2024

Durability, Flexibility and Plasticity in the U.N. Convention on the Law of the Sea

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February 9, 2024

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(forthcoming in the *International Journal of Marine and Coastal Law*)

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Introduction

The title of this symposium volume is 'Resilience of the UN Convention on the Law of the Sea: 40 Years.' The term 'resilience' is quite apt, given that—40 years after its adoption in 1982—the Convention[1] has not just entered into force, and not just garnered the ratification or accession of 168 States (that is 87 percent of the membership of the United Nations), but has also largely drawn in many non-parties, such as the United States, who regularly refer to the substantive rules of the Convention as reflecting customary international law.[2] As such, the Convention has become what its drafters intended it to be—a 'constitution for the oceans.'[3]

Four decades after its adoption—in offices of governments, international organizations, and non-governmental organizations around the world, as well as on military and non-military vessels—the Convention is consulted, referred to, interpreted, applied and enforced on a daily

[1] United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982, in force 16 November 1994) 1833 *UNTS* 396 ('Convention' or 'LOSC').
[2] *See, e.g.*, J Roach, 'Today's Customary International Law of the Sea' (2014) 45 *Ocean Development and International Law (ODIL)* 239.
[3] *See* T Koh, *A Constitution for the Oceans* (adapted from remarks by the President of the Third United Nations Conference on the Law of the Sea made in December 1982 at Montego Bay), available at https://perma.cc/92KG-FUXN; accessed 1 November 2023. All websites accessed on 1 November 2023, unless otherwise mentioned.

basis. National legislators and regulators have written many parts of the Convention into their national laws. Courts and tribunals regularly apply it, both at the international and national levels. Scholars study it.

This outcome was not foreordained. There are major international negotiations that never result in the adoption of a text; the Second U.N. Conference on the Law of the Sea comes to mind. There are major multilateral treaties that never acquire sufficient adherence so as to enter into force. There are major multilateral treaties that enter into force, but ultimately only attract a fraction of States as Parties. The 1958 conventions on the law of the sea might be regarded as such. Some major multilateral treaties have only contained broad and vague frameworks, necessitating repeated protocols in which States keep having to negotiate and renegotiate outcomes, as may be observed in the years following the 1992 Framework Convention on Climate Change.

None of that can be said about the UN Convention on the Law of the Sea. Within 13 years it entered into force and, in the years that followed, it secured widespread adherence. And it is a *very* robust treaty, consisting of 320 articles and nine annexes, which contain highly detailed and even pathbreaking provisions. This volume explores three robust areas of regulation—maritime zones; environmental protection; and dispute settlement. Any one of these areas of regulation might have been thought impossible to achieve let alone to survive for decades.

But the Convention has survived and even thrived. What explains such resilience of the U.N. Convention on the Law of the Sea? One approach for answering that question is to deconstruct the term 'resilience' into three different concepts—durability, flexibility, and plasticity—and suggest how the Convention has fit each of those concepts, and thus been resilient.

Durability of the Convention

One aspect of resilience is durability, which may be understood in this context as the ability of the Convention to withstand wear, pressure, or damage over time. Something that is durable is well-constructed, solid, and impervious to the passage of years.

Certain design features likely have contributed to the Convention's durability. Reservations were prohibited in the Convention,[4] creating a solidity and depth to the Convention

[4] LOSC (n 1), Article 309.

of harmonized rights and obligations. As a consequence, for the most part there is no pressure on the Convention coming from States, when ratifying or acceding, to selectively opt out of provisions that they do not like.

Further, incompatible *inter se* agreements are precluded, even those that are later in time.[5] Hence, there is no pressure to the Convention from a region or group of States, or even two States, in concluding an agreement that affects the enjoyment by other States of their rights under the Convention. Indeed, when negotiating new conventions, at times States have essentially given priority to the 1982 Convention, as they did in Article 22 of the Convention on Biological Diversity, which provides that the CBD must be implemented 'consistently with the rights and obligations of States under the law of the sea.'[6]

Certain institutional structures were created as a part of the Convention, where needed for particular aspects of its functioning, and these too likely have aided its durability. Thus, the Convention created the International Tribunal for the Law of the Sea (ITLOS),[7] the International Seabed Authority (ISA),[8] and the Commission on the Limits of the Continental Shelf (CLCS),[9] all standing bodies of experts designed to allow the Convention to function over time in a dynamic environment. Such institutions add to the mystique of the Convention being a 'constitution' and constitutions generally are more durable than ordinary law.

Further, an important feature favouring durability is that most disputes between States Parties as to the interpretation or application of the Convention may be channelled into dispute resolution procedures,[10] thus reducing pressure on, or damage to, the effectiveness of the Convention over time. Indeed, the Convention creatively embraced four different venues for such dispute settlement – ITLOS, the International Court of Justice (ICJ),[11] general arbitration,[12] or

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[5] *Ibid.*, Article 311.
[6] United Nations Convention on Biological Diversity (Rio de Janeiro, 5 June 1992, in force 29 December 1993) 1760 *UNTS* 143 (CBD), Article 22(2). At the same time, the CBD also says that it does not affect rights and obligations arising from other international agreements 'except where the exercise of those rights and obligations would cause a serious damage or threat to biological diversity.' *Ibid*., Article 22(1).
[7] LOSC (n 1), Article 287(1)(a); Annex VI.
[8] *Ibid.*, Articles 156-85.
[9] *Ibid.*, Article 76(8), Annex II.
[10] Such procedures could be Convention procedures as such or (as allowed by the Convention) could be other procedures that allow for the application of the Convention.
[11] LOSC (n 1), Article 287(1)(b).
[12] *Ibid.*, Article 287(1)(c); Annex VII.

arbitration by means of panels of experts in particular subject matter areas[13] – which both sought to attract State adherence and likely grounded the Convention in the broad system of international law, again promoting its durability. Open-textured terms within the Convention, such as what is meant by 'special circumstances'[14] or by 'equitable solution,'[15] could thus be resolved in specific contexts through these dispute settlement processes.[16] Thus, in places where the 'contract' reached in the Convention was incomplete, dispute settlers can help complete it, relieving pressure from criticisms that the Convention is inadequate or outdated. As a technical matter, of course, 'it is axiomatic that a judgment of the Court is not binding on any State other than the parties to the case.'[17] Even so, according to ITLOS, '[i]nternational courts and tribunals have developed a body of case law on maritime delimitation which has reduced the elements of subjectivity and uncertainty in the determination of maritime boundaries and in the choice of methods employed to that end.'[18]

At the same time, while reservations were not permitted, the dispute settlement process was designed so as to contain certain automatic limitations[19] to compulsory dispute resolution—placing off limits certain matters that States did not wish to include—and to allow for certain optional exceptions that States might invoke when joining the Convention.[20] This approach helped protect the Convention by drawing States into the dispute settlement process, but allowing them to calibrate (to a degree) their exposure.[21]

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[13] *Ibid.*, Article 287(1)(d); Annex VIII.
[14] *Ibid.*, Article 15.
[15] *Ibid.*, Articles 74(1), 83(1).
[16] *See, e.g.*, Y Tanaka, *Predictability and Flexibility in the Law of Maritime Delimitation, 2nd edn* (Hart, Oxford, 2019). Whether such processes are consistent and predictable is a different matter. *See* A Oude Elfrink, T Henriksen and S Veierud Busch (eds), *Maritime Boundary Delimitation: The Case Law—Is it Consistent and Predictable?* (Cambridge University Press, Cambridge, 2018).
[17] *Territorial and Maritime Dispute (Nicaragua* v. *Colombia)* (Judgment) (19 November 2012) *ICJ Reports 2012*, p. 624, para. 228.
[18] *Delimitation of the Maritime Boundary in the Bay of Bengal (Bangladesh/Myanmar*) (Judgment) (14 March 2012) ITLOS Case No. 16, *ITLOS Reports 2012*, p. 4, at p. 64, para. 226.
[19] LOSC (n 1), Article 297.
[20] *Ibid.*, Article 298. On the potential for flexible interpretation of the Section 3 carve-outs, with a focus on the South China Sea arbitration, *see* N Klein, 'The Vicissitudes of Dispute Settlement under the Law of the Sea Convention' (2017) 32 *International Journal of Marine and Coastal Law (IJMCL)* 332.
[21] Of course, Convention dispute settlers are empowered to determine the meaning of such limitations or exceptions. For example, while the Convention refers to 'historic bays' (LOSC (n 1), Article 10(6)) and 'historic title' (LOSC (n 1), Article 15), it makes no reference to 'historic rights.' When construing the meaning of the optional exception in Article 298(1)(a)(i) invoked by China, the Annex VII arbitral tribunal in *Philippines* v. *China* made clear that the Convention contains no preservation of 'historic rights' as might otherwise exist in the South China Sea. *The South*

Perhaps the greatest crisis to the durability of the Convention came at the outset, when it appeared that the Convention would enter into force but without a significant number of developed States, who had objected to the original scheme for the deep seabed. Had a solution not been found, the Convention might have been crippled at birth. The solution was—in effect though not in form—to amend the deep seabed regime by means of an 'implementing agreement.'[22] In this sense, the text of the Convention as originally adopted was not durable, but States moved relatively quickly to resolve the matter on the eve of entry into force, and since that time the deep seabed regime and the Convention as a whole has endured.

Flexibility within the Convention

A second aspect of resilience is flexibility, commonly understood as being the quality of bending easily without breaking. Were the provisions of the Convention too rigid in the face of changes over time, resilience would be less likely.

Such flexibility is necessary given the disinclination of States Parties to amend the Convention. Amendments are technically possible, and a useful non-objection procedure obviates the need for an inter-governmental negotiation before amending,[23] but even so the amendment process is difficult and hence has never been done.

So instead, the Convention has been 'bent' at times to help ensure its continued relevance. For example, the Convention provides that every State intending to establish the limits of a continental shelf beyond 200 nautical miles must submit to the CLCS the 'particulars of such limits ... along with scientific and technical data' by no later than 10 years after entry into force of the Convention for that State.[24] The practical difficulty for many States in doing so resulted in decisions by the Meeting of the States Parties both to extend the deadline and to allow the filing of 'preliminary information' to satisfy the requirement.[25] Many view this as a tacit amendment to

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China Sea Arbitration (Philippines v. *China)* (Award) (12 July 2016) XXXIII RIAA, p. 166, at pp. 262-292, paras. 202-78.

[22] Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea, (New York, 28 July 1994, in force 16 November 1994) 1836 *UNTS* 3 (Implementing Agreement).

[23] LOSC (n 1), Articles 312-14.

[24] *Ibid.*, Annex II, Article 4.

[25] SPLOS/73, at pp. 11-13, paras. 67-84 (14 June 2001); SPLOS/183, at p. 2, para. 1(a) (20 June 2008); see also CLCS Rules of Procedures, Annex I, para. 3 (allowing a State to make a partial submission within ten years of entry into force of the Convention for it in order not to prejudice delimitation questions, with the remaining submission to follow thereafter).

the Convention, albeit one on a relatively minor issue of process. The bottom line, however, is that a means was devised within the framework of the Convention for bending it toward a practical outcome.

The decision by ITLOS in 2015 that it possessed jurisdiction to issue an advisory opinion[26] might also be seen as bending but not breaking the Convention. The Convention itself accords no such jurisdiction to ITLOS and a rigid, formalistic approach might have pushed aside the possibility of ITLOS providing advice to international organizations on important matters relating to the sea, thereby potentially weakening the Convention if it became seen as unresponsive to challenges that arise over time. But, given that the Convention does accord advisory jurisdiction to ITLOS's Seabed Disputes Chamber, ITLOS bent the Convention towards it having such advisory jurisdiction as well. And States have recently pursued such advice from ITLOS on the obligations of States under the Convention to avoid deleterious effects on the marine environment from climate change.[27]

Based on recent events, there are two subject matter areas where flexibility might be observed in how the Convention is interpreted or applied. The first area concerns situations where sovereignty over land is disputed. As a general matter, the Convention is not designed to resolve issues of sovereignty and, as such, tribunals whose jurisdiction is based solely on the Convention[28] are not expected to determine whether a land mass is part of the territory of one of the disputing parties or of a third party. At the same time, it is commonly said that the 'land dominates the sea,' which means that a State's rights and obligations in areas of the sea often turn upon sovereignty over adjacent land masses. So, the question that has arisen is whether tribunals applying the Convention may address law the of sea claims that are dependent upon recognition of a State's sovereignty over disputed territory.

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[26] *Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission* (Request for Advisory Opinion) (2 April 2015) ITLOS Case No. 21, *ITLOS Reports 2015*, p. 4, pp. 18-25, paras. 37-69.

[27] *See Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law submitted to the International Tribunal for the Law of the Sea* (Request for Advisory Opinion) (2022) ITLOS Case No. 31, available at https://perma.cc/JHP7-PADJ.

[28] Tribunals possessing a broader jurisdiction, of course, may be able to address the question of sovereignty, when applying more general international law. For example, the International Court of Justice addressed sovereignty over islands in the *Nicaragua* v. *Colombia* case, given that its jurisdiction was based not on the Convention but on the Pact of Bogotá. *Territorial and Maritime Dispute* (n 17), *ICJ Reports 2012*, p. 624.

In April 2010, the United Kingdom declared a marine protected area ('MPA') at the Chagos Archipelago, which the United Kingdom administers as the 'British Indian Ocean Territory.' Mauritius has long disputed the United Kingdom's sovereignty over this territory, believing that the archipelago should have been maintained as a part of the territory of Mauritius when Mauritius emerged from the period of colonisation and became an independent State in 1968. Consequently, Mauritius initiated a proceeding under the Convention in 2010 before an Annex VII arbitral tribunal, in a case entitled the *Chagos Marine Protected Area Arbitration*. The Convention only allows a 'coastal State' to establish a marine protected area adjacent to its coast, so one aspect of Mauritius' claims was that the United Kingdom was not the 'coastal State' in respect of the Chagos Archipelago for the purposes of the Convention. Alternatively, Mauritius claimed that certain undertakings by the United Kingdom had endowed Mauritius with rights as a 'coastal State' in respect of the Archipelago.

The tribunal found in 2015 by a majority of three votes to two that it lacked jurisdiction to consider either of these claims.[29] According to the tribunal, such claims—at their core—concerned the question of sovereignty over the Chagos Archipelago, not disagreements about the meaning of 'coastal State' or some other issue relating to the marine protected area. Therefore, according to the tribunal, these claims were not truly a matter concerning the interpretation or application of the Convention. The Tribunal, however, did not assert that the issue of sovereignty could never be addressed in Convention proceedings. Indeed, the Tribunal said that it did 'not categorically exclude that in some instances a minor issue of territorial sovereignty could indeed be ancillary to a dispute concerning the interpretation or application of the Convention.'[30] The two arbitrators dissenting in part and concurring in part found that the dispute could not be qualified as a dispute about sovereignty over the Chagos Archipelago, finding that the core issue was whether the United Kingdom was a 'coastal State' within the meaning of the Convention and for the purposes of establishing an MPA, that Mauritius' primary concern was not resolving the sovereignty issue, and that the Tribunal in any event had not jurisdiction to decide such issue.[31]

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[29] *Chagos Marine Protected Area Arbitration (Mauritius* v. *United Kingdom)* (Award) (18 March 2015) XXXI RIAA pp. 455-460, paras. 203-21 and p. 582 para. 547(A)(1). The Tribunal also unanimously found that there was no dispute between the parties with respect to Mauritius' claim concerning submissions to the Commission on the Limits of the Continental Shelf, and therefore that the tribunal was not required to rule on whether it had jurisdiction over the claim. *Ibid.*, pp. 503-511, paras. 331-50 and p. 582, para. 547(A)(2).

[30] *Ibid*., p. 460, para. 221; see also *ibid.,* pp. 459-460, para. 218.

[31] *Ibid.,* Dissenting and Concurring Opinion of Judges Kateka and Wolfrum, pp. 587-588, paras. 9-14.

Thereafter, Mauritius successfully lobbied the UN General Assembly to seek an advisory opinion from the International Court of Justice on whether the separation of the Chagos Archipelago from Mauritius during the process of decolonisation was unlawful.[32] The Court advised that it was unlawful; it said that, 'having regard to international law, the process of decolonisation of Mauritius was not lawfully completed when that country acceded to independence in 1968, following the separation of the Chagos Archipelago,' and that 'the United Kingdom is under an obligation to bring to an end its administration of the Chagos Archipelago as rapidly as possible.'[33]

With these findings in hand, Mauritius then launched a new dispute under the Convention, this time against the Maldives, which is located to the north of the Chagos Archipelago. This dispute was a maritime boundary dispute, which was initially placed before an Annex VII tribunal but then, by agreement, placed before a special chamber of the ITLOS. The Maldives argued that ITLOS lacked jurisdiction, since any delimitation between the Parties would necessarily have to find that Mauritius was—and the United Kingdom was not—sovereign over the Chagos Archipelago, a matter that was in dispute between those two States.[34] The Chamber, however, concluded that this issue had been resolved by the ICJ's advisory opinion, finding that 'determinations made by the ICJ in an advisory opinion cannot be disregarded simply because the advisory opinion is not binding' and that '[w]hile the process of decolonisation has yet to be completed, Mauritius' sovereignty over the Chagos Archipelago can be inferred from the ICJ's determinations.'[35] Thus, although advisory opinions are not legally binding, and although the process of decolonisation admittedly had not yet been completed, the Chamber found that Mauritius was sovereign over the Chagos, and hence was the relevant coastal State for purposes of delimitation.

The issue of sovereignty also loomed in the arbitration brought by the Philippines against China concerning the South China Sea,[36] where the question arose as to whether the tribunal could

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[32] GA Res. 71/292 (22 June 2017).
[33] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* (Advisory Opinion) (25 February 2019) *ICJ Reports 2019*, p. 95, para. 183 (3)-(4).
[34] *Dispute concerning Delimitation of the Maritime Boundary between Mauritius and Maldives in the Indian Ocean (Mauritius* v. *Maldives)* (Judgment on Preliminary Objections) (2023) ITLOS Case No. 28, para. 101 et seq., available at https://perma.cc/EUY3-XMP7.
[35] *Ibid.*, paras. 205, 246.
[36] *The South China Sea Arbitration* (n 21), at p. 166.

opine on the maritime rights at issue, as doing so might require addressing whether China or the Philippines (or neither) exercised sovereignty over the islands and other features in the area. The tribunal artfully skirted the issue, by proceeding first on the basis that it could determine if a particular feature was a low-tide elevation ('LTE') within the meaning of Convention Article 13; if it was, then there was no need to address which State exercised sovereignty over the feature, as no State could claim sovereignty (absent it being located in the State's territorial sea). The tribunal's assessment of ten maritime features in the South China Sea led to a conclusion that several of them – Gaven Reef (South),[37] Hughes Reef,[38] Mischief Reef,[39] Second Thomas Shoal,[40] and Subi Reef[41] – were all LTEs.[42] As such, under the Convention, those features could not generate any maritime entitlements for China (or anyone else) in the South China Sea.[43]

Next, the tribunal proceeded on the basis that it could determine whether a feature that was an island (i.e., a naturally formed area of land, surrounded by water, that was above water at high tide) was capable of having an exclusive economic zone and continental shelf under Convention Article 121. After assessing in some depth the characteristics of the relevant islands in the South China Sea, the tribunal concluded that Cuarteron Reef,[44] Fiery Cross Reef,[45] Gaven Reef (North),[46] Johnson Reef,[47] McKennan Reef,[48] and Scarborough Shoal[49] were all 'rocks that cannot sustain human habitation or economic life of their own,' thus generating no entitlements to an exclusive economic zone or continental shelf.[50] Likewise, the tribunal decided that all of the islands within the Spratly Island group (including Itu Aba Island, North-East Cay, South-West Cay, Spratly Island, Thitu Island, and West York Island) were such 'rocks,' and therefore were not capable of generating entitlements that might affect the ability of the tribunal to render its award.[51] As such, regardless of who exercised sovereignty over these islands, they were not capable of affecting the

[37] *Ibid.*, p. 327, para. 366.
[38] *Ibid.*, pp. 321-323, paras. 355-58.
[39] *Ibid.*, pp. 331-335, paras. 374-78.
[40] *Ibid.*, pp. 335-336, paras. 379-81.
[41] *Ibid.*, pp. 327-330, paras. 367-73.
[42] *Ibid.*, p. 613, para. 1203(B)(3)(c).
[43] *Ibid.*, para. 1203(B)(4) & (5).
[44] *Ibid.*, pp. 392-393, paras. 560-62 and p. 418, para. 644.
[45] *Ibid.*, p. 393, paras. 563-65 and p. 418, para. 644.
[46] *Ibid.*, pp. 393-394, paras. 566-68 and p. 419, para. 645.
[47] *Ibid.*, p. 392, paras. 557-59, p. 418, para. 644.
[48] *Ibid.*, p. 394 paras. 569-70; p. 419, para. 645.
[49] *Ibid.*, p. 391, paras. 554-56; p. 418, para. 643.
[50] *Ibid.*, p. 613, para. 1203(B)(6).
[51] *Ibid.*, pp. 396-414, paras. 577-626; pp. 613-614, 1203(B)(7).

tribunal's ability to render its award, as they could not support maritime zones that overlapped with the maritime zones of the Philippines.[52]

But tribunals applying the Convention no doubt will continue to be cautious in this area, refraining from determining an issue of sovereignty absent compelling reasons to do so. For example, in *Coastal Rights in the Black Sea, Sea of Azov and Kerch Strait,*[53] Ukraine filed an Annex VII arbitration against Russia alleging that Russia had violated Ukraine's rights as a coastal State, such as to the living and hydrocarbon resources. Russia raised as a preliminary objection that the tribunal lacked jurisdiction because the dispute in reality concerned Ukraine's claim to sovereignty over the Crimean Peninsula. Ukraine responded by arguing that there was no sovereignty dispute since Russia had acted unlawfully in seizing Crimea from Ukraine in 2014 and, alternatively, that even if there was a sovereignty dispute, it was an ancillary matter.[54]

In an award on preliminary objections, the Tribunal unanimously upheld Russia's objection 'to the extent that a ruling of the Arbitral Tribunal on the merits of Ukraine's claims necessarily requires it to decide, directly or implicitly, on the sovereignty of either Party over Crimea.'[55] According to the Tribunal, the dispute over sovereignty was not ancillary to the interpretation or application of Convention; whether Ukraine was a coastal State was a prerequisite to deciding a number of Ukraine's claims.[56] This outcome was largely consistent with the 2015 Annex VII arbitral award in the *Chagos* case.

The second subject matter area where flexibility might be observed in how the Convention is interpreted or applied concerns the contemporary treatment of baselines, given rising sea levels due to global climate change. Until recently, the conventional understanding has been that the baselines used for determining maritime zones are ambulatory—meaning that the baselines will move depending on the location and physical features along a coast.[57] Indeed, having analysed carefully the text, context, and negotiating history of the 1982 U.N. Convention on the Law of the

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[52] *Ibid*., p. 416, para. 633 and p. 419, para. 646.
[53] *Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait (Ukraine* v. *Russia)* (Award Concerning Preliminary Objections of the Russian Federation) (21 February 2020) PCA Case No. 2017-06, available at https://perma.cc/6TEE-9PLE.
[54] *Ibid.*, para. 161.
[55] *Ibid.*, paras. 197, 492(a).
[56] *Ibid.*, para. 195.
[57] See generally K Purcell, *Geographical Change and the Law of the Sea* (Oxford University Press, Oxford, 2019) 44–48.

Sea and associated State practice and scholarship, the International Law Association (ILA)'s Committee on Baselines maintained in 2012 that the normal baseline moves with the low water line (and therefore is not fixed), concluding 'that the normal baseline is ambulatory, moving seaward to reflect changes to the coast caused by accretion, land rise, and the construction of human-made structures associated with harbour systems, coastal protection and land reclamation projects, and also landward to reflect changes caused by erosion and sea level rise.'[58] Further, the Committee's 2016 analysis of straight baselines assumed fidelity by States to rules that require using appropriate points along a coast, whether they be found at coastal indentations, fringing islands, low-tide elevations, mouths of rivers, or mouths of bays.[59]

This conventional understanding has been driven, in part, by the principle previously indicated, that 'the land dominates the sea.' Thus, baselines must be associated with land territory of a particular coastal State, and, from that land territory, the State can build outward the various maritime zones that provide it with important rights. At a more granular level, Article 5 of the U.N. Convention on the Law of the Sea expressly refers to the 'normal' baseline being 'the low-water line along the coast as marked on large-scale charts officially recognized by the coastal State.'[60] Thus, Article 5 signals that, as a general proposition, the baseline is found where the water meets the land and not at some other location. Article 7 allows for the drawing of straight baselines using appropriate points along the coast, provided that baselines do not depart 'to any appreciable extent from the general direction of the coast' and that the sea areas lying within those lines are 'sufficiently closely linked to the land domain to be subject to the regime of internal waters.'[61] The same relationship of baselines to land is expressed in Article 6 on reefs, [62] Article 9 on the mouths of rivers, [63] Article 10 on the mouths of bays, [64] Article 13 on low tide elevations, [65] and Article 47

[58] International Law Association Committee on Baselines under the International Law of the Sea, Sophia Conference, Report 31 (2012), available at https://perma.cc/M5J4-TZG2.
[59] International Law Association Committee on Baselines under the International Law of the Sea, Johannesburg Conference, Final Report (2016), available at https://perma.cc/73GY-K7FB.
[60] LOSC (n 1), Article 5.
[61] *Ibid.*, Article 7(3).
[62] *Ibid.*, Article 6.
[63] *Ibid.*, Article 9.
[64] *Ibid.*, Article 10.
[65] *Ibid.*, Article 13.

on archipelagic baselines. [66] All of these provisions support an understanding that the baselines are to be established, and are to exist, in close connection with the physical coast.

That understanding is further reinforced, *a contrario*, by two provisions in the Convention that *do* allow in particular circumstances for the fixing of a baseline or of a maritime zone, notwithstanding the passage of time and associated changes in the coastline. Article 7 says that where a coastline is highly unstable because of the presence of a delta and other natural conditions, a straight baseline may be established and remain effective 'notwithstanding subsequent regression of the low water line.'[67] Article 76 provides that, if a State establishes the limits of its continental shelf beyond 200 nautical miles based on a recommendation by the Commission on the Outer Limits of the Continental Shelf, then those limits 'shall be final and binding.'[68] The concept of 'final and binding' is suggestive of permanency, even if there is a regression of the coastline at a later time that otherwise might have affected the Commission's recommendation. Yet such allowances for permanency in the face of coastal regression do not exist for other provisions relating to the location of baselines.

Even so, most observers today seem to accept that a legal framework by which baselines and maritime zones are automatically ambulatory is problematic. Global climate change is causing a rise in sea levels, and that rise will affect the coastlines of many States, especially those of low-lying and small island States. Indeed, the ILA itself felt that, even if ambulatory baselines were the *lex lata*, that law was inequitable, prompting it to establish a Committee on International Law and Sea Level Rise which, since 2012, has been looking afresh at the issue of baselines in the context of sea-level rise.[69]

A particular interpretive solution may be gaining traction, which would allow for the fixing of existing baselines and maritime zones at their current locations as reflected on nautical charts. This interpretation emphasizes aspects of Articles 5 and Article 16 of the Convention. Article 5 provides that the normal baseline is the low-water line along the coast 'as marked on large-scale charts officially recognized by the coastal State.' Article 16 provides that straight baselines are to

[66] *Ibid.*, Article 47.
[67] *Ibid.*, Article 7(2).
[68] *Ibid.*, Article 76(8).
[69] Information on the work of the committee is available at: International Law and Sea Level Rise, International Law Association, available at https://www.ila-hq.org/en_GB/committees/international-law-and-sea-level-rise.

be shown by the coastal State on nautical charts (or by lists of geographical coordinates), which are to be deposited with the U.N. Secretary-General. No Convention provision then requires an updating of such charts (or lists), such that it might be argued that charts or lists can be developed based on the location of baselines today and then simply never updated.

Several small island States have declared their intention to fix their baselines and maritime zones in this way. In some instances, that declaration has been expressed collectively, notably through the Pacific Islands Forum[70] and the Alliance of Small Island States.[71] Further, other States are beginning to react in ways that seem supportive of the approach. For example, Germany has stated that 'through such contemporary reading and interpretation' it finds that the Convention 'allows for freezing of once duly established, published and deposited baselines and outer limits of maritime zones in accordance with the Convention.'[72] The United States has announced that it 'will work with other countries toward the goal of lawfully establishing and maintaining baselines and maritime zone limits and will not challenge such baselines and maritime zone limits that are not subsequently updated despite sea-level rise caused by climate change.'[73]

Bending the Convention is this direction may not be without costs. One downside concerns the consequences that such an interpretation would entail near the coast, where there would potentially be large areas of internal waters, no right of innocent passage, and a fictitious 'baseline' that provides little guidance to mariners as to the actual location of the physical coast. Thus, if a coast recedes by 10 or 20 nautical miles, there would be a baseline potentially 20 nautical miles from the coast, and everything between that baseline and the coast would be internal waters,[74] through which there would be no right of innocent passage as would exist in the territorial sea,[75] nor any freedom of navigation that would otherwise exist outside the territorial sea.[76] And the

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[70] See Pacific Island Forum, 'Declaration on Preserving Maritime Zones in the Face of Climate Change-related Sea-Level Rise' (6 August 2021), available at https://perma.cc/X4CM-3C9L. The Forum consists of 18 Member States. See generally Pacific Islands Forum available at https://www.forumsec.org.

[71] See Alliance of Small Island States, Leaders' Declaration (22 September 2021), available at https://perma.cc/E778-47TK. The AOSIS consists of 39 Member States. See generally Alliance of Small Island States available at https://www.aosis.org.

[72] Written Statement by the Federal Republic of Germany on the 71st and 72nd ILC Report (30 June 2022), available at https://legal.un.org/ilc/sessions/74/pdfs/english/slr_germany.pdf.

[73] Statement by the United States, Sixth Committee, 27th meeting (28 October 2022), available at https://perma.cc/C5V7-WKMB.

[74] LOSC (n 1), Article 8.

[75] *Ibid.*, Articles 17-32 (explaining the rules relating to the right of innocent passage through the territorial sea).

[76] *Ibid.*, Articles 58(1) (applying the high seas freedom of navigation within the exclusive economic zone), 87 (identifying the freedom of navigation on the high seas).

interpretative approach, with its emphasis on charts (or lists) requires ignoring the underlying information upon which those charts are supposed to be based, which concerns the physical location of the coast.

An interesting question as to the flexibility of the Convention has now arisen with respect to the United States: can a non-party to the Convention make a submission to the CLCS with respect to its claim as to the extended continental shelf? In 2023, the United States announced that it had delineated the limits of its extended continental shelf in accordance with the relevant provisions of the Convention and the Technical Guidelines of the CLCS.[77] When announcing the delineation of its extended continental shelf, the United States said:

> The United States is also open to filing its submission package with the Commission as a non-Party to the Convention. This would be consistent with the Commission's mandate to provide recommendations and advice to coastal States concerning the outer limits of the continental shelf and would support the rules-based system under the Convention for delineating the continental shelf and the seabed area beyond national jurisdiction.[78]

Yet the Convention, by its terms, does not appear to contemplate such a submission by a non-party. Allowing the United States to do so might operate to the benefit of not just the United States but also Convention Parties by resolving the scope of the U.S. continental shelf vis-à-vis the deep seabed. At the same time, allowing the United States to do so might be viewed as according to the United States an important benefit under the Convention without the United States assuming the obligations of the Convention,[79] potentially including those arising under Article 82.[80]

Plasticity of the Convention vis-à-vis other International Rules

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[77] The U.S. extended continental shelf is located in seven offshore areas: the East Coast; the West Coast; the Arctic; the Bering Sea; the Mariana Islands; and two areas in the Gulf of Mexico. All told, the U.S. extended continental shelf comprises approximately one million square kilometers (about twice the size of California). See https://www.state.gov/the-us-ecs/.

[78] U.S. Extended Continental Shelf Project, The Outer Limits of the Extended Continental Shelf of the United States of America: Executive Summary 6 (2023), available at https://perma.cc/Q2TL-CFER.

[79] See BM Magnússon, 'Can the United States Establish the Limits of Its Extended Continental Shelf Under International Law?, (2017) 48 *Ocean Development & International Law* 1; KA Baumert, 'The Outer Limits of the Continental Shelf Under Customary International Law,' (2018) 111 *American Journal of International Law (AJIL)* 827; KA Baumert, 'Article 76 of the UN Convention on the Law of the Sea: Parties and Non-Parties,' (2022) 99 *International Law Studies* 963.

[80] LOSC (n 1), Article 118 (obliging the coastal State to make payments or contributions to other States through the Authority in respect to exploitation of the non-living resources of the extended continental shelf).

A third aspect of resilience is plasticity, by which is mean the quality of being easily shaped or moulded. Though closely allied with the concept of flexibility, the plasticity of the Convention may be considered in the way that it is shaped by new treaties not envisaged by the Convention, but that interpret, develop, and augment the Convention.[81]

The most notable of these to date may be the 1995 Convention on the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks,[82] which provides in Article 4 that it is to be interpreted and applied 'in the context of and in a manner consistent with the [1982] Convention.' At the same time, the Fish Stocks Agreement expressly stipulates how certain Convention provisions are to be interpreted and applied; in this way, the Fish Stocks Agreement is shaping and moulding the Convention, especially Convention Articles 61-63 and 116-19, at least for the States Parties to the Fish Stocks Agreement, but perhaps even more broadly.

Other new treaties not envisaged by the Convention have furthered its provisions relating to underwater cultural heritage,[83] marine pollution,[84] regional or high seas fishing,[85] and other matters. Moreover, in 2023, States completed the negotiation of a new Convention on Marine

[81] *See, e.g.*, LOSC (n 1), Article 118 (obliging States to cooperate for conservation and management of high seas living resources through regional and subregional organizations).
[82] Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (New York, 4 August 1995, in force 11 December 2001) 2167 *UNTS* 3.
[83] UNESCO Convention on the Protection of the Underwater Cultural Heritage (Paris, 2 November 2001, in force 2 January 2009) 2562 *UNTS* 3.
[84] Protocol to the 1972 Convention on the Prevention of Marine Pollution by Dumping of Wastes and other Matter, (London, 7 November 1996, in force 24 March 2006) 36 *ILM* (London Protocol).
[85] Framework Agreement for the Conservation of the Living Marine Resources on the High Seas of the South-Eastern Pacific (Santiago, 14 August 2000) UN Law of the Sea Bulletin No. 45, at 70 (2001) (Galapagos Agreement); Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean (Honolulu, 5 September 2000, in force 19 June 2004) 40 *ILM* 277; Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas (Rome, 24 November 1993, in force 24 April 2003) 33 *ILM* 968.

Biodiversity of Areas beyond National Jurisdiction.[86] The ability of such treaties to shape or mould the Convention, may explain in part the lack of interest in amending the Convention itself.[87]

A helpful design feature in this regard is that the Convention is not a 'self-contained regime,' in the sense of a special regime that operates separate from and without regard to general international law. To the contrary, the Convention's final preambular clause affirms the governance of rules and principles of general international law not regulated by the Convention.[88] Further, the Convention's provisions repeatedly refer to rules of general international law as co-existing with and pertinent to the application of Convention rules.[89] Indeed, the Convention allows its general provisions to be shaped through other generally accepted international rules and standards, requiring States Parties—when adopting national laws and regulations—to 'give effect' to such rules and standards,[90] or to adopt measures that are 'no less effective' than them,[91] or to at least to take them 'into account.'[92] Such international rules and standards may be those developed under the auspices of the International Maritime Organization[93] or the U.N. Environment Programme,[94] or agreements and standards adopted at the regional and subregional and even bilateral levels,[95] so

[86] Agreement under the UN Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas Beyond National Jurisdiction (New York, 19 June 2023) A/CONF.232/2023/4* (BBNJ Agreement); *see* C Einhorn, 'Nations Agree on Language for Historic Treaty to Protect Ocean Life' (4 March 2023) *New York Times*; *see also* G.A. Res. 72/249 (2017) (convening an intergovernmental conference to elaborate the text of an agreement); C Payne, 'Symposium on Governing High Seas Biodiversity' (2018) 112 *American Journal of International Law (AJIL) Unbound* 118 (ed); V De Lucia, A Oude Elferink and L Ngoc Nguyen (eds), *International Law and Marine Areas beyond National Jurisdiction* (Brill/Nijhoff, Leiden, 2022).

[87] *See* D Freestone & A Oude Elferink, 'Flexibility and Innovation on the Law of the Sea – Will the LOS Convention Amendment Procedures Ever Be Used?' in D Freestone & A Oude Elferink (eds), *Stability and Change in the Law of the Sea: The Role of the LOS Convention* (Martinus Nijhoff Publishers, Leiden, 2005) 169.

[88] LOSC (n 1), Preamble cl. 8 ('*Affirming* that matters not regulated by this Convention continue to be governed by the rules and principles of general international law').

[89] See, e.g., LOSC (n 1), Article 2(3) ('The sovereignty over the territorial sea is exercised subject to this Convention and to other rules of international law.'); *ibid*., Article 19(1) ('Passage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal State. Such passage shall take place in conformity with this Convention and with other rules of international law.'); *ibid*., Article 58(2) ('Articles 88 to 115 and other pertinent rules of international law apply to the exclusive economic zone in so far as they are not incompatible with this Part.').

[90] *See, e.g.*, LOSC (n 1), Articles 21(2), 42(1)(b), 211(5), 220(3).

[91] See, e.g., *ibid.,* Articles 208(2), 209(2), 210(6).

[92] See, e.g., *ibid.,* Articles 22(3), 60(3), 60(5), 61(3), 94(3), 119(1)(a), 207(1), 212(1), 262.

[93] See, e.g., Convention for the Prevention of Pollution from Ships (London, 2 November 1973, in force 2 October 1983) 1340 *UNTS* 184 (MARPOL Convention) as modified by the Protocol of 17 February 1978, with six Annexes.

[94] See, e.g., Basel Convention Conference of the Parties, Technical guidelines for the Identification and Environmentally Sound Management (ESM) of Plastic Wastes and for Their Disposal (23 August 2002) UNEP/CHW.6/21, Annex, available at https://www.basel.int/Portals/4/download.aspx?d=UNEP-CHW-WAST-GUID-PlasticWastes.English.pdf (addressing, inter alia, transport and shipping of plastic waste).

[95] See, e.g., Convention for the Protection of the Mediterranean Sea Against Pollution (Barcelona, 16 February 1976, in force 12 February 1978) 1102 *UNTS* 44 (Barcelona Convention) amended and renamed in 1995 as the Convention

long as they are consistent with the broad terms of the Convention.[96] Importantly, other international agreements relating to the marine environment do not have to conform to Part XII of the Convention, but need only be carried out in a manner 'consistent with the general principles and objectives' of the Convention.[97] In this way, the Convention both shapes and is shaped by international law extrinsic to the Convention, and through such integration draws strength from the broader international legal system.

Further, the Convention's provision on 'applicable law' indicates that Convention tribunals may apply not just the Convention, but also 'other rules of international law not incompatible with this Convention.'[98] That provision opens a door to the potential application of legal rules that exist outside the four corners of the Convention. To similar effect, the Vienna Convention on the Law of Treaties, which provides that an interpretation of any treaty may take into account 'any relevant rules of international law applicable in the relations between the parties.'[99] As a consequence, and as previously indicated, Convention tribunals appear to accept that, so long as a dispute *principally* concerns the interpretation or application of the Convention, jurisdiction extends to making such findings of fact or ancillary determinations of law as are necessary to resolve the dispute.

Based on recent events, there are two areas where the plasticity of the Convention may be observed vis-à-vis other international rules. First, the interpretation and application of the Convention has relied upon rules concerning the use of force and military activities, including the difference between permissible maritime law enforcement and impermissible violation of the U.N. Charter. Thus, in *Guyana* v. *Suriname*, an Annex VII arbitral tribunal used Article 279 of the Convention as a means to address this issue; that article provides that the parties shall settle any dispute between them under the Convention 'by peaceful means.'[100] Seeing that article as allowing it to apply the *jus ad bellum* of the U.N. Charter and general international law, the tribunal found 'that in international law force may be used in law enforcement activities provided that such force

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for the Protection of the Marine Environment and the Coastal Region of the Mediterranean. The Barcelona Convention now has seven protocols.

[96] *See, e.g.*, LOSC (n 1), Articles 61(3), 63, 69(2)-(3), 70(3)-(4), 98(2), 119, 125, 210(6), 211(2).

[97] *Ibid.*, Article 237(2) ('Specific obligations assumed by States under special conventions, with respect to the protection and preservation of the marine environment, should be carried out in a manner consistent with the general principles and objectives of this Convention').

[98] *Ibid.*, Article 293(1).

[99] Vienna Convention on the Law of Treaties (Vienna, 22 May 1969, in force 27 January 1980) 1155 *UNTS* 331 Article 31(3)(c).

[100] LOSC (n 1), Article 279.

is unavoidable, reasonable and necessary.'[101] In that instance, Suriname's action of sending a patrol vessel to order an oil rig to leave the contested waters did not meet such a standard and was thus determined to be an unlawful threat of force. That determination turned on the circumstances of the particular incident: the rig was approached at midnight and given twelve hours to leave; the rig was told if it didn't leave 'the consequences will be yours'; and the men on the rig perceived that this meant military force would be used if they did not leave.[102]

In the context of using force, the 'military activities' exception to the Convention's dispute settlement processes may feature.[103] In the *Coastal Rights* case, Russia was *not* able to invoke that exception as a basis for excluding jurisdiction over Ukraine's case concerning coastal rights relating to Crimea. Russia's assertion that the dispute generally related to the 2014 Ukraine-Russia conflict was deemed by the Annex VII arbitral tribunal as insufficient for triggering the exception; to do so, the specific acts at issue in Ukraine's complaints had to constitute military activities.[104] Further, simply alleging that force was used to deny access to resources was not enough; among other things, the tribunal noted that maritime enforcement action and other 'non-military' functions may be exercised equally by military and non-military vessels.[105]

At the provisional measures phase of *Detention of Three Ukrainian Naval Vessels*, ITLOS interpreted this exception when ordering Russia to release the Ukrainian naval vessels, as well as their crew, that had been detained in or near the Kerch Strait on 25 November 2018.[106] Although Russia had invoked the military activities exception when adhering to the Convention, ITLOS found the exception *prima facie* not applicable to a situation where Russian naval vessels forcibly seized Ukrainian naval vessels and crew. According to ITLOS, the underlying dispute concerned the legal status of the Kerch Strait, which was not military in nature.[107] Moreover, the Ukrainian naval vessels had abandoned their effort to pass through the strait when they were nevertheless

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[101] *Arbitration Regarding the Delimitation of the Maritime Boundary Between Guyana and Suriname (Guyana* v. *Suriname)* (Award) (17 September 2007) PCA Case No. 2004-04, XXX RIAA, p. 126, para. 445.
[102] *Ibid*., pp. 121-123, paras. 432-39.
[103] LOSC (n 1), Article 298(1)(b).
[104] *Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait (Ukraine* v. *Russia)*, (Award on Preliminary Objections) (21 February 2020) PCA Case No. 2017-06, para. 331, available at https://pcacases.com/web/sendAttach/9272.
[105] *Ibid*., para. 335.
[106] *Detention of Three Ukrainian Naval Vessels (Ukraine* v. *Russia)* (Order on Provisional Measures) (25 May 2019), ITLOS Case No. 26, *ITLOS Reports 2019*, p. 310, para. 118.
[107] *Ibid*., pp. 300-301, paras. 68-72.

detained by Russia, which, according to ITLOS, cast the event as in the nature of a law enforcement rather than a military operation.[108] The lone dissenting judge, however, regarded navigational activities at sea of a State's warships to be inherently 'military' and regarded this particular incident as involving military activities by both sides.[109]

The case then proceeded before an Annex VII arbitral tribunal, which at the jurisdictional phase carved a path between these two positions. On the one hand, the tribunal in found that the events of 25 November 2018 were, up until a certain point in time, 'military activities,' which were excluded from the tribunal's jurisdiction; on the other hand, after that point in time, the arrest of the Ukrainian naval vessels were more in the nature of a law enforcement operation falling within its jurisdiction. The precise point in time when things changed was left for consideration at the merits phase.[110]

A second area where the plasticity of the Convention may be observed vis-à-vis other international rules concerns the law of immunity. For example, in a 2012 shooting incident at sea during a counter-piracy operation, two Italian marines on board an Italian-flagged commercial oil tanker, the *MV Enrica Lexie*, fired on a small fishing boat and killed two Indian fishermen who were mistaken for pirates. When Indian authorities charged the marines with murder, Italy claimed that they were entitled to functional immunity (or immunity *rationae materiae*) for their conduct as members of the Italian armed forces. Thereafter, Italy requested a provisional measures order from ITLOS, asserting that India had infringed upon the immunity applicable to the marines. Without addressing the immunity issue, ITLOS prescribed provisional measures, as did an Annex VII arbitral tribunal, resulting in a relaxation of bail conditions.[111]

At the merits phase, the arbitral tribunal was squarely confronted with whether it had jurisdiction to decide a claim concerning such immunity, given that none of the Convention articles

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[108] *Ibid*., pp. 301-302, paras. 73-76.
[109] *Ibid*., Dissenting Opinion of Judge Kolodkin, p. 359, paras. 9-10.
[110] *Dispute Concerning the Detention of Ukrainian Naval Vessels and Servicemen (Ukraine* v. *Russia)* (Award on Preliminary Objections) (27 June 2022) PCA Case No. 2019-28, para. 208(a), (b), (c), available at https://pcacases.com/web/sendAttach/38096.
[111] See *The 'Enrica Lexie' Incident (Italy* v. *India)* (Decision on Provisional Measures) (24 August 2015) ITLOS Case No. 24*, ITLOS Reports 2015*, p. 182; *The 'Enrica Lexie' Incident Arbitration (Italy* v. *India)* (Order on the Request for Prescription of Provisional Measures) (29 April 2016) PCA Case No. 2015-28, available at https://perma.cc/TZL2-VM8D.

address personal immunities (as opposed to immunity of warships).[112] In essence, the tribunal found that the issue of its entitlement to exercise jurisdiction over the incident could not be satisfactorily answered without first addressing the question of the immunity of the marines.[113] Quoting from the *Case Concerning Certain German Interests* before the Permanent Court of International Justice, the tribunal found that the issue of the marines' immunity 'belongs to those 'questions preliminary or incidental to the application' of the Convention.'[114] The tribunal then analysed customary international law relating to immunity *rationae materiae* and applied it to the marines, finding that they were State officials, that they were exercising official functions when taking the actions in question, that any 'territorial exception' to such immunity was not applicable, and that therefore they were entitled to immunity *rationae materiae.* [115]As such, India was precluded from exercising any jurisdiction over them before its national courts and acted inconsistently with the Convention in doing so.[116]

More squarely present within the Convention is acknowledgment of the immunity of warships.[117] In *Detention of Three Ukrainian Naval Vessels*, ITLOS found at the provisional measures stage that the rights to immunity claimed by Ukraine for its three vessels (and their military and security crew) were plausible.[118] At the jurisdictional stage before the Annex VII arbitral tribunal, Russia focused its arguments on the lack of any immunity for the Ukrainian vessels within the territorial sea. The Annex VII tribunal, however, decided that the location of the seizure of the vessels was not yet determined, such that Russia's objection could only be addressed at the merits stage.[119]

The Risks of Flexibility and Plasticity

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[112] *The 'Enrica Lexie' Incident Arbitration (Italy* v. *India)* (Award) (21 May 2020) PCA Case No. 2015-28, paras. 796-99, available at https://perma.cc/MW53-5Y85.
[113] *Ibid*., para. 808 ('The Arbitral Tribunal could not provide a complete answer to the question as to which Party may exercise jurisdiction without incidentally examining whether the Marines enjoy immunity.').
[114] *Ibid*. (quoting *Case Concerning Certain German Interests in Polish Upper Silesia (Germany* v. *Poland)*, (Judgment) (1925) PCIJ Series A, No. 6, at p. 18; see also *ibid*., paras. 809-11.
[115] *Ibid*., paras. 732-873.
[116] *Ibid*., para. 874.
[117] See LOSC (n 1), Articles 32, 58, 95-96.
[118] *Case Concerning the Detention of Three Ukrainian Naval Vessels (Ukraine* v. *Russia)* (Provisional Measures) (25 May 2019) ITLOS Case No. 26, *ITLOS Reports 2019*, p. 307, para. 98.
[119] *Dispute Concerning the Detention of Ukrainian Naval Vessels and Servicemen (Ukraine* v. *Russia)* (Award on Preliminary Objections) (27 June 2022) PCA Case No. 2019-28, pp. 56-57, paras. 152-55, available at https://pcacases.com/web/sendAttach/38096.

There is, of course, a risk in approaching any treaty with an excessive degree of flexibility and plasticity, whether by dispute resolution processes, by other institutional structures of the treaty, or even by the States Parties. The risk is that if the approach taken is not careful and cautious, some or all of the States Parties may view their consent to the treaty, or to dispute settlement jurisdiction under the treaty, as being abused, potentially triggering adverse reactions that challenge if not undermine the treaty regime.

With respect to the Convention it has been argued that the Commission on the Limits of the Continental Shelf has itself 'legislated' by introducing new requirements that are not supported by Article 76 or by impermissibly qualifying rights enjoyed under that article.[120] For example, the Convention provides that the Commission 'shall make recommendations' regarding a State's submission that it possesses an extended continental shelf, making clear that the 'actions of the Commission shall not prejudice matters relating to delimitation of boundaries between States with opposite or adjacent coasts.'[121] A plain reading of the Convention suggests that the mere existence of a dispute, including a dispute concerning delimitation, does not foreclose action by the Commission; any such action is merely speaking to the geomorphic nature of the shelf and seabed, without prejudice to, for example, whether an island is fully-entitled or where a delimitation line should be drawn. Yet the Commission's Rules of Procedure provide that, in cases where a land or maritime dispute exists, the Commission shall not consider a submission made by any of the States concerned in the dispute,[122] and this regardless of whether the dispute concerns delimitation or some other issue (such as continental shelf claims by States in relation to Antarctica). While one might understand the Commission's desire to bend the Convention so as to avoid unwelcome involvement in controversies between States, Andrew Serdy maintains that this outcome 'is surely repugnant to LOSC Article 76,' which 'entitles the submitting State to expect that its submission will be examined on its technical merits.'[123]

With respect to decisions on delimitation rendered by Convention dispute settlers, a common concern has been apparent inconsistency and unpredictability in the decisions rendered.

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[120] A Serdy, 'The Commission on the Limits of the Continental Shelf and its Disturbing Propensity to Legislate,' (2011) 26 *IJMCL* 355.
[121] LOSC (n 1), Article 76(8) and Annex II, Article 9.
[122] CLCS Rules of Procedure, Annex I, para. 5(a).
[123] Serdy (n 120), at p. 366.

In some cases, such as *Guyana* v. *Suriname*,[124] or *Ghana/Côte d'Ivoire*,[125] the tribunal follows closely a pure equidistance line, while in other cases, such as *Somalia* v. *Kenya*,[126] the tribunal adjusts the equidistance line based on highly discretionary 'relevant circumstances,' in that instance a view that adjustment was warranted given the concavity of the coastline in the broader East African regional context, including the coast of Tanzania. In *Peru* v. *Chile*, an 'agreed maritime boundary' of 80 nautical miles along a latitude was found,[127] even though neither Party argued that a boundary of such length had been agreed upon. Even within a single case, inconsistencies can arise, such as discounting offshore features on one side of a boundary for delimitation purposes, while using similar features on the other side of the boundary.[128]

To the extent that dispute settlers issue decisions that conflict or are incoherent, the risk of fragmentation of the law of the sea seems heightened. A recent example might be the treatment of 'grey areas' in maritime boundary delimitation between two states with adjacent coasts. In cases where a dispute settler concludes that the delimitation line deviates from an equidistance line, it is possible for there to be an area where one of the states has rights to an extended continental shelf, but does not have rights to an EEZ (because the area is located more than 200 nautical miles from its baselines), while the other state has rights in the area to an EEZ (because the area is not located beyond 200 nautical miles from its baselines). When this happens, a 'grey area' exists, whereby one state has extended continental shelf rights 'underneath' the other State's EEZ, an outcome present in several delimitation cases.[129] The Convention is silent on this issue. Yet, in 2023, the International Court of Justice concluded 'that, under customary international law, a State's entitlement to a continental shelf beyond 200 nautical miles from the baselines from which the

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[124] *Arbitral Tribunal Constituted Pursuant to Article 287, and in Accordance with Annex VII, of the United Nations Convention on the Law of the Sea (Guyana* v. *Suriname)* (n 97), XXX RIAA, p. 1.
[125] *Delimitation of the Maritime Boundary in the Atlantic Ocean (Ghana/Côte d'Ivoire)* (Judgment) (23 September 2017) ITLOS Case No. 23, *ITLOS Reports 2017,* p. 4.
[126] *Maritime Delimitation in the Indian Ocean (Somalia* v. *Kenya)* (Judgment) (12 October 2021) *ICJ Reports 2021*, p. 206.
[127] *Maritime Dispute (Peru* v. *Chile)* (Judgment) (27 January 2014) *ICJ Reports 2014*, p. 3, p. 58, para. 151.
[128] See P Bekker & C Schofield, 'Transparency and Predictability in the Maritime Delimitation Process: Reverse-engineering the Somalia-Keny Adjudicated Boundary' (2022) 37 *IJMCL* 413, at pp. 415-16.
[129] See *Delimitation of the Maritime Boundary in the Bay of Bengal (Bangladesh/Myanmar)* (Judgment) (14 March 2012) ITLOS Case No. 16, *ITLOS Reports 2012*, pp. 119-121, paras. 463-76; *Bay of Bengal Maritime Boundary Arbitration (Bangladesh v. India)* (Award) (7 July 2014) XXXII RIAA, p.147, para. 498; *Maritime Delimitation in the Indian Ocean (Somalia v. Kenya)* (Judgment) (12 October 2021) *ICJ Reports 2021*, p. 277, para. 197.

breadth of its territorial sea is measured may not extend within 200 nautical miles from the baselines of another State.'[130] If that is correct, then how are grey areas permissible?

There can be little doubt that the flexibility allowed by the Convention's delimitation provisions has promoted this inconsistency, leaving to dispute settlers a range of possibilities when delimiting in a particular context. But there is a risk that excessive flexibility will promote a view that the Convention has failed to provide for predictability and transparency, and hence stability, in the allocation of maritime resources among States.

With respect to the deep seabed (or 'Area'), Part XI of the Convention established a sophisticated regime for exploring and exploiting the Area, allowing access to all States (including landlocked States), but with provisions for equitable sharing of the benefits from exploitation. Among other things, the ISA was tasked with organizing and controlling mining in the Area.[131] To date, the ISA has issued regulations governing the *exploration* of sites within the Area, a necessary precursor to identifying sites for future mining, but the ISA has not adopted regulations governing *exploitation*. In June 2021, Nauru sent a letter to the ISA requesting that the ISA adopt exploitation regulations, which under the Convention (and its 1995 implementing agreement) requires the ISA to adopt the regulations within two years (the so-called 'two-year rule').[132] The two-year period lapsed, however, without the ISA adopting any such regulations.[133] The primary difficulty in the ISA acting appears to be that Nauru's action has prompted a significant group of States Parties

[130] *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 nautical miles from the Nicaraguan Coast (Nicaragua v. Colombia)* (Judgment) (13 July 2023) *ICJ Reports 2023*, p. 29, para. 79.
[131] LOSC (n 1), Articles 156-57.
[132] Implementing Agreement, Annex, Section 1, para. 15(b); see Press Release, International Seabed Authority, *Nauru requests the President of ISA Council to complete the adoption of rules, regulations and procedures necessary to facilitate the approval of plans of work for exploitation in the Area* (29 June 2021), available at https://perma.cc/R97J-QBLK; see also P Singh, 'What Are the Next Steps for the International Seabed Authority after the Invocation of the "Two-year Rule"?'(2022) 37 *IJMCL* 1. The two-year rule also requires that the ISA consider and provisionally approve any application for exploitation that is pending at the conclusion of the two-year period, even in the absence of a formally-adopted exploitation regulations. Implementing Agreement, Annex, Section 1, para. 15(b). The company being sponsored by Nauru, The Metals Company, had not yet submitted a mining application as of 2023.
[133] See, e.g., A Mehta, 'Policy Watch: After fraught global meeting, future of deep-sea mining still hangs in balance' *Reuters* (3 August 2023), available at https://www.reuters.com/sustainability/policy-watch-after-fraught-global-meeting-future-deep-sea-mining-still-hangs-2023-08-03/; see also Statement by M Lodge, Secretary-General, International Seabed Authority, to the Thirty-Third Meeting of States Parties to the United Nations Convention on the Law of the Sea, New York (12 June 2023), available at https://perma.cc/KEC5-U7F3; ('I believe that the work that has been accomplished so far is highly constructive and is building consensus around many of the critical issues in the draft regulations.').

(numbering more than 20 nations) to call for a 'pause'[134] and some even a moratorium[135] on deep seabed mining, citing adverse environmental harms. Other States Parties, however, including China, continue to support such mining.[136] Can the Convention be 'bent' in the direction of either a pause or ban on deep seabed mining?

There may be some precedent for such a moratorium in the evolution, over time, of the International Convention on the Regulation of Whaling,[137] from originally a conservation treaty to a treaty today that bans whaling,[138] but in that instance there developed a near-global consensus in favour of the ban. Here, where there is considerable disagreement among States Parties, there would seem to be a significant risk that bending the Convention in this way will unravel the 'package deal' upon which the Convention was predicated. The ISA Secretary-General recognized this risk when he warned that:

> The regime, and the entire Convention, are threatened and undermined when States Parties act unilaterally, outside the rules set by the Convention and its implementing agreements. It is a matter of greatest concern, therefore, when States Parties promote positions that radically change the rules of engagement and even deny the essential vision set out in the Convention. … Each chapter of the Convention is an integral part of the whole. . . . We cannot pick and choose different elements to support short-term positions. With benefits come obligations and responsibilities.[139]

To the extent that a pause or even moratorium on deep seabed mining is to be justified under the Convention, it may be necessary to emphasize that the Area is, pursuant to the

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[134] Y Khan, 'Canada Joins Nearly 20 Nations Calling for Halt to Deep-Sea Mining as Negotiators Meet to Agree Rules' *Wall Street Journal (WSJ)* (11 July 2023), available at https://perma.cc/T836-FAX3.

[135] See Deep Sea Conservation Coalition, Resistance to Deep-Sea Mining: Governments and Parliamentarians (2023), available at https://perma.cc/CJW3-B874; French Ministry of Foreign Affairs Press Release, International Seabed Authority Council–France calls for expanding the coalition against deep-sea mining (2023), available at https://perma.cc/DNH3-KY6H; ('France reaffirmed its total opposition to deep-sea mining.').

[136] L Kuo, 'China is set to dominate the deep sea and its wealth of rare metals' *Washington Post* (19 October 2023), available at https://perma.cc/87J5-JR7P.

[137] International Convention for the Regulation of Whaling (Washington, D.C., 2 December 1946, in force 10 November 1948) 161 *UNTS* 74.

[138] For an account, see M Fitzmaurice, *Whaling and International Law* (Cambridge University Press, Cambridge, 2015).

[139] Statement by M Lodge, Secretary-General, International Seabed Authority, on the Fortieth Anniversary of the Adoption and Opening of Signature of the United Nations Convention on the Law of the Sea, New York (8 December 2022), available at https://perma.cc/6QVJ-7FSK.

Convention, part of the common heritage of mankind,[140] to be understood as seeking not just to exploit its minerals, but to preserve its essential attributes for the enjoyment of all. Yet, to be a stable interpretation or application of the Convention, bending the Convention in such a direction would require a general understanding of States Parties to that effect, which at present does not appear to exist.

A final risk of flexibility and plasticity may arise when relevant international actors, anxious to move forward in addressing a problem, fail to acknowledge the institutional role of other actors. That possibility has arisen in recent years when dispute settlers have considered whether to delimit the extended continental shelf, in circumstances where no recommendations yet exist from the CLCS as to the existence of such a shelf. Thus, in 2012, ITLOS decided in the *Bay of Bengal* case that it could delimit the extended continental shelves of Bangladesh and Myanmar notwithstanding that one or both of the state parties had a submission pending before the Commission.[141] At the same time, the tribunal stated that it 'would have been hesitant to proceed with the delimitation of the area beyond 200 nautical miles had it concluded that there was significant uncertainty as to the existence of a continental margin in the area in question.'[142] This cautious approach of ITLOS, now referred to as the 'significant uncertainty' standard, featured again in the 2023 *Mauritius/Maldives* delimitation, where, given the uncertainty of any shelf of Mauritius beyond 200 nautical miles, an ITLOS chamber declined to determine any entitlement for Mauritius in that area.[143] By contrast, the International Court of Justice had no such hesitancy in a delimitation between Somalia and Kenya, prompting Judge Donoghue to express some reluctance, given 'the fact that the Court has scant evidence regarding the existence, shape, extent and continuity of any outer continental shelf that might appertain to the Parties.'[144] Time will tell whether this desire for international courts and tribunals to move forward with delimitations is a necessary step for overcoming the slow pace of the CLCS's work, or poses difficulties for the CLCS in issuing its recommendations.

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[140] LOSC (n 1), Article 136.
[141] See *Delimitation of the Maritime Boundary in the Bay of Bengal (Bangladesh/Myanmar*) (Judgment) (14 March 2012) ITLOS Case No. 16, *ITLOS Reports 2012*, p. 102, para. 392 ('In the view of the Tribunal, it would be contrary to the object and purpose of the Convention not to resolve the existing impasse.').
[142] *Ibid*., para. 443.
[143] *Delimitation of the Maritime Boundary between Mauritius and Maldives in the Indian Ocean (Mauritius/Maldives)* (Judgment) (28 April 2023) ITLOS Case No. 28, *ITLOS Reports 2023*, pp. 144-145, paras. 448-53.
[144] See *Maritime Delimitation in the Indian Ocean (Somalia v. Kenya)* (Judgment) (12 October 2021) *ICJ Reports 2021*, p. 286, para. 4 (separate opinion of President Donoghue).

Conclusion

The overall resilience of the Convention—its durability, its flexibility and its plasticity in the face of myriad challenges that have unfolded over time—is largely attributable to certain design features within the Convention, to a willingness to 'bend' the Convention toward practical outcomes when necessary, and to the foresight of the drafters in closely tying the Convention to other agreements and standards, as well as to the general field of international law, so that the Convention might evolve as the world evolves. There are risks in flexibility and plasticity; in measured doses they promote resilience, while if taken too far they can erode confidence and support in the regime. Ultimately, such resilience rests on the good faith of States and other relevant actors in pursuing common ground in regulating a common space. For without good faith in its application and interpretation, no treaty can be resilient.