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RECONCEPTUALISING THE 'AMBULATORY CHARACTER' OF BASELINES: THE INTERNATIONAL LAW COMMISSION'S WORK ON SEA-LEVEL RISE AND INTERNATIONAL LAW

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Returning to consider the international law of the sea after almost 70 years, the International Law Commission ('ILC') now has the topic of sea-level rise in international law on its active work programme. In *Sea-level Rise in Relation to International Law: First Issues Paper by paper by Bodgan Aurescu and Nilüfer Oral, Co-Chairs of the Study Group on Sea-level Rise in Relation to International law ('Issues Paper'), the preliminary observation is made that UNCLOS was interpreted as prescribing an 'ambulatory character' for baselines and maritime zones measured from them. The article contends that the Issues Paper's reconceptualisation of 'ambulatory character' offers a theoretical synthesis of aspects of existing scholarship that draws from state practice and is consistent with the historical development of the law of the normal baseline. The article further contends that to maximise the normative force of this reconceptualisation of the law's 'ambulatory character', when the topic is considered by the ILC as a whole, the ILC should recognise that its task calls for treaty interpretation as well as the identification of custom, and potentially engaging both aspects of its mandate: the codification of international law and its progressive development.*

CONTENTS

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The 'golden era' of the International Law Commission ('ILC'), commonly identified as spanning the late 1950s to the mid-1970s, led to the generation of significant feats of codification in the law of the sea, the law of treaties and the law of diplomatic and consular relations, many of which today 'still belong to the cornerstones of the contemporary international law'.[1] The law of baselines within the international law of the sea is one such example of this trajectory: building on the earlier codification initiatives of various expert bodies (such as the Institut de Droit International and the International Law Association)[2] and the League of Nations, the ILC's draft articles on baselines formed the basis for text adopted in the 1958 *Convention on the Territorial Sea and Contiguous Zone*,[3] as well as its equivalent in the 1982 *United Nations Convention on the Law of the Sea* ('*UNCLOS*').[4]

In 2018, the ILC decided to recommend the inclusion of the topic '[s]ea-level rise in relation to international law' in its programme of work.[5] This inquiry was recognised to have implications beyond the law of the sea, such as on questions of statehood and the protection of persons. The ILC proposed

> an in-depth analysis of existing international law, including treaty and customary international law, in accordance with the mandate of the International Law Commission, which is the progressive development of international law and its codification.[6]

The United Nations General Assembly noted this new topic, calling for the ILC to take into consideration the views of governments,[7] and the first issues paper on the topic of sea-level rise and international law, focusing on the law of the sea, was released in the 72nd session of the ILC (2020–21) by Bogdan Aurescu and Nilüfer Oral, Co-Chairs of the Study Group on sea-level rise in relation to international law ('*Issues Paper*').[8]

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1 Pavel Šturma, 'Concluding Remarks by Pavel Šturma' in United Nations (ed), *Seventy Years of the International Law Commission: Drawing a Balance for the Future* (Brill Nijhoff, 2021) 154, 155.

2 For an outline of pre-League of Nations initiatives to codify the law of the sea, see DP O'Connell, *The International Law of the Sea*, ed IA Shearer (Clarendon Press, 1982) vol 1, 20–1.

3 *Convention on the Territorial Sea and Contiguous Zone*, opened for signature 29 April 1958, 516 UNTS 206 (entered into force 10 September 1964) ('*Geneva Convention on the Territorial Sea and Contiguous Zone*').

4 *United Nations Convention on the Law of the Sea*, opened for signature 10 December 1982, 1833 UNTS 397 (entered into force 16 November 1994) ('*UNCLOS*').

5 International Law Commission, *Report of the International Law Commission*, UN GAOR, 73rd sess, Supp No 10, UN Doc A/73/10 (30 April – 1 June and 2 July – 10 August 2018) annex B ('*Sea-Level Rise in Relation to International Law*').

6 Ibid 326 [5].

7 *Resolution Adopted by the General Assembly on 22 December 2018*, GA Res 73/265, UN GAOR, 73rd sess, 65th plen mtg, Agenda Item 82, UN Doc A/RES/73/265 (14 January 2019) para 3.

8 International Law Commission, *Sea-Level Rise in Relation to International Law: First Issues Paper by Bogdan Aurescu and Nilüfer Oral, Co-Chairs of the Study Group on Sea-Level Rise in Relation to International Law*, 72nd sess, UN Doc A/CN.4/740 (28 February 2020) ('*Issues Paper*').

In examining the possible impacts of sea-level rise on baselines and the outer limits of maritime zones, the *Issues Paper* observes that

> [a]t 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 ...[9]

While this observation aligns with the prevailing view amongst scholars who have grappled with the topic of sea-level rise, Part I of this article identifies how the *Issues Paper* has, informed by submissions received by certain coastal states to its inquiry, illuminated aspects of that 'ambulatory character' which have previously not been emphasised by scholars. The *Issues Paper* shows an awareness of the capacity for baselines and maritime zones to remain in place *until* they are amended by the coastal state in certain circumstances; in particular, this view is based on examples from state practice showing that a charted baseline would not be revised for minor changes to the coastline. And while the approach of the *Issues Paper* signals a departure from existing scholarship, Part II will show that its conception of 'ambulatory character' is well supported by the preparatory materials for art 5 of the*UNCLOS* on the normal baseline.

From an explanatory point of view, it is contended that the *Issues Paper* offers a persuasive account of 'ambulatory character' under existing law, particularly as it is informed by examples of state practice and consistent with the law's historical development. But to maximise the normative force of this account, Part III argues that when the topic is considered by the ILC as a whole, the ILC should recognise that its analytical work calls for treaty interpretation as well as the identification of custom.[10] In this way, state practice and the preparatory works for *UNCLOS* may — considered together with other elements (such as the ordinary meaning of the treaty provisions, or the requirement for *opinio juris*) — have potential legal significance for both treaty and custom. Adoption of this methodological framework may assist to 'persuade States to entertain the Commission's interpretative pronouncements'.[11] To conclude, Part IV will observe that the contemporary circumstances in which the ILC now finds itself should have implications for its work on this topic. This involves embracing treaty interpretation as part of its methodological approach. But if this reconceptualisation of the 'ambulatory character' is ultimately supported in that exercise, not only might this mean recognising the law's capacity for a certain degree of stability, but also that such stability has limits. To fully deal with the possible impacts of sea-level rise on maritime zones, the ILC should accordingly also embrace both aspects of its mandate: the codification of international law and its progressive development.

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9 Ibid 40 [104].

10 Note that this article is current as at 1 July 2021.

11 Danae Azaria, 'The Working Methods of the International Law Commission: Adherence to Methodology, Commentaries and Decision-Making' in United Nations (ed), *Seventy Years of the International Law Commission: Drawing a Balance for the Future* (Brill Nijhoff, 2021) 172, 177 ('The Working Methods of the International Law Commission').

I THE *ISSUES PAPER*'S RECONCEPTUALISATION OF 'AMBULATORY CHARACTER': MOVING AWAY FROM THE NATURALLY AMBULATORY BASELINE

The term 'ambulatory' is, of course, not one drawn from the terms of *UNCLOS* itself nor from jurisprudence. It is a term which has emerged from scholarship seeking to understand the behaviour of the legal baseline and associated maritime zones under conditions of coastal variability. This Part will outline the scholarship developing the ambulatory theory of baselines, as well as the contrasting theory that baselines may be fixed. Against this backdrop, the article will then show that the *Issues Paper*'s reconceptualisation of 'ambulatory character' draws insights from state practice to develop existing scholarship on the prevailing ambulatory theory in two ways. This Part will argue that, first, the *Issues Paper* signals a move away from the idea of a 'naturally' ambulatory baseline,[12] towards a view that 'ambulatory character' refers more broadly to the contemplation of baseline change in any particular domestic framework. Secondly, the *Issues Paper* highlights information from some coastal states outlining processes for effecting baseline change within its domestic framework, such as through an inter-agency baselines committee. Discussing these as examples of ambulatory baseline systems, the *Issues Paper* suggests that the 'ambulatory character' of these frameworks is not incompatible with the stability of baselines in the case of minor (or *de minimis*) coastal fluctuations.

A *The 'Ambulatory' and 'Fixed' Theories of Baselines in Existing Scholarship*

In the international law of the sea, the term 'baseline' refers to a juridical concept that has strong links to the physical world and, specifically, the coast. A baseline is 'the legal expression of the coast',[13] and the International Court of Justice ('ICJ') has stated that '[t]he juridical link between the State's territorial sovereignty and its rights to certain adjacent maritime expanses is established by means of its coast'.[14] The dominant type of baseline used is the normal baseline,[15] which is defined in art 5 of *UNCLOS* to be 'the low-water line along the coast as marked on large-scale charts officially recognized by the coastal State'.[16]

Under the ambulatory theory of baselines, scholars consider that '[t]he normal baseline is constituted by the low-water line along the coast',[17] and, as a result,

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12 This phrase recalls the reference made by members of the ILA Baselines Committee to the 'naturally ambulatory normal baseline': Coalter G Lathrop, J Ashley Roach and Donald R Rothwell, 'Baselines under the International Law of the Sea: Reports of the International Law Association Committee on Baselines Under the International Law of the Sea' (2019) 2(1–2) *Brill Research Perspectives in the Law of the Sea* 1, 41.

13 Coalter G Lathrop, 'Baselines' in Donald R Rothwell et al (eds), *The Oxford Handbook of the Law of the Sea* (Oxford University Press, 2015) 69, 69.

14 *Continental Shelf (Libyan Arab Jamahiriya v Malta) (Judgment)* [1985] ICJ Rep 13, 41 [49].

15 See Clive Schofield, 'Departures from the Coast: Trends in the Application of Territorial Sea Baselines under the Law of the Sea Convention' (2012) 27(4) *International Journal of Marine and Coastal Law* 723, 724 ('Departures from the Coast').

16 *UNCLOS* (n 4) art 5.

17 AHA Soons, 'The Effects of a Rising Sea Level on Maritime Limits and Boundaries' (1990) 37(2) *Netherlands International Law Review* 207, 210 (emphasis omitted).

'[t]here is no doubt that changes in the shoreline, however and how quickly effected, result in changes in the baseline from which the territorial sea is measured'.[18] This view, as expressed in relation to the normal baseline, also has relevance in the context of other types of baselines (such as straight baselines under art 7) to the extent that they must still connect to the low-water line on the coast to create a unified baseline system.[19]

The key features of the ambulatory theory of baselines may be identified: first, a geographic feature (the low-water line along the coast) is *identified* with the baseline; second, changes to the former automatically result in changes to the latter. In addition, David D Caron considered that this ambulatory quality applies not only to baselines, but also to the maritime zones which are drawn from those baselines, stating that '[i]f the baseline moves, the boundary moves. If a baseline point such as an exposed rock disappears, the boundary generated by that point also disappears. Although this is obviously an important principle, it often goes unstated'.[20]

Caron's work has been influential in the scholarship,[21] and the ambulatory theory is the 'widely accepted'[22] understanding of the existing law. A clear example of this position can be seen in the views of Michael W Reed, who wrote that '[t]he coast line, or baseline, is the mean low-water line. As that line moves landward and seaward with accretion and erosion, so does the baseline. As the baseline ambulates, so does each of the maritime zones measured from it'.[23]

On the other side of this debate between theories, some scholars take the view that baselines (and by implication, the maritime zones drawn from them) can be

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[18] O'Connell (n 2) vol 2, 682. See also Lewis M Alexander, 'Baseline Delimitations and Maritime Boundaries' (1983) 23(4) *Virginia Journal of International Law* 503, who noted that non-natural changes to the low-water line could result in changes to the baseline. 'Normal baselines may change over time as the low-water line changes because of erosion, deposition or the emplacement of man-made structures on the shore.': at 535.

[19] For a discussion of the placement of straight baselines in relation to the normal baseline, see Office for Ocean Affairs and the Law of the Sea, United Nations, *The Law of the Sea: Baselines* (1989) 24 [51].

[20] David D Caron, 'When Law Makes Climate Change Worse: Rethinking the Law of Baselines in Light of a Rising Sea Level' (1990) 17(4) *Ecology Law Quarterly* 621, 634. Note that here Caron uses the term maritime 'boundary' to refer to the outer limit of a maritime zone.

[21] See, eg, Rosemary Rayfuse, 'Sea Level Rise and Maritime Zones: Preserving the Maritime Entitlements of "Disappearing" States' in Michael B Gerrard and Gregory E Wannier (eds), *Threatened Island Nations: Legal Implications of Rising Seas and a Changing Climate* (Cambridge University Press, 2013) 167 ('Sea Level Rise and Maritime Zones'); Rosemary Rayfuse, 'International Law and Disappearing States: Maritime Zones and the Criteria for Statehood' (2011) 41(6) *Environmental Policy and Law* 281; Schofield, 'Departures from the Coast' (n 15) 725; Natalie Klein, 'Land and Sea: Resolving Contested Land and Disappearing Land Disputes under the UN Convention on the Law of the Sea' in Chiara Giorgetti and Natalie Klein (eds), *Resolving Conflicts in the Law: Essays in Honour of Lea Brilmayer* (Brill Nijhoff, 2019) 249; Sarra Sefrioui, 'Adapting to Sea Level Rise: A Law of the Sea Perspective' in Gemma Andreone (ed), *The Future of the Law of the Sea: Bridging Gaps between National, Individual and Common Interests* (Springer, 2017) 3, 14, 18; Jonathan Lusthaus, 'Shifting Sands: Sea Level Rise, Maritime Boundaries and Inter-State Conflict' (2010) 30(2) *Politics* 113, 114, 116 ('Shifting Sands').

[22] Tim Stephens, 'Warming Waters and Souring Seas: Climate Change and Ocean Acidification' in Donald R Rothwell et al (eds), *The Oxford Handbook of the Law of the Sea* (Oxford University Press, 2015) 777, 789.

[23] Michael W Reed, *Shore and Sea Boundaries* (US Government Printing Office, 2000) vol 3, 185.

fixed, irrespective of changes to the coastline. An early statement of this position was offered by DC Kapoor and Adam J Kerr: 'once the normal baseline has been established and cartographically depicted on large scale charts, it remains in place until such time as it is redrafted, irrespective of whether or not the actual low-water line has physically moved'.[24]

Under this view

> [i]t is … the chart that is the legal document determining the position of the normal baseline and this remains the case even where the coastline has, in reality, changed. Thus, if the coastline has altered, but it has not been published, the legal baseline is still that on the published chart.[25]

So in circumstances where there has been a physical change to the coastline, 'the normal baseline will only come to reflect the physical change in the coastline if a fresh survey is undertaken and the chart correspondingly updated'.[26] Kate Purcell goes further, making a 'positive case for the conclusion that, while the coastal State is in most cases entitled to redraw established maritime limits, geographical change does not trigger a legal obligation to do so'.[27]

The International Law Association's Baselines Committee ('ILA Baselines Committee') affirmed the dominance of the ambulatory theory of baselines in scholarship in its work on the identification of the existing law on the normal baseline. The ILA Baselines Committee framed its work in this way: 'The 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).'[28] The ILA Baselines Committee considered that '[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',[29] concluding 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'.[30] The work of the ILA Baselines Committee was the first major collaborative scholarly undertaking on this topic, and has been influential in providing the starting point for further expert work on law reform[31] and, as shall be outlined in this Part, has also informed the work of the *Issues Paper*.

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24 DC Kapoor and Adam J Kerr, *A Guide to Maritime Boundary Delimitation* (Carswell, 1986) 31.

25 Chris Carleton and Clive Schofield, *Developments in the Technical Determination of Maritime Space: Charts, Datums, Baselines, Maritime Zones and Limits*, ed Shelagh Furness (International Boundaries Research Unit, 2001) vol 3, 24.

26 Ibid 24–5.

27 Kate Purcell, *Geographical Change and the Law of the Sea* (Oxford University Press, 2019) 9.

28 Lathrop, Roach and Rothwell (n 12) 8.

29 Ibid 41.

30 Ibid 47.

31 For an example of the work of the Committee on International Law and Sea Level Rise, see Davor Vidas, David Freestone and Jane McAdam, *International Law and Sea Level Rise: Report of the International Law Association Committee on International Law and Sea Level Rise* (Brill, 2019).

B *'Ambulatory Character' as the Contemplation of Change in a (Domestic) Baseline System*

The *Issues Paper* addresses a range of issues relevant to the law of the sea. This article will focus on just one of these, which is the possible effects of sea-level rise on baselines and outer limits of maritime zones.[32] The *Issues Paper* explains 'the effects of ambulation of the baseline as a result of sea-level rise' in this way:

> In the case of a normal baseline where, owing to the permanent inundation of coastal areas, the low-water line moves in a landward direction, thus changing the configuration of the coast, if a new baseline is to be drawn, its position will also move landward from the position of the previous baseline.[33]

The *Issues Paper* states that the implications of this position are that the outer limits of marine spaces will shift (for example, that the outer limit of the territorial sea would also move in a landward direction),[34] that the legal status and applicable maritime zone regime would change (for example, that part of the exclusive economic zone becomes high seas),[35] and that 'such implications affect legal stability, security, certainty and predictability, as well as the balance of rights between the coastal State and third States in these maritime zones'.[36]

In support of this view, the *Issues Paper* points to the work of international law scholars[37] as well as the conclusions of the ILA Baselines Committee on the ambulatory nature of baselines.[38] In addition, the *Issues Paper* also refers to information submitted to it by member states expressly taking up the language of the ambulatory theory developed in scholarly literature. In particular, the *Issues Paper* notes the submission of the United Kingdom, which states that its domestic legislation 'provides for ambulatory baselines',[39] the submission of the Netherlands, which reports on 'the practice of the Kingdom of the Netherlands

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[32] Other issues addressed in the first issues paper concern the possible legal effects on delimitations, islands in the context of delimitations, the exercise of coastal State rights and jurisdiction, the status of islands and the status of artificial islands or island fortification activities: *Issues Paper*, UN Doc A/CN.4/740 (n 8) 43–80.

[33] Ibid 25 [68].

[34] Ibid 27 [75]–[76].

[35] Ibid 27 [76].

[36] Ibid 27–8 [77].

[37] Ibid 28 [78] nn 150, 152–3, which refer to the scholarship of Caron (n 20), Soons (n 17), Rayfuse (n 21) and others.

[38] *Issues Paper*, UN Doc A/CN.4/740 (n 8) 30 [81].

[39] Ibid 33 [88], quoting the United Kingdom, Submission to the International Law Commission, 10 January 2020, 2 <https://legal.un.org/ilc/sessions/72/pdfs/english/slr_uk.pdf>, archived at <https://perma.cc/3G3Q-PSMV>.

with regard to ambulatory baselines',[40] and the view expressed by the United States in its submission that 'coastal baselines are generally ambulatory'.[41]

The *Issues Paper* also points to examples from state practice that it considers to amount to 'an ambulatory baselines system',[42] even though the coastal state does not expressly describe it as such. Examples offered are the domestic legislation of Romania, which, in setting out coordinates for its straight baselines, also envisages that such coordinates may be reviewed and 'the coordinates of the new points … established through Governmental Decision'.[43] In a similar way, the *Issues Paper* refers to information deposited with the UN Division of Ocean Affairs and the Law of the Sea which 'may indicate that a State implements ambulatory baselines through its domestic legislation'.[44] A range of examples are offered to illustrate such deposited information: the legislation of Bangladesh, while principally employing a charted line, also gives legal status to the baseline as 'notified from time to time';[45] Finnish legislation provides for review of relevant baselines for a particular period, the current period being valid between 1995 to 2024;[46] and coordinates set out in a German proclamation are 'subject to a more precise calculation by the Federal Ministry of Transport (if and where appropriate) using the latest methods'.[47]

It is clear that these examples of state practice expressly contemplate change to the baseline or maritime zone in one way or another, whether this be through the substitution of new coordinates or a chart update. This idea that a baseline and maritime zone may change over time is consistent with the central idea of change underpinning the ambulatory theory.

But a closer look reveals that the 'ambulatory character' identified by the *Issues Paper* in its examples does not always envisage that the baseline is *identified* with the coast, in the sense that 'changes in the shoreline, however and how quickly effected, result in changes in the baseline from which the territorial sea is measured'.[48] Rather, information submitted by the Netherlands, the US, and Romania, in addition to other deposited legislation mentioned above, makes clear that there is a process undertaken by the coastal state to make changes to the baseline; in these cases changes to the baseline are not automatic. The legislation of one coastal State considered by the *Issues Paper* does identify the baseline with the coast; the UK refers to ambulatory baselines expressly, yet

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40 Kingdom of the Netherlands, Submission to the International Law Commission, 27 December 2019, 2 <https://legal.un.org/ilc/sessions/72/pdfs/english/slr_netherlands.pdf> archived at <https://perma.cc/7VPU-PTQP> ('Netherlands Submission'), cited in *Issues Paper*, UN Doc A/CN.4/740 (n 8) 33 [88].

41 *Issues Paper*, UN Doc A/CN.4/740 (n 8) 34 [88], quoting the United States, 'Comments of the United States regarding Sea-Level Rise in Relation to the Law of the Sea', Submission to the International Law Commission, 14 February 2020, 1 <https://legal.un.org/ilc/sessions/72/pdfs/english/slr_us.pdf>, archived at <https://perma.cc/7YW6-6V5R> ('US Submission').

42 *Issues Paper*, UN Doc A/CN.4/740 (n 8) 33 [88].

43 Ibid, quoting Romania, Submission to the International Law Commission, 9 January 2020, 2 <https://legal.un.org/ilc/sessions/72/pdfs/english/slr_romania.pdf>, archived at <https://perma.cc/3MK3-P8FP>.

44 See *Issues Paper*, UN Doc A/CN.4/740 (n 8) 39 [101].

45 Ibid 39 [101] n 219 (emphasis omitted).

46 Ibid.

47 Ibid.

48 O'Connell (n 2) vol 2, 682.

does not disclose any particular process to review or change its baselines 'established in accordance with the relevant provisions of the *United Nations Convention on the Law of the Sea*'.[49] However, the Explanatory Memorandum makes clear that '[g]enerally the baseline will follow the low-water line'.[50]

The *Issues Paper*'s conception of 'ambulatory character', in common with scholars proposing the ambulatory theory of baselines, has at its core the idea that a baseline and/or maritime zone may change over time. But such scholars consider either that the baseline is identified with the coast, or, where a chart is used, that 'charts are not determinative of the naturally ambulatory normal baseline'.[51] In contrast, the examples of national legislation considered by the *Issues Paper* to amount to 'an ambulatory baselines system' suggest the possibility that different methods of domestic implementation may have an ambulatory character — including where the baseline is identified with the low-water line along the coast, or defined by reference to an official chart or coordinates. These examples affirm that 'ambulatory character' is consistent with the idea that the (legal) baseline is conceptually distinct from the natural feature to which it refers (such as the low-water line along the coast).

Informed by its consideration of state practice, the *Issues Paper* has developed the idea of the law's 'ambulatory character' beyond the notion that a baseline is necessarily 'naturally' ambulatory; rather, it is more that an 'ambulatory character' is revealed by whether the domestic framework[52] of the coastal State shows that a baseline is envisaged to change over time. If the domestic framework does contemplate such change, then the *way* in which the baseline may change is also a product of that domestic framework, such that it may be 'natural', such as suggested in the UK's legislation, or change may follow coastal state action, as in the Netherlands, US and Romanian examples.

C *The Capacity for 'Ambulatory Character' to Accommodate Minor Discrepancies*

It follows then that in those ambulatory baseline systems where baseline change is envisaged to take place following coastal state action, until that action is in fact taken by the coastal state, the baseline may be retained as set out in the relevant chart or coordinates. The *Issues Paper*'s development of the understanding of the law's 'ambulatory character' can clearly be seen, in that the examples offered not only demonstrate that they envisage baseline change over time, but also encompass an element in common with scholars proposing a 'fixed' view of baselines. Particularly apposite is the view of Kapoor and Kerr, who consider that the baseline 'remains in place until such time as it is redrafted, irrespective of whether or not the actual low-water line has physically moved'.[53]

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49 *The Territorial Sea (Baselines) Order 2014* (UK) SI 2014/1353, art 2(1).

50 Explanatory Memorandum, *The Territorial Sea (Baselines) Order 2014* (UK) SI 2014/1353, [7.1].

51 Lathrop, Roach and Rothwell (n 12) 41.

52 See, eg, *Issues Paper*, UN Doc A/CN.4/740 (n 8), which 'noted that the legislation accompanying notifications is a publicly available source of information with respect to baselines, as it may indicate that a State implements ambulatory baselines through its domestic legislation': at 39 [101].

53 Kapoor and Kerr (n 24) 31.

How does the *Issues Paper* reconcile the tension posed by these elements of stability within in its conception of the law's 'ambulatory character'?

Key here is the information submitted by two coastal States outlining details of their domestic processes for amendment of the baseline. The Netherlands explains that its normal baseline

> is defined by the low-water line along the coast. The Act lays down that the low-water line shall be defined as the line indicating the depth of 0 metres on the large-scale Dutch sea charts issued upon the instructions of the Minister of Defence. … Due to a high re-survey frequency and a dynamic seabed, the low water line has a dynamic behaviour. Additionally, low tide elevations within the distance of the 12 NM appear and disappear, causing further changes to the determination of the normal baselines. When such a change occurs at a distance exceeding 0.1 NM, the normal baselines are adjusted accordingly.[54]

The US describes a similar approach:

> The United States conducts routine surveys of its coasts and evaluates potential resulting changes to its baselines. For shifts other than de minimis ones (*ie*, shifts that are greater than 500 meters), an interagency baseline committee reviews and approves any changes to the US baselines. In these instances, any associated changes to the outer limits of maritime zones are also made on official charts.[55]

These domestic processes illustrate the way in which an ambulatory baseline system does not necessarily entail a 'naturally ambulatory normal baseline', either in the sense that legal change to the Netherlands' and US' baselines does not occur automatically, nor even in response to every change to the coast. Both systems contemplate that for minor changes to the coast,[56] there would be no change to the baseline.

Informed by its consideration of this state practice, the *Issues Paper*'s understanding of the law's 'ambulatory character' accommodates minor discrepancies between the coast and the baseline. This challenges the binary approach in current scholarship which posits that 'ambulatory' and 'fixed' are mutually exclusive theories of existing law; rather, this view suggests that a limited degree of stability is available for ambulatory baseline systems. And at least in the Netherlands' and US' systems, the tension between change and stability is mediated by national policies making clear that no baseline change is contemplated for small changes to the coast.

II How the Drafting History of Article 5 of *UNCLOS* Supports the *Issues Paper*'s Reconceptualisation of 'Ambulatory Character'

While the *Issues Paper* has presented a more nuanced understanding of 'ambulatory character' that is informed by examples of state practice, it rightly remarks that insufficient information on state practice was submitted to it to form any definitive conclusions.[57] The *Issues Paper* has reiterated its call to states to provide further information, which may yet inform consideration of this issue by

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54 'Netherlands Submission' (n 40) 3.

55 'US Submission' (n 41) 2.

56 For comparison, 0.1 NM equates to 185.2 metres (on the basis that 1 international nautical mile is 1,852 metres: *Hydrographic Dictionary* (5th ed, 1994) 'International nautical mile'.

57 See *Issues Paper*, UN Doc A/CN.4/740 (n 8) 43 [104].

the ILC. Yet this article will show that this reconceptualisation is likely to be well-founded, not least because it is consistent with historical development of the law of the normal baseline.[58] This Part will discuss two propositions that can be drawn from the drafting history: first, difficulties in reaching agreement on a way to refer to the low-water line along the coast led drafters to adopt a charts-based legal definition of the baseline; secondly, drafters envisaged that minor discrepancies between the chart and the coast should not attract legal challenge.

A *Opting for a Charts-Based Legal Definition of the Baseline*

The starting point in the development of draft articles on the baseline lies in the work of the League of Nations Conference for the Codification of International Law ('the Hague Conference'), which took place in 1930. Ultimately, the codification of an overall conventional regime of the territorial sea eluded the Hague Conference, largely owing to a failure to agree on the question of its breadth and the emerging concept of the contiguous zone.[59] But Sub-Committee II of the Hague Conference (which had been tasked to consider baselines in detail) developed the first textual formulation on the subject, in the form of a draft article on the 'base line': 'For the purposes of this Convention, 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.'[60]

The accompanying observations, reflecting the replies of governments, noted that the traditional expression 'low-water mark' is capable of being interpreted in different ways and required further definition. Finland noted that the low-water level varies considerably 'in different parts of the world, and is lowest at the new and at the full moon, highest at the second quarter, and at the mean four days before and four days after the new and the full moon', and therefore called on any draft convention to specify exactly which line of low water should be used for the purposes of the baseline.[61] To address this concern, some countries proposed a particular line of low water, (such as South Africa, which suggested mean low-water spring tides)[62] and Germany proposed that a draft article could refer to the 'sea level adopted in the charts',[63] thereby accommodating a range of methods currently used by various countries.

While the replies of governments affirmed the principle of the 'line of low-water mark following all the sinuosities of the coast',[64] at no stage was this proposed as potential article text. Instead, Sub-Committee II considered the

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58 It is noted that it has not been possible to survey the drafting history of the totality of *UNCLOS* baseline provisions for the purposes of this article. Since most of the scholarship on the ambulatory theory engages with the law of the normal baseline, this article has selected a focus on the preparatory materials relating to art 5 of *UNCLOS* to support its contentions.

59 Donald R Rothwell and Tim Stephens, *The International Law of the Sea* (Hart Publishing, 2nd ed, 2016) 4–5.

60 M François, Rapporteur, 'Report of the Second Committee: Territorial Sea' (1930) 24(3) *American Journal of International Law* 234, 247.

61 *Bases of Discussion for the Conference Drawn up by the Preparatory Committee: Volume II — Territorial Waters*, League of Nations Doc C.74.M.39.1929.V (15 May 1929) 36.

62 Ibid 35.

63 Ibid.

64 M François (n 60) 247.

possibility of defining the 'low-water mark' as either the low-water mark as indicated on the charts officially used by the coastal state, or as the line of mean low-water spring tides.[65] In what appears to follow the approach suggested by Germany, Sub-Committee II opted for the charts-based formulation because it was 'more practical'.[66] The result was that the first drafting effort to articulate the law on the baseline did not refer to the coastline itself, but to a visual representation of the coast at the time of charting.

In its work to 'identify the existing law on the normal baseline',[67] the ILA Baselines Committee characterised the issue to be whether the art 5 normal baseline was 'a line on a chart (the charted low-water line) or a line on the "ground" (the actual low-water line)'.[68] Its conclusion on the drafting history of art 5 was that

> [t]o the extent that the wording of Article 5 is vague, the 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.[69]

This article partially agrees with these views: as illustrated above, the inclusion of charts into the draft article was indeed intended to address the difficulties relating to the tidal datum. But this article contends that the drafting history shows that despite inevitable discrepancies caused by different tidal datums, this difficulty was to be addressed by giving the charted line a degree of 'primacy' over the 'actual' low-water line in so far as the charted line was intended to serve as the default legal baseline. In this way, the charted line could — indeed, was intended to — constitute the normal baseline.

This view is supported by the discussion around a reference to 'the shore line' in the drafting history, and its eventual omission from the text. The wording referred to in this article as 'the shoreline provision' originally formed part of the 'Report of the Committee of Experts on Technical Questions concerning the Territorial Sea'[70] ('Experts' Report') commissioned by the Special Rapporteur, and was included verbatim as the final sentence of new provisional art 4, entitled 'Normal baseline' and adopted by the ILC:

> Subject to the provisions of article 5 ['Straight base lines'] and to the provisions regarding bays and islands, the breadth of the territorial sea is measured from the low-water line along the coast, as marked on the largest-scale chart available, officially recognized by the coastal State. *If no detailed charts of the area have*

65 M François (n 60) 248.
66 Ibid.
67 Lathrop, Roach and Rothwell (n 12) 1.
68 Ibid 8.
69 Ibid 24.
70 JPA François, Special Rapporteur, *Addendum to the Second Report on the Regime of the Territorial Sea*, 5th sess, UN Doc A/CN.4/61/Add.1 (18 May 1953) annex ('*Report of the Committee of Experts on Technical Questions concerning the Territorial Sea*') ('*Second Report on the Regime of the Territorial Sea*'). The Committee of Experts comprised the following members serving in their personal capacity: LEG Asplund (Sweden), S Whittemore Boggs (USA), PRV Couillault (France), RH Kennedy (UK) and AS Pinke (Netherlands): at 1.

> *been drawn which show the low-water line, the shore-line (high-water line) shall be used.*[71]

Mentioned by only a handful of scholars who have engaged with the preparatory material for art 5,[72] the content of the 'shoreline provision' directly bears on the relationship between the legal definition of the baseline, the low-water line along the coast, vertical datum and charts. During debate at the ILC, the Special Rapporteur explained that the intention behind 'the shoreline provision' had been to provide for a solution where there were no charts of the area showing the low-water line; in that situation, the high-water line of the shore line should be used.[73] The term 'high-water line' refers to a tangible, visible manifestation of the coast: it is the 'mark left by the tide at high water. The line or level reached, especially the highest line ever reached'.[74]

In contrast to the options earlier considered by the Hague Conference, the high-water line is not a representation of the coast in the way that a chart or a specific vertical datum is. The proposed language was intended to reflect the practicalities of navigation: 'The official charts of most countries showed the low-water line, but where no such indication was given, ships at sea could only rely on the high-water line which, being identifiable with the shoreline, was always visible.'[75] Ultimately, 'the shoreline provision' was discarded because some considered it might imply that a coastal state was obliged to use the high-water line as the baseline. This would be inconsistent not only with state practice but with the finding of the ICJ in the *Fisheries* case[76] that the low-water mark, rather than high-water mark, should be used for measuring the breadth of the territorial sea.[77]

Although 'the shoreline provision' was omitted to make clear the entitlement of the coastal state to make use of the low-water line as the baseline for measuring the territorial sea, no concerns were raised about the notion that the shoreline could be used to determine the baseline *if* no appropriate chart existed.[78] Two observations can be drawn from this examination of the fate of 'the shoreline provision' in the drafting history. First, a key objective of the drafters was to develop a legal definition of the baseline that was practical, in the sense that it could provide for a readily identifiable spatial reference point for the inner limit of the territorial sea. Concern for mariners seeking to navigate in the absence of charts indicating the low-water line shows that the drafters sought to

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71 International Law Commission, *Report of the International Law Commission: Covering the Work of its Sixth Session*, UN GAOR, 9th sess, Supp No 9, UN Doc A/2693 (1954) 14 (emphasis added).

72 The 'shoreline provision' is mentioned by Purcell in the context of consideration by drafters of the high- or low-water line: Purcell (n 27) 170. See also Myres S McDougal and William T Burke, *The Public Order of the Oceans: A Contemporary International Law of the Sea* (New Haven Press, 1987) 325–6. The 'shoreline provision' does not appear to have been considered by the ILA Baselines Committee.

73 JPA François, *Second Report on the Regime of the Territorial Sea* (n 70) 5–6.

74 *Hydrographic Dictionary* (n 56) 'high water mark'.

75 International Law Commission, *Summary Record of the 254th Meeting*, 6th sess, UN Doc A/CN.4/SR.254 (1954) 65 [18].

76 *Fisheries (UK v Norway) (Judgment)* [1951] ICJ Rep 116, 128.

77 JPA François, Special Rapporteur, *Third Report on the Regime of the Territorial Sea*, 5th sess, UN Doc A/CN.4/77 (4 February 1954) 7.

78 See also McDougal and Burke (n 72) 325–6.

provide for jurisdictional clarity in a very practical way. Secondly, this debate demonstrates that drafters considered looking to the shoreline (high-water line) as the baseline as a solution in the situation where there are no applicable charts. This suggests that the drafters assumed that if there *was* an applicable chart, then that chart would most readily identify the low-water line to be used as the baseline.

Kai Trümpler, reflecting on this drafting history, considers that it is 'at least possible to interpret the history as also indicating that the charted low-water line is to be considered as the baseline'.[79] This article contends that if the discussion of 'the shoreline provision' is taken into account, a stronger case can be made that the legislative history of art 5 supports the view that drafters intended the charted low-water line to be the default definition of the baseline. Where such a chart was absent, then the shoreline — that is, the actual coastline, rather than a vertical tidal datum — could be used because this presents a practical solution to finding a visible, identifiable reference point for the territorial sea. The records demonstrate that the drafters intended that the charted low-water line would have 'primacy' over use of a specific vertical datum for the purposes of a definition of the baseline, and that in the absence of a charted low-water line, the fallback would be to use the shore line (whether high-water line or otherwise). This is consistent with the *Issues Paper*'s reconcepualisation of 'ambulatory character' in so far as it makes clear that the normal baseline need not be identified with the low-water line along the coast. Moreover, it supports the state practice put forth in the *Issues Paper* in so far as the drafters envisaged that state practice necessarily entails a degree of variation, both in terms of the vertical datum, and also as to whether a chart may be applicable or not for any given area (for example, comparing the information of the Netherlands and that of the UK).

B *A Qualified Primacy for Charts: Guarding against Abuse*

The 'proviso' was originally proposed at the Hague Conference: 'In order to guard against abuse, however, the proviso has been added that the line indicated on the chart must not depart appreciably from the more scientific criterion: the line of mean low-water spring tides.'[80] This language was included in text considered at the ILC's Fourth Session:

> Article 5
>
> Base Line
>
> 1. As a general rule and subject to the provisions regarding bays and islands, the breadth of the territorial sea is measured from the line of low-water mark along the entire coast.
>
> 2. [new text on straight baselines] …

[79] Kai Trümpler, 'Section 2: Territorial Sea and Contiguous Zone' in Alexander Proelss (ed), *United Nations Convention on the Law of the Sea: A Commentary* (Nomos Verlagsgesellschaft, 2017) 34, 54 [22].

[80] M François (n 60) 248.

> 3. 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*.[81]

Debate at the Fourth Session of the ILC on the proviso showed that ILC members certainly envisaged the possibility — however remote — of a dispute about a discrepancy between the charted line and the low-water line along the coast (at a particular vertical datum, such as mean high-water spring tides). Gilberto Amado considered the proviso could be deleted, because 'if the low-water mark in official charts departed appreciably from the line of mean low-water spring tides, those charts would not be accurate and their validity would be questioned by any legal tribunal'.[82] JM Yepes also held the view that '[i]f a dispute arose as to whether a chart did or did not "appreciably" depart from that criterion, it could be referred to an international tribunal', though he concluded that for this reason the proviso should be retained.[83] By 10 votes to one (with two abstentions), the proviso was retained in this version of the draft.[84]

When the matter was next debated at the ILC, Jean Spiropolous expressed the similar sentiment that 'if the line drawn on an official chart differed to any great extent from the tide-line a protest could be made and the chart corrected'.[85] Importantly, by this stage the proviso had been discarded from the draft text following the recommendation of the Experts' Report. The ILC considered the proviso to be unnecessary in the sense that the likelihood of any such discrepancy was low.[86] But Spiropolous' intervention at this stage suggests that ILC members did not consider that omission of this language affected the underlying view that a charted line which 'departed appreciably' from the low-water line along the coast could be the subject of protest or challenge. The revised draft article text (omitting the proviso) was approved 12 votes to one.[87]

Some have concluded from this aspect of the drafting history of art 5 that the ability to challenge charts supports the conclusion that it is the actual low-water line, rather than the charted line, that constitutes the normal baseline.[88] This article has suggested there is evidence that drafters did indeed intend charts to be used as the baseline (where applicable charts were available). How can this suggestion be reconciled with the fact that the possibility of challenging or disputing charts was clearly in the mind of the drafters? To wrestle with this issue, it is necessary to focus on the circumstances in which the drafters envisaged a possible challenge to a charted low-water line.

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81 JPA François, Special Rapporteur, *Report on the Regime of the Territorial Sea*, 4th sess, UN Doc A/CN.4/53 (4 April 1952) 21–2 (emphasis added).

82 International Law Commission, *Summary Record of the 169th Meeting*, 4th sess, UN Doc A/CN.4/SR.169 (1952) 172 [33].

83 International Law Commission, *Summary Record of the 170th Meeting*, 4th sess, UN Doc A/CN.4/SR.170 (1952) 178 [49].

84 Ibid 178 [57].

85 *Summary Record of the 254th Meeting*, UN Doc A/CN.4/SR.254 (n 75) 65 [19].

86 Ibid 64 [2]. This is confirmed by the Special Rapporteur at the beginning of discussion at the 254th meeting: 'The Committee of Experts which met at The Hague in 1953 had come to the conclusion that the provision referring to that possibility was unnecessary and should be deleted'.

87 Ibid 65 [22].

88 See Reed (n 23) 179–80; Lathrop, Roach and Rothwell (n 12) 11–12, 24–5.

A starting point lies in the wording of the proviso itself. The idea was that any exercise by a coastal state to select any particular line of low water should not 'depart appreciably' from a particular scientific criterion — that of mean low-water spring tides. While it appears there was nothing particular about the selection of mean low-water spring tides other than its use by some of the League members at the time,[89] Sub-Committee II dealt expressly with its use of the phrase 'departed appreciably' and the circumstances in which it might apply:

> The term 'appreciably' is admittedly vague. Inasmuch, however, as this proviso would only be of importance in a case which was *clearly fraudulent*, and as, moreover, absolute precision would be extremely difficult to attain, it is thought that it might be accepted.[90]

This recalls the explanation by the Special Rapporteur that the intention of the proviso was to guard against 'cases of *possible bad faith* on the part of States in determining the limits of their territorial waters'.[91] In the view of the ILC, the scenario that the proviso sought to address was one in which '[g]overnments … shift the low-water lines on their charts unreasonably';[92] it was precisely because the ILC considered this scenario unlikely that it considered that the proviso could be discarded.

Though some vagueness remains, the drafting history does shed light on the types of discrepancy between the charted low-water line and the actual shoreline that, in the view of the drafters, may fall within the remit of the proviso and thereby be amenable to challenge or protest. These circumstances were those in which there was a physical discrepancy of a certain magnitude ('departed appreciably', or 'differed to any great extent'), or where there was an element of *mala fides* or unreasonableness ('clearly fraudulent' or shifting the charted line 'unreasonably'). Indeed, the Hague Conference drafters expressly contrasted the type of discrepancy engaging the proviso with those discrepancies which it considered to be acceptable and necessary consequences of its proposal for a charts-based definition:

> The divergencies due to the adoption of different criteria on the different charts are *very slight and can be disregarded*. In order to guard against abuse, however, the proviso has been added that the line indicated on the chart must not depart appreciably from the more scientific criterion: the line of mean low-water spring tides.[93]

Following this logic, these comments suggest that the former of these discrepancies — those which are slight, such as the adoption of different vertical tidal datum — may be disregarded and should not attract challenge to the charted low-water line. The drafting history is consistent with the examples of the practice of the Netherlands and US considered in the *Issues Paper*, in showing

89 Purcell (n 27) 167.

90 M François (n 60) 248 (emphasis added).

91 *Summary Record of the 254th Meeting*, UN Doc A/CN.4/SR.254 (n 75) 64 [2] (emphasis added).

92 International Law Commission, *Report of the International Law Commission Covering the Work of its Eighth Session, 23 April – 4 July 1956*, GA Res A/3159, UN GAOR, 11th sess, Supp No 9, UN Doc A/CN.4/104 (1956) 267.

93 M François (n 60) 248 (emphasis added).

that the law was designed to incorporate a degree of tolerance for discrepancies of this kind.

III THEORETICAL SYNTHESIS AND THE POTENTIAL FOR ITS NORMATIVE FORCE

A *Building a Bridge between the Ambulatory and Fixed Theories of Baselines*

Many scholars consider that the ambulatory theory of baselines is, despite being reflective of the existing law, a problematic state of affairs, particularly in light of potential climate change impacts. Clive Schofield writes that the 'direct relationship between the position of normal baselines and the limits of maritime jurisdiction is potentially and increasingly problematic',[94] and Rosemary Rayfuse refers to the 'baseline dilemma' which she considers is 'immediately apparent in the context of sea level rise'.[95] Natalie Klein considers that '[t]he prospect of the outer limit of maritime zones shifting is problematic for stability in terms of changing the allocation of rights and duties in different maritime space. States risk losing rights to natural resources as a result'.[96] Caron and other writers have recognised the risks of conflict and wasted resources devoted to coastal protection.[97] Writers have also identified the impracticality of the ambulatory theory, noting that

> [r]igid adherence to this view might logically result in a coastal State's obligation to provide real-time notification of changing baselines and limits through continuous detection, depiction, and dissemination of the physical and legal geography.[98]

Purcell remarks that 'established rights and legal limits [are] vulnerable to the vicissitudes of nature'[99] if baselines automatically ambulate. Further, the theory does not adequately account for the inherent dynamism of coasts, since

> [o]ff many coasts, the low-water line varies considerably from tide to tide, following the lunar cycle: accordingly, some means has to be found to define this line for legal purposes, both domestic and international. In other words, the line cannot be completely ambulatory and undefined.[100]

Criticisms have also been raised about the fixed view of baselines. Caron, expressly addressing the views of Kapoor and Kerr, considered that the 'practical matter' of depicting the low-water line in charts (which may remain in place until the chart is revised) 'does not alter the legal question' on the nature of the baseline.[101] In a similar vein, Jenny Grote Stoutenberg cautions against blurring

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94 Schofield, 'Departures from the Coast' (n 15) 725.

95 Rayfuse, 'Sea Level Rise and Maritime Zones' (n 21) 173.

96 Klein (n 21) 282.

97 On risks of waste and conflict, see Caron (n 20) 636–41. On international security dimensions, see Lusthaus, 'Shifting Sands' (n 21) 114–16.

98 Lathrop (n 13) 77.

99 Purcell (n 27) 9.

100 David H Anderson, 'Baselines in the Modern Law of the Sea' in Michael W Lodge and Myron H Nordquist (eds), *Peaceful Order in the World's Oceans: Essays in Honor of Satya N Nandan* (Brill Nijhoff, 2014) 51, 53.

101 Caron (n 20) 634 n 76 (emphasis omitted).

the difference between 'the factual existence and the legal consecration of a situation'.[102] Furthermore, the fixed view of baselines may also be seen to pose a challenge to the principle that the land dominates the sea by envisaging the possibility of divorcing the legal baseline from geographic reality.[103]

Some common themes emerge through these criticisms that suggest inherent difficulties in the ability of either approach to provide a coherent view of existing law on the baseline. Neither theory strikes a satisfactory balance between key features of the law of the sea framework: the ambulatory view places great weight on the principle that the land dominates the sea, placing the goals of stability and certainty at risk. The fixed theory tips the balance the other way. Neither view provides a satisfactory account of the exercise of coastal state power in establishing maritime zones: the coastal state either exercises a potentially unfettered prerogative in determining the spatial limits of its maritime domain under the fixed view, or 'established rights and legal limits [are] vulnerable to the vicissitudes of nature'[104] if baselines automatically ambulate.

The reconceptualisation of 'ambulatory character' proposed by the *Issues Paper* goes some way to not only addressing some of the concerns raised about a (purely) ambulatory theory of baselines, but also finding a way to synthesise features of the previously opposed ambulatory and fixed theories. The *Issues Paper* recognises that a coastal state may adopt different methods of implementation of the baseline in their domestic framework and that some of these (such as through giving the legal status of the baseline to the low-water line in an official chart, or a line constituted by coordinates) may remain in place until changed by a coastal state. This view of the law's 'ambulatory character' addresses the concerns raised by scholars about the 'direct relationship'[105] between the baseline and the coast, and the problem of jurisdictional uncertainty if the baseline is subject to the 'vicissitudes of nature'.[106] In its recognition that a charted baseline may remain in place where there are minor variations to the coast, the *Issues Paper* more closely articulates the relationship between the legal baseline and 'geographic reality', rather than divorcing one from the other. Within the degree of tolerance identified, a normal baseline could still form the basis for maritime jurisdiction, conforming with the principle that the land dominates the sea.[107]

The contribution of the *Issues Paper* lies in how it has developed the understanding of the law's 'ambulatory character' in a way that offers a theoretical synthesis of key elements of previously opposed scholarly conceptions of the law, draws from state practice, and is consistent with that law's historical development.

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102 Jenny Grote Stoutenburg, *Disappearing Island States in International Law* (Brill Nijhoff, 2015) 202.

103 Lathrop (n 13) 78.

104 Purcell (n 27) 9.

105 Schofield 'Departures from the Coast' (n 94) 725.

106 Purcell (n 27) 9.

107 In the international law of the sea, the relationship between maritime zones and land is reflected in the fundamental principle that 'the land dominates the sea': *North Sea Continental Shelf (Federal Republic of Germany v Denmark) (Judgment)* [1969] ICJ Rep 3, 51 [96] ('*North Sea Continental Shelf*').

B *Contributing to the ILC's Consideration of Applicable Treaty and Custom*

To now consider the significance of the *Issues Paper*'s contribution in this regard, it is necessary to turn to the institutional context in which it arises, namely, as part of the ILC's consideration of the topic of sea-level rise in international law.

The *Statute of the International Law Commission* makes clear that it has a twin mandate for 'the promotion of the progressive development of international law and its codification',[108] with the Statute prescribing a distinct methodology for each aspect.[109] But from the first decade of the ILC's operation, 'a single consolidated procedure has been made applicable to both types of work, and the formal differentiation established in the Statute has been blurred. This seems to be, on the whole, uncontroversial, and is probably inevitable'.[110] Instead, the ILC has pursued a pragmatic focus on being responsive to the needs of the international community.[111] This is evident in the approach taken by the Study Group on sea-level rise in international law, which has stated that this work aims to

> contribute to the endeavours of the international community to ascertain the degree to which current international law is able to respond to these issues and where there is a need for States to develop practicable solutions in order to respond effectively to the issues prompted by sea-level rise.[112]

The topic of sea-level rise in international law is the first time that ILC has returned to the law of the sea for almost 70 years. During the 1950s, the ILC embarked on the codification of the corpus of international law of the sea, aiming to place within a treaty framework what had largely been the subject of customary rules. Building on that work, four draft conventions were proposed in 1956, followed by the conclusion of *UNCLOS* in 1982. So today, the ILC is re-engaging with an area of international law which has already been densely 'treatified'.[113] The ILC embarked on a similar process in relation to the law of treaties, which, like the law of the sea, is now enshrined in a conventional framework (ie the *Vienna Convention on the Law of Treaties*) ('*VCLT*'),[114] much of whose content is also reflected in customary rules. Following the ILC's

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108 *Establishment of an International Law Commission*, GA Res 174 (II), UN GAOR, 2nd sess, 123rd plen mtg, UN Doc A/RES/174(II) (21 November 1947) annex ('*Statute of the International Law Commission*') art 1.

109 Articles 16 and 17 of the *Statute of the International Law Commission* refer to the methods of work relating to progressive development, while arts 18–24 relate to codification.

110 Shabtai Rosenne, 'The International Law Commission, 1949–59' (1960) 36 *British Yearbook of International Law* 104, 142.

111 See Shabtai Rosenne, 'The Rôle of the International Law Commission' (1970) 64(4) *American Journal of International Law* 24, 25.

112 *Sea-Level Rise in Relation to International Law*, UN Doc A/73/10 (n 5) 326 [5].

113 Most of the discussion of 'treatification' is found in scholarship on investment law. See, eg, José E Alvarez, 'A BIT on Custom' (2009) 42(1) *New York University Journal of International Law and Politics* 17, 71.

114 *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) ('*VCLT*').

codification work leading to the conclusion of the *VCLT* in 1969, the ILC has since completed four topics on the law of treaties.[115]

Danae Azaria describes the ILC's return to the law of treaties as being part of a 'new development in the ILC's work: the fact that the ILC interprets international law'.[116] It is perhaps unsurprising that at this stage in the development of international law, the international community will seek the ILC's engagement on topics already addressed, to some degree at least, by existing laws.[117] Accordingly, while the *Statute of the International Law Commission* does not expressly refer to the ILC's role as interpreter of international law, it remains relatively uncontroversial that this, too, can be, viewed pragmatically, embraced within the ILC's twin roles for the codification and progressive development of international law.[118]

This article contends that such a view of the ILC's methodological approach is relevant not only to the ILC as such, but also at the different stages contributing to its work where interpretation must be brought to bear. Viewed in this way, the work of the Study Group to 'analyse the existing international law, including treaty and customary international law'[119] relevant to sea-level rise necessarily entails an interpretation of existing applicable laws. This insight has implications for the kind of legal reasoning that should be brought to bear in analysing that existing law. In relation to the provisions of *UNCLOS* on baselines, the analytical framework is that set out in the *VCLT* for the interpretation of treaties. Broadly speaking, this involves the application of a general rule of interpretation,[120] in which the ordinary meaning of the terms of the treaty, the context in which those terms occur, and the object and purpose of the treaty are considered together in 'the crucible of interpretation'.[121] Especially noting that *UNCLOS* currently has 168 parties (139 of which are coastal states),[122] state practice in respect of baselines and maritime zones is likely to be referable to the applicable provisions of the Convention and therefore also relevant as 'subsequent practice'.[123]

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115 Danae Azaria identifies these four topics in relation to which the ILC has interpreted the *VCLT*: (i) the 2011 Guide to Practice on Reservations to Treaties, (ii) the Conclusions on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties, (iii) the Draft Guidelines on Provisional Application of Treaties and (iv) the Draft Conclusions on *Jus Cogens*: Danae Azaria, '"Codification by Interpretation": The International Law Commission as an Interpreter of International Law' (2020) 31(1) *European Journal of International Law* 171, 174 ('Codification by Interpretation').

116 Ibid 172.

117 The ILC's interpretative role in the context of climate change obligations is also discussed in Benoit Mayer, 'A Review of the International Law Commission's Guidelines on the Protection of the Atmosphere' (2019) 20(2) *Melbourne Journal of International Law* 453, 491.

118 Azaria specifically argues that the ILC's interpretative role is encompassed within its codification function: Azaria, 'Codification by Interpretation' (n 115) 182.

119 *Sea-Level Rise in Relation to International Law*, UN Doc A/73/10 (n 5) 329 [18].

120 *VCLT* (n 114) art 31.

121 Richard Gardiner, *Treaty Interpretation* (Oxford University Press, 2015) 230.

122 'United Nations Convention on the Law of the Sea', *United Nations Treaty Collection* (Web Page) <https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&clang=_en>, archived at <https://perma.cc/HBH7-CQZ9>.

123 *VCLT* (n 114) art 31(3)(b).

In relation to the parallel customary international law on baselines (reflected in *UNCLOS*),[124] the analytical framework to ascertain the content of those rules is that used for the identification of custom (as there is no separate framework for the *interpretation* of customary rules as differentiated from their *identification*);[125] generally, this requires the identification of general practice accepted as law. It is apparent that these two frameworks — treaty interpretation under the *VCLT* and rules for the identification of custom — while having elements in common (such as consideration of state practice) are conceptually and methodologically distinct. For the ILC to fully respond to the need of the international community to understand 'the degree to which current international law is able to respond'[126] to the prospect of significant sea-level rise, its legal reasoning should include both an interpretation of applicable treaty law and the identification of relevant customary rules.

The *Issues Paper* is clearly focussed on the identification of custom, for which it finds evidence supporting the material element, though it notes that 'the existence of the *opinio juris* is not yet that evident'.[127] Yet the *Issues Paper* does not expressly engage the framework of treaty interpretation. It does not, for example, consider the cited examples of state practice as matters of 'subsequent practice' under art 31(3) of the *VCLT*, nor its engagement with scholarship on the ambulatory theory of baselines as relevant to the 'ordinary meaning' of the terms of art 5 of *UNCLOS*. Further, express application of a treaty interpretation framework could also bring to bear other factors relevant to the understanding existing law, such as theConvention's preparatory works. As such, the drafting history of art 5 of *UNCLOS* could have legal significance as a supplementary means of interpretation to either confirm meaning or even determine meaning in case of ambiguity.[128] And since art 5 of *UNCLOS* is also reflective of parallel customary law (indeed, the treaty provision is the product of well-known efforts of codification), these preparatory works are also relevant to the identification of customary international law.[129]

In terms of next steps in the consideration of the *Issues Paper* and the topic more broadly, other members of the Study Group will be invited to contribute, and the work of the Study Group would be reflected in a substantive report that would be presented to the ILC as a whole for its consideration at the relevant

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124 See James Crawford, *Brownlie's Principles of Public International Law* (Oxford University Press, 9th ed, 2019) ch 11; RR Churchill and AV Lowe, *The Law of the Sea* (Juris Publishing, 3rd ed, 1999) 54. For an examination of specific articles and customary status, see J Ashley Roach, 'Today's Customary International Law of the Sea' (2014) 45(3) *Ocean Development and International Law* 239.

125 While there is no express framework for the interpretation of customary international law per se, there is some debate on the interpretability of custom. See, eg, Azaria, 'Codification by Interpretation' (n 115) 177; Orfeas Chasapis Tassinis, 'Customary International Law: Interpretation from Beginning to End' (2020) 31(1) *European Journal of International Law* 235.

126 *Sea-Level Rise in Relation to International Law*, UN Doc A/73/10 (n 5) 326 [5].

127 *Issues Paper*, UN Doc A/CN.4/740 (n 8) 43 [104].

128 *VCLT* (n 114) art 32.

129 See *North Sea Continental Shelf* (n 107) 29–30 [37]; *Jurisdictional Immunities of the State (Germany v Italy) (Judgment)* [2012] ICJ Rep 99, 122–3 [55] ('*Jurisdictional Immunities of the State*'). See also the discussion in Jimenez de Arechaga, 'Custom and Treaties' in Antonio Cassese and Joseph HH Weiler (eds), *Change and Stability in International Law-Making* (De Gruyter, 1988) vol 9, 1.

session.[130] It is intended that consolidated issues papers (that is, considering law of the sea issues together with statehood and the protection of persons) would be prepared in the next quinquennium.[131] It is submitted that consideration of this topic by the ILC as a whole would be strengthened by the express application of both analytical frameworks for the examination of existing law in treaty and custom. This would have the benefit of bringing the full suite of factors to bear upon an inquiry into the existing law, as well as providing a sound methodological basis for the ILC to

> play the functions of persuasion, legitimation and communication [since the] very existence of a systemized text carefully elaborated by the International Law Commission, whether legally binding or not, carries with it an inherent force of normativity that cannot be lightly denied or bypassed.[132]

IV CONCLUDING REMARKS

This article has shown that the *Issues Paper* has offered a reconceptualisation of the 'ambulatory character' of baselines and associated maritime zones, putting forth the view that a certain degree of stability is not incompatible with an ambulatory baselines system. Key in its reconceptualisation of 'ambulatory character' is that an ambulatory baseline need not be identified with the low-water line along the coast, nor that it need automatically change with every coastal fluctuation; rather, an ambulatory baseline system is one which contemplates baseline change. Drawing on some state practice and supported by the relevant preparatory materials of *UNCLOS*, this article contends that the reconceptualisation offered by the *Issues Paper* is persuasive.

But delivering on the task before it today requires the ILC to acknowledge that it is returning to the law of the sea in circumstances vastly different from those in 1958. As a matter of methodological approach, its legal analysis needs to acknowledge that it is operating 'against a normative background that is "treatified"',[133] a circumstance to which it has itself contributed. Adherence to the rules of treaty interpretation and transparency about the ILC's engagement with this framework could 'persuade States to entertain the Commission's interpretative pronouncements',[134] thereby contributing to the normative force of the ILC's outputs.

And increased treaty density is not the only change relevant to this topic. The *Issues Paper* has identified a handful of examples from state practice signalling that the ability to effect legal baseline preservation may be available in circumstances where there are minor changes to the coast, and this is supported by the drafting history. Considering that future projections of sea-level rise in the

130 *Issues Paper*, UN Doc A/CN.4/740 (n 8) 3 [6].

131 Ibid 18 [37].

132 Yifeng Chen, 'Between Codification and Legislation: A Role for the International Law Commission as an Autonomous Law-Maker' in The United Nations (ed), *Seventy Years of the International Law Commission: Drawing a Balance for the Future* (Brill Nijhoff, 2021) 233, 261.

133 Danae Azaria, 'The International Law Commission's Return to the Law of Sources of International Law' (2019) 13(6) *Florida International University Law Review* 989, 994.

134 Azaria, 'The Working Methods of the International Law Commission' (n 11) 177.

order of up to 1.10 metres at the end of 2100[135] will more than likely approach the bounds of what is an appreciable departure from the coast, significant coastal changes at this order of magnitude were almost certainly outside what the drafters considered could be addressed by the stabilising effect of a charted line as a baseline. In these circumstances, it is uncertain how the *Issues Paper* envisaged that this kind of limited legal stability might apply in conditions of coastal change beyond these examples of state practice. Indeed, it is also unclear how this reconceptualisation of 'ambulatory character' is envisaged to interact with the observation that 'the Convention does not indicate an obligation to draw and notify new baselines when coastal conditions change'.[136] Why wouldn't the logic of the reconceptualisation of 'ambulatory character' dictate that where there is significant coastal change, a normal baseline rather must be revised to more closely reflect the coast in order to avoid challenge? Or is it that growing support for the practice of maintaining baselines and maritime zones once drawn and deposited[137] might form the basis for the extension of such legal stability into future conditions?

It is likely that in making these preliminary observations, the *Issues Paper* has identified a potential limit within existing law. While the Study Group's syllabus stated that '[t]his topic will not propose modifications to existing international law, such as [the Convention]',[138] it is difficult to see how such a conversation may be wholly avoided. Indeed, it seems that the topic of sea-level rise is one that 'cannot be easily labeled as codification or progressive development of international law'.[139] To adequately meet the changed circumstances of grappling with the law of the sea in conditions of high treaty density as well as significant coastal change, the ILC must marshal its full suite of tools across its methodology and mandate: it should apply frameworks to analyse treaty law and custom, with a view to understanding its current state as well as its progressive development.

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135 IPCC, *Special Report on the Ocean and Cryosphere in a Changing Climate* (Report, 2019) 352. The IPCC has estimated the global mean sea level rise by the end of 2100 to possibly be between 0.61–1,010 metres.

136 *Issues Paper*, UN Doc A/CN.4/740 (n 8) 41 [104].

137 See supportive comments on this point made in General Assembly debate on the *Issues Paper* by Tuvalu (on behalf of the Pacific Islands Forum), Belize (on behalf of the Alliance of Small Island States), Papua New Guinea, Federated States of Micronesia, Maldives and Solomon Islands: *Summary Record of the 13th Meeting*, UN GAOR, 75th sess, Agenda Item 80, UN Doc A/C.6/75/SR.13 (25 November 2020) 4, 5, 7, 9, 11. Indeed, the *Issues Paper* recognised many examples of domestic laws establishing fixed baselines (and outer limits), but did not discuss how that practice might relate to those domestic frameworks which have an ambulatory character: in principle, all such practice appears to be directed to the application of *UNCLOS* and has potential legal significance for its interpretation. For a discussion about some relevant practice in establishing, depositing and maintaining baselines and maritime zones, and its legal significance, see Frances Anggadi, 'Establishment, Notification and Maintenance: The Package of State Practice at the Heart of the Pacific Islands Forum Declaration on Preserving Maritime Zones' (2022) 53(1) *Ocean Development and International Law* (forthcoming).

138 *Sea-Level Rise in Relation to International Law*, UN Doc A/73/10 (n 5) 328 [14].

139 Šturma (n 1) 163.

A *Postscript*

Since the release of the *Issues Paper*, there have been some notable developments on this topic in the international community. Two regional declarations have been made by overlapping state groupings: on 6 August 2021, the Leaders of the Pacific Islands Forum signed the *Declaration on Preserving Maritime Zones in the Face of Climate Change-Related Sea-Level Rise*,[140] and on 22 September 2021, the Alliance of Small Island States issued a similar declaration.[141] These political declarations are significant in that they make clear the signatory states' goal to preserve the stability of their maritime zones, pointing to *UNCLOS* as the legal framework through which this goal is to be achieved. Further, the ILC considered the *Issues Paper* in its 72nd session: its Report suggests that there was a range of views amongst ILC members as to the existing law on the normal baseline, and that the question of whether baselines are 'inherently ambulatory' will be among those issues further considered.[142] Notably, the Report shows an awareness of the need to embrace treaty interpretation, clarifying that the Study Group will consider 'the genesis and interpretation'[143] of art 5 of *UNCLOS* and its antecedents, and also 'the interrelation between State practice and sources of law by assessing whether such practice is relevant to customary international law or whether it is pertinent to treaty interpretation'.[144] These are welcome clarifications, and provide a robust framework for a deeper understanding of the law of baselines that fully accounts for the diversity of state practice, the views of states, the law's development and its possible trajectory in changing circumstances.

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140 Pacific Islands Forum, *Declaration on Preserving Maritime Zones in the Face of Climate Change-Related Sea-Level Rise*, 6 August 2021 <https://www.forumsec.org/2021/08/11/declaration-on-preserving-maritime-zones-in-the-face-of-climate-change-related-sea-level-rise/>, archived at <https://perma.cc/T6FE-T8RT>.

141 Alliance of Small Island States, *Alliance of Small Island States Leaders' Declaration, 2021*, 22 September 2021, [41] <https://www.aosis.org/launch-of-the-alliance-of-small-island-states-leaders-declaration/>, archived at <https://perma.cc/6TAJ-DCNZ>.

142 International Law Commission, *Report of the International Law Commission*, UN GAOR, 76th sess, Supp No 10, UN Doc A/76/10 (26 April – 4 June and 5 July – 6 August 2021) 170 [270].

143 Ibid 176 [294(a)].

144 Ibid 176–7 [294(c)].