Remarks by Rüdiger Wolfrum*

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Shifting baselines – Shifting maritime boundaries?

It has been argued that the expected sea-level rise will lead to the shifting of baselines. It is further held that, as a matter of consequence, this means that all maritime borders depending upon baselines will have to shift accordingly or have to be renegotiated. This would affect the boundaries vis-à-vis neighboring states, opposite or adjacent, as well as the delineation of the exclusive economic zone and the delineation of the continental shelf if no outer continental shelf (no shelf beyond 200 nm) exists. The Baselines Committee of the International Law Association (ILA) stated that in "extreme circumstances [landward changes of the baseline] could result in total territorial loss and the consequent total loss of baselines and of the maritime zones measured from those baselines. The existing law of the normal baselines does not offer an adequate solution to this potentially serious problem." I see the logic of the arguments based upon Articles 3, 4, and 5 of the United Nations Convention on the Law of the Sea (UNCLOS). Nevertheless, I disagree with the interpretation of UNCLOS Articles 3 and 4. In consequence thereof, I disagree with the qualification that baselines are "ambulatory." In my view, other considerations have to be taken into account—see below. I am pleased to note that the ILA Committee on sea-level rise in its report took a more balanced view than the Baselines Committee.

It has further been stated by the Baselines Committee that sea-level rise may lead to the loss of islands and rocks and thus to the territorial substance of island states and that public international law does not provide for a humane solution for such cases. In my view, the disappearance of islands with all its consequences would constitute a human catastrophe and is a more serious challenge on international law than the question of baselines. All efforts should concentrate on finding solutions for the states and their populations. International solidarity is requested in this respect—see also below. The ILA Report touches upon these issues but seems to leave it—arguing that this was a sensitive issue—to considerations in political fora, although it had before it suggestions on a promising path how the international community should proceed.

Three "baseline systems" exist under UNCLOS, namely normal baselines (Article 5), straight baselines (Article 7), and archipelagic baselines (Article 47). Sea-level rise will affect them in different ways. Therefore, treating them as one is not fully adequate.

There are several means to establish maritime boundaries. As a matter of principle, maritime boundaries depend upon the consent of the coastal states concerned. This is explicitly stated in the last sentence of Article 76(8). Coastal states have established maritime borders unilaterally based on their declared baselines as provided for in UNCLOS Part II, Section 2. Coastal states have further entered into agreements with neighboring countries establishing maritime boundaries. In respect of these agreements, it is not always clear whether baselines were taken into account. Frequently enough other considerations, such as established fishing rights, played a dominant role. Judgments and awards of international courts and tribunals have decided a significant number of maritime boundaries, again taking into consideration unilaterally declared baselines or not. For example, in the delimitation cases between Bangladesh and Myanmar and India, respectively, the baselines claimed by these states did not play a role. Also, these boundaries are consent

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based since adjudication depends on the consent by the coastal states concerned. If adjudication or arbitration was based upon UNCLOS, such consent was given by adhering to UNCLOS.

To unravel this established system of maritime boundaries would be contrary to one of the leading principles of public international law, namely legal security. This principle would clearly be jeopardized by insinuating that baselines are neither stable nor may be rendered stable. The reference to the necessity of stability of maritime borders as highlighted by the Arbitral Tribunal in the maritime delimitation case between Bangladesh and India may be considered a pragmatic reasoning. It, however, reflects object and purpose of borders in general and maritime borders particularly.

Let me add three legal arguments against qualifying baselines and the maritime boundaries depending upon these baselines as ambulatory.

The first one concerns the interpretation of UNCLOS Articles 3 and 4. These two provisions prescribe that the outer limit of the territorial sea shall not exceed 12 nm "measured from the baseline." UNCLOS Article 33(2) uses the same formula, so do UNCLOS Articles 48 and 76(1). It is evident that these provisions are to be applied when the coastal state determines its maritime boundaries. None of them indicates that these delimitations should be reviewed from time to time or adjusted. Those who claim that these boundaries are ambulatory and have to be adjusted read an additional clause into the provisions quoted. I see no justifying reasons for such interpretation—as a matter of principle, facts in themselves cannot change the law. One should not forget the limited applicability of the *clausula rebus sic stantibus*.

Let me come to my second argument. According to UNCLOS Article 16: "[T]he baselines measuring the breadth of the territorial sea . . . or the limits derived therefrom, and the lines of delimitation drawn in accordance with Article 12 and 15 shall be shown on charts. . . ." What is the meaning of this provision, which is more or less repeated in respect of the other baseline dependent boundaries referred to? The meaning is evident. This documentation is meant to establish legal security. Here again, no indication is provided for that these charts are to be revised from time to time. The ILA Report provides a few examples where states agreed to revise their boundaries or to keep them under review. These few examples do not constitute subsequent general practice, but a subsequent treaty that changes the general legal situation *inter partes.*

My third argument relies on general principles of public international law concerning land boundaries. Certainly, maritime boundaries are not identical to land boundaries, in particular not the ones delineating the exclusive economic zones from the high seas or the continental shelves from the Area. However, maritime boundaries in respect of neighboring states have similar functions as land boundaries and the lateral boundaries of the territorial sea (the same applies to archipelagic waters) are, considering the status of these maritime areas, equivalent to land boundaries. In spite of dogmatic differences between land boundaries and maritime boundaries that may exist, one has to apply, in respect of the latter, the leading principles governing the regime on land boundaries.

International law provides safeguards in respect of the stability of boundaries. For example, in case of state succession, a new state—although in principle the clean slate theory applies in respect of international agreements concluded by the previous state—is bound by the agreements concerning boundaries as well as the boundaries declared by the previous state. This rule applies to maritime boundaries as well. Additionally, one may refer to the fact that the *clausula rebus sic stantibus* may not be invoked in respect of the establishment of boundaries. This is a clear indication that international law tries to avoid uncertainties about boundaries. The reason behind these two rules is evident. Boundaries are to be protected against changes; states should be able to trust in the permanence of boundaries since disputes about boundaries may lead to belligerent conflicts.

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What is the appropriate way out of the alleged uncertainties concerning maritime boundaries? First it is recommended that coastal states document their baselines as well as the coordinates of all their maritime boundaries. The ILA Report seems to support this approach and indicates that some coastal states have already started this exercise. I have no doubt that such documentation has a clarifying effect in spite of my misgivings concerning the interpretation favored by the Baselines Committee. Such documentation—in particular if undertaken by several states—constitutes subsequent practice in accordance with Article 31(3)(b) of the Vienna Convention on the Law of Treaties. Second, it would be advisable if the UNCLOS Meeting of Parties adopts a statement giving an interpretation of the provisions referred to and thus putting an end to the uncertainty that may have been created. Sure, so far, the Meeting of Parties (UNCLOS Article 319(2)(e)) has no explicit mandate to issue interpretative statements concerning UNCLOS. However, such a function has become standard for other conferences or meetings of parties. Third, if one does not accept that the UNCLOS Meeting of Parties may issue such an interpretative statement, one may request an advisory opinion of the International Tribunal for the Law of the Sea on this issue.

Let me now address the vanishing islands due to sea-level rise. Several questions arise in this respect. It has been recommended that island states should take technical measures to protect against the consequences of sea-level rise. Some have already started to do so.

This does not, however, absolve international law to produce an answer concerning the following questions: What happens to the states concerned, what happens to the populations, and what happens to the maritime zones? Let us deal with each of these issues in turn.

According to Article 1 of the Montevideo Convention on the Rights and Duties of States, of 1933 "the State as a person of international law should possess the following qualifications: a) a permanent population; b) a defined territory; c) government; and d) capacity to enter into relations with the other States." In fact, it is the question whether this axiom is still valid or in other words whether states should be defined more flexibly.

Traditionally it was held that the territory was the most constituent factor of statehood. Considering the growing acceptance and relevance of human rights, the most important factor should be the population. There are several different possibilities how to safeguard the population of island states, which is actually a humanitarian demand. States should cooperate in this matter as requested already by E. de Vattel. It is a matter of interstate solidarity.

However, even if the population of a vanishing island has found a new homeland, this does not solve the legal questions concerning the continuing existence of the state. The most radical solution would be to accept that there may be states without a territory consisting of a population but having a government of its own and being able to enter into international relations with other states. Such a redefinition of statehood requires a universal discussion, and the acquiescence in what are the qualifications of a state. It has been argued that in the past, states have existed over a certain period of time although their territories had been occupied by other states. The situation, however, is hardly comparable with the one at hand. The occupation of states was considered as illegal and therefore any legal effect of occupation could be denied. The situation of the vanishing states, however, is the consequence of a factual development.

Accepting states without territorial basis—which I would recommend—would mean that the axiom coined by the International Court of Justice that "land dominates the sea"—if that axiom is to be understood that there cannot be national maritime zones, which are not connected to land—be given up or modified.

These considerations may sound utopian. However, it is a demand of humanity that solutions be developed, which not only give the population of vanishing islands a new homeland but find ways and means to safeguard the existence of island states being an enrichment in the world's system of statehood. Certainly, this would mean a significant modification of the presently accepted matrix

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of international law. Such a modification is justifiable though but needs the overwhelming support of the international community.

Remarks by Alfred Soons*

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What are the possible solutions to address the eventual shortcomings of the United Nations Convention on the Law of the Sea to address this new impact with regard to baselines, maritime zones, and boundaries? What are the key findings of the International Law Association Committee on international law and sea-level rise in this respect?

Whether or not there are "shortcomings" in the United Nations Convention on the Law of the Sea (UNCLOS) depends of course on one's view of the adequacy or desirability of the current law, and that in turn depends on one's views of what the current law is. Before I comment on that, it is useful to first summarize what we are talking about, and that is what the consequences are of a rising sea level for the location and extent of maritime jurisdictional areas. And here a distinction must be made between (1) areas that have been delimited between two coastal states by a boundary agreement or a decision by an international court or tribunal, and (2) areas where either there are no adjacent or opposite other coastal states or no delimitation has yet taken place. The first situation in my view does not raise any problems because, in brief, under general international law such boundaries are permanent unless the parties agree to change the existing boundary. Much more can be said about this but there is no time to delve into that area. The second situation is more complicated. Here the international law on "baselines" (in combination with the law on extent and limits of maritime jurisdictional zones) is decisive. A distinction must then be made between the "normal" baseline and artificial baselines (straight baselines, UNCLOS Article 7; and archipelagic baselines, UNCLOS Article 47). I will now concentrate on the "normal" baseline and leave the somewhat more technical issues of straight and archipelagic baselines aside.

The current law on the "normal" baseline is principally constituted by UNCLOS Article 5, which can be regarded as reflecting general customary international law.[1] All maritime areas that coastal states have some measure of authority over (like the 12M territorial sea, the 24M contiguous zone, the continental shelf and the 200M exclusive economic zone (EEZ)) are measured from a legally defined line on the coast, called the baseline.[2] This line is "the low-water line along the coast," so it is a naturally fluctuating line (I will leave aside now the technical issues of how that line is actually determined).

Thus, since the low-water line may move over time, in principle the legal baseline may move; the baseline is, as the International Law Association (ILA) Committee on Baselines states, "ambulatory" (whether this is a felicitous term is another matter, but it is intended to convey the condition of

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[1] The other two provisions of UNCLOS concerning the normal baseline are Article 6 (Reefs) and Article 13 (Low-tide elevations).

[2] The continental shelf extending beyond 200M is only partially measured from the baseline (UNCLOS Article 76). And its limit is *permanently* established by the coastal state according to paragraph 9.

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