BRILL

PORTUGUESE YEARBOOK OF THE LAW OF THE SEA
1 (2024) 5–11

PYLS

Some Observations on the 'Ambulatory' Nature of the Normal Baseline

Alfred Soons
Professor emeritus of public international law, Utrecht University, Utrecht, The Netherlands
A.H.A.Soons@uu.nl

Received 21 February 2024 | Accepted 6 March 2024 |
Published online 15 July 2024

Abstract

From the start of the discussion about the implications of sea level rise for the entitlements of coastal States to maritime jurisdictional zones, the question of the interpretation of Art. 5 UNCLOS (and the corresponding rule of customary international law) on the 'normal' baseline of the territorial sea became an essential element of the debate. The then generally accepted interpretation of Art. 5 assumed that this normal baseline, *viz.*, the low-water line along the coast, when physically moving as a result of sea level rise, would have the effect of also moving the outer limits of the maritime zones. This interpretation became known as the 'ambulatory' baseline, and was *inter alia* adopted by the ILA Committee on Baselines in the Law of the Sea and the ILA Committee on Sea Level Rise and International law.

However, this interpretation has recently been challenged by a few authors, as well as, more importantly, by some States. This contribution briefly examines State practice, and concludes that the normal baseline of the territorial sea is indeed 'ambulatory' under the current law as reflected in Art. 5 UNCLOS. However, a significant change in the interpretation (and application) of this provision is developing in State practice, to the effect that coastal States affected by sea level rise should be allowed to maintain their current normal baselines, as determined in accordance with the provisions of UNCLOS, notwithstanding future changes to the low-water line.

If this changed interpretation is not also reflected in a change of the text of Art. 5 (which would involve an amendment of UNCLOS under its articles 312 or 313), we may be witnessing an example of tacit amendment (modification) of a treaty provision by subsequent practice. At the same time the relevant rule of customary international law would then be changed as well.

Published with license by Koninklijke Brill BV | DOI:10.1163/29501636-01010002
© ALFRED SOONS, 2024 | ISSN: 2950-1636 (online)
This is an open access article distributed under the terms of the CC BY 4.0 license.

Keywords

Sea level rise – normal baseline – Art. 5 unclos – treaty interpretation – State practice

1 Introduction

The last time I saw Alan Boyle in professional action was at the meeting of the ILA Committee on International Law and Sea Level Rise in Lisbon, in November 2022. Notwithstanding his mobility limitations he was fully participating and evidently enjoying the debates with his fellow committee members, demonstrating his indefatigable nature in coping with his illness. And we as committee members as always enjoyed his sharp contributions to the debate. The law of the sea was one of his main particular subjects of interest (and overlapped with the other: international environmental law), and his seminal article on the UN Convention on the Law of the Sea (UNCLOS)'s inherent capacity to accommodate technological and societal developments[1] was present in the thoughts he expressed concerning the interpretation and progressive development of the law of the sea for the purpose of dealing with the consequences of sea level rise, in particular the issue of how to protect vulnerable States from the potentially negative effects of sea level rise on the geographical extent of their entitlements to maritime jurisdictional zones.

My friendship with Alan dates back almost forty years, while he was Hon. Secretary of the British Branch of the ILA, participating in meetings of the ILA Executive Council in London. We also met at ILA conferences and other events on international law. We soon discovered that, apart from international law, we shared other interests, and a passion: gliding. He was a very experienced glider pilot and instructor, and one of my fondest memories of Alan is when he taught me 'hill-soaring' at 'his' gliding field (Portmoak Airfield) near his home. And he never was short of the most interesting topics for discussion; to name a few: self-determination for Scotland, the invasion of Iraq, Brexit ....

Given our most recent shared interest in sea level rise I thought the topic of my brief contribution to this volume in his memory should be related to that issue, *viz.* the question that is at the source of all discussions on the potential consequences of sea level rise for maritime jurisdictional entitlements of coastal States: whether or not the normal baseline for measuring the breadth of the territorial sea (and the exclusive economic zone and continental

1 Alan Boyle, "Further development of the Law of the Sea Convention: mechanisms for change", *International and Comparative Law Quarterly* 2005, pp. 563–584.

shelf) is 'ambulatory' or not. If not, there would be little cause for concern; if yes, something would need to be done to prevent its potential negative consequences.

2 The Start of the Debate

As soon as scientists started to call attention to the rising of the sea level as a consequence of global warming in the late 1980s, international law academics looked into the potential consequences of sea level rise for the limits of maritime jurisdictional zones and the location of maritime boundaries.[2] The common conclusion then was that the normal baseline of the territorial sea, *viz.*, the low-water line along the coast, when moving as a result of sea level rise, would have the effect of moving the outer limits of the maritime zones, just like it had that effect when the normal baseline shifted because of other physical processes. This conclusion was based on an interpretation of Article 5 of UNCLOS, which was and is deemed to reflect customary international law.[3] Article 5 UNCLOS says that "the normal baseline for measuring the breadth of the territorial sea is the low-water line along the coast as marked on large-scale charts officially recognized by the coastal State".

This conclusion was confirmed by the 2012 report of the ILA Committee on Baselines under the International Law of the Sea. That committee used the expression 'ambulatory' to describe the nature of the normal baseline.[4] Whether this really is a felicitous expression is debatable, but it has since become the shorthand term for referring to the nature of the normal baseline, as one which over time may change as a result of physical processes affecting the low-water line along the coast. The ILA Committee on International Law

2 E.C.F. Bird and J.R.V. Prescott, "Rising Global Sea Levels and National Maritime Claims", *Marine Policy Reports*, 1 (1989), pp. 177–196; A.H.A. Soons, "The effects of a rising sea level on maritime limits and boundaries" (based on the author's inaugural lecture at Utrecht University on 13 April 1989), *Netherlands International Law Review* 1990, pp. 207–232; D.D. Caron, "When Law Makes Climate Change Worse: Rethinking the Law of Baselines in Light of Rising Sea Level", *Ecology Law Quarterly*, 17 (1990), pp. 621–641; D. Freestone, "International Law and Sea Level Rise", in R.R. Churchill and D. Freestone (eds), *International Law and Global Climate Change* (London/Dordrecht: Graham and Trotman/Martinus Nijhoff, 1991), pp. 119–122.

3 The same provision had been included in Art. 3 of the 1958 Geneva Convention on the Territorial Sea and Contiguous Zone.

4 ILA Committee on Baselines under the International Law of the Sea, 2012 Report, http://www.ila-hq.org/index.php/committees.

and Sea Level Rise took this as point of departure for its work on the law of the sea issues within its mandate.[5]

3 Other Views

However, this interpretation of Art. 5 UNCLOS has recently been challenged by a few authors, in particular Kate Purcell in her 2019 book *Geographical Change and the Law of the Sea*.[6] Also Rüdiger Wolfrum has expressed his reservations, by stating the view that baselines in general, thus including the normal baseline of Article 5, are not 'ambulatory'. He took the view that under Article 16 of UNCLOS the low-water lines and limits appearing on charts recognized by the coastal State are presumably fixed, and that no later adaptations to changed physical conditions are then required.[7]

The interpretation is now also being challenged by some States in their statements submitted to the International Law Commission (ILC), and made at meetings of the Sixth Committee of the UN General Assembly when dealing with the reports of the ILC on Sea Level Rise. Purcell's view on this specific matter is not convincing, particularly because of her treatment of the role of State practice; and the views expressed by States in the debates concerning the reports of the ILC must be seen as primarily attempts to get a new interpretation of Art. 5 UNCLOS generally accepted as part of the solution to the problems of sea level rise, in particular for low-lying island States.

An important element invoked to support this approach is that Art. 5 refers to the low-water line "as marked on large-scale charts officially recognized by the coastal State", and that this qualification would allow the coastal State to maintain a particular chart, notwithstanding later physical changes to the low-water line. Those would then not affect the location of the baseline.

There now seems to be a consensus emerging that coastal States affected by sea level rise should be allowed to maintain their current normal baseline (as determined in accordance with the provisions of the UNCLOS), notwithstanding future changes to the low-water line. This is along the lines of proposals that the academics writing from the early 1990s, and also the ILA Committee on International Law and Sea level Rise, have been making as the proper way to deal with the problem all along. But these were proposals *de*

5 https://www.ila-hq.org/en/committees/international-law-and-sea-level-rise.
6 K. Purcell, *Geographical Change and the Law of the Sea,* OUP 2019, especially chapter 2 (UNCLOS and the 'ambulatory thesis'), pp. 44–48.
7 R. Wolfrum, in *Proceedings* ASIL Annual Meeting 2020, pp. 387–389.

lege ferenda. My observations in this brief contribution merely serve to point out that under the current law the normal baseline indeed is 'ambulatory', and that the ongoing debate on how to deal with Art. 5 UNCLOS is a debate about changing the law, rather than a debate about what the current law is. And, I may add, I am all in favor of such change (albeit that there are still important questions about how exactly this change should be formulated).[8]

4 State Practice

It must not be forgotten that the conclusions about the interpretation of Art. 5 UNCLOS that were drawn in the academic literature, and by the two ILA Committees, are based on analyses of State practice until a decade or so ago. State practice has been changing since then, but it seems not yet possible to make definitive statements about whether or not the law has indeed been changed.

Until very recently uniform and consistent State practice, in particular of the States directly affected by continuously changing low-water lines, demonstrated the 'ambulatory' nature of the baseline as the generally accepted interpretation of Article 5. This conclusion is based on the long-standing practice that current nautical charts are used for the purpose of locating the baseline and that the limit of the territorial sea simply follows from calculating its breadth from the low-water line depicted on this chart. This is how mariners calculated their position when they needed to know if they were inside or out of the territorial sea, in particular commanders of naval vessels and fishermen. There is no obligation found in this provision or elsewhere to give due publicity to such charts or to deposit them with the UN Secretary General (as contrasted with the obligation to deposit charts depicting straight baselines established under Article 7, as provided in Article 16; and for archipelagic baselines in Article 47), let alone an obligation to indicate the limit of the territorial sea.

It should be noted that the frequency of surveying and updating charts in practice is generally greater for areas where natural changes are known to occur almost continuously. Although this was and is done primarily for navigational safety, they were also considered to have the effect of adapting the baseline.

The practice of indicating the limits of the territorial sea (or Fisheries Zone, later the EEZ) as derived from this baseline on charts is of fairly recent origin: it

8 See my contribution "The effects of sea level rise on baselines and outer limits of maritime zones", in T. Heidar (ed), *New knowledge and changing circumstances in the law of the sea,* Leiden/Boston (Brill Nijhoff) 2020, pp. 358–381.

started only around the turn of the century, after and as a result of the entry into force of UNCLOS (1994). The introduction of electronic charts, with all their new options of continuously updating information, has added to this practice.

This can be seen in the International Hydrographic Organization's recommendations for including information on nautical charts. The relevant IHO-standard S4 (previously M4) stated until 2005: "The provision of recommended symbols does not imply a recommendation that any particular boundary or limit should be charted (other than a land boundary). Boundaries and limits of no significance to navigation or fishing should preferably be omitted from navigational charts". This changed in the 2008 edition, which states: "IHO Member States should show, on selected series of their charts, their own baseline and maritime limits in accordance with UNCLOS. (Former IHO Technical Resolution B2.35.) Many coastal States interpret this statement as permitting depiction on special charts, not on the standard navigational series."[9]

As far as the limit of the territorial sea is concerned, this practice of showing limits on charts is not mandated by international law (Article 5 UNCLOS), but a voluntary practice to assist mariners and fishermen and other users of the sea in identifying the limits of the territorial sea, EEZ and continental shelf (as well as maritime boundaries between coastal States). At least until very recently the general practice was to adapt when necessary these limits to the changed baselines, indicating a uniform and common understanding of Article 5 to the effect that changes in the natural low-water line would be reflected in the updated charts. In cases where these charts (or rather 'maps') were issued separately from the regular nautical charts – an altogether new practice – they may not always be subject to this practice of adaptation, which could lead to a difference between the latest charted line and the limits as shown on such charts/maps. The simple fact that in recent years such maps have voluntarily been deposited by the coastal State with the UN does not mean that they cannot be challenged by another State as being not in conformity with Article 5. I should add here that the indication of the limits of the EEZ and continental shelf, also as derived from the normal baseline, on deposited charts as mandated by Articles 75 and 84 UNCLOS does not mean that, in case the normal baseline has shifted significantly, these outer limits may not be contested by other States as not conforming to the provisions of UNCLOS.

9 https://iho.int/iho_pubs/misc/M3-E-AUGUST18.pdf.

5 Conclusion

The normal baseline of the territorial sea is indeed 'ambulatory' under the current law as reflected in Art. 5 UNCLOS. However, we are witnessing a change in the interpretation (and application) of this provision. If this change is not also reflected in a change of the text of Art. 5 (which would involve an amendment of UNCLOS under its articles 312 or 313), we may be witnessing an example of tacit amendment (modification) of a treaty provision by subsequent practice.[10] At the same time the relevant rule of customary international law would then be changed as well.

10 See I. Buga, *Modification of treaties by subsequent practice*, OUP 2018.