Carved in Charts, not Sand: The ICJ's Stance on Preservation of Baselines in Its Advisory Opinion on Climate Change

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Abstract

Climate-induced sea-level rise poses an unprecedented challenge to the fundamental structure of the law of the sea, particularly regarding the legal status of baselines. The debate between "ambulatory" baselines that shift with changing coastlines and "fixed" baselines that remain static despite physical alterations has emerged as a critical legal question with implications for small island developing states. As coastal recession threatens the location of maritime zones, the international community has faced an urgent need to clarify a legally valid route between the polarised stances.

This Article employs the Vienna Convention on the Law of Treaties interpretative framework to conduct an analysis of Article 5 of the United Nations Convention on the Law of the Sea – the article setting the scene – to determine the favourable approach. Furthermore, after analysing the International Court of Justice's recent Advisory Opinion on Climate Change, this paper accentuates the drawbacks in the evaluation of the Court under the veil of ostensibly evolutionary steps concerning baselines and emphasizes potential routes that would be favored.

Annotasiya

İqlim dəyişikliyi nəticəsində baş verən dəniz səviyyəsinin qalxması, xüsusilə də başlanğıc xətlərin hüquqi statusu baxımından dəniz hüququnun fundamental quruluşuna qarşı təcrübədə rastlanmamış bir çətinlik yaradır. Sahil xətlərinin dəyişməsi ilə hərəkət edən "dəyişkən" başlanğıc xətləri ilə fiziki dəyişikliklərə baxmayaraq stabil olan "sabit" başlanğıc xətləri arasındakı mübahisə inkişaf etməkdə olan kiçik ada dövlətləri üçün kritik hüquqi sual kimi meydana çıxmışdır. Sahil xəttinin geriyə çəkilməsi dəniz zonalarının mövcudluğunu təhdid altına aldıqca beynəlxalq cəmiyyət bu qütbləşmiş mövqelər arasında təcili etibarlı bir hüquqi yolun müəyyən edilməsi zərurəti ilə üz-üzə qalmışdır.

Bu məqalə üstün yanaşmanı müəyyən etmək üçün Müqavilələr hüququ haqqında Vyana Konvensiyasının müqavilələrin şərhi üzrə çərçivəsindən istifadə edərək Birləşmiş Millətlər Təşkilatının Dəniz hüququ haqqında Konvensiyasının 5-ci maddəsinin, yəni araşdırma üzrə əsas müddəanın təhlilini aparır. Bundan əlavə, bu yazı Beynəlxalq Ədalət Məhkəməsinin yaxın vaxtlarda dərc olunan iqlim dəyişikliyi ilə bağlı məsləhət rəyini təhlil etməklə başlanğıc xətləri məsələsində Məhkəmənin təkamül kimi təqdim edilən qiymətləndirməsinin zəif cəhətlərini ön plana çıxarır və daha əlverişli potensial yanaşma istiqamətlərini vurğulayır.

CONTENTS

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Introduction

Rising sea levels, brought on by climate change and endangering coastal states globally,[1] had already been anticipated in the 20th century,[2] since such a change was anticipated to affect governments' marine entitlements by causing coastlines to recede or even vanish.[3] This resulted in the convening of several conferences to elaborate on the legal ramifications of such causes.[4] Furthermore, a new phase of discussion emerged once the International Law Commission (hereinafter ILC) included "Sea-level rise in relation to international law" into its agenda in 2018,[5] expounding upon potential legal impacts on maritime zones and the exercise of rights therein.[6]

The Intergovernmental Panel on Climate Change's (hereinafter IPCC) 2023 Report has predicted that sea levels will continue rising throughout this century with near-complete scientific certainty. While sea level changes vary by location, about two-thirds of coastal regions worldwide will experience rises that fall within 20% of the global average increase.[7] As the prediction started proving itself correct, the baselines began sinking. Hence, calling them

[1] The Ocean, Guarantor of Life – Sustainable Use, Effective Protection, 7 World Ocean Review, 40-41 (2021).
[2] Vincent P. Cogliati-Bantz, *Sea-Level Rise and Coastal States' Maritime Entitlements: A Cautious Approach*, 7 Journal of Territorial and Maritime Studies 86, 88 (2020).
[3] *Id.*, 87.
[4] *See* UN Doc. A/CONF.167/9, Report of the Global Conference on the Sustainable Development of Small Island Developing States (Bridgetown, April 25-May 6, 1994), Resolution I, Annex I (Declaration of Barbados), p. 3, p. 10; UN Doc. A/CONF.207/11, Annex II (Mauritius Strategy for the Further Implementation of the Programme of Action for the Sustainable Development of SIDS), p. 9 (2005).
[5] Snjólaug Árnadóttir, Climate Change and Maritime Boundaries: Legal Consequences of Sea Level Rise, 22 (2022).
[6] Patrícia Galvão Teles, Sea-Level Rise in Relation to International Law: A New Topic for the United Nations International Law Commission, in *Global Challenges and the Law of the Sea* 145, 151-152 (Marta Chantal Ribeiro, Fernando Loureiro Bastos, Tore Henriksen eds. 2020).
[7] IPCC, Climate Change 2023: Synthesis Report, 77. Available at: https://www.ipcc.ch/report/ar6/syr/downloads/report/IPCC_AR6_SYR_LongerReport.pdf (last visited Jul. 29, 2025).

the "coast" was no longer acceptable due to the fact that the coast had relocated inside the land. Thus, debates intensified around the query of "What precise point must the coastal state consider to be the baseline?" and contradicting approaches began emerging to respond to practical complexities.

As such an enquiry, accompanied by polarised state practices, was prevailing in the arena of the law of the sea. On July 23rd the International Court of Justice (hereinafter – the ICJ) delivered its long-anticipated Advisory Opinion on Obligations of States in respect of Climate Change. The Opinion has already been hailed as a milestone for its treatment of environmental obligations and the interlinks between climate change and international law more broadly.[8] Yet whether it succeeded in effectively addressing questions of baselines and sea-level rise remains questionable and turns out to be a matter of close scrutiny.

This Article, considering that each approach on the location of baselines arises from different analysis, assesses their consistency with interpretative standards under the Vienna Convention on the Law of Treaties (hereinafter VCLT), as legal conclusions cannot be drawn solely on the basis of expediency, if the law provides otherwise. It then turns to the recent Advisory Opinion, analysing the Court's reasoning on this issue. Finally, the Article considers the potential implications of that reasoning in light of the Opinion's non-binding character and lack of comprehensiveness in the matter.

I. Between the Lines and the Waves: Interpretation through VCLT Lenses

To address the receding coastline issue, scholars commenced analysing the legal meaning of normal baselines, namely Article 5 of the United Nations Convention on the Law of the Sea (hereinafter UNCLOS). The article describes the normal baseline as "*a low-water line along the coast as marked on large-scale charts*".[9] A low-water line or mark is "the line along a coast which the sea recedes at low water".[10] By its inherent nature, the physical low-water line ambulates in accordance with coastal changes.[11]

This is an undisputed geographical reality, but the legal question is: *do*/*must* the baselines ambulate too? While the positive answer, on the basis of the

[8] Historic International Court of Justice Opinion Confirms States' Climate Obligations (2025), https://www.iisd.org/articles/deep-dive/icj-advisory-opinion-climate-change (last visited Jul. 29, 2025).

[9] United Nations Convention on the Law of the Sea, art. 5 (1982).

[10] S-32 IHO - Hydrographic Dictionary (2019), https://portal.iho.int/iho-ohi/S32/engView.php?page=2&quick_filter=low+water (last visited Jul. 29, 2025).

[11] Julia Lisztwan, *Stability of Maritime Boundary Agreements*, 37 Yale Journal of International Law 153, 162-165 (2012).

above definition, appears to be unambiguous,[12] scholars[13] and states[14] diverged in their approaches. As a result, two main legal theories emerged: ambulatory baselines and fixed baselines.

According to proponents of the ambulatory baseline, when the coastal elements that form the coast are submerged beneath the sea, maritime lines vanish. New baselines must be created on the basis of still valid exposed baseline points, regardless of what charts depict on the basis of a previous situation.[15] Likewise, the outer limits of maritime zones are to be re-determined to meet pertinent UNCLOS requirements; they cannot expand in width exceeding allowed maritime zone scope.[16]

On the other hand, theorists of fixed baselines advocate modifying the standards to make the baselines remain as they were before the rise in sea level, in other words, remain as they were in the charts.[17] This view, supported by the 2020 Report of the ILC Working Group on rising sea levels, and 2024 Report of the International Law Association (hereinafter ILA) on International Law and Sea-Level Rise, disregards the geographical alterations.[18] Referred to as "masterly inactivity" strategy, it invests in attaining legal stability of marine zones without recourse to artificial shoreline protection designed to prevent coastal retreat.[19]

All these conclusions eventually led to a tension between actual and charted low-water lines.[20] A tension, the legal basis of which can be illuminated through the prisms of Article 31 and Article 32 of VCLT. As further analysis will unveil, resolving this tension requires prioritising legal

[12] Massimo Lando, *Stability of Maritime Boundaries and the Challenge of Geographical Change: A Reply to Snjólaug Árnadóttir*, 35 Leiden Journal of International Law 379, 380 (2022).
[13] Alexander Proelss et al., United Nations Convention on the Law of the Sea: A Commentary, 51 (2017).
[14] Árnadóttir, *supra* note 5, 75-78.
[15] Michael W. Reed, Shore and Sea Boundaries: The Development of International Maritime Boundary Principles Through United States Practice, Vol. 3, 185 (2000).
[16] Clive Schofield, A New Frontier in the Law of the Sea? Responding to the Implications of Sea Level Rise for Baselines, Limits and Boundaries, in *Frontiers in International Environmental Law: Oceans and Climate Challenges* 171, 180 (2021); ILA Committee on International Law and Sea Level Rise, Sydney Conference, 11-12 (2018); *Supra* note 5, 20-21.
[17] Michael J. Strauss, *The Future of Baselines as the Sea Level Rises: Guidance from Climate Change Law*, 6 Journal of Territorial and Maritime Studies 27, 28 (2019).
[18] *See* United Nations General Assembly, Sea-level Rise in Relation to International Law Report, § 104 (2020); International Law Association Committee on International Law and Sea Level Rise, Athens Conference, 44-45 (2024).
[19] Jenny G. Stoutenburg, *Implementing a New Regime of Stable Maritime Zones to Ensure the (Economic) Survival of Small Island States Threatened by Sea-Level Rise*, 26 The International Journal of Marine and Coastal Law 263, 279 (2011).
[20] *See* ILA, "Baselines under the International Law of the Sea", Sofia Conference Report (2012).

certainty over strict adherence to geographical change to uphold the established rights while embracing the inescapable waves.

A. The Interpretation of Article 5 under VCLT Article 31(1)

According to 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*".[21] As evident, this article establishes three elements of the primary rule of interpretation: ordinary meaning, context, object and purpose. This part will construe Article 5 on the basis of each of them, respectively.

1. Ordinary Meaning

While there is no hierarchy among the aforementioned elements, interpretation generally begins with *the ordinary meaning* of the terms, which is preferred by the ICJ.[22] The Court has several times accentuated that interpretation must be based "above all" upon the text of the document.[23] When the wording of a treaty provision is clear in its plain sense, meaning should be applied as it stands, without recourse to alternative subtexts.[24] In other words, unless such an interpretation leads to a meaning unsuited to the object, purpose and context of the instrument,[25] that is "an end of the matter"[26].

a) Ambulatory approach

The normal baseline, "*the low-water line along the coast* as marked on the charts",[27] must be interpreted through this textual lens. In its ordinary meaning, the baseline is a low-water line and a chart as a dependent, cartographical figure, must depict this actual line.[28] The majority of scholars following this interpretation have concluded that, although the charted line is the initial reference for identifying the baseline, it does not have constitutive authority in determining it. That is to say, if the charted line deviates from the actual low-water line without proper revision, it loses legal validity.[29]

b) Fixed approach

Through "fixed" lenses, the focus is on the second part of the definition: "the low-water line along the coast *as marked on the charts*." The chart is the

[21] Vienna Convention on the Law of Treaties, art. 31(1) (1969).
[22] Buga Irina, Modification of Treaties by Subsequent Practice, 80, 84 (2018).
[23] ICJ, Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment of 3 February 1994, para. 41; Legality of the Use of Force (Serbia and Montenegro v Belgium) [2004] ¶100.
[24] ICJ, Advisory Opinion on the Competence of the General Assembly for the Admission of a State to the United Nations, 8 (1950).
[25] ICJ, South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962, p. 336.
[26] Advisory Opinion on the Competence of the General Assembly, *supra* note 24, 8.
[27] *Supra* note 9, art. 5.
[28] Reed, *supra* note 15, 179-180; the Note on the Practice of the Secretary-General in respect of the deposit of charts (2020) § 8.
[29] *Supra* note 5, 43-44.

official document that determines the location of this baseline, even when the coastline's layout has changed. In this case, the normal baseline will only abide by the change in the coast if a new survey is conducted and the chart is updated to match it.[30]

Evidently, the legal ambiguities surrounding baseline interpretation are not resolved by the ordinary meaning alone, even though it offers a logical place to start. The ambulatory and fixed approaches both demonstrate how following the plain text can produce different outcomes, so it is not "an end of the matter." This entails the review of further elements.

2. Context

The word acquires its meaning from the context in which it is employed.[31] Under Article 31 of the VCLT, "the context" does not encompass common sense or the political framework in which the relevant treaty was signed. Rather, it pertains to the textual elements of treaty provisions unrelated to those involved in the interpretation process.[32] When a consequence for interpreting a particular phrase is drawn from these elements, the treaty must be read as a whole.[33] For example,the ICJ, based on the systemic reading of the treaty as a whole, has applied exceptions found in other parts of the treaty, even when the particularly interpreted article does not expressly provide for any exceptions.[34]

a) Ambulatory approach

In this regard, there are two exceptions to ambulatory baselines.[35] First, Article 7(2) of UNCLOS on straight baselines provides for the retention of baselines "in the presence of a delta and other natural conditions":

"Where because of the presence of a delta and other natural conditions the coastline is highly unstable, the appropriate points may be selected along the furthest seaward extent of the low-water line and, notwithstanding subsequent regression of the low-water line, the straight baselines shall remain effective until changed by the coastal State in accordance with this Convention".[36]

Second, Article 76(8-9) of UNCLOS on the continental shelf sets down the requirement of a "permanent description of the outer limits of the continental

[30] Christopher Carleton & Clive Schofield, *Developments in the Technical Determination of Maritime Space: Charts, Datums, Baselines, Maritime Zones and Limits*, 3 IBRU Maritime Briefing 1, 24-25 (2001).

[31] ICJ, Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization, Advisory Opinion of 8 June 1960, 158.

[32] Alexander Orakhelashvili, The Interpretation of Acts and Rules in Public International Law, 340 (2008).

[33] Oliver Dörr, Article 31, in: Dörr, O., Schmalenbach, K. (eds) *Vienna Convention on the Law of Treaties,* 583 (2018).

[34] ICJ, Mutual Assistance in Criminal Matters, ICJ Rep 177, § 123 (2008).

[35] Árnadóttir Snjólaug, *The Impact of Sea Level Rise on Maritime Limits: A Grotian Moment in the Law of the Sea?*, 42 Grotiana 277, 286 (2021).

[36] *Supra* note 9, art. 7(2).

shelf": *"The coastal State shall deposit with the Secretary-General of the United Nations charts and relevant information, including geodetic data, permanently describing the outer limits of its continental shelf"*.[37]

Professor Bernard H. Oxman specifically outlined that the inclusion of the word "*permanent*" takes its roots from the earlier recommendation which proposed that these limits "should... not be subject to change because of subsequent alterations in the coastline or revelations of more detailed surveys".[38]

The conjunctive interpretation of Articles 5, 7, and 76 invokes the so-called "negative implication" rule.[39] That is to say, UNCLOS's explicit designation of only a straight baseline case where this baseline is fixed as in the chart implies that other baselines, including the normal baseline, must be ambulatory in all instances. UNCLOS's further mention of freezing the other end of the continental shelf showcases that it is a precaution against changing baseline.[40] This conclusion is strengthened by Oxman's observation that Article 76(9) was intended as a response to geographical change: if the drafters had intended to protect normal baselines from movement, they would have included the same 'permanency' requirement in Article 5.

The other considerable provisions encompass Articles 16(1) and 47(8) concerning "notice" or "publicity" clauses.[41] According to these articles, artificial and straight-line baselines "*shall be shown on charts of a scale or scales adequate for ascertaining their position*".[42] While even their permanency is uncertain,[43] one thing is clear that the absence of such publicity requirements for normal baselines further reinforces that these baselines must correspond to the physical low-water line.[44]

While this contextual analysis appears to be sufficient to take a side in between the polarised views, the above-mentioned reasoning remains shallow. These specific provisions cited when construed adequately in the context of UNCLOS's broader systematic approach to maritime stability,

[37] *Id.*, art. 76 (8-9).
[38] David Caron, Climate Change, Sea Level Rise and The Coming Uncertainty In Oceanic Boundaries: A Proposal To Avoid Conflict, in *Maritime Boundary Disputes, Settlement Processes, and the Law of the Sea* 1, 9-10 (2009).
[39] Rosemary Rayfuse, Sea Level Rise and Maritime Zones: Preserving the Maritime Entitlements of "Disappearing" States, in *Threatened Island Nations: Legal Implications of Rising Seas and a Changing Climate* 167, 172-173 (2013).
[40] Coalter Lathrop et al., Baselines under the International Law of the Sea, 17 (2019).
[41] *Ibid.*
[42] *Supra* note 9, art. 16(1).
[43] Nguyen Hong Thao, *Sea-Level Rise and the Law of the Sea in the Western Pacific Region*, 13 Journal of East Asia and International Law 121, 133 (2020).
[44] Alfred Soons 114 AM. SOC'y INT'l L. PROC. 389, 390 (2020); Alfred Soons, *Some Observations on the 'Ambulatory' Nature of the Normal Baseline*, 1 Portuguese Yearbook of the Law of the Sea 5, 9 (2024).

prove to be wrongfully assessed by ambulatory champions. The fixed baseline interpretation, examined below, provides a more coherent reading of these elements that better serves the treaty's overarching objectives.

Yet even with this reasoning, the debate remains unsettled. To see why, it must be considered how fixed baseline theorists interpret these same provisions.

b) Fixed approach

While contemporary voices embrace the ambulatory baseline theory as dominant and attempt to resolve the legal problems it causes, Kate Purcell opposes this and constructs her strategy on the argument that the baseline has never been intended to be ambulatory. And she begins to defend this by examining the soundness of the aforementioned "negative implication".[45]

The above argument that because Article 7(2) provides for the retention of straight baselines "*in the presence of a delta and other natural conditions where the coastline is highly unstable*", other types of baselines must otherwise shift with the coast misconstrues the meaning. Instead, the Article clearly states that baselines should remain fixed, *even* in the face of significant changes to the coastline.[46] It establishes intactness as the general principle, with Article 7(2) serving as a reaffirmation rather than an exception. In essence, the Article means: "While baselines throughout various coastal changes have to remain as they are, because other baseline focused provisions don't establish otherwise, the particularly volatile nature of deltaic conditions should not cause confusion or provide justification for abandoning this practice of permanence." By explicitly addressing the most extreme scenarios of coastal instability, Article 7(2) reinforces rather than undermines the general presumption that baselines maintain their integrity despite geographical alterations.

While such an approach seems questionable at the first glance, it fully aligns with the principle of effectiveness.[47] According to the principle, when the provision leads to two meanings (one by ambulatory, the other by fixed thesis), the interpretation that best upholds the treaty's objectives should prevail.[48] Affirming the general rule on baselines, even amidst changes,

[45] Mara R Wendebourg, *Interpreting the Law of the Sea in the Context of Sea-Level Rise: The Ambulatory Thesis and State Practice*, 35 Journal of Environmental Law 499, 502-503 (2023).
[46] Kate Purcell, Article 7(2) and the Special Case of Deltaic Coasts, in *Geographical Change and the Law of the Sea* 49, 52 (2019).
[47] Draft Articles on the Law of Treaties with Commentaries, § 6 (1966).
[48] *Ibid.*

strengthens durable relations[49] and fosters predictability in the sea.[50] These objectives will be further elaborated in the next section.

Similarly, the above-mentioned argument that Article 76(9) implies the ambulatoriness of the baseline misinterprets that Article. Indeed, "permanency" was intended to shield the outer limits of the shelf from changes, but those changes were not concerning geographical evolutions at all.[51] Permanency was sought to preserve common heritage rights, as states may extend their rights over the international seabed area if the limit was not defined once for all.[52] This intent is further evidenced by the negotiating states' approach to the shift from depth-based to distance-based definition. Back in the time, there were "the exclusive sovereign rights of the coastal State to exploit the seabed up to the 200-metre isobath or as far as the depth of the superjacent waters admits of the exploitation of the natural resources of the seabed".[53] But as later on, it started to be considered imprecise, many states advocated for current provision defining the shelf not on the basis of its exploitability or depth, but by its width:[54] "*The coastal State shall delineate the outer limits of its continental shelf, where that shelf extends beyond 200 nautical miles from the baselines*...".[55] Notably, they never discussed this shift as a potential drawback in relation to possible alteration of limits due to coastal instability – a strong indication that the negotiating states never foresaw baselines shifting with the coast. Hence, "negative implication" is completely flawed, drawing on the non-existent intention.[56]

Regarding the non-existence of the "publicity" clause for normal baselines, this stems from the fact that such baselines are already inherently available in officially recognised nautical charts as per definition: "the low-water line along the coast *as marked on large-scale charts officially recognised by the coastal State*". Unlike Article 5, artificial and straight-line baselines don't mention any reflection-in-the-chart requirement in their texts and that is why there are additional articles to do so. The Commentary of UNCLOS itself outlines that "it seems that "large-scale" and "a scale or scales adequate for ascertaining their position" may be used synonymously".[57] The mere reason that the same

[49] Rozemarijn J. Roland Holst, Change in the Law of the Sea: Context, Mechanisms and Practice, 188 (2022).

[50] ILC, 'Sea-level rise in relation to international law: Additional paper to the first issues paper (2020), by Bogdan Aurescu and Nilüfer Oral, Co-Chairs of the Study Group on sea-level rise in relation to international law', 35, fn. 164 (2023).

[51] Purcell, *supra* note 46, 75-76.

[52] *Id.*, 88-89, 95-96, 102-103.

[53] *Id.*, 87.

[54] *Id.*, 91-86.

[55] *Supra* note 9, art. 76(7).

[56] *Supra* note 46, 96.

[57] Proelss et al., *supra* note 13, 56.

wording is not employed, hence, brings no conclusion of the supremacy of the actual low-water line over the charted line.

Evidently, this demonstration that Article 7(2) reinforces rather than contradicts baseline permanency reveals how superficial readings of UNCLOS can lead to conclusions that undermine the treaty's commitment to stability. More importantly, the insight into the fact that the continental shelf permanency provision was never intended to address baseline mobility exposes a flaw in ambulatory reasoning. The fixed baseline approach thus emerges not as an innovative departure from UNCLOS, but as the interpretation that most efficiently preserves the treaty's original understanding of how maritime zones should function in a legally ordered system.

3. Object and purpose

The third element of interpretation is connected to context, because context is employed to decipher the underlying tones of the text, ultimately guiding the interpretation to the object and purpose.[58] Consideration of object guarantees that any implications derived from the provision contribute to the effectiveness of the treaty.[59] This teleological approach is of paramount importance in the interpretation of instruments underpinning ongoing legal regimes rather than settlement of specific disputes. While the preamble-enhancing purposes of the treaty are generally the first course,[60] these treaties also establish broad principles, in light of which the intention of drafters, and consequently, optimal ways to construe the particular provisions are discerned.[61]

a) Ambulatory approach

In this regard, starting with the preamble of UNCLOS, the attainment of "a legal order for the seas and oceans", and "a just and equitable international economic order which takes into account the interests and needs of mankind as a whole", "efficient utilisation of the resources" are set out as objectives in the fourth and fifth paragraphs, respectively.[62] Such order and needs of all nations can be achieved by eschewing potential contradictions as states may use UNCLOS baseline rules to maximise their territorial claims.[63] If no shift

[58] Gardiner Richard, Treaty Interpretation, 210 (2nd ed., 2015); *See also* Bank Markazi Iran v. the Federal Reserve Bank of New York, IUSCT Case No. 823, § 58 (2000). Available at: https://jusmundi.com/en/document/decision/en-bank-markazi-iran-v-the-federal-reserve-bank-of-new-york-award-award-no-595-823-3-tuesday-16th-november-1999 ; Irina, *supra* note 22, 81.

[59] Dörr, *supra* note 33, 584.

[60] *Id.*, 585.

[61] Vaughan Lowe, The Law of Treaties: Or, Should This Book Exist?, in *Research Handbook on the Law of Treaties* 1, 8 (2014).

[62] *Supra* note 9, § 4-5.

[63] Strauss, *supra* note 17, 37.

occurs, coastal states obtain more ocean area as their coasts retreat.[64] For instance, if the coastline shifts inland by two miles, given that no corresponding change applies to baselines, the state now commands over extra miles of ocean that become internal waters with respective resource rights. However, if baselines are altered as well, not only states keep their twelve-mile territorial sea from the new coastline, but also high seas expand by two miles.[65] This expansion advances the common interest in enlarging Areas Beyond National Jurisdiction.[66]

Further, the exercise of rights over maritime zones on the basis of now-outdated baselines raises legal concerns regarding the efficient utilisation of the resources. With respect to the territorial sea, as Gershon Hasin rightfully asserts, "without a land territory to protect, subjecting parts of the open ocean to a regime of innocent passage or allowing a state to enforce its domestic laws therein, simply because there "used to be" land there, is illogical".[67] With respect to the EEZ, such exercise goes against the rationale behind the EEZ regime.[68] Judge Budislav Vukas opined in his declaration appended to the Volga Case Judgement of 2002 that the EEZ regime was established to meet the needs of coastal fishing communities whose livelihood depended on nearby marine resources. That is why preserving sovereign rights over EEZ areas that no longer serve the needs of displaced people – either because they migrated from the submerged state or relocated far inland – goes against the primary objective of the regime.[69]

Proceeding with the principles, the first principle to be evaluated is land dominates the sea (LDS). LDS, a cardinal concept in maritime law, elucidates that a state's maritime rights are heavily contingent on its sovereignty over land territory.[70] To be more specific, land dominates the sea "by the intermediary of the coastal front".[71] It is this land territory that provides the starting points for maritime delineation, serving as the basis for the extension of legal rights on the sea. While UNCLOS does not expressly indicate the principle, it accentuates that the maritime zones' outer limits are measured

[64] Tony George Puthucherril, *Rising Seas, Receding Coastlines, and Vanishing Maritime Estates and Territories: Possible Solutions and Reassessing the Role of International Law*, 16 Int'l Comm. L. Rev. 38, 57 (2014).
[65] *Ibid.*
[66] Ekrem Korkut & Lara B Fowler, *Implications of Sea-Level Rise for the Law of the Sea*, 10 KMI International Journal of Maritime Affairs and Fisheries 1, 13 (2018); *See also supra* note 5, 80.
[67] Gershon Hasin, *Ocean Governance in the 21st Century: A "New Package-Deal"*, 48 Yale Journal of International Law 223, 250 (2023).
[68] Stoutenburg, *supra* note 19, 271-272.
[69] *Ibid, see also* Hasin, *supra* note 67, 250.
[70] Qatar v. Bahrain, ICJ No. 87, § 185 (2001). Available at: https://www.icj-cij.org/case/87 (last visited Jul. 31 2025).
[71] Weil Prosper, The Law of Maritime Delimitation – Reflections, 51 (1989).

from the "baseline," which implies LDS.[72] The ICJ has reaffirmed this principle on several occasions,[73] and did so in relation to normal baselines as well.[74] These case laws highlighting the need for a natural connection to land establish the core of ambulatory theory: maritime entitlements should alter to mirror the physical reality.[75] Any contrary outlook poses a threat to this foundational basis of UNCLOS by envisaging the possibility of separating the legal baseline from geographic reality.[76]

The second principle to be analysed is freedom of the high seas.[77] All states enjoy "inclusive" interests, such as freedom of navigation and rights of fishing, and "exclusive" interests, including security and warfare.[78] The abundant resources of this zone profit distant-water fishing nations, as they don't have to negotiate access rights to foreign fishing zones.[79] This advantage is buttressed by the consequences of shifting baselines: as EEZs transform into high seas, the associated fish stocks transfer under the regime of the global commons, meaning all nations.[80]

The third principle to be considered is the common heritage of mankind.[81] UNCLOS balances exclusive rights of coastal states with the interests of the international community in the area.[82] Article 1 defines the "area" as the seabed and ocean floor and subsoil thereof, beyond the limits of the continental shelf, as well as all the non-living resources contained therein.[83] The area and its mineral resources are part of the common heritage of mankind.[84] All states have an interest in the scope[85] and exploitation[86] of this

[72] Cogliati-Bantz, *supra* note 2, 89 (2020).
[73] Nuno Antunes & Vasco Becker-Weinberg, Entitlement to Maritime Zones and Their Delimitation: In the Doldrums of Uncertainty and Unpredictability, in *Maritime Boundary Delimitation: The Case Law: Is It Consistent and Predictable?*, 64-66 (2018).
[74] *Supra* note 70, § 184-185.
[75] Busch Signe Veierud, *Sea Level Rise and Shifting Maritime Limits: Stable Baselines as a Response to Unstable Coastlines*, 9 Arctic Review on Law and Politics 174, 176 (2018); Julia Lisztwan, *Stability of Maritime Boundary Agreements,* Note, 37 Yale Journal of International Law 154, 165 (2012).
[76] Frances Anggadi, *Reconceptualising the 'Ambulatory Character' of Baselines: The International Law Commission's Work on Sea-Level Rise and International Law*, 22 Melbourne Journal of International Law 163, 179 (2021); *Supra* note 2, 99-100.
[77] *Supra* note 9, art. 87.
[78] *Supra* note 13, 681.
[79] *Supra* note 19, 301-302.
[80] *Ibid.*
[81] *Supra* note 9, art. 136.
[82] *Supra* note 67, 233.
[83] *Supra* note 9, art. 1.
[84] *Id.*, preamble, § 6.
[85] *Supra* note 5, 49.
[86] International Law Association, Legal Issues of The Outer Continental Shelf, Berlin Conference (2004), 8.

international seabed area, as they can utilise the area if duely authorised by the international body.[87]

Within the context of the last two principles, if baselines shift inwards due to coastal recessions, logically the scope of area and high seas enlarges, meeting the common interests. On the contrary, if baselines are frozen, a smaller portion of oceans will fall under the common heritage. This arguably diminishes the principles' sphere of application, augmenting the ambulatory approach.[88]

While these arguments possess initial plausibility, emphasis on expanding high seas and common heritage areas, ignores the practical reality that legal uncertainty breeds conflict rather than cooperation. The mischaracterisation inherent in each sentence posed is effectively rebutted by the preservation-oriented approach expanded upon below.

b) Fixed approach

Before delving into the text of UNCLOS, proper account must be taken of the interpretive framework developed in international jurisprudence. A former ECtHR president, Luzius Wildhaber has stated: "The "living instrument" doctrine is one of the best-known principles of Strasbourg case law. It expresses that the Convention is interpreted in the light of present-day conditions".[89] Known as evolutionary interpretation, it is rooted in the principle of effectiveness (*ut res magis valeat quam pereat*),[90] which requires that the text be construed by reference to the treaty's object and purpose so as to ensure they remain operative.[91]

To determine the object and purpose of a treaty, the intentions of drafters must be considered.[92] However, under evolutionary interpretation, intention plays a role at a more abstract level; namely, focusing on giving effect to the legal relationship the parties intended to establish and maintain,[93] rather than what they had actually said in the treaty.[94] This interpretive approach holds particular significance for UNCLOS as a "living instrument".[95] It ensures that

[87] *See Supra* note 9, part XI, section 2.

[88] *Supra* note 5, 80.

[89] Abi-Saab, Georges, et al., eds. Evolutionary interpretation and international law, 80 (2019).

[90] Spain v. Canada, ICJ No. 96, §49, §84 (1995). Available at: https://www.icj-cij.org/case/96 ; *See also* Hersch Lauterpacht, The Development of International Law by the International Court, 228 (1958).

[91] *Supra* note 22, 82.

[92] Employment of Women During the Night, 1932 PCIJ (Ser.A/B)No.50,383 (Adv.Op.) (Anzilotti,diss.op.).

[93] *See* Holst, *supra* note 49, 188-189; Lowe, *supra* note 61, 8.

[94] Bjorge Eirik, The Means of Interpretation Admissible for the Establishment of the Intention of the Parties, in *The Evolutionary Interpretation of Treaties* 56, 88 (2014).

[95] ITLOS, Request for an Advisory Opinion submitted by the Sub-Regional Fisheries Commission, §9 (2015).

the treaty preserves its efficacy in the context of contemporary conditions[96] rather than being confined to the circumstances of its original draughting, the period when the drafters didn't even predict global sea-level rise.[97]

This understanding resonates with the caveat stated by the Secretary-General of the Third UN Conference on the Law of the Sea: "…*It was of the utmost importance that, in the process of change, the international community should be constantly on guard so as to anticipate new problems and issues which might divide it. Change was imperative but it had to be accompanied by greater diligence to maintain the stability necessary for real progress*". [98] The statement underscores that the Convention's intrinsic stability is contingent upon its capacity to respond to and mediate change.[99] The most significant of these changes is sea-level rise.

Reading the preamble of UNCLOS, it puts forward "establishing through this Convention, with due regard for the sovereignty of all States, a legal order for the seas and oceans" and "conformity with the principles of justice and equal right" in the fourth and seventh paragraphs, respectively.[100] Rethinking these objectives through the lens of "intrinsic stability of the Convention", obviously drafters schemed to form legally stable, predictable and certain relations in the maritime context. Such an approach has been widely entertained in the 2023 additional paper of the ILC, prepared by Bogdan Aurescu and Nilufer Oral.[101] Considering what ambulatory champions claim – shifting the baselines constantly – this is arguably doubtful if any kind of certainty can be sought there.[102] On the other hand, freezing baselines is a direct means to avoid instability as to the location of maritime zones, a potentially "fertile source of inter-State conflict".[103]

In this regard, a classic ambulatory prone argument "If no shift occurs, coastal states obtain more ocean area as their coasts retreat" fails to take into account the fact that the core reason for "obtaining more ocean area" is because of "losing more land area" in exchange.[104] And to shield their long

[96] *See* Joost Pauwelyn, The Nature of WTO Obligations; *supra* note 50, § 8.
[97] Rosemary Rayfuse, *W(h)ither Tuvalu? International Law and Disappearing States*, 9 University of New South Wales Faculty of Law Research Series 1, 5 (2009).
[98] Statement by the Secretary General, Third UN Conference on the Law of the Sea, Summary Records of 14th Plenary Meeting, UN Doc. a/conf.62/sr.14 (20 June 1974), para. 41.
[99] *Supra* note 49, 7.
[100] *Supra* note 9, preamble, § 4, 7.
[101] *See supra* note 50.
[102] *Id.*, § 79.
[103] *See* Lanovoy & O'Donnell, *Climate Change and Sea-Level Rise: Is the United Nations Convention on the Law of the Sea up to the Task?*, 23 International Community Law Review 133, 137 (2021); The Declaration on Preserving Maritime Zones in the Face of Climate Change-related Sea-Level Rise, 18 Pacific Islands Forum Leaders, preamble, § 3 (2021); *supra* note 50, § 84, 92.
[104] Puthucherril, *supra* note 64, 57-58.

time owned maritime zones, especially their resourceful EEZs, states would apply the artificial shoreline protection measures. These measures have gone through the test of time and been proved impractical, profligate and not so legally watertight strategy.[105] For example, in 1988 Japan spent $240 million over three years to save Okinotorishima – two rocks from submerging under water. Now, in 2025 it is not hard to predict that the amount to be expended to save small-island states' territories from volatile sea-level rise (91.2 mm on July 7)[106] would be outrageous.[107]

Furthermore, such actions carry serious environmental risks, such as habitat destruction and pollution from sediment discharges, in addition to creating a "coastal squeeze" that jeopardises biodiversity and ecosystem services.[108] The International Tribunal for the Law of the Sea has underlined that prudence and caution require states to work together in assessing the environmental impacts of coastal alterations. States further should endeavour to choose the measures that don't entail substantial physical alteration of the coastal environment.[109] Freezing baselines would remove the worry and need for these artificial methods that harm the environment and free up funds for climate adaptation.[110] This strategy gives maritime zones legal certainty while also conforming to the growing trend in customary international law toward environmental cautiousness.

Proceeding with principles, **LDS** is not an absolute rule. UNCLOS already permits some maritime limits to remain fixed regardless of coastal changes, for example, Article 76(8-9) on the continental shelf, the article constantly referred by ambulatory proponents themselves for negative implication, establishes permanent fixation of outer limits of the shelf even if baselines shift landward.[111] As well-known professor Alfred Soons has expressed: "*The land dominates the sea*" *is a maxim, it is a summary of what some positive legal rules (on baselines and perhaps on the extent of maritime zones) currently provide. But circumstances can change, and so will the law; law is inherently adapting to the*

[105] Jessica Reynolds, *A Sinking Feeling: The Effect of Sea Level Rise on Baselines and Statehood in the Western Pacific*, 37 The Australian Year Book of International Law 169, 199 (2020); *supra* note 5, 57-58.
[106] NASA Sea Level Change, https://climate.nasa.gov/vital-signs/sea-level/?intent=121 (last visited on July 8, 2025).
[107] David Caron, *When Law Makes Climate Change Worse: Rethinking the Law of Baselines in Light of a Rising Sea Level*, 17 Ecology Law Quarterly 621, 640 (1990).
[108] Clive Schofield et al., *Reflections on Coastal State Response Options in an Era of Sea Level Rise: Practical Challenges and Legal Consequences*, 38 Ocean Yearbook 101, 112, 117-118, 123 (2024).
[109] Tim Stephens, Climate Change Adaptation in Marine and Coastal Areas and International Law, in *Research Handbook on Climate Change Adaptation Law* 254, 265 (2022).
[110] Rosemary Rayfuse, *International Law and Disappearing States: Utilising Maritime Entitlements to Overcome the Statehood Dilemma*, UNSW Law Research Paper 1, 6 (2010).
[111] *Supra* note 50, 63.

requirements of developments in society".[112] Hence, freezing baselines to prevent states from losing maritime zones would be a legitimate application of evolutionary interpretation.

As to the common heritage of mankind and freedom of the high seas, the above interpretation adopts an overly cursory course, omitting the trade-off between land loss and expansion of high seas again. In reality, the fixed baseline approach doesn't encroach upon these principles, rather shields nations from the risks of the transformation of rich-in-fisheries EEZs into high seas: Fisheries in the EEZs are subject to state's conservation laws and management as per requirements of UNCLOS, including licensing fishermen, fishing vessels.[113] For example, under article 62, states are obliged to promote the objective of optimum utilisation of the living resources in their EEZs. Article 61, on the other hand, obliges them to determine the allowable catch of these living resources. Perused together, these provisions create a regulatory framework designed to ensure sustainable utilization within set limits, preventing resource depletion through overexploitation.[114]

However, such articulate regulation doesn't apply to fisheries in high seas: UNCLOS requires states to share fishing data and maintain vessel records, but enforcement is difficult and states have little incentive to police distant waters. They struggle to monitor their own flagged vessels even inland waters, let alone on the high seas. The case of The Chilean Sea Bass exemplifies this problem – it's seriously overfished with illegal harvesting in 2000 reaching twice the legal catch limits, despite being regulated by an international commission.[115]

In light of these facts, the consequences of following the lead of shifting baselines leave nothing to the imagination. The implications extend beyond fisheries to encompass marine protected areas increasingly established within EEZs.[116] A shift of these areas to the high seas status would dismantle conservation measures maintained by coastal states, leaving them to the mercy of flag states,[117] which would undoubtedly be uninterested in anything

[112] Alfred Soons, *Proceedings of the 118th Annual Meeting*, 118 American Society of International Law 389, 392 (2020).
[113] Joyner Christopher, *Biodiversity in The Marine Environment: Resource Implications for The Law of The Sea*, 28 Vanderbilt Journal of Transnational Law 635, 642-643 (1995).
[114] *Supra* note 9, art. 61(1-2), 62; *supra* note 13, 497.
[115] Ann Powers, *Sea-Level Rise and Its Impact on Vulnerable States: Four Examples*, 73 Louisiana Law Review 151, 165-6 (2012).
[116] Nilufer Oral & Bogdan Aurescu, Sea Level Rise and Maritime Boundaries: The Case for Stability, Legal Certainty, and Peaceful Relations, in *By Peaceful Means: International Adjudication and Arbitration - Essays in Honour of David D. Caron*, 447 (2024).
[117] *See Ibid;* Rolf Einar Fife, Sea-Level Rise in Relation to International Law: How to Protect Coastal State Rights by Operationalizing Legal Analysis, in *The International Legal Order in The XXIst Century: Essays in Honour of Professor Marcelo Gustavo Kohen*, 789 (2023).

other than exploiting.[118] This jurisdictional shift is particularly troubling given that over one-third of global fish stocks already suffer from over-exploitation even within the relatively well-regulated EEZs.[119] While international organisations call for collective action to promote sustainable ocean-based economies,[120] maintaining such objectives becomes practically impossible and undesirable for coastal states facing the legal uncertainty of ambulatory baselines.

As a result, proper interpretation of Article 5, in contrast to what the ambulatory champion offers, in light of legally stable and certain relations favours freezing baselines. These baselines not only ensure predictability of maritime entitlements for vulnerable coastal states but also sustain the regulatory regimes already in place within their EEZs. It eschews uncertainties and risks associated with climate change based coastal recession – ranging from economic hazards to shield the baseline to unregulated exploitation of marine resources. Thus, in preserving the effectiveness of UNCLOS in a contemporary context, such interpretation is not a departure from the Convention's purposes, but a necessary evolution of them. Both the treaty's hierarchy of values and the practical consequences of interpretation are properly judged and competing interests are balanced. While the contravening stance may appear to honour reality at first blush, it ultimately undermines the treaty's capacity to provide the predictable legal framework, which eventually dooms what was initially "honoured".

B. The Interpretation of Article 5 under VCLT Article 32

According to the Article 32 of the VCLT:

"*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".[121]

While the above interpretation does not lead to a manifestly absurd result, but to confirm the meaning drawn from the texts, this section will elaborate on travaux préparatoires and subsequent practice, respectively.

1. Travaux préparatoires

[118] Powers, *supra* note 115, 167; *see also* Stephen Floyd, *Fishing for Answers: Illegal Fishing, Depleted Stocks, and the Need for WTO Fishing Disciplines*, 52 Georgetown Journal of International Law 797 (2021).

[119] UNGA, Oceans and the Law of the Sea: Report of the Secretary-General, § 29 (2024).

[120] UNGA, Draft Resolution Submitted by the President of the General Assembly: Our Ocean, Our Future: United for Urgent Action, § 21 (2025).

[121] Vienna Convention on the Law of Treaties, art. 32 (1969).

The object and purpose element of the interpretation has already been employed to distinguish the meaning between the lines. Yet sometimes recourse to preparatory work serves a finalising effect to distinguish the true intention of drafters through their discussions.[122] Having no clearly defined scope, travaux covers not only legal, but also politically motivated oral and written remarks provided they are made in an official context.[123]

a) Ambulatory approach

This means of interpretation is generally applied to substantiate that the charted line was not intended to constitute the normal baseline.[124] Historical records showcase that the function of nautical charts and their depicted lines was to elucidate the term "low-water line" as subsequently codified in Article 5.[125] Reference to the charted line was added to avoid demanding states to agree on a universal vertical datum to determine the low-water mark, intention was never to give it precedence.[126] This finds further support in the light of the statement of the International Law Commission: "At the time of the negotiation of the United Nations Convention on the Law of the Sea, sea-level rise and its effects were not perceived as an issue that needed to be addressed. The Convention was thus interpreted as prescribing an ambulatory character for baselines and the outer limits of the maritime zones measured therefrom", excluding continental shelf limits and straight baselines.[127]

Furthermore, in 1952, the definition of normal baseline was as follows: "The line of low-water mark is that indicated on the charts officially used by the coastal State, *provided the latter line does not appreciably depart from the line of mean low-water spring tides*." But later on, drafters have concluded that the last part is not necessary, because any significant departure would be disputed by other states and a correction would be forced. As a result, the phrase was removed. This record indicates that challenging the charts was already contemplated by the drafters, so how could they envisage giving primacy to charts to define the baseline?[128]

While these historical arguments possess surface appeal, they reflect a selective reading of the preparatory materials that overemphasises isolated statements. The left out broader draughting context when taken into complete account sheds a different light on the matter, as below analysis indicates.

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[122] Yearbook of The International Law Commission, Volume II, 58, § 21 (1964); Peru v. Chile, ICJ No. 137 (2014). Available at: https://www.icj-cij.org/case/137 (last visited Jul. 31, 2025).

[123] Orakhelashvili, *supra* note 32, 383.

[124] *See Supra* note 20, 9-11.

[125] Lathrop et al., *supra* note 40, 18.

[126] *See* Lanovoy & O'Donnel, *supra* note 103, 143.

[127] *Supra* note 18, 41.

[128] Anggadi, *supra* note 76, 176-177.

b) Fixed approach

A lesser-known interpretation of the preparatory work of Article 5 has been put forward by Kate Purcell. Rather than selecting the low-water line as a geographical fact that Article 5 subsequently required to be marked on charts, the drafters actually proceeded in reverse: they chose existing charts first, and the low-water line was adopted precisely because it was already represented as a linear representation of the coast on nautical charts.[129] This approach is sounder considering the fact that drafters were looking for practical convenience in the early 20-30s.[130] In 1930, the Second Sub-Committee selected the low-water mark as a maritime baseline primarily because existing British Admiralty charts already employed this tidal measurement.[131] The U.S. proposed using "whatever line of sea level is adopted in the charts of the coastal State" [132] – this demonstrates that the significance of physical reality was diminished. Further, many states faced practical differences in determining the precise spots of the low-water line,[133] however these were deemed negligible,[134] establishing the charted low-water line as the uncontested normal baseline.[135] As a result, the question of whether the charted line should have primacy never arose because only the charted line was ever considered as a viable baseline candidate. This is the interpretation that completely aligns with the approach of fixed baselines: charts over physical reality, and it refutes the polarised view that has been grounded on non-existent premises.

2. Subsequent practice

Subsequent practice, as a supplementary means consisting of conduct by one or more parties,[136] is referred to in the practice of international adjudicatory bodies, albeit not always by explicit reference to Article 32 of the VCLT.[137] The practice directly embraces the statements and judicial decisions of states.[138] The resolutions of international bodies, and annunciations of

[129] *Supra* note 46, 166-167.
[130] UNGA, 'Report on the Regime of the Territorial Sea by J. P. A. Francois, Special Rapporteur' (4 April 1952) UN Doc A/CN.4/53, 22.
[131] IHO, Manual on Hydrography, 267 (2005).
[132] *Supra* note 46, 168.
[133] Yearbook of ILC II, 267 (1956).
[134] M Frangois, *Rapporteur, Report of the Second Committee: Territorial Sea*, 24 American Journal of International Law 234, 248 (1930).
[135] *Supra* note 76, 178.
[136] United Nations General Assembly, Resolution No. A/RES/73/202, Conclusion 4.3 (2018).
[137] Botswana/Namibia, ICJ No.98, § 79-80 (1996). Available at: https://www.icj-cij.org/case/98 (last visited Aug. 3, 2025); Loizidou v. Turkey, ECtHR No. 15318/89, § 79-82 (1996). Available at: https://hudoc.echr.coe.int/eng?i=001-58007 (last visited Aug. 3, 2025).
[138] United Nations General Assembly, Report of the International Law Commission No. A/71/10, 149 (2016).

dispute settlement bodies,[139] while not constituting subsequent practice under Article 32, are held useful when assessing the conduct of parties in relation to a treaty.[140]

a) Ambulatory approach

The theory of ambulatory baselines is consistent with state practice historically.[141] For example, the United Kingdom's government expressed that "baselines were liable to physical change in the course of time" during the negotiations of the 1958 Geneva Convention on the Territorial Sea.[142] Moving forward, in 2012, the International Law Association Baselines Committee accepted the ambulatory nature of the normal baseline in the light of both interpretation and state practice.[143] In the 2019 and 2021 UN Sixth Committee Debate, some states outlined the lack of sufficiently widespread state practice in fixing baselines, and cautioned against "over-emphasising such regional practice".[144] During 2020-2021, the International Law Commission has reflected many pro-ambulatory State submissions, and referred to information deposited with the UN Division of Ocean Affairs and the Law of the Sea as evidence that several states implement shifting baselines domestically.[145] Notably, major naval powers such as the US, the UK and the Netherlands, expressed their positive view on this issue in the 21st century too. As rightly put by Snjólaug Árnadóttir, uniform state practice contrary to shifting zones advocacy cannot be met while such important actors maintain their position.[146]

At the same time, it must be recognised that the object and purpose of the treaty can impose significant limitations on the ability to derogate from its provisions through subsequent practice.[147] UNCLOS, adopted as a form of the "package deal",[148] establishes a careful balance between parties with conflicting interests,[149] with the aim of achieving universal participation.[150]

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[139] *Id.*, 152-153.

[140] *Supra* note 136, Conclusion 5.2 (2018).

[141] Snjólaug Árnadóttir, *Emerging State Practice on Maritime Limits: A Grotian Moment Unveiling a Hidden Truth?*, 4 Grotiana 44, 10-11 (2023).

[142] *Ibid.*

[143] *Supra* note 20, 31.

[144] Davor Vidas & David Freestone, *Legal Certainty and Stability in the Face of Sea Level Rise: Trends in the Development of State Practice and International Law Scholarship on Maritime Limits and Boundaries*, 37 The International Journal of Marine and Coastal Law 673, 712, 721-723 (2022).

[145] *Supra* note 18, § 88, 101.

[146] Árnadóttir, *supra* note 141, 69.

[147] *Supra* note 22, 110.

[148] International Seabed Authority, A Constitution for The Oceans, in *Law of the Sea: Compendium of Basic Documents* lx, lxii (2001).

[149] Irina Buga, Between Stability and Change in the Law of the Sea Convention, in *The Oxford Handbook of the Law of the Sea* 46, 67 (2016).

[150] United Nations General Assembly, Resolution No. 44/26, § 3-4 (1989).

After creating a single universal regime in agreement with the object,[151] UNCLOS cannot tolerate departures from that balance by a minority of states.[152] Fragmented practices on freezing baselines that alter the Convention's allocation of rights and duties are not approved unless they are compatible with the object and purpose, which is not the case for ambulatory advocates as proved above.

And exactly these considerations were a huge reason for scholars to keep their flag flying… till it surpassed the year 2020, passing the flag to the opposite side once and for all.

b) Fixed approach

Subsequent conduct holds particular significance in evolutionary interpretation,[153] as both serve the same purpose: keeping the treaty alive in contemporary conditions.[154] And these state actions in the form of "preservation of baselines" have surpassed dated practices.

While initially ILA's 2012 Sofia Report seemed valid, slowly both practices evolved and the gap in the employed methodology in the Report surfaced. The Report turned a blind eye to the state practice that was emerging specifically in response to sea level rise and focused on what seemed to be the pre-dominant approach back in the time.[155] But soon in six years ILA endorsed a proposal that, in order to promote legal certainty and stability, properly determined baselines and outer limits of maritime zones "should not be required to be recalculated should sea level change affect the geographical reality of the coastline".[156] The Committee reaffirmed this approach in the 2022 Lisbon Conference, along with acknowledging the likelihood of additional developments in the future.[157] The future didn't take too long to arrive. Most recently at the 2024 Athens Conference, many major maritime nations began to clarify their stances or even enact legislation that directly addressed the legal stability of baselines, including naval powers, namely the USA, the UK, Japan, that were previously believed to be adhering to the opposite guide.[158]

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[151] Shirley Scott, The LOS Convention as a Constitutional Regime for the Oceans, in *Stability and Change in the Law of the Sea: The Role of the LOS Convention* 9, 23-25 (2005).

[152] United Nations General Assembly, Oceans and the Law of the Sea, § 40 (2004).

[153] Murphy Sean, The Relevance of Subsequent Agreement and Subsequent Practice for the Interpretation of Treaties, in *Treaties and Subsequent Practice* 82, 86 (2013).

[154] *Supra* note 22, 93; *See also* United Nations General Assembly, Report of the International Law Commission No. A/66/10, 283-284 (2011).

[155] Vidas & Freestone, *supra* note 144, 683.

[156] International Law Association Committee on International Law and Sea Level Rise, Resolution No. 5/2018, 1 (2018).

[157] International Law Association Committee on International Law and Sea Level Rise, Lisbon Conference, 20-21 (2022).

[158] International Law Association Committee on International Law and Sea Level Rise, Athens Conference, 41-44 (2024).

In the same vein, in 2020 ILC has observed that an adequate approach responding to the effects of sea level rise is one based on the preservation of baselines.[159] While the support was scattered at that time, it intensified with the submission of the Additional Paper in 2023, which covered many more state submissions and analyses. This paper concluded that "there is no evidence of State practice in support of the view that an obligation exists under the Convention or other sources of international law to regularly revise charts for the purposes of updating baselines or maritime zones."[160] The final report, adopted by the ILC at its seventy-sixth session (2025), sealed this matter by indicating a convergence of views among states across all regions in this regard.[161] To be more accurate, Kiribati in its official submission has observed that at least 106 states, representing a strong majority of island and coastal States, acknowledge that maritime baselines remain fixed at their current coordinates.[162]

After mentioning all these conclusions of international bodies vested with dominion over analysis of the law of the sea, there is no need to delve into state practice separately. Because provided observations by them capture the consolidated position of states on these matters.

This overwhelming convergence of contemporary state practice exposes the inadequacy of the ambulatory baseline theory in addressing the realities of maritime areas. While ambulatory proponents cling to outdated interpretations that fail to account for the treaty's evolutionary capacity, the international community has decisively moved toward recognising that legal stability must prevail. In contrast to the misguided literalism, the fixed baseline approach, backed up by accelerating practice, reflects a mature understanding of treaty effectiveness by adapting legal frameworks to preserve core tenets under fluctuating circumstances. The evidence has now become incontrovertible: the preeminent judicial organ in the UN system, namely the International Court of Justice finally took its side, the side that was not unexpected.

[159] United Nations General Assembly, Sea-level Rise in Relation to International Law Report, § 104(e) (2020).

[160] *Supra* note 50, § 249.

[161] International Law Commission, Final Report of the Study Group on Sea-Level Rise in Relation to International Law, § 27-32 (2025).

[162] International Court of Justice, Obligations of States in Respect of Climate Change, Written Comments of the Republic of Kiribati, § 41 (2024).

II. Water Stills in the Law of the Sea, If Not the Sea Itself: ICJ Advisory Opinion on Climate Change

A. From Hamburg to Hague

Climate change poses the single greatest threat to the peoples of small island states, particularly those in the Pacific.[163] They voice their concerns most effectively through intergovernmental organisations, including the Pacific Islands Forum, the Alliance of Small Island States, and the Commission of Small Island States on Climate Change and International Law (hereinafter - COSIS). COSIS, established on 31 October 2021, is authorised to promote and contribute to the progressive development of international law concerning climate change, including the obligations of states relating to the protection and preservation of the marine environment.[164]

To fulfil its mandate efficiently COSIS submitted its Request for an Advisory Opinion to ITLOS on 12 December 2022. The Request mainly covered the topics on the marine environment, but not explicitly the sea level rise.[165] On 21 May 2024, ITLOS issued an advisory opinion in response, clarifying the specific obligations under UNCLOS to prevent, reduce, and control marine pollution through GHG emissions, and to protect and preserve the marine environment from climate change. In the opinion, ITLOS has stated that some participants, referring to the mention of sea level rise in the Request, invited the Tribunal to address the issues of consequences of coastal recession upon baselines. However, the Tribunal called these questions outside the scope of the advisory proceedings, keeping them unanswered.[166]

Following the submission of COSIS, the air condensed in the United Nations General Assembly as well. The States finally convened at the 64th plenary meeting to adopt the Resolution on "Request for an advisory opinion on the obligations of States in respect of climate change" on 29 March 2023.[167] During the discussions, destructive effects of sea-level rise were frequently

[163] Boe Declaration on Regional Security (2018), https://forumsec.org/publications/boe-declaration-regional-security (last visited Aug. 2, 2025).

[164] Agreement for The Establishment of The Commission of Small Island States on Climate Change and International Law, Article 1(3), https://treaties.un.org/doc/Publication/UNTS/No%20Volume/56940/Part/I-56940-08000002805c2ace.pdf (last visited Aug. 12, 2025).

[165] *See* Commission of Small Island States on Climate Change and International Law, Request for Advisory Opinion (2022).

[166] International Tribunal for the Law of the Sea, Request for an Advisory Opinion Submitted by the Commission of Small Island States on Climate Change and International Law, § 149-150 (2024).

[167] *See* United Nations General Assembly, Resolution No. A/RES/77/276 (2023).

voiced, with Norway,[168] Chile,[169] and the USA[170] explicitly addressing the effect of changing coastlines on the location of maritime limits. After the Secretary-General of the United Nations transmitted the Request to the ICJ on 12 April 2023,[171] these slightly scattered statements led to the shaping of subsequent submissions. Namely, numerous states emphasised the importance of the Court recognizing the following in its responses to the questions put to it: the emerging state practice spearheaded by small island developing States and the Pacific Islands Forum proves that baselines remain legally fixed under the UNCLOS despite the impacts of sea-level rise.[172]

The Court has answered these concerns on 23rd July 2025 in its long anticipated Advisory Opinion under the section "Obligations of States in relation to sea level rise and related issues".[173] While keeping the analysis short, the Court gives preference to focus on the "publicity" clause Article 16(1) to begin with. Nonetheless, the Court takes different recourse for reasoning, rather than construing the publicity requirement as embedded in the normal baseline's definition itself, which would have prevented this factor from serving as a basis for distinguishing normal baselines from others in the context of accentuating charts.[174] The Court directly goes to the core and states that UNCLOS under neither Article 5 nor Article 16(1) and 47(8) contains text

[168] United Nations General Assembly, Resolution No. A/77/PV.64, 26 (2023).

[169] *Id.,* 25.

[170] *Id.,* 28.

[171] Request for Advisory Opinion transmitted to the Court pursuant to General Assembly resolution 77/276 of 29 March 2023, https://www.icj-cij.org/sites/default/files/case-related/187/187-20230412-app-01-00-en.pdf (last visited Aug. 12, 2025).

[172] *e.g. see* Obligations of States in respect of Climate Change, Written Statement of Burkina Faso, para. 345 (02.02.2024); Written Statement of the Bahamas, para. 222 (22.03.2024); Written Statement of El Savador, para. 58 (22.03.2024); Written Statement of Solomon Islands, para. 212 (22.03.2024); Written Statement of the Federated States of Micronesia, para. 115 (15.03.2024); Written Statement of Tonga, paras. 235-236 (15.03.2024); Written Statement of Dominican Republic, para. 4.40 (22.03.2024); Written Statement of Kenya, para. 5.68 (22.03.2024); Written Statement of Liechtenstein, para. 77 (22.03.2024); Written Statement of Marshall Islands, para. 105 (22.03.2024); Written Statement of New Zealand, para. 13 (22.03.2024); Written Statement of Korea, para. 8 (22.03.2024); Written Statement of Melanesian Spearhead Group, para. 326 (22.03.2024); Written Statement of the Parties to the Nauru Agreement Office, para. 22 (22.03.2024); Written Statement of the Pacific Islands Forum Fisheries Agency (FFA), paras. 38-40 (15.03.2024); Written Statement of the Alliance of Small Island States (AOSIS), para. 5 (22.03.2024); Written Statement of the Organisation of African Carribean and Pacific States (OACPS), para. 176 (22.03.2024); Written Statement of the Commission of Small Island States (COSIS), para. 196 (22.03.2024); Written Statement of Costa Rica, paras. 125-127 (26.03.2024); Written Comments of Mauritius, para. 151 (15.08.2024); Written Comments of the Cook Islands, (15.08.2024); Written Comments of Timor-Leste, 26-7 (15.08.2024); Written Comments of the Bahamas, paras. 91-5 (14.08.2024); Written Statement of Australia, para. 1.17 (26.03.2024).

[173] International Court of Justice, Advisory Opinion of 23 July 2025 on Obligations of States in Respect of Climate Change, § 105 (2025).

[174] This Article, II Context, fixed approach, last paragraph.

requiring states parties to update baselines.[175] It acknowledges the widespread state practice endorsing this approach and emphasises the pertinency of this practice for the interpretation of UNCLOS.[176] After these brief considerations, it sets down the finding in the climate change context for the last time: UNCLOS does not require states to revise established baselines or maritime boundaries due to physical alterations like coastal recession.[177]

Ostensibly, that was the main analysis to be made of the"physical reality vs charts" issue. All of the polarised stances were centred on the query of whether charts had to be renewed to reflect coastal changes or not, and this could be answered in the simplest way through the lack of an update requirement in the text. However, this course bypasses a lot of controversial points by merely announcing "regional and cross-regional declarations relevant for the purposes of the interpretation of UNCLOS". The reason why, in the words of Vice-President Sebutinde,[178] "an overly cautious approach" is taken can be unravelled by the analysis of the referred documents.

In addition to UNCLOS, the Court concentrates on the 2021 Declaration of the Pacific Islands Forum on Preserving Maritime Zones in the Face of Climate Change-Related Sea-Level Rise and the 2025 final report of the ILC on sea level rise (2025 Report) to support its conclusion.[179] The Pacific Islands Forum (PIF) has been calling upon States to reflect on their baselines in the face of sea-level rise since 2010.[180] Stimulating regional efforts to fix maritime baselines through the adoption of the 2014 Palau Declaration on "The Ocean: Life and Future",[181] the PIF has become the main player to have this approach spread and through this path, it gained more recognition from other states.[182] This fact has been also endorsed in the 2025 Report referenced by the Court,[183] hence, their firm stance and attraction of attention worldwide truly tells a lot about the required interpretation of UNCLOS.

Furthermore, the second incorporated document belongs to the ILC's Study Group, the body which has been investigating evolving state practice and proposed interpretations on the pertinent issue for more than 7 years. In general, the Court has cited ILC outputs in a minimum of 25 judgments, while

[175] *Supra* note 173, § 359.
[176] *Id.*, § 360.
[177] *Id.*, § 362.
[178] International Court of Justice, Advisory Opinion of 23 July 2025 on Obligations of States in Respect of Climate Change, Separate opinion of Vice-President Sebutinde, § 8 (2025).
[179] *Id.*, § 360-361.
[180] *Supra* note 144, 702.
[181] Obligations of States in Respect of Climate Change, Written Statement of the Pacific Island Forum Secretariat, 5-7 (2024).
[182] Advisory Opinion on Obligations of States in Respect of Climate Change, § 360.
[183] *Supra* note 161, § 32.

over 70 individual opinions highlight multiple ILC papers.[184] This means that the contribution of the Commission is highly appreciated on the international front and this fact proved itself once again in the landmark Advisory Opinion. Thus, considering the role of both PIF and ILC in the context of sea-level rise, it becomes more pellucid why the Court has chosen to reach the conclusion via a concise, yet resourceful route.

However, those points still don't erase the fact that the Court's approach represents a missed opportunity for more comprehensive legal development. By limiting itself to textual analysis and two documents of state practice, the Court avoided engaging with the deeper foundations that could have provided meticulous guidance for future cases. By explicitly acknowledging the principle of legal stability, the Court could set down a firm foundation. This tenet would lead any interpretation to the fixed baseline approach in a world with unstatic state practice.

B. So Close, Yet so far from Customary Law?

This implicit confirmation of freezing baseline will undeniably be embraced by the states most susceptible to sea-level rise, but it remains unfortunate that the Court did not elaborate further on this finding, and the very first concern about this came from Judge Aurescu, former Co-Chair of the Study Group of the ILC on sea-level rise in relation to international law. Judge Aurescu initially regrets the absence of any mention of the principle of legal stability, certainty and predictability – the core rationale behind the stance in favour of fixed baselines, as articulated in the ILC documents.[185] Moreover, the Judge designates "non-requirement to update their baselines" not only as a correct interpretation of UNCLOS, but also as a norm of customary international law.[186] Proceeding with the demonstration of extensive state practice, the Judge concludes that over 100 states explicitly recognise that baselines should remain unchanged satisfies the requirements for customary law and that had to be dictated by the Court.[187] Briefly, the Court was expected to formalise the creation of a new custom by "translating in terms of express principle such changes as have in fact been accomplished".[188]

This, in turn, raises another question: Does explicit judicial recognition of customary law matter when the Court already acknowledged widespread state practice on the issue? At first glance, the practical effect appears to

[184] Sotirios-Ioannis Lekkas, *The Uses of the Outputs of the International Law Commission in International Adjudication: Subsidiary Means or Artefacts of Rules?*, 69 Netherlands International Law Review 327, 328 (2022).

[185] International Court of Justice, Advisory Opinion of 23 July 2025 on Obligations of States in Respect of Climate Change, Separate opinion of Judge Aurescu, § 4 (2025).

[186] *Id.*, § 5.

[187] *Id.*, § 5-13.

[188] Lauterpacht, *supra* note 90, 713.

remain the same whether the Court spoke explicitly or implicitly about baseline fixation. However, this perspective misapprehends the transformative power that judicial pronouncements have on the evolution of international law. Especially considering that the document as an advisory opinion has a non-binding nature,[189] expectation regarding the confirmation of custom becomes sounder.

Advisory opinions expounding on questions of international law in a generalised manner carry transformative legal weight, thereby affecting the normative expectations of the entire international community.[190] The Court's 1996 advisory opinion in *Legality of the Threat or Use of Nuclear Weapons* provides a cogent example in this regard. As Philippe Sands argues that this opinion recognised for the first time the existence of norms of international environmental law as customary rules equally applicable during armed conflict.[191] While the opinion was not revolutionary in creating new law, it "formally confirmed an "evolutionary" development of the twentieth century."[192] The lesson here is that environmental law duties and the mutual application of pertinent legal systems existed before the Court's pronouncement, it reflected itself in state practice and opinio juris, but the ICJ's formal confirmation represented an imperative step in their universal recognition as custom.

The same logic applies to the present advisory opinion. Had the Court explicitly affirmed the customary nature of the freezing of baselines, as urged by Judge Aurescu, it would have elevated dispersed evidence of opinio juris into a concrete rule. This would have filled the interpretative gaps left by the Court's brief treatment of the issue and prevented its less-than-ten-paragraph analysis from being overshadowed by the Opinion's more elaborate emphasis on other customary environmental rules.[193] Yet, the ICJ refrained, whether due to genuine conviction in the sufficiency of its implicit statement based on two documents, or from a cursory approach to this critical legal question remains unclear. Time will reveal the consequences of this restraint, either through increase or dormancy in practice, and ultimately determine whether the Court's landmark Advisory Opinion truly proves adequate to guide international practice in the seas or leaves a gap precisely when coastal states need it most.

[189] International Court of Justice, Advisory Opinion Concerning the Interpretation of Peace Treaties with Bulgaria, Hungary and Romania; First phase, 10 (1950).
[190] Massimo Lando, *Advisory Opinions of the International Court of Justice in Respect of Disputes*, 61 Columbia Journal of Transnational Law 68, 127 (2023).
[191] Mahasen M. Aljaghoub, The Advisory Function of the International Court of Justice, 199 (2006).
[192] D. Stephens, *Human Rights and Armed Conflict – The Advisory Opinion of the International Court of Justice in the Nuclear Weapons Case*, 4 Yale Human Rights & Development Journal 1, 23 (2001).
[193] Advisory Opinion on Obligations of States in Respect of Climate Change, 84-95.

Conclusion

Viewed through the prism of the Vienna Convention on the Law of Treaties, Article 5 of UNCLOS presents a horizon far richer than the simple contest between ambulatory and fixed baselines. Although the text accommodates both readings, the holistic examination offered in this Article shows a subtle but decisive shift within the contemporary practice: the tendency gravitates towards shielding fixed baselines even as coastal geography is transmuted by climate-induced coastal change.

The fixed baseline approach represents not merely a practical accommodation, but a sound application of evolutionary interpretation that serves UNCLOS's fundamental tenets. The ICJ's Advisory Opinion, while reaching the desired conclusion, exemplifies both the potential and limitations of international judicial opinion in addressing climate-related challenges. The Court's implicit endorsement of baseline fixation provides important support for vulnerable states, yet its failure to explicitly recognise the customary law dimension of this practice leaves the legal framework incomplete. Future developments in state practice and judicial interpretation must build upon this foundation to create the legal certainty that maritime-bound states demand.

Accepting fixed baselines instead of ambulatory ones is more than just a change in our legal interpretation. It showcases that international law can respond to new challenges while still focusing on legal clarity and peaceful relations among states. The baselines may be carved in charts rather than sand, but the legal foundations they support must be more durable than either – a test that the fixed baseline approach appears better equipped to meet in the contemporary world. And whether the ICJ's Advisory Opinion will be considered as a cautious step in this legal evolution or as a missed moment for decisive judicial leadership remains to be seen.