

United Nations Convention on the Law of the Sea

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The United Nations Convention on the Law of the Sea provides a comprehensive system of maritime delimitation. There will soon be no more conflict over maritime limits and boundaries.¹

This premise assumes one of two scenarios. The first is that by using the United Nations Convention on the Law of the Sea (UNCLOS) the world will eventually reach a point where all borders are settled. The second is that UNCLOS is such a comprehensive document that any disagreements will be solved without conflict simply by applying its codified rules. In order to adequately analyse this premise, this essay will tackle the first scenario before moving on to the second.

Additionally, this essay defines conflict as any dispute requiring third party intervention rather than by the simple application of the UNCLOS provisions by the parties themselves. The provisions in Part XV of UNCLOS for arbitration outsource conflict resolution to courts by granting them the ultimate authority in interpreting existing provisions and creating new law.² Therefore, the decisions of the courts cannot be said to fall within the “comprehensive” provisions codified in UNCLOS as the courts frequently find it necessary to create new rules and interpretations to settle maritime delimitation conflicts.³

The first scenario presumes a world with stable, permanent borders. This assumption is false on two counts. The first is that land borders are not permanent. The second argument is that, even presuming permanent land borders, changes due to global warming are constantly altering baselines and thus, maritime delimitation making

¹ Essay Prompt

² Irini Papanicolopulu, ‘From the North Sea to the Bay of Bengal: Maritime Delimitation at the International Tribunal for the Law of the Sea’ (2012) <ejiltalk.org/from-the-north-sea-to-the-bay-of-bengal-maritime-delimitation-at-the-international-tribunal-for-the-law-of-thesea/> accessed 7 January 2019

³ Irini Papanicolopulu, ‘From the North Sea to the Bay of Bengal: Maritime Delimitation at the International Tribunal for the Law of the Sea’ (2012) <ejiltalk.org/from-the-north-sea-to-the-bay-of-bengal-maritime-delimitation-at-the-international-tribunal-for-the-law-of-thesea/> accessed 7 January 2019

such delimitation of conflicts temporary solutions. Scenario two assumes that the application of UNCLOS's codified rules will resolve any delimitation disputes without conflict. Unfortunately UNCLOS has too many provisions susceptible to differing interpretations to provide conflict-free resolutions.

The first scenario, argument one, will be demonstrated utilizing the breakup of the former Yugoslavia and the resulting maritime delimitation conflicts in the Adriatic Sea. The first scenario, argument two, will be demonstrated utilising the rising coastline and climate change phenomena that affect Small Island Developing States. The second scenario argument will be demonstrated utilizing the Bangladesh versus Myanmar case to show the various resolutions allowed for competing valid claims.

These arguments prove that UNCLOS, as it exists today, is not capable of eliminating conflict over maritime delimitation for three reasons. One, UNCLOS does not eliminate conflict over land borders, which must be settled before maritime delimitation can occur. Two, UNCLOS does not address the need for continuous re-evaluation, and thus conflict, over baseline and coastline changes due to global warming. And three, UNCLOS itself does not settle conflicts as its provisions are not indisputable and it leaves final authority in that hands of courts that create new rules not codified in UNCLOS.

First Scenario- Argument One

The former Yugoslavia and Italy were paragons of international cooperation over maritime delimitation.⁴ They utilized UNCLOS effectively with only minor alterations due to exceptions to the rules.⁵ It is a prime example of what can happen to a peaceful

⁴ Gerald Blake and Duško Topalović, 'The Maritime Boundaries of the Adriatic Sea' (Clive Schofield and Mladen Klemenčić eds., International Boundaries Research Unit 1996) vol 1 number 8 <<https://www.dur.ac.uk/ibru/publications/view/?id=231>> accessed 10 January 2019 page 55

⁵ Gerald Blake and Duško Topalović, 'The Maritime Boundaries of the Adriatic Sea' (Clive Schofield and Mladen Klemenčić eds., International Boundaries Research Unit 1996) vol 1 number 8 <<https://www.dur.ac.uk/ibru/publications/view/?id=231>> accessed 10 January 2019 page 55

and relatively stable maritime delimitation when one of the states involved dissolves into multiple new states.

The Federal Republic of Yugoslavia experienced civil war and eventually broke into four coastal states; Slovenia, Croatia, Bosnia and Herzegovina, and Montenegro.⁶ The new land borders created multiple states- where previously there was only the former Yugoslavia- and meant that each of those new states must create new maritime delimitations among themselves.⁷ While UNCLOS does contain provisions to determine key delimitation issues, such as the new Adriatic states' baselines, it also has exceptions for special circumstances.⁸

The former Yugoslavia predominantly used the Article 7 exception in UNCLOS to create straight baselines as its coastline was quite jagged and deeply indented.⁹ Art. 7 contains the phrases "deeply indented... immediate vicinity... [and] appreciable extent," without providing precise guidance on how those phrases are to be applied.¹⁰ When neighbouring states interpret these phrases in the most advantageous manner, their statutorily valid claims can overlap and lead to conflict.¹¹

⁶ Gerald Blake and Duško Topalović, 'The Maritime Boundaries of the Adriatic Sea' (Clive Schofield and Mladen Klemenčić eds., International Boundaries Research Unit 1996) vol 1 number 8 <<https://www.dur.ac.uk/ibru/publications/view/?id=231>> accessed 10 January 2019 page 1 [listed here in order of coastline from north to south- in the interest of simplicity, the remaining states that have separated further since 1996 are not discussed in this paper as the either have limited or no coastline in the disputed Adriatic sea.]

⁷ Gerald Blake and Duško Topalović, 'The Maritime Boundaries of the Adriatic Sea' (Clive Schofield and Mladen Klemenčić eds., International Boundaries Research Unit 1996) vol 1 number 8 <<https://www.dur.ac.uk/ibru/publications/view/?id=231>> accessed 10 January 2019 page 16

⁸ Gerald Blake and Duško Topalović, 'The Maritime Boundaries of the Adriatic Sea' (Clive Schofield and Mladen Klemenčić eds., International Boundaries Research Unit 1996) vol 1 number 8 <<https://www.dur.ac.uk/ibru/publications/view/?id=231>> accessed 10 January 2019 page 7

⁹ Gerald Blake and Duško Topalović, 'The Maritime Boundaries of the Adriatic Sea' (Clive Schofield and Mladen Klemenčić eds., International Boundaries Research Unit 1996) vol 1 number 8 <<https://www.dur.ac.uk/ibru/publications/view/?id=231>> accessed 10 January 2019 page 10

¹⁰ United Nations General Assembly Convention on the Law of the Sea (UNCLOS) [10 December 1982] Art. 7 <<https://www.refworld.org/docid/3dd8fd1b4.html>> accessed 15 January 2019

¹¹ UNCLOS [10 December 1982] Art. 7; Gerald Blake and Duško Topalović, 'The Maritime Boundaries of the Adriatic Sea' (Clive Schofield and Mladen Klemenčić eds.,

Croatia received the lion's share of the former Yugoslavia's coastline.¹² It has a vested interest in keeping as much of that maritime territory as possible by continuing the former Yugoslavia's application of UNCLOS Art. 7 as it has "high value ecologically and environmentally and is of outstanding natural beauty."¹³ This leads to conflict between Croatia and neighbouring states like Bosnia and Herzegovina.

Bosnia and Herzegovina's small chunk of the Adriatic coastline is completely surrounded by Croatia's internal waters due to the continuation of the former Yugoslavia's Art. 7 boundaries.¹⁴ A strict application of UNCLOS would have denied Bosnia and Herzegovina access to the open sea and fishing.¹⁵ Instead of applying UNCLOS, the conflict was resolved by agreement between the two states.¹⁶ If no agreement had been reached, the two states would have had to argue the merit, definition, and application of different UNCLOS exception provisions to reach a solution.¹⁷ Given

International Boundaries Research Unit 1996) vol 1 number 8

<<https://www.dur.ac.uk/ibru/publications/view/?id=231>> accessed 10 January 2019 page 8

¹² Gerald Blake and Duško Topalović, 'The Maritime Boundaries of the Adriatic Sea' (Clive Schofield and Mladen Klemenčić eds., International Boundaries Research Unit 1996) vol 1 number 8 <<https://www.dur.ac.uk/ibru/publications/view/?id=231>> accessed 10 January 2019 page 11

¹³ Gerald Blake and Duško Topalović, 'The Maritime Boundaries of the Adriatic Sea' (Clive Schofield and Mladen Klemenčić eds., International Boundaries Research Unit 1996) vol 1 number 8 <<https://www.dur.ac.uk/ibru/publications/view/?id=231>> accessed 10 January 2019 page 11

¹⁴ UNCLOS [10 December 1982] Article 7; Gerald Blake and Duško Topalović, 'The Maritime Boundaries of the Adriatic Sea' (Clive Schofield and Mladen Klemenčić eds., International Boundaries Research Unit 1996) vol 1 number 8 <<https://www.dur.ac.uk/ibru/publications/view/?id=231>> accessed 10 January 2019 page 12

¹⁵ UNCLOS [10 December 1982] Article 7; Gerald Blake and Duško Topalović, 'The Maritime Boundaries of the Adriatic Sea' (Clive Schofield and Mladen Klemenčić eds., International Boundaries Research Unit 1996) vol 1 number 8 <<https://www.dur.ac.uk/ibru/publications/view/?id=231>> accessed 10 January 2019 page 12

¹⁶ Gerald Blake and Duško Topalović, 'The Maritime Boundaries of the Adriatic Sea' (Clive Schofield and Mladen Klemenčić eds., International Boundaries Research Unit 1996) vol 1 number 8 <<https://www.dur.ac.uk/ibru/publications/view/?id=231>> accessed 10 January 2019 page 12

¹⁷ UNCLOS [10 December 1982] Article 7, 8, 125 (such as Article 8 allowing for innocent passage when a newly formed internal water was not previously considered internal waters and Article 125 containing a right to maritime freedom of transit, although

that most instances of newly created land borders due to civil war would foster animosity, it cannot be assumed that all new states would resolve such disputes peacefully using the prior UNCLOS application of the parent state.

Unlike the peaceful agreement between Croatia and Bosnia and Herzegovina, conflict occurred between Slovenia and Croatia. The former Yugoslavia had used the UNCLOS Article 10 to close the Bay of Piran and create internal waters.¹⁸ Upon the dissolution of the former Yugoslavia, the Bay of Piran is now split between the coastlines of both Slovenia and Croatia.¹⁹ As Article 10 applies only to bays located on the coastline of a single state, UNCLOS does not neatly resolve this conflict.²⁰

It is of no surprise that the maritime delimitation conflict arises out of the land dispute. Depending on its resolution, the land border will alter the starting points for any baseline and offshore delimitation.²¹ Should the land territory dispute be resolved, and the maritime delimitation starting points determined, UNCLOS appears to provide a clear line of demarcation in Article 15 by requiring the de facto boundary to be equidistant.²²

intended for landlocked states); Gerald Blake and Duško Topalović, 'The Maritime Boundaries of the Adriatic Sea' (Clive Schofield and Mladen Klemenčić eds., International Boundaries Research Unit 1996) vol 1 number 8 <<https://www.dur.ac.uk/ibru/publications/view/?id=231>> accessed 10 January 2019 page 12

¹⁸ Gerald Blake and Duško Topalović, 'The Maritime Boundaries of the Adriatic Sea' (Clive Schofield and Mladen Klemenčić eds., International Boundaries Research Unit 1996) vol 1 number 8 <<https://www.dur.ac.uk/ibru/publications/view/?id=231>> accessed 10 January 2019 page 12

¹⁹ Gerald Blake and Duško Topalović, 'The Maritime Boundaries of the Adriatic Sea' (Clive Schofield and Mladen Klemenčić eds., International Boundaries Research Unit 1996) vol 1 number 8 <<https://www.dur.ac.uk/ibru/publications/view/?id=231>> accessed 10 January 2019 page 12

²⁰ Gerald Blake and Duško Topalović, 'The Maritime Boundaries of the Adriatic Sea' (Clive Schofield and Mladen Klemenčić eds., International Boundaries Research Unit 1996) vol 1 number 8 <<https://www.dur.ac.uk/ibru/publications/view/?id=231>> accessed 10 January 2019 page 12

²¹ Gerald Blake and Duško Topalović, 'The Maritime Boundaries of the Adriatic Sea' (Clive Schofield and Mladen Klemenčić eds., International Boundaries Research Unit 1996) vol 1 number 8 <<https://www.dur.ac.uk/ibru/publications/view/?id=231>> accessed 10 January 2019 page 20

²² UNCLOS [10 December 1982] Art. 15; Gerald Blake and Duško Topalović, 'The Maritime Boundaries of the Adriatic Sea' (Clive Schofield and Mladen Klemenčić eds., International Boundaries Research Unit 1996) vol 1 number 8

As is usually the case with UNCLOS, even within Article 15 there is an exception to that rule for “historic title or other special circumstances.”²³ UNCLOS itself opens the door for continued conflict by allowing states to use the same article to create competing, yet valid claims.

The Croatia and Montenegro maritime boundaries similarly hinge on disputed land territory on the Prevlaka peninsula and the Bay of Kotor.²⁴ A simple application of UNCLOS to the Croatia and Montenegro dispute is not necessarily advised. Due to the political instability surrounding ethnic and religious tensions between the two states, the settlement of this maritime conflict must consider circumstances falling outside UNCLOS, which UNCLOS itself may consider “special circumstances” that warrant exceptions to its rules.²⁵

Croatia also claims land territory on the eastern side of the bay at Cape Zukovac.²⁶ A maritime delimitation based on starting points according to Croatia’s land claims would leave Montenegro with no direct access from the Bay of Kotor to international waters.²⁷ This is precisely why the settlement of land disputes is imperative before the

<<https://www.dur.ac.uk/ibru/publications/view/?id=231>> accessed 10 January 2019 page 28-29

²³ UNCLOS [10 December 1982] Art. 15; Gerald Blake and Duško Topalović, ‘The Maritime Boundaries of the Adriatic Sea’ (Clive Schofield and Mladen Klemenčić eds., International Boundaries Research Unit 1996) vol 1 number 8 <<https://www.dur.ac.uk/ibru/publications/view/?id=231>> accessed 10 January 2019 page 28-29

²⁴ Gerald Blake and Duško Topalović, ‘The Maritime Boundaries of the Adriatic Sea’ (Clive Schofield and Mladen Klemenčić eds., International Boundaries Research Unit 1996) vol 1 number 8 <<https://www.dur.ac.uk/ibru/publications/view/?id=231>> accessed 10 January 2019 page 41

²⁵ Gerald Blake and Duško Topalović, ‘The Maritime Boundaries of the Adriatic Sea’ (Clive Schofield and Mladen Klemenčić eds., International Boundaries Research Unit 1996) vol 1 number 8 <<https://www.dur.ac.uk/ibru/publications/view/?id=231>> accessed 10 January 2019 page 41

²⁶ Gerald Blake and Duško Topalović, ‘The Maritime Boundaries of the Adriatic Sea’ (Clive Schofield and Mladen Klemenčić eds., International Boundaries Research Unit 1996) vol 1 number 8 <<https://www.dur.ac.uk/ibru/publications/view/?id=231>> accessed 10 January 2019 page 53

²⁷ Gerald Blake and Duško Topalović, ‘The Maritime Boundaries of the Adriatic Sea’ (Clive Schofield and Mladen Klemenčić eds., International Boundaries Research Unit 1996) vol 1 number 8 <<https://www.dur.ac.uk/ibru/publications/view/?id=231>> accessed 10 January 2019 page 53

occurrence of maritime delimitation. Its effects are enormous.²⁸ The importance of these examples is best summarized in the following quote.²⁹

[Upon the breakup of an existing nation, conflicts arise which] require extremely careful handling. They demonstrate how disputed land boundaries can create uncertainty over maritime boundaries. The Croatia-Slovenia dispute... remains unresolved even though the political, strategic, and economic stakes are not particularly high. On the other hand, the unresolved Croatia-Montenegro dispute over the Prevlaka Peninsula and... the Bay of Kotor can be regarded as potentially far more serious because the bay has considerable strategic and military importance as a naval harbour.³⁰

Given all of the various political, environmental, economic, and security concerns involved in the Adriatic sea delimitations, UNCLOS provides a helpful tool in some circumstances but not the overall cure. UNCLOS is susceptible to any changes in a state's land borders. Without agreed upon land borders, UNCLOS cannot determine new maritime delimitation as it does not have beginning fixed points to determine boundaries. The re-establishment of trust and political will to compromise and negotiate boundaries over both the land and sea is more important in these conflicts than the provisions contained in UNCLOS.³¹

*First Scenario- Argument Two*³²

²⁸ Gerald Blake and Duško Topalović, 'The Maritime Boundaries of the Adriatic Sea' (Clive Schofield and Mladen Klemenčić eds., International Boundaries Research Unit 1996) vol 1 number 8 <<https://www.dur.ac.uk/ibru/publications/view/?id=231>> accessed 10 January 2019 page 53

²⁹ Gerald Blake and Duško Topalović, 'The Maritime Boundaries of the Adriatic Sea' (Clive Schofield and Mladen Klemenčić eds., International Boundaries Research Unit 1996) vol 1 number 8 <<https://www.dur.ac.uk/ibru/publications/view/?id=231>> accessed 10 January 2019 page 55

³⁰ Gerald Blake and Duško Topalović, 'The Maritime Boundaries of the Adriatic Sea' (Clive Schofield and Mladen Klemenčić eds., International Boundaries Research Unit 1996) vol 1 number 8 <<https://www.dur.ac.uk/ibru/publications/view/?id=231>> accessed 10 January 2019 page 55

³¹ Gerald Blake and Duško Topalović, 'The Maritime Boundaries of the Adriatic Sea' (Clive Schofield and Mladen Klemenčić eds., International Boundaries Research Unit 1996) vol 1 number 8 <<https://www.dur.ac.uk/ibru/publications/view/?id=231>> accessed 10 January 2019 page 55-56

³² This paper assumes that the reader understands the causes and science of global warming. If the reader wishes to know more global warming and the science behind it,

Coastal communities, particularly those in the developing world, are dangerously sensitive to global warming.³³ It is predicted that rising sea levels will “sink” nearly forty Small Island Developing Nations (SIDS).³⁴ Some states will need to be relocated entirely as their territory will have “sunk” under the sea, such as the Maldives.³⁵

While this is tragic, there are currently no provisions in UNCLOS to deal with nations that only have maritime territory and no land to use for baselines. As such, this paper focuses on whether UNCLOS could resolve the issues of states in which only a portion of their territory will “sink,” such as those surrounding the Bay of Bengal.³⁶

India and Bangladesh contain approximately 75% of the people at risk for having their communities “sunk” from global warming related disasters. The prediction is that so much of the Bangladesh coastline will “sink” that it will not be able to find housing for the resulting displaced peoples and as such, nearly 75 million will flee to India.³⁷ This loss of land and population will have significant impacts on its economy. Additionally, losing such a significant portion of land to global warming creates new maritime delimitation, as the baseline points upon which all other maritime boundaries are calculated will have changed.

Applying the codified provisions of UNCLOS would result in each state maintaining their volume of maritime territory, or perhaps even grow their maritime boundaries as the increasing volume of the sea would decrease the amount of overlapping

please look at the Geneva: Intergovernmental Panel on Climate Change, ‘Climate Change 2007: Synthesis Report’ or any other IPCC reports.

³³ Tony G. Puthucherril, ‘Climate Change, Sea Level Rise and Protecting Displaced Coastal Communities: Possible Solutions’ (2012) *Global Journal of Comparative Law* 226-28

³⁴ Koko Warner and others, ‘In Search of Shelter: Mapping the Effects of Climate Change on Human Migration and Displacement’ (2009) *CARE International* 18-19

³⁵ Tony G. Puthucherril, ‘Climate Change, Sea Level Rise and Protecting Displaced Coastal Communities: Possible Solutions’ (2012) *Global Journal of Comparative Law* 228

³⁶ Tony G. Puthucherril, ‘Climate Change, Sea Level Rise and Protecting Displaced Coastal Communities: Possible Solutions’ (2012) *Global Journal of Comparative Law* 228

³⁷ Tony G. Puthucherril, ‘Climate Change, Sea Level Rise and Protecting Displaced Coastal Communities: Possible Solutions’ (2012) *Global Journal of Comparative Law* 228

claims between two neighbouring states.³⁸ Conflicts arise due to each state having a vested interest in maintaining or gaining territory and resources. Rising sea levels altering baseline points opens up previously decided boundaries to new delimitation.

States like Bangladesh would fight to increase the UNCLOS provisions limiting maritime boundaries- like the 200 nautical mile (nm) limits for the Exclusive Economic Zone (EEZ) or Continental Shelf (CS). If it were able to fix a permanent line on a map, the overall nautical miles contained within that territory would potentially grow over the current UNCLOS limits. Altering UNCLOS to increase these limits may be necessary to grant states like Bangladesh access to the maritime resources they historically enjoyed offsetting the economic consequences of losing population and land territory.

UNCLOS currently has no provisions dealing with the consequences of rising sea levels.³⁹ As states have incentive to fight for as much maritime territory as possible, rising sea levels will create conflicts.⁴⁰ Conflicts that UNCLOS is simply not currently equipped to handle, as these resolutions would fall under the exceptions and ‘special circumstances’ provisions.

Premise Two

Premise two asserts that UNCLOS can resolve the aforementioned disputes without conflict. However, even the most accurate application UNCLOS provisions can end with two overlapping- yet equally valid- claims. When equally valid, overlapping claims exist between neighbouring states, UNCLOS has delegated the responsible for making the final delimitation decisions to arbitration courts.

It is important to note that ITLOS and other courts deciding maritime delimitation cases exercise judicial authority to create law when there are no relevant provisions in

³⁸ See Coalter G Lathrop, ‘Baselines’ in Donald R Rothwell and others (eds.), *The Oxford Handbook of the Law of the Sea* (OUP 2015) 77

³⁹ See Coalter G Lathrop, ‘Baselines’ in Donald R Rothwell and others (eds.), *The Oxford Handbook of the Law of the Sea* (OUP 2015) 77

⁴⁰ Tony G. Puthucherril, ‘Climate Change, Sea Level Rise and Protecting Displaced Coastal Communities: Possible Solutions’ (2012) *Global Journal of Comparative Law* 226-28

UNCLOS.⁴¹ This raises serious concerns about the consistency of case law since multiple different tribunals and courts have final jurisdiction over maritime delimitation cases, such as a case being heard at either the International Court of Justice (ICJ) or the International Tribunal for the Law of the Sea (ITLOS), but neither serving as an appellate court for the other. The potential for tension is illustrated by the fact that the first case regarding maritime delimitation boundaries tried by ITLOS required the tribunal to interpret previous case law from other courts.⁴²

UNCLOS Art. 15 states that the boundary line must be drawn equidistant unless there are special circumstances or historic use justifying deviation.⁴³ UNCLOS fails to define what constitutes a special circumstance or how those circumstances are to affect the boundary.⁴⁴ Previous case law had established deviations for situations regarding the natural prolongation of a coastline based on geology and geography.⁴⁵ In Bangladesh versus Myanmar, ITLOS determined that arguments surrounding geology, such as those argued in the Tunisia versus Libya case, were irrelevant.⁴⁶ It also stated that it would apply an equidistant line to determine the EEZ and CS boundary only to proclaim an

⁴¹ Irini Papanicolopulu, 'From the North Sea to the Bay of Bengal: Maritime Delimitation at the International Tribunal for the Law of the Sea' (2012) <ejiltalk.org/from-the-north-sea-to-the-bay-of-bengal-maritime-delimitation-at-the-international-tribunal-for-the-law-of-thesea/> accessed 7 January 2019

⁴² Irini Papanicolopulu, 'From the North Sea to the Bay of Bengal: Maritime Delimitation at the International Tribunal for the Law of the Sea' (2012) <ejiltalk.org/from-the-north-sea-to-the-bay-of-bengal-maritime-delimitation-at-the-international-tribunal-for-the-law-of-thesea/> accessed 7 January 2019

⁴³ UNCLOS [10 December 1982] Art. 15

⁴⁴ UNCLOS [10 December 1982] Art. 15

⁴⁵ Irini Papanicolopulu, 'From the North Sea to the Bay of Bengal: Maritime Delimitation at the International Tribunal for the Law of the Sea' (2012) <ejiltalk.org/from-the-north-sea-to-the-bay-of-bengal-maritime-delimitation-at-the-international-tribunal-for-the-law-of-thesea/> accessed 7 January 2019

⁴⁶ *Dispute Concerning Delimitation Of The Maritime Boundary Between Bangladesh And Myanmar In The Bay Of Bengal* International Tribunal for the Law of the Sea (ITLOS) Judgement (14 March 2012) para 332; Irini Papanicolopulu, 'From the North Sea to the Bay of Bengal: Maritime Delimitation at the International Tribunal for the Law of the Sea' (2012) <ejiltalk.org/from-the-north-sea-to-the-bay-of-bengal-maritime-delimitation-at-the-international-tribunal-for-the-law-of-thesea/> accessed 7 January 2019; *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* Judgment I.C.J. Reports (1982) p. 18.

“equidistant” line that was in reality a modified line as it ignored one baseline point in Bangladesh to favour Myanmar’s geographic argument of prolongation.⁴⁷

ITLOS pressed forward after invalidating previous case law on utilizing geology in determining baselines by adopted prior precedent from the Greenland versus Jan Mayen case in 1993 and onwards.⁴⁸ Using this precedent, ITLOS divided the delimitation into three parts; territorial sea, EEZ and CS, and finally the CS past 200 nm.⁴⁹ In determining the territorial sea, ITLOS created the principle that Bangladesh’s territorial sea around St. Martin’s island was to have full effect as it carried more legal weight than Myanmar’s EEZ or CS.⁵⁰ ITLOS also made law stating that the territorial sea of one state will prevail upon the EEZ of another state, thus adding another special circumstance to UNCLOS Art. 15.⁵¹ ITLOS did not stop there.

⁴⁷ *Dispute Concerning Delimitation Of The Maritime Boundary Between Bangladesh And Myanmar In The Bay Of Bengal* (ITLOS) Judgement (14 March 2012) para 241, 265, 434; Irini Papanicolopulu, ‘From the North Sea to the Bay of Bengal: Maritime Delimitation at the International Tribunal for the Law of the Sea’ (2012) <ejiltalk.org/from-the-north-sea-to-the-bay-of-bengal-maritime-delimitation-at-the-international-tribunal-for-the-law-of-thesea/> accessed 7 January 2019

⁴⁸ Irini Papanicolopulu, ‘From the North Sea to the Bay of Bengal: Maritime Delimitation at the International Tribunal for the Law of the Sea’ (2012) <ejiltalk.org/from-the-north-sea-to-the-bay-of-bengal-maritime-delimitation-at-the-international-tribunal-for-the-law-of-thesea/> accessed 7 January 2019. See *Maritime Delimitation in the Area between Greenland and Jan Mayen* Judgment I.C.J. Reports (1993) p. 38

⁴⁹ Irini Papanicolopulu, ‘From the North Sea to the Bay of Bengal: Maritime Delimitation at the International Tribunal for the Law of the Sea’ (2012) <ejiltalk.org/from-the-north-sea-to-the-bay-of-bengal-maritime-delimitation-at-the-international-tribunal-for-the-law-of-thesea/> accessed 7 January 2019

⁵⁰ *Dispute Concerning Delimitation Of The Maritime Boundary Between Bangladesh And Myanmar In The Bay Of Bengal* (ITLOS) Judgement (14 March 2012) para 169; Irini Papanicolopulu, ‘From the North Sea to the Bay of Bengal: Maritime Delimitation at the International Tribunal for the Law of the Sea’ (2012) <ejiltalk.org/from-the-north-sea-to-the-bay-of-bengal-maritime-delimitation-at-the-international-tribunal-for-the-law-of-thesea/> accessed 7 January 2019

⁵¹ *Dispute Concerning Delimitation Of The Maritime Boundary Between Bangladesh And Myanmar In The Bay Of Bengal* (ITLOS) Judgement (14 March 2012) para 169; Irini Papanicolopulu, ‘From the North Sea to the Bay of Bengal: Maritime Delimitation at the International Tribunal for the Law of the Sea’ (2012) <ejiltalk.org/from-the-north-sea-to-the-bay-of-bengal-maritime-delimitation-at-the-international-tribunal-for-the-law-of-thesea/> accessed 7 January 2019

It also created new rights by stating that a state may exercise rights in an area of valid but overlapping claims so long as the exercise of such rights does not inhibit the exercise of rights by the other state.⁵² UNCLOS has no provisions for the actual determination of an extended CS.⁵³ ITLOS held that the method for determining the boundary line for a CS beyond the 200nm limit was held to be equidistance, just as that for the territorial sea. ITLOS also altered the nature of “gray zones” or areas in which valid EEZ and extended CS claims overlap.⁵⁴ Instead of making a firm delimitation affecting both the CS and EEZ zones, the court stated that when the equidistance line must be deviated from, any extension of the CS into the EEZ of another state resulted in no change to the other states EEZ territory or its rights therein.⁵⁵ Instead, the state with the extended CS would only exercise rights that would not impede the exercise of the EEZ rights of the other state.⁵⁶

⁵² Irini Papanicolopulu, ‘From the North Sea to the Bay of Bengal: Maritime Delimitation at the International Tribunal for the Law of the Sea’ (2012) <ejiltalk.org/from-the-north-sea-to-the-bay-of-bengal-maritime-delimitation-at-the-international-tribunal-for-the-law-of-thesea/> accessed 7 January 2019

⁵³ Irini Papanicolopulu, ‘From the North Sea to the Bay of Bengal: Maritime Delimitation at the International Tribunal for the Law of the Sea’ (2012) <ejiltalk.org/from-the-north-sea-to-the-bay-of-bengal-maritime-delimitation-at-the-international-tribunal-for-the-law-of-thesea/> accessed 7 January 2019

⁵⁴ Irini Papanicolopulu, ‘From the North Sea to the Bay of Bengal: Maritime Delimitation at the International Tribunal for the Law of the Sea’ (2012) <ejiltalk.org/from-the-north-sea-to-the-bay-of-bengal-maritime-delimitation-at-the-international-tribunal-for-the-law-of-thesea/> accessed 7 January 2019

⁵⁵ *Dispute Concerning Delimitation Of The Maritime Boundary Between Bangladesh And Myanmar In The Bay Of Bengal* (ITLOS) Judgement (14 March 2012) para 474; Irini Papanicolopulu, ‘From the North Sea to the Bay of Bengal: Maritime Delimitation at the International Tribunal for the Law of the Sea’ (2012) <ejiltalk.org/from-the-north-sea-to-the-bay-of-bengal-maritime-delimitation-at-the-international-tribunal-for-the-law-of-thesea/> accessed 7 January 2019

⁵⁶ Irini Papanicolopulu, ‘From the North Sea to the Bay of Bengal: Maritime Delimitation at the International Tribunal for the Law of the Sea’ (2012) <ejiltalk.org/from-the-north-sea-to-the-bay-of-bengal-maritime-delimitation-at-the-international-tribunal-for-the-law-of-thesea/> accessed 7 January 2019

The final step in delimitation was the proportionality test.⁵⁷This test is also not clearly defined in UNCLOS and falls under special circumstance.⁵⁸ITLOS, in this case, arbitrarily decided that a ratio of 1:1.42 for coastline and 1:1.54 for sea area was not significantly disproportionate.⁵⁹ This willingness to attempt to clarify provisions in UNCLOS by creating new law and categories means that the development of case law, not the provisions in UNCLOS, are what is important in maritime delimitation disputes. Simply applying UNCLOS does not resolve conflict. Instead, while admittedly the provision for arbitration is part of UNCLOS, states must submit to the interpretive and law creation powers of courts like ITLOS to resolve conflicts. UNCLOS itself is not clear or comprehensive enough to eliminate conflicts.

Conclusion

Stable maritime borders necessitate stable land borders. Armed conflict over borders continues between and among states across the world. Several Central and South

⁵⁷ Irini Papanicolopulu, 'From the North Sea to the Bay of Bengal: Maritime Delimitation at the International Tribunal for the Law of the Sea' (2012)

ejiltalk.org/from-the-north-sea-to-the-bay-of-bengal-maritime-delimitation-at-the-international-tribunal-for-the-law-of-thesea/ accessed 7 January 2019

⁵⁸ UNCLOS [10 December 1982] Art. 15

⁵⁹ *Dispute Concerning Delimitation Of The Maritime Boundary Between Bangladesh And Myanmar In The Bay Of Bengal* (ITLOS) Judgement (14 March 2012) para 477; Irini Papanicolopulu, 'From the North Sea to the Bay of Bengal: Maritime Delimitation at the International Tribunal for the Law of the Sea' (2012)

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Asian nations have seemingly continual border disputes.⁶⁰ Other nations, like those in the Adriatic Sea region, undergo changes due to civil war or asserting self-determination.⁶¹

A warming climate is leading to elevated sea levels.⁶² As sea levels rise, the corresponding changes to the baselines encroach on the total land territory of a nation. As the sea claims more land, individual nations will seek to alter their maritime delimitation to counteract this loss. Developing states situated on small islands are particularly susceptible to this phenomenon.⁶³ Applying UNCLOS to these situations does not guarantee avoidance of conflict as UNCLOS itself has many exceptions and differing interpretations to fight over.

UNCLOS provisions include historic use exceptions⁶⁴ and various, competing scientific test to determine baselines.⁶⁵ Even if the rules were clear and unambiguous to

⁶⁰ Azam Ahmed and Habib Zahori, 'Afghan Ethnic Tensions Rise in Media and Politics' *New York Times* (19 February 2014) <<https://www.nytimes.com/2014/02/19/world/asia/afghan-ethnic-tensions-rise-in-media-and-politics.html>> accessed 15 January 2019 (highlighting the on-going tension between Afghanistan and Pakistan over the ethnic Pashtun region that straddles the border); Ananth Krishnan, 'For India And China, Uncertainty Is The Only Sure Thing About 2019' *South China Morning Post* (11 January 2019) <<https://www.scmp.com/week-asia/geopolitics/article/2181382/india-and-china-uncertainty-only-sure-thing-about-2019>> accessed 15 January 2019 (discussing the on-going disputes over the India-China border around the area of Doklam)

⁶¹ Gerald Blake and Duško Topalović, 'The Maritime Boundaries of the Adriatic Sea' (Clive Schofield and Mladen Klemenčić eds., International Boundaries Research Unit 1996) vol 1 number 8 <<https://www.dur.ac.uk/ibru/publications/view/?id=231>> accessed 10 January 2019

⁶² Tony G. Puthucherril, 'Climate Change, Sea Level Rise and Protecting Displaced Coastal Communities: Possible Solutions' (2012) *Global Journal of Comparative Law* 226

⁶³ Tony G. Puthucherril, 'Climate Change, Sea Level Rise and Protecting Displaced Coastal Communities: Possible Solutions' (2012) *Global Journal of Comparative Law* 226

⁶⁴ UNCLOS [10 December 1982] Art. 15; Irini Papanicolopulu, 'From the North Sea to the Bay of Bengal: Maritime Delimitation at the International Tribunal for the Law of the Sea' (2012) <ejiltalk.org/from-the-north-sea-to-the-bay-of-bengal-maritime-delimitation-at-the-international-tribunal-for-the-law-of-thesea/> accessed 7 January 2019

⁶⁵ Irini Papanicolopulu, 'From the North Sea to the Bay of Bengal: Maritime Delimitation at the International Tribunal for the Law of the Sea' (2012) <ejiltalk.org/from-the-north-sea-to-the-bay-of-bengal-maritime-delimitation-at-the-international-tribunal-for-the-law-of-thesea/> accessed 7 January 2019

all parties, UNCLOS does not have a clear provision for resolving instances where, according to UNCLOS rules, two or more neighbouring nations have valid but completing claims to the same sea territory.⁶⁶ Despite principles such as equidistant and equitable distribution, cases resolving these situations do not provide unanimous precedent.⁶⁷ Instead, like the Bangladesh versus Myanmar case, courts like ITLOS invalidate previous interpretations (geography, not geology), adopt interpretations that are not codified in UNCLOS (special circumstances and order of delimitation), and create new law when UNCLOS fails to provide any relevant rules to resolve maritime delimitation (such as calculating rights when extended CS overlaps with another state's EEZ).

Despite the aforementioned problems; scenario one with unstable borders and rising sea levels, and scenario two with rules left up to interpretation and unclear precedent- UNCLOS is the best option for maritime delimitation conflicts. While UNCLOS is not the Holy Grail for maritime delimitation, or the final olive branch of peace for sea territory resolution, it can be improved. UNCLOS's rules can be adapted. Additional conventions could clarify existing UNCLOS rules to limit matters for interpretation.

These conventions would also make UNCLOS a more complete and comprehensive solution to maritime delimitation conflicts by removing law making authority from courts such as the International Court of Justice (ICJ) and the International Tribunal for the Law of the Seas (ITLOS) by taking their precedent and binding it into black letter provisions within UNCLOS itself. This clarity of case law could potentially eliminate the need for such courts and should prevent different courts promulgating competing precedent. After all, if all the relevant rules were adopted into UNCLOS then

⁶⁶ Irini Papanicolopulu, 'From the North Sea to the Bay of Bengal: Maritime Delimitation at the International Tribunal for the Law of the Sea' (2012) <ejiltalk.org/from-the-north-sea-to-the-bay-of-bengal-maritime-delimitation-at-the-international-tribunal-for-the-law-of-thesea/> accessed 7 January 2019

⁶⁷ Irini Papanicolopulu, 'From the North Sea to the Bay of Bengal: Maritime Delimitation at the International Tribunal for the Law of the Sea' (2012) <ejiltalk.org/from-the-north-sea-to-the-bay-of-bengal-maritime-delimitation-at-the-international-tribunal-for-the-law-of-thesea/> accessed 7 January 2019

it would truly be comprehensive and there would be no need for courts to create new rules.

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