinary meaning is ambiguous, using the object and purpose will help to determine which one of the two possible meanings is correct, and which one is not.[134]

Indeed, just as with the objects and purposes of Article 31(1), the consideration of context is also subject to this limitation. This includes such considerations that are referred to in Article 31(3)(a-c) as subsequent practice, subsequent agreements and other relevant rules of international law applicable between the parties. Both the context and the objects and purposes should be understood as hierarchically equally authoritative, yet must be distinguished from the ordinary meaning of the terms of the treaty which is interpreted.[135]

3.4.1 The doctrine of intertemporality

The doctrine of intertemporality was introduced by Judge Huber in the 1928 *Island of Palmas* arbitration. The case concerned a dispute between Spain and the Netherlands, in which Spain claimed the title to the Island of Palmas off the coast of the Philippines based on their discovery of the nation in the 16th century. Judge Huber thus had to consider whether the applicable law was that present at the time of the discovery, or whether changes in the law up to the point of the judgment should be taken into account. He formulated what today is called the first branch of the intertemporality doctrine in stating that: "[a] juridical fact must be appreciated in the light of the law contemporary with it, and not of the law in force at the time when a dispute in regard to it arises or falls to be settled".[136] However, Huber also continued to formulate the second branch of the intertemporality doctrine:

> As regards the question which of different legal systems prevailing at successive periods is to be applied in a particular case (the so-called intertemporal law), a distinction must be made between the creation of rights and the existence of rights. The same principle which subjects the act creative of a right to the law in force at the time the right arises, demands that the existence of the right, in other words its continued manifestation, shall follow the conditions required by the evolution of law.[137]

Hence, while the first branch would require the application only of the law contemporary with the creation of a legal right, the second branch of the intertemporality doctrine suggests that the continued validity or existence of a right requires that conditions are continuously met in accordance with the

[134] Linderfalk (2007) p. 203.
[135] Ibid., p. 343ff.
[136] RIAA (1928) p. 829, 845.
[137] Ibid. p. 845.

evolution of international law. The distinction between the branches forms the basis for the so called intertemporality problem, namely which law to apply when the law has changed with the passage of time.[138]

While the first branch of the intertemporality doctrine – in line with the static approach – has been generally accepted among legal scholars, the second branch has generated more controversy in the field.[139] Nevertheless, the second branch of the doctrine is not without application in international law. In the 2019 *Chagos Archipelago* proceedings, the ICJ produced an advisory opinion on the legality of the British detachment of the Chagos Archipelago prior to the granting of independence for Mauritius in 1968.[140] In the view of the United Kingdom, applying the first branch of the intertemporality doctrine, argued that the detachment of the islands in 1965 was not unlawful at the time since the principle of the right of self-determination of peoples was not established as a norm of customary international law until the adoption of the Declaration on Friendly Relations in 1970. The ICJ disagreed, instead deciding that the detachment was unlawful at the time. In order to reach this conclusion it however relied on the 1970 Friendly Relations Declaration. The ICJ stated that while the right of self-determination of peoples crystallised in 1960 with the adoption of General Assembly resolution 1514 (XV), the 1970 Friendly Relations Declaration "confirmed its normative character under customary international law".[141] Furthermore, the court found that it "may also rely on legal instruments which postdate the period in question, when those instruments confirm *or interpret* pre-existing rules or principles".[142] The argument is thus made that, particularly as regards the development of customary international law, the interpretation or confirmation of the existence of a norm is not strictly constricted to the perception of existing law at the contemporary moment, but can allow for the consideration of later instruments establishing the status of a norm.

The question of intertemporality was also actualised in the *Iron Rhine Arbitration*, concerning a railway linking the port of Antwerp in Belgium to the Rhine basin in Germany via the Netherlands.[143] The case required the interpretation of provisions in a treaty concluded between the parties in 1839 as the question of developing the railway reemerged in the 1990's. The tribunal applied the VCLT Articles 31-32, as they reflected customary international law.[144] The tribunal recalled in the case the dictum of the ICJ in the *Gabčíkovo-Nagymaros* case that:

[138] Wheatley (2021) p. 488.
[139] Ibid.
[140] ICJ Reports (2019).
[141] Ibid., p. 133, para. 155.
[142] Ibid. [emphasis added]
[143] RIAA (2005) p. 66, para. 57.
[144] RIAA (2005) p. 62, para. 45.

> new norms have to be taken into consideration, and […] new standards given proper weight, not only when States contemplate new activities but also when continuing with activities begun in the past[145]

The Tribunal found that the continued viability of the arrangement between the parties was itself an important reason to accept that even rather technical rules may have to be dynamically interpreted.[146] Furthermore, the tribunal found that subparagraph 31(3)(c) of the VCLT supported the view that subsequent rules, including principles of general international law emerged in the legal field and applicable between the parties (in this case relating to the protection of the environment) could be considered in the interpretation of previously concluded treaties.[147] Particularly, the tribunal noted: "a general support among the leading writers today for evolutive interpretation of treaties."[148]

3.4.2 On temporality in the emergence of customary international law

The creation of a rule of customary international law is in itself complicated in a temporal sense. Article 38 of the ICJ Statute describes "international custom, as evidence of a general practice accepted as law". In the *North Sea Continental Shelf* case, the ICJ described the two elements involved in the creation of a new rule of customary law as the existence of "a settled practice […] carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it".[149] Evidence of these components can only emerge through the passage of time.[150] The process of a customary rule of law coming into being thus remains essentially paradoxical, in the sense famously described by Sir Gerald Fitzmaurice as the "rule-breaking practice for a new rule of customary international law to come into existence".[151] The paradox lies in the fact that the customary rule's emergence requires the practice of states to be *settled* in order for the rule to be considered as law, while at the same time the requirement of accompanying *opinio juris* entails that the state must be of the opinion that it regards its practice as required by law. In other words, the process entails the expression of the (factually incorrect) opinion of the state that the rule exists, before it by definition does.

Hence, Crawford points out that the emergence of rules of customary law cannot be understood as the result of a sudden moment of change. Instead

[145] ICJ Reports (1997) at p. 78, para. 140.
[146] Nolte (2013) p. 186.
[147] RIAA (2005) p. 66, paras. 58-60.
[148] Ibid., p. 73, para. 81.
[149] ICJ Reports (1969) p. 3, para. 77.
[150] ICJ Reports (2009a) Separate opinion of Judge Sepulveda-Amor, p. 279, para. 25.
[151] Fitzmaurice (1957b) p. 113.

they come into being in an "intensive dialectic process".[152] This was also the case for the emergence of a customary rule allowing the jurisdiction of states over the continental shelf. While references are often made to the 1945 Truman Proclamation as the decisive moment for the creation of this rule of customary law, Crawford notes that there was little general support to this end before the proclamation. Rather, the proclamation was defended primarily on the basis that it was considered "reasonable and just" and grounded on equitable principles.[153] Crawford continuous in saying that:

> This clearly did not reflect international law the day before the Proclamation. Yet at some later point in time, to a large extent, it did. How and when did that happen? It seems to illustrate a paradox: that new customary international law rules can only come into existence if we deceive ourselves into believing they existed all along.[154]

The customary rule on jurisdiction over the continental shelf has since become conclusively established in international law and was eventually codified in UNCLOS in 1982. Taking the case of the continental shelf as an example, it is possible that the formation of a new customary rule allowing preservation of the normal baseline would emerge in tandem with the proactive interpretation of UNCLOS allowing for fixed baselines, as a dialectic process between the agents and instruments active in the law of the sea. To conclusively determine the existence of such a law at the present moment certainly does not rule out that it might be considered to have emerged when looking back at this time with the benefit of hindsight.

3.4.3 Subsequent agreements and practice

I have previously mentioned the potential relevance of subparagraph 31(3)(c) VCLT for the elaboration of a fixed baseline regime, which will be expanded on in the following chapter. First however, it may be prudent to expand briefly on the relevance in this situation of the preceding subparagraphs 31(3)(a-b). These state that the interpretation of treaties shall take into account (a) any *subsequent agreement* between the parties regarding the interpretation of the treaty or the application of its provisions, and (b) any *subsequent practice* in the application of the treaty which establishes the agreement of the parties regarding its interpretation. The distinction between the two has been described by Nolte:

> 'subsequent agreements' are only express agreements which are designed to serve as a means of interpretation for the treaty under review, whereas 'subsequent practice' are all other forms of

[152] Crawford (2013) para 73.
[153] Truman (1945), for text see AJIL supplement 4, Vol 40(1).
[154] Crawford (1957b) para 75.

> subsequent conduct which could conceivably serve as an elucidation of a relevant agreement of the parties.[155]

The distinction between subsequent conduct, here encapsulating both subparagraphs (a-b), and other "relevant rules of international law applicable between the parties",[156] is not immediately clear. The division can be described on a temporal level as subsequent conduct expressly requires the conduct to be subsequent to the treaty itself, while the other relevant rules has no expressly stated temporal limitation. Nolte describes an additional important point relating to this distinction, namely that it is:

> a continuum between subsequent conduct by the parties which *specifically relates to a treaty* and other practice which bears some meaningful but less immediate relationship with that treaty.[157]

Thus, one can argue that, while subparagraph (c) requires the rules in question to be *relevant*, and as such must be related to the subject matter, it allows rules with a less direct relationship to the treaty itself to become relevant in its interpretation. The further requirements of this subparagraph will be laid out in more detailed in the following section.

There is however nothing preventing the subparagraphs (a-b) to become relevant in supporting a particular interpretation, when a separate rule of international law has become applicable between the parties of a treaty on a subject matter otherwise governed by the actual treaty. Hence, if a relevant rule of law became relevant to the interpretation of UNCLOS on the basis of subparagraph (c), the compliant state conduct to this new rule could serve to support the dynamic interpretation of the treaty also on the basis of subparagraphs (a-b).

3.4.4 Article 31(3)(c) VCLT

As previously described, Article 31(3)(c) of the VCLT makes up a part of the general rule of interpretation, stating that "there shall be taken into account, together with the context [...] any relevant rules of international law applicable in the relation between the parties". The subparagraph can be said to be made up of three principal elements. First, the reference to 'rules of international law' appears to indicate that the subparagraph refers to the sources of international law listed in Article 38(1) of the ICJ-Statute, hence including rules of customary international law. Second, the rules must be 'relevant'. This is generally understood to mean simply that the rules must concern the subject-matter in question.[158] Third, the rule must be 'applicable in the relations between the parties'. As we have seen, the reference made to 'the

[155] Nolte (2013) p. 174.
[156] VCLT Art. 31(3)(c).
[157] Nolte (2013) p. 175.
[158] Villiger (1997), p. 265.

parties' in the general article should be taken to mean that the relevant rule in question must be applicable to all parties to the treaty, i.e. states "which [have] consented to be bound by the treaty and for which the treaty is in force".[159] The use of the term 'applicable' is more complicated. The natural question then becomes: applicable at the time of conclusion, or at the time of interpretation?

The general opinion in the contemporary legal literature is that an interpreter can, depending on the circumstances, apply not only the rules applicable at the time of conclusion, but also those rules that are applicable at the time of interpretation.[160] In the words of Villiger, a function of subparagraph 3(c) is to instruct the interpreter of a treaty provision to "take into account, *inter alia*, any respective subsequent developments of general customary law".[161] The possibility of allowing customary international law in the application of Article 31(3)(c) is specifically pointed out by Thirlway:

> The background of customary law is relevant to any question on which the treaty does not speak, and may well be of service in the interpretation of the treaty, on the basis, for example, of Article 31, paragraph 3(c), of the Vienna Convention on the Law of Treaties.[162]

The assumption that also *subsequent* developments of law can be taken into account in the application of Art. 31(3)(c) is not new to the theory of treaty interpretation. An often cited excerpt to support this view comes from the *Namibia Advisory Opinion*, where the ICJ had to decide on the application of Article 22(1) of the Covenant of the Legue of Nations, by which South Africa had assumed a "sacred trust" to provide for the "well-being and development" of the Namibian population in certain areas.[163]

> [T]he court must take into considerations the changes that have occurred in the supervening half-century, and its interpretation cannot remain unaffected by the subsequent development of law, through the Charter of the United Nations and by way of customary law. Moreover, an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of interpretation.[164]

The excerpt above has however given rise to debate and should be read with some caution.[165] While it supports the view that the evolution of law up to the point of interpretation sometimes can be relevant to consider in the

[159] VCLT, Art. 2(1)(g); Linderfalk (2007), p. 178.
[160] Jennings and Watts (1996) p. 1282; Linderfalk (2007), p. 179.
[161] Villiger (1997) p. 198.
[162] Thirlway (2019) p. 159.
[163] ICJ Reports (1971) p. 38.
[164] ICJ Reports 1971, p. 38.
[165] See Linderfalk (2007) pp. 177-189.

interpretation of a treaty provision, the fact is that the statement was made in relation to the court's reasoning about the non-static nature of some of the terms of Article 22 of the Covenant of the League of Nations, which in turn necessitated the consideration of the evolution of law as this followed from the inferred intention of the parties. Nevertheless, the analogies drawn from this section of the *Namibia* case has introduced a view toward the feasibility of dynamic applications of Article 31(3)(c) VCLT to consider not only temporal evolution of conventional language, but also the evolution of law, in the interpretation of treaty provisions. Hence, Elias refers to the case to state the need to "have regard to the problem of the effect of the evolution of law on the interpretation of the legal terms used in a treaty".[166]

3.4.5 Modification and desuetude of treaties

The ILC in its previous drafts to the law of treaties included provisions – namely Article 68(c) in the 1964 Draft[167] and Article 38 of the 1966 Draft[168] – explicitly providing for the possibility that a treaty rule could be modified by the development of a rule of customary international law on the same subject matter. However, as these suggestions were met with hesitancy in the state community, the 1969 VCLT ended up not making any explicit references to the concept of modification. The ILC commentary to the 1966 Draft states in relation to both Article 38 and to Article 68(c) in the 1964 Draft:

> However, after re-examining these paragraphs in the light of the comments of Governments, the Commission decided to dispense with them. […] As to the case of modification through the emergence of a new rule of customary law, it concluded that the question would in any given case depend to a large extent on the particular circumstances and on the intentions of the parties to the treaty.[169]

It is submitted by Villiger that the ILC omitted the concepts of modification in the 1969 VCLT "because it exceeded the scope of a convention on the law of treaties, and not because it did not exist", and that, while the VCLT provides for the *contractual* means of terminating and amending treaties, it "never intended to address the issue of the impact of customary law on treaties".[170]

According to Villiger, in the case that a rule of customary international law has developed on the same subject-matter of a conventional treaty rule, a conflict arises in which there is the possibility of the customary law rule either modifying the conventional rule, or rendering it to pass out of use completely (so called *desuetude*). While the precise effect of the customary rule may

[166] Elias (1974) p. 77.
[167] YBILC (1964) II, p. 198.
[168] YBILC (1966) II, p. 236.
[169] Ibid., p. 236, para 3.
[170] Villiger (1997), p. 200.

differ depending on the circumstances, the precondition remains the same in that the rules are inherently incompatible. This incompatibility results in the situation whereby states are obligated to apply one law while abstaining from applying the other. This is the reason, according to Villiger, that "*modification necessarily implies desuetude of the original conventional rule*".[171] As international law has no formal hierarchy of sources, customary and treaty rules are technically equal means for the determination of international law. The possibility thus exists for the customary rule to supersede the conventional rule as the international law in a given field evolves past the original conventional treaty rule.

The concept of desuetude has been defined in a general sense as "the rejection of a rule through subsequent non-enforcement or non-compliance".[172] As such, it is strongly linked to the principle that *lex posterior derogat legi priori*. Perhaps the most famous example of *desuetude* concerns Article 27(3) of the Charter of the United Nations. According to the wording of this Article, a UN Security Council Resolution requires nine affirmative votes, including the concurring vote of the permanent members, in order to pass. However, the practice emerged that the abstention of a permanent members did not prohibit the adoption of a resolution if it received nine votes.[173] This practice was later confirmed in the *Namibia* case in which the court found that the general acceptance of the validity of resolutions adopted in this way, both by UN Security Council members and by other UN member states, proved that the practice had become established in the organisation.[174] Other examples can be mentioned in relation to the UN Security Council, including the decision to seat Russia as a permanent member of the council in place of the USSR, despite the express wording of the UN Charter Article 23.

As desuetude is not included in the VCLT however, it cannot itself be a legal ground for the termination of a treaty or its provisions, as this would be inconsistent with Article 42(2) VCLT, which states that the termination of a treaty must follow from a provision in the Vienna convention. The concept can however be the factual ground for such termination of modification in two cases. In the first case, a treaty or a provision could be modified or terminated by means of consent through tacit agreement of the parties in accordance with Article 54(b) VCLT, which allows for the termination of a treaty provision via the consent of all the parties. This could occur if one or more parties repeatedly acts in opposition of an obligation under a treaty while the other parties renounce their right to insist on the performance in accordance with the treaty.[175] The other situation would come about if a new rule of customary international law emerged as *lex posterior* to the treaty rule in the way

[171] Ibid., p. 206.
[172] Wouters and Verhoeven (2008) para 1.
[173] Ibid., para. 5.
[174] ICJ Reports (1971) para. 21.
[175] Wouters and Verhoeven (2008) para. 10.

described above, made possible despite the lack of inclusion in the VCLT on the basis that "[t]he ILC considered changes to treaties by a subsequent custom as falling out of the scope of the law of treaties".[176] The customary rule may not however override a more specific rule of law despite it being conceived at a later time, in line with the principle that *lex posterior generalis non derogat legi priori speciali*.[177]

3.5 Objective regimes

A fundamental principle in international law is that of consent, whereby states as the sovereign subjects of international law can only be bound by agreements to which they have themselves agreed.[178] Closely linked to this principle is the principle of *pacta tertiis nec nocent nec prosunt* (or simply *pacta tertiis*) accommodated in Article 34 of the VCLT stating that "[a] treaty does not create either obligations or rights for a third State without its consent".[179] However, state practice and the jurisprudence of international tribunals have shown that certain territorial legal regimes can become valid *erga omnes*, creating obligations for third states regardless of their consent.[180] This concept has been described as "[…] a situation of law created by the parties to an agreement, which purports to have directly applicable legal effects on third parties".[181] While the concept of treaties creating obligations for third states might seem to run counter to the traditional understanding of international law, this is not the case in practice. The clearest example of this, and perhaps the most classic example of objective regimes, is that of treaties regulating boundaries between states. Such boundary agreements, internationally sensitive as they may be, are widely accepted as creating legal regimes which must be respected by third states.[182]

The concept of objective regimes appears to originate in the writings of Visscher in 1916. Visscher describes two treaties concluded in the 1830's as having established an "objective situation" regarding Belgian neutrality, the violation of which by Germany in World War I constituted not just a contractual breach but "a disregard for an objective rule of international law".[183] Continuing, Visscher remarks that the effects of neutrality affects not just the contracting parties, but the legal positions of all members of the community of nations.[184] It was however only in the early 1960's, during the deliberations of the ILC on the draft Articles of the VCLT, that the concept became subject for a more detailed discussion. Introduced by Special Rapporteur Fitzmaurice in his fifth report and elaborated by his successor Waldock in 1964, the

[176] Ibid., para 11.
[177] Ibid.
[178] Orakhelashvili (2020), para. 1.
[179] VCLT Art. 34.
[180] Subedi (1996) p. 174; MacNair (1961) pp. 255-271.
[181] Barnes (2000), p. 97.
[182] Subedi (1996) p. 180.
[183] Visscher (1917) p. 17.
[184] Ibid., p. 92, 142-143; Subedi (1996) p. 175.

existence of certain treaties having *erga omnes* application was proposed as an inclusion in the draft articles.[185]

In Fitzmaurice's view, treaties with third party effect could be divided in treaties demanding either active or passive participation of third states. In this latter sense, third states are not required to perform anything but to "recognize, accept, not intervene in, or obstruct the functioning of the regime".[186] As such, Fitzmaurice, in Article 18, proposed that subject to certain conditions:

> all States are under a [general] duty to recognize and respect situations of law or of fact established by lawful and valid treaties tending by their nature to have effects erga omnes.[187]

Waldock, following up on the proposal by Fitzmaurice, agreed that "certain kinds of treaty [...] either have or acquire an objective character"[188] and suggested himself the inclusion of objective regimes in draft article 63 paragraphs 1-2. However, he remained uncertain as to whether this objective status would derive from the character of the treaty itself, from the subsequent recognition and acceptance of third states of the treaty or, as Fitzmaurice claims, from a general duty of states to recognize and respect certain situations in law.[189]

In 1966, the ILC decided to exclude a provision recognising the creation of objective regimes, on the basis that this would be unlikely to be generally accepted by states.[190] However, as Subedi points out, those members of the ILC opposing the suggestion by Waldock did so primarily on the basis that such a provision might be used by the great powers to impose their will on other states without their consent.[191] In any event, the ILC deliberations appear to show that the ILC did not reject the concept as such, but came instead to view it as being outside the scope of the convention itself.[192]

Among the typical examples of treaties of an objective character, those that aims to establish territorial zones of neutralisation or demilitarisation are among the most prominent. Examples of such treaties, while not unanimously agreed upon to have reached the status of objective regimes[193], include the 1815 treaty on the permanent neutralisation of Switzerland, the Antarctic

[185] Subedi (1996) p. 176-179.
[186] Ibid., p. 176.
[187] YBILC (1960) II, p. 80.
[188] YBILC (1964) II, p. 26.
[189] Ibid.
[190] YBILC (1966) II, p. 230f.
[191] Subedi (1996) p. 179.
[192] Ibid., p. 180.
[193] See Simma (1986) pp. 186-210.

treaty of 1959 and the 1856 Convention on the demilitarization of the Åland Islands.[194]

The Åland Islands is widely regarded as an objective regime.[195] The islands have a special status in that they are both demilitarised and neutralised, with the effect that neither military fortifications or structures nor war operations are allowed in the area.[196] This status has its roots in the above mentioned convention signed at the end of the Crimean War in 1856 between France, Great Britain and Russia, but is today regarded primarily to rely on the 1921 *Convention relating to the non-fortification and Neutralisation of the Aaland Islands*, concluded between ten state parties, along with later subsequent legal confirmations.[197] The view that the Åland situation makes up an objective regime was supported by an appointed Commission of Jurists established by the League of Nations, which in a 1921 report referred to the demilitarisation established by the 1856 Convention as provisions "laid down in European interests", which constituted "a special international status relating to military considerations, for the Aaland Islands".[198] The Committee clearly did not indicate that this was an unusual situation, instead adding that:

> The Powers have indeed, in numerous cases since 1815 [...] sought to establish a true objective law, and true political regimes the effects of which make themselves felt even outside the circle of the contracting Parties[199]

While opinions are still divided in the legal scholarship as to whether third states are formally bound by the 1921 Convention in its entirety, there is "a wide body of opinion suggesting that at least the main principles of the demilitarisation regime have achieved the status of customary law".[200]

The special status and erga omnes effect of the Åland Islands situation can also be read together with Article 38 of the VCLT, which states that nothing in the preceding articles, including the above mentioned *pacta tertiis* principle, "precludes a rule set forth in a treaty from becoming binding upon a third State as a customary rule of international law, recognised as such."[201] This generative function of Article 38 VCLT has been generally recognised in practice and has been shown, according to Villiger, to be "well established in customary law and may play an important part in the modern international legal order".[202]

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[194] YBILC (1964) pp. 30-33; Simma (1986) p.
[195] McNair (1961), p. 270f.
[196] Joenniemi (1997), p. 9.
[197] Rosas (1997), p. 25f.
[198] League of Nations Official Journal (1920) Special Supplement No. 3, p 18f.
[199] Ibid., p. 18.
[200] Ibid., p. 28.
[201] VCLT Art. 38.
[202] Villiger (1997), p. 172.

The concept of objective regimes has been shown to exist under certain circumstances in international law, evidenced by state practice, international conventions, international case law and the opinions of scholars.[203] However, a clear definition of an objective regime is still missing, and the means of its creation as well as the mechanisms by which it produces obligations for third states have never been conclusively systematised or codified in treaty law. For instance, the opinions vary on the importance of a 'general interest' in the regime, or of the number of states parties to the treaty. However, as Subedi describes, what is generally accepted is:

> that a multilateral treaty concluded between a set of States designed to establish a political order in international society following major upheavals and concerning territorial arrangements can acquire objective status. [...] [I]t can be concluded that there exists in international law a rule of objective regimes according to which regimes concerning the finality of boundaries, maintenance of peace and security in troubled areas, preservation of independence, and existence of strategically located states and the regulation of the objects of common use and exploration, produce valid effects *erga omnes*.[204]

3.6 Summary

In conclusion, I will briefly summarise some key takeaways from this chapter. First, treaty interpretation must adhere to the VCLT Articles 31-33 which together form a system of interpretation with the fundamental aim of establishing the communicative intention of the parties. This system combines different aspects to interpretation, including a textual starting point to treaty interpretation, teleological considerations and a search for the intention of the parties, while allowing the interpreter a degree of flexibility in the application of the different means of interpretation depending, *inter alia*, on the character of the treaty.

In a temporal sense, the standard rule in interpretation is that the interpreter applies a static approach, considering only the law in place at the time of the conclusion of the treaty. There is however wide support in theory for the application of dynamic approaches to interpretation, by which the evolution of law in an area, in the sense of relevant rules of law applicable between the parties to a treaty, to be considered in the interpretation process in accordance with Article 31(3)(c). The views of scholars on the second branch of the intertemporality doctrine provides some support for this view. The textual primacy of the interpretation process however dictates that subsequent developments of law and practice, as well as considerations of the objects and purposes of the treaty, should have a supplementary function to elucidate the

[203] Subedi (1996) p. 203.
[204] Ibid., p. 203f.

meaning of the terms based on conventional language. Despite this, the views of scholars appears to indicate that the dynamic approach may be relevant for interpretation of treaty provisions intended to follow the evolution of law and in the context of a treaty of a constitutional character.

The existence of a rule of customary law is complex to confidently identify before it is generally accepted. As shown by the example of the jurisdiction over the continental shelf, such a rule can emerge in a dialectic process between the agents and instruments in international law, which require both a general practice of states and sufficient *opinio juris* in order to create the rule before the rule has *de facto* emerged. Customary rules can also, in some cases, bring a conventional treaty rule into modification or desuetude, by means of consent through tacit agreement or regarded as *lex posterior* to the treaty rule, if the customary rule can be identified as binding for all parties to the treaty. While having a limited impression in case law, the concepts are generally recognised in international law and are supported by some state practice. Further, there are examples of application of the concepts of desuetude and modification in treaty interpretation, including in relation to the UN Charter.

Objective regimes, as exemplified by the demilitarized status of the Åland Islands, establish legal situations that have effects on third parties without their explicit consent. These regimes, particularly when they concern territorial issues and serve an interest beyond the strictly contractual relationship, can become applicable *erga omnes*. The intention of the parties is of importance in the creation of such a regime, which should serve to create a political order which requires the recognition and acceptance of third states. This potential for an objective status of suggests that objective regimes could play a role in shaping international legal orders beyond bilateral or multilateral agreements, particularly in areas that have broad international relevance such as environmental or demilitarisation regimes.

4 Baseline fixation in light of the theoretical framework

In this chapter, I relate the fixation of baselines to the theoretical framework presented in the previous chapter. The chapter is structured as a discussion on the efforts towards establishing the right to fix baselines as a rule of international law, analysing the suggestions made in the works of the ILC in light of the theoretical framework and the conclusions of the ILA. As a first step, the ILC approach will be discussed in relation to the relevant existing law of the sea under UNCLOS. Following this, theoretical themes explored in the previous chapter are applied to the ILC approach. Finally, I outline three main approaches to achieve a fixation of baselines and evaluate their feasibility as well as their interrelation.

4.1 The existing law on the normal baseline

The existing law on baselines has, at least until very recently, been clear on the ambulatory nature of baselines. In large part, this follows from the relatively clear wording of Article 5, entailing that the conventional meaning of the terms applied in the provision does not appear to have been intended to follow the evolution of law. For instance, references to the low-water line and its position on nautical charts, appears to indicate the objective understanding of the baseline as corresponding to a geographical fact. Consequently, the normal baseline under Art 5 UNCLOS has been regarded as the *actual* low-water line along the coast. If the low-water line for some reason has shifted, the baseline has thus been considered to have moved with it. An important clarification here is that the ambulatory nature of baselines entails that the position of the baseline, legally, is not dependant on any conscious action by the coastal state. The baseline *is* the actual low-water line, a legal fact which exists *a priori* to the eventual confirmation of it through, for instance, the deposition of corroborating documentation. Thus, if baselines are deemed ambulatory according to UNCLOS, simultaneously allowing their fixation simply through the coastal state's withholding of updated documentation naturally cannot be a legally justifiable outcome.

Additionally, both the ILA and ILC are clear on the fact that, without prejudice to the rules governing the position of and jurisdiction over the continental shelf, the relation between the *outer* limits of maritime zones and the baseline along the coast is so that when the baseline shifts either land- or seawards, the outer limits of maritime zones must move the corresponding distance in the same direction. Hence, as UNCLOS is currently understood, the Convention does not allow for a fixation of the outer limits of maritime zones.

The suggestion that baseline fixation can be achieved through an interpretation of UNCLOS, without revising the treaty or taking into consideration any external development of law, hence constitutes a new interpretation. It would

entail a shift in the previous understanding of the existing law on the legal nature of the normal baseline. This is the underlying rationale for the analysis of the so called *interpretative approach* of the ILC, understood in contrast to an approach aimed at changing existing law by revising provisions in UNCLOS.

4.2 The central argument of the ILC

The ILC emphasises the severity of the risks posed by sea-level rise to coastal states, and particularly to low-lying island states. As the Study Group points out, the current established legal interpretation of UNCLOS Article 5 is that baselines are ambulatory, following the receding low-water line along the coast in the event of land inundation. As the reality of global warming is now beyond doubt, the legal consequences of sea-level rise must be understood as far from hypothetical.

The severity of the potential effects from sea-level rise on baselines was established already in the ILA works prior to the adoption of the issue in the ILC. The legal framework governing jurisdiction over maritime zones is outlined in UNCLOS. For this reason, the ILA recommended that, since they could establish the ambulatory nature of baselines, a fixation of baselines could not be permitted according to the existing law under UNCLOS.

The UNCLOS holds a unique position in international law. It enjoys particularly broad recognition in the catalogue of international treaties and is often labelled the "constitution of the seas".[205] However, in the current international political context, the option of convening a conference to formally renegotiate the treaty to amend the legal status of baselines under the Law of the Sea, appears an increasingly unrealistic proposition. This is what the ILC Study Group refers to when claiming that such a formal amendment "was deemed difficult".[206]

With the above in mind, the position of the ILC is that the issue of potential loss of maritime entitlements due to sea-level rise should be addressed through the application of an interpretative approach. This approach can be contrasted with an alternative approach aiming to change existing law, namely through the renegotiation of UNCLOS following a new meeting of the parties. The central argument of the ILC is thus that UNCLOS should be interpreted to the effect that coastal states are allowed to keep their existing maritime zones and subsequent rights as a result of them intentionally avoiding to report that their actual coastline has shifted landward. This would entail that the legal baseline could be preserved at its last revised position and as

[205] Barnes (2012) p. 3.
[206] ILC (2023b) para 148.

such be kept as a separate, fictional line detached from the actual low-water line in case of land inundation caused by sea-level rise.

4.3 The character of the treaty

The treaty is also to be interpreted in light of its object and purpose, what we have previously identified as the element of teleological interpretation. The object and purpose of a treaty can be inferred not only from the text, but to a large degree also from the character of the treaty itself.

As described in chapter 3, UNCLOS is widely held as an example of a treaty of constitutional character. This character is evident not least from the preamble. In it, the parties to the Convention express their desire to "[s]ettle … all issues relating to the law of the sea and aware of the historic significance of this Convention as an important contribution to the maintenance of peace, justice and progress for all peoples of the world", and explains that "problems of ocean space are closely interrelated and need to be considered as a whole". The preamble also states that the parties recognize "the desirability of establishing through this Convention, with due regard for the sovereignty of all States, a legal order for the seas and oceans" and express the belief that "the codification and progressive development of the law of the sea achieved in this Convention will contribute to the strengthening of peace, security, cooperation and friendly relations among all nations".[207] The preamble's focus on the wide scope and general nature of the Convention, along with references to the establishment of a legal order for the seas and oceans, points to the intent of the parties to convey the constitutional character of the treaty.

The ILC Study Group, arguing in favour of the interpretative approach, made repeated references in both the first and additional issues papers to the need to ensure legal stability, security, certainty and predictability in accordance with the objects and purposes of UNCLOS. In addition, the ILC maintains that the objects and purposes of the Convention are in line with the moral need to protect vulnerable coastal states from the risks posed by sea-level rise to existing maritime entitlements. Importantly, comments conveyed by UN member states, either in the sixth committee of the UN General Assembly or in communications provided directly in response to questions raised by the ILC, have generally emphasised the need both to ensure the primacy of UNCLOS in the law of the sea, as well as to ensure legal stability in areas governed by the Convention.[208] Much for this reason, the meaning of legal stability was considered by the Study Group as a separate subtopic, presented in the ILC report of its seventy-fourth session (2023). Here, the study Group "noted that the concept of legal stability was encapsulated in the United

[207] UNCLOS, preamble.
[208] Oral and Galvão Teles (2023) p. 10.

Nations Convention on the Law of the Sea", and that it "contributed to the maintenance of international peace and security".[209]

Considering the character of the Convention and the objects and purposes of the treaty outlined above, it is not problematic to assume that the interpretation of UNCLOS allows a greater emphasis on teleological aspects in the interpretation focus. However, as established in chapter three, this is not to say that the objects and purposes of a treaty should be applied independently or as a starting point in the interpretation process. Rather, recourse should in general only be taken to the objects and purposes of a treaty when the ordinary meaning of the terms of a provision is either vague or ambiguous. Thus, if the objects and purposes should be given a more prominent role in interpretation, such a lack of clarity pertaining to the communicative intention of the parties would have to be shown. When reviewing the works of the ILC however, it certainly appears that the supplementary function of the teleological perspective has expanded considerably in relation to the textual elements, understood as the conventional meaning of the terms read in good faith. At the same time, as the theoretical framework shows, several authors stress (albeit often without specific references to more than observation) that this emphasis on a particular school of thought in certain interpretation situations are encapsulated in the inherent freedom of the interpreter as provided by the VCLT rules of interpretation.

4.4 Dynamic interpretation and the intertemporality doctrine in relation to the ILC interpretation

In previous chapters, we have seen that there is a significant body of scholarly views and case law in favour of the application of dynamic interpretation methods under certain circumstances. Indeed, several different approaches have been developed that takes into account the evolution of law in a given area, emerged since the conclusion of the treaty, in the interpretation process. How far a particular new interpretation can stretch while still being considered the correct meaning of the treaty in question, is however determined by the limitations provided by the application of VCLT Articles 31-33.

The so-called intertemporality problem consists in the difficulty in determining which law to apply when the law in a given area has changed. The doctrine of intertemporal law consequently concerns how law evolved at different points in time can be applied in a certain case. The second branch of this doctrine establishes that in some cases, the application of law must take into account the evolution of law. This second branch has thus been held as support for a dynamic interpretation approach.[210] However, in the case of baseline fixation to account for sea-level rise, both the ILC and UN member states have been clear on the need to maintain the question firmly within the

[209] ILC (2023b), p. 92, para. 143.
[210] Khan (2007) p. 167; Wheatley, 2021, p. 488.

applicability of UNCLOS, rather than treating the situation as a *sui generis* situation in which the Convention would not apply.

In other words, the question is whether UNCLOS could be interpreted so as to allow a change from the earlier interpretation of baselines as ambulatory, without either formal changes to the convention or a distinctive change of the conventional meaning of the terms used in the relevant provisions. How then should we understand the issue in relation to the intertemporality problem, concerned with the choice of application between different law, conceived at different times?

The answer, I argue, lies in viewing the second branch of the doctrine of intertemporality as applicable in the dynamic interpretation of the UNCLOS provisions. In this sense, through the provisions of Article 31(3) VCLT and in particular subparagraph (c), the evolution of law could be understood to be relevant for the interpretation of UNCLOS provisions. If the new law emerged were of a customary international law nature, this could form a relevant rule of law if it is applicable between all the parties to the treaty. In other words, if the emerging, albeit currently regional, practice of states allowing for baseline fixation ILC constitutes, together with sufficient *opinio juris*, a new norm of customary international law, we would have a situation in which two separate sources of law existed for the same area. Thus, we would be faced with the intertemporality problem: Should the law at the time of the convening of the treaty be applied to the situation, or could the present day law influence this interpretation? The second branch of the intertemporality doctrine has in this case the potential to allow for a dynamic interpretation, whereby the customary norm constitute an evolution of international law to which UNCLOS must adapt. In this sense, the interpretation of UNCLOS deliberated by the ILC and favoured by a majority of UN member states, which allows for this new rule of customary international law to influence the potential judgment of a sea-level rise-related baseline issue, might go a long way towards the real acceptance of legitimizing baseline fixation. Consequently, customary international law can influence the existing law in an already regulated area of law, provided the application of dynamic interpretation and the second branch of the intertemporality doctrine.

The importance of customary international law for the question of baseline fixation is not lost on the ILC Study Group, nor was it to the ILA Committees. While the Study Group recognized the so-called "*prima facie* indication of the formation of a new rule of customary international law providing for fixed baselines"[211], it found that neither sufficient practice of states, nor accompanying *opinio juris* was sufficient to establish the existence of a new norm of customary international law. The Study Group does however, in both papers published so far, recommend affected states to act in accordance with this emerging practice, namely to emphasise the intention not to update baselines

[211] ILC (2023b), p. 93, para. 149.

and to state the understanding that the baseline can be maintained at the present datum regardless of the retention of the low-water line.

However, even without an established rule of customary international law having emerged, the possibilities for a dynamic interpretation can still be of importance in the present case. As discussed in the previous chapter, the law of the sea has previously been flexible to adopt seemingly alien concepts even before these concepts were established rules of customary law. One of the most prominent such examples is found in the adoption of the concept of state jurisdiction over the continental shelf emerging after the Truman proclamation of 1945. Similarly, the proposed suggestion of the ILC, so far generally welcomed by UN member states, might eventually form a custom which could have influence over the law of the sea. Alternatively, the regional practice emerging among states could be codified in a separate treaty encompassing a particular geographic zone, in which the parties establish their intention to regulate the legal effects of sea-level rise on baselines as an objective regime. If established, such a regime has effects *erga omnes*, including for states parties to UNCLOS but not to the specific treaty. Hence, it would be applicable between the parties, and could be applied as the basis for an interpretation of UNCLOS Article 5 via Article 31(3)(c) VCLT.

4.5 Equity and legal stability or a potential for disputes?

The uniquely broad scope and near universal acceptance of UNCLOS as a framework convention for the law of the sea has led to the general view that matters regarding baselines and marine delineation should, as far as possible, be contained in this Convention. As formal revisions of the Convention grow more unlikely in a political context, there is a tendency to encapsulate the evolution of law in a given field in the UNCLOS area of application by means of interpretation. A potential risk of this development is that issues which appears *prima facie* not to be consistent with the Convention, tend to be managed with an interpretative approach to be incorporated within the application of the treaty. This progressive approach to legal development displayed by the ILC Study Group is built around the need to simultaneously preserve the universality and primacy of UNCLOS as the primary instrument governing the law of the sea, while also adapting the Convention to maintain its practical relevance with the progression of time.

An established and generally accepted solution by which UNCLOS were to allow for the fixation of baselines would undoubtedly be of great benefit for vulnerable coastal states. It could have the potential of easing international tensions by assuring states of their continued access to revenue sources such as fishing and the exploration and exploitation of natural resources within exiting maritime zones. Additionally, the predictability and international legal stability that would result from preserved maritime entitlements could

serve to uphold the balance of rights and to promote friendly relations between states in accordance with the expressed goals of UNCLOS. Overall, legal stability is an issue emphasised by UN Member States as the most important consideration on the issue of sea-level rise in relation to baselines.[212] Maintaining the primacy of UNCLOS as the primary instrument for the law of the sea has also been a priority for both UN member states and the ILC Study Group.[213]

The approach to preserve maritime entitlements is also motivated on the basis of the principle of equity. While sea-level rise is a global phenomenon, certain states are more vulnerable to its effects, including low lying states and small island developing states, whose contribution to historical net emissions has been negligible. For this reason, allowing fixed baselines for these states has a compensatory function, alleviating some of the adverse effects in order to produce an equitable outcome. The need to consider the moral justification of fixing baselines is also notable in statements by member states in the consideration of the subject in the UN General Assembly.[214]

However, on the question of baselines, the suggested approach taken by the ILC is not guaranteed to produce outcomes which guarantee legal stability and equity. Indeed, it is conceivable that, in certain situation, it might have the opposite effect of harming legal stability and friendly relations between states, if the suggested interpretation of the baselines provisions are stretched, without sufficient supporting state practice or the existence of a separately emerged rule of customary international law, to the degree that creates uncertainty regarding the application or validity of the relevant rules.[215] In addition, there is a risk that the fixation of baselines on the basis of a new interpretation disturbs the balance of interests between states, instead creating the preconditions for predictable disputes between states concerning the correct application of UNCLOS.

One such situation regards the potential effects on the application of UNCLOS Article 15. This article describes the so called provisional equidistance principle, stating that two states with opposing or adjacent coasts may not "extend its territorial sea beyond the *median line* every point of which is equidistant from *the nearest points on the baselines* from which the breadth of the territorial seas of each of the two States is measured".[216] In other words, when two geographically opposing states delimit their respective territorial sea, they are to divide the waters between them so that the distance to the maritime

[212] ILC (2023a) paras. 82-85.
[213] ILC (2020) para. 27.
[214] ILC (2020) paras. 8-27.
[215] See, for a discussion on the harmful micro- and macro effects of uncertainty in interpretation, Merkouris (2019) p. 129f.
[216] UNCLOS, Art. 15 [emphasis added].

border is equal from each state's closest baseline point, thus dividing the waters in half.

Considering the above, imagine two neighbouring island states, each of which have previously established baselines in accordance with UNCLOS. Since the islands lie closer together than would allow for both to enjoy full entitlements to their respective maritime zones, their maritime delimitation is governed by the equidistance rule, dividing the maritime space between both states at the half-way point measured from their respective baselines. If these islands have coastlines of different characteristics, such as state A having a low-lying coastline of sand beaches while state B has a coastline marked by sheer cliffs, the actual effects of sea-level rise on their respective low-water line will differ. If baselines were frozen to no longer represent the actual coastal changes, the landward shift of the coastline of the low-lying island would not influence the position of the equidistance line, instead resulting in an expanding body of internal waters for the low-lying state A. This creates an unequal distribution of the actual maritime area between the two, meaning that the equidistance line, if regarding the normal baseline as ambulatory, would no longer be at the correct point as described in Article 15. This in turn could result in disputes based on different interpretations of Article 5 (since it determines the position of the normal baseline). Furthermore, State B, less affected by the sea-level rise, could conceivably be more prone to challenge the interpretation of baseline fixation if an ambulatory baseline interpretation, which would mean a new equidistance line closer to state A, would result in the transfer of fishing rights or rights to natural resource exploitation to state B. How such a situation would be judged in accordance with the principle of equity is uncertain.

In the *Maritime Delimitation in the Black Sea* case, the ICJ established that non-geographical factors could be considered by the court when making adjustment to the provisional equidistance line to ensure an equitable solution.[217] These include socioeconomic factors such as fisheries activities, navigation, defence and natural resource exploitation. In practice however, non-geographic circumstances have not been applied directly to influence maritime delimitation either by courts or in state practice.[218] In the *Gulf of Maine* case, the ICJ set a high threshold for the application of such circumstances, stating that such activities "cannot be taken into account as a relevant circumstance or […] equitable criterion to be applied in determining the delimitation line" unless the failure to apply such circumstances would be "likely to entail catastrophic repercussions for the livelihood and economic well-being of the population of the countries concerned".[219] Reaching a similar conclusion, the Arbitral Tribunal for the delimitation of the maritime frontier between Guinea and Guinea-Bissau, concluded in its 1985 award that it had not been

[217] ICJ Reports (2009a) p. 61.
[218] Tanaka (2007) p. 288, 354; ILC (2023) p. 74.
[219] ICJ Reports (1984) p. 342, para 237.

convinced that economic problems constituted such circumstances to be taken into account in delimitation, and that it was not in a position to rebalance the economic relation between the parties by changing the delimitation which was based on objective factors.[220] While it is likely that, in some cases, the threshold of catastrophic repercussions could be met for states vulnerable to land inundation, not all cases could rely on this high limit to be met. Additionally, while the ICJ has previously made its distinction between geographical and non-geographical factors, the scenario described above, given the successful interpretation of a fixed baseline, would strictly have to be concerned only with non-geographic factors, as the fixed baseline would have to be understood as a fictional legal construct rather than the actual low-water line.

Notwithstanding the consequences for the application of the equidistance rule, failure to apply the Convention consistently between different states might also occur as a result of the temporal difference in the determination of baselines. Since sea-level rise is a gradually and slowly occurring event, the time of determining the fixed baseline could greatly influence the extent of maritime zones and create variations between coastal states. The ILC admits this potential risk suggesting that solutions would have to be discussed in order to prevent the disadvantage to states submitting their baseline points at later times than others.[221] One such option to alleviate this problem is a cut-off point in time, after which no new fixations would be allowed. The practical realities of developing and enforcing such a rule is not discussed, however it would certainly require a significant level of international synchronisation without alterations of the treaty framework itself.

Furthermore, while ILC recommendations and suggestions can sometimes carry a significant influence, in the end, the interpretation must be made by the relevant court in each case, which might come to a different conclusion from the ILC regarding the correct meaning of a particular provision. In the case of UNCLOS, the matter becomes more complex when considering Article 287, which provides that the settlement of disputes relating to the convention can be referred to several different instances depending on the choice of procedure of the parties, including the ICJ, ITLOS, as well as regular and special international arbitration tribunals.[222]

Notwithstanding the points made above, it remains important to add that continuing to view the baseline as ambulatory would also be likely to call into question the validity of existing baselines following significant sea-level rise. It goes without saying that this has potential to increase the proneness to international disputes and could risk harming the established legal stability in the field of the law of the sea. Indeed, this was one of the key reasons that the

[220] ILR (1988) p. 193f.
[221] ILC (2023b) p. 96, para 173(a).
[222] UNCLOS, Art. 287(1).

question was brought up by the ILA in the first place. The fixation or freezing of baselines is in large part suggested, by the ILA, the ILC as well as from UN Member States, as an attempt to reduce this potential for disputes. However, as discussed in this part, limiting the approach to a *lex ferenda* suggestion of a particular interpretation, itself new to the law of the sea, might well lead to a proneness to disputes rooted in the potential uncertainty and inconsistency in application. Even if the interpretation becomes generally accepted as authoritative, there remains unanswered questions pertaining to the practice of states and the temporal limits to determine a permanent baseline, which have yet to be answered.

4.6 Outlining paths toward baseline fixation

The approaches to establishing a legal right to fix baselines can be divided in three main lines of reasoning. The first one, mirroring the proposal of the ILC, focuses on the interpretation of UNCLOS Article 5 and emphasises the teleological elements of Article 31 VCLT to establish a right to baseline fixation. The second approach requires the elaboration of a separate legal regime to influence the interpretation of Article 5. The third path consists in viewing the effects of sea-level rise on baselines as a unique situation entirely outside the applicability of UNCLOS. I argue however that this is an unlikely outcome. This section outlines the three approaches and their interrelation.

4.6.1 UNCLOS interpretation

The central approach of the ILC is to interpret the relevant provisions of UNCLOS to allow for a fixation of baselines in situations where the coastline is threatened by sea-level rise. More specifically, the case is made by the ILC Study Group that such an interpretation can be made entirely without recourse to rules of international law outside of the UNCLOS framework establishing such a right, instead relying primarily on teleological references to the objects and purposes of UNCLOS, including references to principles of equity and legal stability. This approach is what has been referred to in this thesis as the *interpretative approach* of the ILC.

As shown in the previous chapter, the VCLT articles on treaty interpretation requires that the starting point of interpretation is textual, based on establishing the meaning of the terms in good faith according to conventional language. This does however not preclude the consideration of the objects and purposes and relevant context as provided by the general rule of interpretation in Article 31 VCLT, as long as this is does not violate the requirement of good faith. In other words, while the interpreter has the freedom in some cases to put greater emphasis on some aspects of the general rule in order to adapt to the specific circumstances, such an interpretation cannot circumvent the requirement of textual interpretation with focus on the ordinary meaning of the terms. Hence, a treaty provision which is sufficiently clear cannot be interpreted to mean something entirely different for the sole reason of this better

fitting the current political context, as this would result in stretching the interpretation of the provision beyond the given consent of the parties, amounting to an immoral outcome.

The wording of Article 5 UNCLOS is in my view sufficiently clear to concur with the conclusion of the ILA that the normal baselines under the existing law of the sea are ambulatory, thereby corresponding to the actual low-water line. At the same time, and as emphasised by the ILC, the objects and purposes of the Convention could support the preservation of current maritime entitlements of states that would follow from a baseline fixation based, *inter alia*, on the constitutional character of the Convention as well as an emphasis on legal stability and international legal predictability. However, simply identifying a need for such a right to baseline fixation under the Convention, along with the observation that there is nothing apart from the wording of Article 5 expressly prohibiting such an interpretation, is insufficient to defend the complete inversion of the existing law on the nature of normal baselines. Thus, an interpretation permitting fixed baselines based solely on the existing UNCLOS framework appears premature or at the very least highly proactive. However, if taking into account separately developed law regimes to support a new UNCLOS interpretation, the outlook could be more positive. This is the focus for the following section.

4.6.2 A separate legal regime

The second approach to consider is that of the emergence of a legal regime separate from the UNCLOS framework which permits the practice of preserving baselines at their current geographical positions. This could take the form of rules established in a treaty, a rule of customary international law, or a combination of the two. In the past, the law of the sea has seen similar developments with regards to the emergence of rules of customary law permitting the establishment of the EEZ and state jurisdiction over the continental shelf, eventually influencing the framework convention. At the present moment however, both the ILA and the ILC admits that no such rule of customary international law could be said to exist in more than an embryonic form. However, nothing prevents such a norm to come into being following widespread and consistent state practice to this effect, accompanied by opinio juris.

Once the existence of a separate legal regime accepted as a rule of international law can be identified, the next step to consider is how it may influence the interpretation of the UNCLOS provisions for the determination of baselines. As introduced in chapter 3 of this essay, article 31(3)(c) VCLT can be applied so that an UNCLOS provision can be interpreted with regard taken to other relevant rules of international law applicable between all the parties to a treaty. These rules can be of a customary law nature, and, given the application of a dynamic interpretation approach, have emerged after the

conclusion of the treaty which is interpreted, thus functioning as *lex posterior* to the original rule.

The requisite that the separate legal regime must be applicable to *all* parties to the treaty in order to affect the interpretation via 31(3)(c) VCLT bears repeating. In particular since the present case appears to show, according to the ILC, the emergence of a specifically *regional* rule of customary international law. The concepts of modification and desuetude however suggests that such a practice could eventually be considered applicable to the parties and consequently alter the interpretation of treaty provisions, on the basis of consent through tacit agreement of the state parties. However, I suggest that the relative uncertainties related to the application of these concepts merit some caution.

The, thus far, limited reach of the currently emerging rule of customary law could also be analysed further through the perspective of objective regimes. If formalised through a treaty among the impacted parties, such a regime could eventually amount to the status of having effects *erga omnes*, thus applicable to all parties of UNCLOS. As noted in the previous chapter, rules concerning issues of broad international relevance, including environmental issues, have been pointed out as particularly suitable for having such broad influence in shaping international law.

4.6.3 Maintaining the non-applicability of UNCLOS

There is of course a third option by which the need to preserve baselines could be met while completely avoiding the complexities of a far reaching interpretation or revision of the treaty. What is referred here is the option of maintaining that UNCLOS simply does not apply to the situation of sea-level rise-induced land inundation, resulting in baseline determination falling outside the scope of the Convention in these situations. The case could be made that the unique character of this situation, unpredicted by the drafters of the 1982 third oceans conference, makes up an ungoverned area of the law of the sea, thus creating no obligations for states as they have never consensually agreed to any instrument of international law governing the actions of states in this field.

This approach, I argue, is however not very likely to be seen as a viable option to solve the baseline issue for two main reasons. First, it is clear from the works of the ILC that they, together with UN Member States, greatly emphasise the need to maintain the primacy of UNCLOS in all matters relating to the law of the sea. This all-encompassing nature of the Convention is seen as an important part of maintaining its status as the "convention of the oceans"[223], and arguing for its non-applicability in a certain area of law would likely be met with resistance as it could undermine the status of the

[223] Treves (2008) p. 1.

Convention. Second, excluding the issue of sea-level rise-induced land inundation from UNCLOS could create significant legal uncertainty and lack of predictability in maritime governance, which would run counter to the objects and purposes of the Convention. As sea-level rise is projected to increase, a parallel development of law outside the UNCLOS scope would risk harming the consistent application of the law of the sea.

5 Conclusions and final remarks

In the previous chapter, I assessed options to the issue of baseline fixation in light of the theoretical framework established in chapter 3. In this final chapter of the thesis, I summarise the previous discussion by answering the research questions in turn. To conclude, some final remarks are given on the broader implications relating to the development of law in the face of sea-level rise, as well as on the avenues for further research on the subject.

5.1 The existing law on baselines under UNCLOS

The first research question to be answered was: "*How are baselines under the UN Convention on the Law of the Sea affected by sea-level rise?*". The answer to this question depends on the perspective chosen. At the moment, the extensive analysis by the ILA and supporting works supports the view that according to the current interpretation of Article 5 UNCLOS, normal baselines are ambulatory under the international law of the sea. This is grounded both in practice and in the textual interpretation of the terms used in the provision, which demands that the terms are interpreted in their ordinary meaning based on conventional language. This entails that the normal baseline is not just representative of the low-water line along the coast, but that it actually *is* the low-water line, shifting with the recession and accretion of the actual coastline. In the event of land inundation resulting from sea-level rise, the baseline would thus shift landward unless efforts to preserve the actual low-water line, such as with physical reinforcement, was put in place by the coastal state.

However, this current interpretation of UNCLOS might change depending on the perceived legitimacy among state parties of a parallel state practice evolving around baseline fixation. Despite being currently of a regional nature, the state practice could still eventually amount to a rule of customary international law. To have an impact to the interpretation of UNCLOS however, such a separate legal regime, customary or not, would need to be applicable to all parties of the treaty. This is a conceivable result if, for instance, this legal regime were to be codified in a treaty and subsequently accepted as an objective regime. However, while the embryonic development toward a customary rule of law is beginning to emerge among some states, the state practice and accompanying *opinio juris* is currently insufficient to be considered established as a rule of law. It should be noted however that the act of identifying a rule of customary law is often not possible until after the fact, as was the case with the granting of jurisdiction over the continental shelf.

5.2 The ILC interpretative approach and its relation to the theory of treaty interpretation

The second research question of the thesis was: "*What is the ILC:s interpretative approach to the question of fixation of baselines, and how does it relate to the theory of international law concerning the interpretation of treaties?*". The interpretative approach of the ILC is understood here as the attempt of the ILC to interpret the existing provisions in UNCLOS, namely Article 5, to allow fixed baselines without either a formal revision of the treaty, or the identification of a separate rule of international law allowing the practice of baseline fixation. The relevant articles of the VCLT provides a flexibility to the interpreter and can thus, under certain circumstances, allow for an emphasis on teleological interpretation well suited to the elements of the principles of equity and legal stability inherent in the UNCLOS framework. The articles, I argue, could also support a dynamic interpretation whereby the parallel evolution of international law applicable between the treaty parties can influence the interpretation of previously concluded treaty provisions. However, while scholars continue to endorse the application of dynamic and teleological interpretation, the system of rules established in the VCLT articles on interpretation limits the uses of both the objects and purposes and the context to a supplementary role, used for clarification where the ordinary meaning leaves the meaning ambiguous or obscure. Even if one argues that Article 31(3)(c) of the VCLT supports the application of dynamic interpretation, it would nevertheless require the existence of a separate, relevant rule of international law applicable between the parties, which as of yet cannot be deemed to exist with reference to the primary sources listed in Article 38 of the ICJ-statute. At least until a customary law norm or other relevant rule of international law could be identified and widely accepted among all parties to the treaty, alleging the permissibility of baseline fixation through a far reaching UNCLOS interpretation alone appears to be a highly proactive approach by the ILC Study Group.

5.3 Concluding remarks

This thesis has been based on a critical assessment of the current efforts to relieve the legal issues relating to sea-level rise, threatening the loss of territory and maritime entitlements of states. This does however not mean that I am unsympathetic toward these efforts. Rather, this thesis was conceived on the premise that the catastrophic risks facing coastal states as a result of sea-level rise requires the greatest possible attention in the international law community.

The law of the sea is one of the most central areas of international law. On the one hand, its development has been marked by an exceptional convergence of the international community, evidenced by the elaboration of broad and widely ratified treaties such as the UN Convention on the Law of the Sea. On the other hand, the history of this legal field shows how its development

has been greatly influenced by the need to adapt to the changing realities and needs of states through time. This special nature has led to the law of the sea evolving as a particularly dynamic field of law, often being the avenue to radical shifts in the development of general public international law. The subject for this thesis, as I hope I have shown, requires us to reexamine fundamental questions of international law, such as the blurred lines between proposals *de lege lata* and *de lege ferenda*, as well as new perspectives on the law of sources and their interpretation. As we are faced with the risk of catastrophic climate change threatening not just current maritime entitlements but the very continued existence of some states, the need for sober and creative efforts in understanding and adapting the law is of the greatest importance to the international legal community.

The ILC defends its interpretative approach largely on the basis that it would benefit the equality and legal stability in line with the objects and purposes of UNCLOS, as well as serve to protect the interests of vulnerable states in a moral sense. The fixation of baselines could as such reduce the potential stresses to international relations brought on by shifting maritime borders and, consequently, maritime entitlements. While this the underlying motives for this approach are commendable, it is important to stress that in developing options to help alleviate these legal issues, the international law of treaties must be respected. Attempts at progressive development should not be confused with extending the interpretation of rules beyond their intended scope, as this would have detrimental effect to the system of rules itself. Hence, an interpretation of UNCLOS with weak support in the theory of interpretation of treaties has a risk of undermining the status and authority of the Convention itself. It is my hope that this essay has contributed to bringing some clarity to the work undertaken by the ILC on the baseline question, and that it may serve as a starting point for further discussion and study on the matter.

The baselines question opens several avenues for further research. The evolution of state practices concerning baseline fixation warrants continuous observation as these practices could crystallize into customary international law, influencing broader interpretations of UNCLOS. Also, the role of international courts and tribunals in adjudicating cases related to baseline fixation will be critical in shaping the practical outcomes of the theoretical positions discussed here. Closer examination of the potential to regard regional customary norms as objective regimes could also benefit our understanding of the potential for the wider acceptance of fixed baselines.

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