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ARTICLE

The 'Constitution for the Oceans'? The Law of the Sea Convention as a Living Treaty

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Abstract

It has been over 40 years since the United Nations Convention on the Law of the Sea (LOSC) was concluded and opened for signature, and 30 years since its entry into force. This has sparked renewed attention to the question of how the LOSC can continue to regulate new uses of, and threats to, our oceans. Some have sought to answer this question by framing the LOSC as a 'constitution' for the oceans, as a reassertion of its continued influence. This article shows that this provides a false sense of security. While the LOSC is one of the most impressive and significant treaties, it should not be regarded as a constitution. This article examines how the LOSC can remain an effective and enduring framework for the law of the sea, arguing that regarding it as a constitution does not necessarily contribute to that goal. Instead, it proposes a new approach to the treatment of the LOSC which attempts to explain how best it can serve as a 'living treaty' and as a framework that is truly capable of guiding legal responses to new opportunities and challenges at sea.

Keywords: public international law; law of the sea; United Nations Convention on the Law of the Sea; constitutions; treaty interpretation

1. Introduction

1.1. The United Nations Convention on the Law of the Sea

In 1973, the United Nations (UN) General Assembly (UNGA) set States the ambitious task of adopting a single convention 'dealing with *all* matters relating to the law of the sea … bearing in mind that the problems of ocean space are closely interrelated and need to be considered as a whole'.[1] This was something two previous UN Conferences had failed to achieve, but a third Conference (UNCLOS III) was convened and succeeded, producing the UN Convention on the Law of the Sea (LOSC or Convention).[2] At the final session, the President of UNCLOS III,

[1] UNGA Res 3067 (XXVIII) (16 November 1973) UN Doc A/RES/3067 (XXVIII) (emphasis added).

[2] United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 397 (LOSC); see further MD Evans and R Lewis, 'The Law of the Sea' in MD Evans (ed), *International Law* (6th edn, OUP 2024).

Tommy Koh, claimed that the LOSC was 'a constitution for the oceans which will stand the test of time'.[3] Ever since, this claim has been widely and routinely repeated by States,[4] the European Union (EU),[5] UN Secretaries-General (UNSG),[6] the International Maritime Organization (IMO),[7] in international courts and tribunals[8] and by some leading scholars on the law of the sea.[9]

The LOSC is an impressive convention. It is comprised of 320 Articles, 17 Parts, nine Annexes and two Implementing Agreements in force, with a third recently adopted on 19 June 2023—the Agreement on the Conservation and Sustainable Use of Marine Biological Diversity of Areas beyond National Jurisdiction, commonly referred to as the BBNJ Agreement.[10] The LOSC governs a range of activities and

[3] T Koh, 'A Constitution for the Oceans' (Third United Nations Conference on the Law of the Sea, Montego Bay, 11 December 1982) <https://www.un.org/depts/los/convention_agreements/texts/koh_english.pdf>. It is not clear who first coined the phrase but, as early as 1975, Borgese considered that the LOSC (then under negotiation) would become a 'constitution for the oceans': see E Borgese, 'A Constitution for the Oceans' in E Borgese and D Krieger (eds), *The Tides of Change: Peace, Pollution, and Potential of the Oceans* (Mason Carter 1975).

[4] Meeting of States Parties to LOSC (SPLOS), 'Report of the Thirty-Second Meeting of States Parties' (5 July 2022) UN Doc SPLOS/32/15, para 79. States have repeated this claim before the UNGA and the UNSC: see, e.g. UNGA, 'Oceans and the Law of the Sea' (7 December 2021) UN Doc A/76/PV.46; UNSC, 'Letter dated 12 August 2021 from the President of the Security Council addressed to the Secretary-General and the Permanent Representatives of the Members of the Security Council' (12 August 2021) UN Doc S/2021/722.

[5] 'UNCLOS: Statement by High Representative Josep Borrell and Commissioner for Environment, Oceans and Fisheries Virginijus Sinkevičius on the 40th Anniversary of the United Nations Convention on the Law of the Sea' (EU External Action Service, 11 December 2022) <https://www.eeas.europa.eu/eeas/unclos-statement-high-representative-josep-borrell-and-commissioner-environment-oceans-and_en>.

[6] UNGA, 'Report of the Secretary-General: Oceans and the Law of the Sea' (9 September 2022) UN Doc A/77/331, para 6: 'The legal framework for all activities in the oceans and seas is well-established in the United Nations Convention on the Law of the Sea, the world's "constitution for the oceans", with 2022 marking the fortieth anniversary of its adoption.' See also UNGA, 'Oceans and the Law of the Sea: Commemoration of the Twentieth Anniversary of the Opening for Signature of the 1982 United Nations Convention on the Law of the Sea' (9 December 2002) UN Doc A/57/PV.70, 2.

[7] International Maritime Organization (IMO), 'UNCLOS and IMO – 40 Years of Cooperation' (Press Release, 30 November 2022) <https://www.imo.org/en/MediaCentre/Pages/WhatsNew-1796.aspx>.

[8] See, e.g. *South China Sea Arbitration (Republic of the Philippines v the People's Republic of China)*, PCA Case No 2013-19 (Award of 12 July 2016) para 4; *Southern Bluefin Tuna Cases (Australia v Japan; New Zealand v Japan)* (Award on Jurisdiction and Admissibility of 4 August 2000) ITLOS Reports 2000, para 26 (Separate Opinion of Justice Sir Kenneth Keith).

[9] See, e.g. S Scott, 'The LOS Convention as a Constitutional Regime of the Oceans' in A Oude Elferink (ed), *Stability and Change in the Law of the Sea: The Role of the LOS Convention* (Brill 2005); R Churchill, V Lowe and A Sander, *The Law of the Sea* (Manchester University Press 2022) 44; RR Churchill, 'The 1982 United Nations Convention on the Law of the Sea' in DR Rothwell et al (eds), *The Oxford Handbook of the Law of the Sea* (OUP 2015); R Barnes, D Freestone and D Ong, 'The Law of the Sea: Progress and Prospects' and A Boyle, 'Further Development of the 1982 Convention on the Law of the Sea: Mechanisms for Change' in D Freestone, R Barnes and D Ong (eds), *The Law of the Sea: Progress and Prospects* (OUP 2006) 40–62: 'the term "constitution for the oceans" is not inappropriate'; K Sellars, *A 'Constitution for the Oceans': The Long Hard Road to the UN Convention on the Law of the Sea* (CUP 2025). In respect of academic circles, see, e.g. 'Symposium: The "Constitution for the Oceans" in Light of Emerging Challenges' (International Foundation for the Law of the Sea and Korea Maritime Institute, Hamburg, 21–22 September 2024).

[10] Agreement under the United Nations Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas beyond National Jurisdiction (adopted 19 June 2023, opened for signature 20 September 2023) (BBNJ Agreement) <https://www.un.org/bbnj/>.

uses of the sea, from fixing the maximum breadth of the territorial sea to 12 nautical miles (nm) (a crucial issue which had plagued the discipline for decades prior) through to the codification of navigational rights and freedoms, and from the protection and preservation of the marine environment to the regulation of marine scientific research. It created (what were at the time) new legal regimes that have since become permanent fixtures in the law of the sea.[11] It established bodies competent to address several aspects of the LOSC, including the Commission on the Limits of the Continental Shelf, the International Seabed Authority and the International Tribunal for the Law of the Sea (ITLOS). It also devised a compulsory dispute settlement procedure for disputes arising over matters covered by the LOSC—which is, quite rightly, regarded as a uniquely 'remarkable' contribution to the peaceful order of our oceans.[12]

Chief among the methods employed at UNCLOS III was the 'package deal approach',[13] meaning that a single convention was negotiated and presented for ratification as a whole and States were denied the opportunity to ratify parts of the agreed text selectively. As a result, negotiations were conducted in a way which sought to achieve broad consensus and compromise across many competing interests.[14] However, this approach caused difficulties for ratification. The LOSC now enjoys broad international acceptance with 170 States Parties, but it took 12 years for it to enter into force. Many industrialised States expressed reluctance to ratify the Convention due to concerns that the provisions of Part XI LOSC relating to deep seabed mining were overly restrictive and unfavourable to market economies. A 1994 Implementation Agreement essentially rewriting Part XI removed this barrier to ratification,[15] finally allowing the Convention to enter into force.[16]

1.2. Ensuring the LOSC's continued relevance and effectiveness

Anything which claims to be a comprehensive legal framework covering over 70 per cent of the planet can be nothing other than influential. However, this statistic gives pause for thought. How can a single treaty, however extensive, truly address the full range of activities and uses of the oceans? And with it now being 42 years since the LOSC was opened for signature and 30 years since its entry into force, the question whether it remains fit for purpose today inevitably emerges.[17] It is becoming

[11] Including the Exclusive Economic Zone in pt V LOSC giving coastal States the exclusive right to explore and exploit resources up to a maximum breadth of 200 nm; the regime of transit passage through international straits for navigation (pt III LOSC); and a regime applicable to 'archipelagic States' and their maritime entitlements (pt IV LOSC).

[12] See, e.g. BH Oxman, 'Courts and Tribunals: The ICJ, ITLOS, and Arbitral Tribunals' in Rothwell et al (n 9).

[13] Churchill, Lowe and Sander (n 9) 22–25; Boyle (n 9).

[14] M Nordquist (ed), *United Nations Convention on the Law of the Sea 1982: A Commentary* (Martinus Nijhoff 1985) vol 1, 29–134 (on the negotiation strategy of UNCLOS III).

[15] Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 28 July 1996) 1836 UNTS 42.

[16] Churchill (n 9) 26–27.

[17] This was the subject of a major inquiry by the United Kingdom (UK) House of Lords International Relations and Defence Committee (IRDC). While its report recognised that the LOSC provides stability,

increasingly clear that new uses of the oceans, innovations in maritime technology and modern demands of ocean governance are beginning to put the LOSC under strain.[18] This article seeks to address these questions in examining the claim that the Convention is a living treaty. As has been sagely warned: 'The continued relevance of the LOSC will first and foremost be determined by its capacity to deal with new developments relating to the oceans and human activities taking place in them.'[19] This is because the LOSC is highly unlikely to be renegotiated and even less likely to be amended following negotiations, given that what might constitute an improvement in one area of the LOSC for one State would doubtless be considered an unravelling of the Convention for another.

1.3. The argument

The LOSC is here to stay and given it is widely ratified and accepted in practice, the goal is clear: to integrate novel considerations into its framework where appropriate and possible and, in doing so, live up to another long-held claim that it is a 'living treaty' capable of addressing novel circumstances. This article argues that greater clarity in the characterisation of the LOSC is needed to achieve this. Section 2 challenges the claim that the LOSC is a 'constitution' and questions the analogy's effectiveness as an analytical tool.[20] It questions the usefulness of analogising treaties to constitutions in international law generally, and it argues that treating the LOSC as a constitution is not only inaccurate, but also potentially hinders helpful approaches to the interpretation of the Convention and its integration with other areas of international law and encourages unhelpful ones. Instead of being perceived as the so-called 'constitution for the oceans', it is better to view the LOSC simply as one of the legal elements which, together, are constitutive of the modern law of the sea. The article demonstrates the extent to which the continued efficacy of the LOSC hinges on regime interaction and systemic treaty interpretation.[21] Such techniques depend, however, on developing an approach to

many of its gaps and shortcomings were highlighted: see IRDC, *UNCLOS: The Law of the Sea in the 21st Century* (HL 2021–2022, 159–II).

[18] R Lewis, 'UK House of Lords UNCLOS Inquiry: A Significant Intervention' (*Opinio Juris*, 17 March 2022) <http://opiniojuris.org/2022/03/17/uk-house-of-lords-unclos-inquiry-a-significant-intervention/>.

[19] DR Rothwell et al, 'Charting the Future for the Law of the Sea' in Rothwell et al (n 9).

[20] In contrast to K Scott, 'The LOSC: "A Constitution for the Oceans" in the Anthropocene?' (2023) 41 AustYBIL 269, this article demonstrates why the LOSC is not a constitution. However, Scott similarly criticises the analogy, concluding that it has become a 'straitjacket' preventing serious exploration of transformational change which, she convincingly argues, is needed in response to the environmental and geopolitical crises of today and tomorrow. There are, however, fundamental differences between the theory proposed here and Scott's. While Scott's call for transformational change is convincing, the LOSC is here to stay and the approach proposed here (while also building on the rejection of the constitution analogy) highlights how advances may be made within the existing framework, to prevent it from becoming a 'straitjacket'.

[21] See, e.g. C McLachlan, 'The Principle of Systemic Interpretation and Article 31(3)(C) of the Vienna Convention' (2005) 54 ICLQ 279; C McLachlan, *The Principle of Systemic Integration in International Law* (OUP 2024); O Fauchald and A Nollkaemper (eds), *The Practice of International and National Courts and the (De-)Fragmentation of International Law* (Hart 2012); D French, 'Treaty Interpretation and the Incorporation of Extraneous Legal Rules' (2006) 55 ICLQ 281.

the law of the sea of the kind set out in this article rather than as a constitutional framework premised on supremacies and hierarchies.

The article argues that it is equally important to identify the other hitherto hidden matrix of factors and considerations which, while extraneous to the so-called constitution, make an impact on its interpretation (Section 3) and interaction with other areas of international law (Section 4). It is shown that, in practice, it is this broader matrix of factors outside the four corners of the LOSC—rather than anything inherently 'constitutional' within it—which can enable it to respond to new demands and incorporate innovative approaches to the law of the sea. These wider factors can breathe new life into the Convention, rendering it a living treaty capable of responding to change and integrating more fully with other fields of international law. The Conclusion (Section 5) reviews some of the broader lessons to be learned for both the law of the sea and international law. It argues that achieving harmony across international law, in the face of its increasing specialisation, means abandoning constitutional aspirations—whether real or perceived—of any element of any one of its specialised regimes.

2. Testing the constitutional analogy

2.1. Nature of the claim

There are few absolute claims that the LOSC is a genuine legal constitution—reflective of the doubt surrounding the characterisation. Nevertheless, the analogy continues to be employed both in a political sense and as an analytical tool to describe the framework role that the LOSC plays for the law of the sea. In 1982, Ambassador Koh, it might be suggested, had good reason for insisting that a text which had been negotiated for years finally reflected a 'constitution for the oceans'. At the time of his statement, the LOSC had been opened for signature and some 60 States needed to ratify it before it could enter into force. In truth, pessimism was in the air: not all were happy with the text. As explained above, it took radical change in the form of the 1994 Implementation Agreement to prompt States to ratify the LOSC. The claim that the LOSC is a constitution for the oceans continues to be repeated today, even by States who have already ratified the LOSC, and not only in the context of encouraging accession by those few States yet to do so.

The constitutional claim can also be explained as a response to threats to the LOSC's continuing authority. It has become more prominent as some States have begun to push the envelope of what is permissible under the Convention or appeal to alternative bases to justify their behaviour (such as historic rights or local customary practices). In a Meeting of States Parties to the LOSC in July 2022 it was noted that:

> Many delegations and a group of States took the opportunity to reaffirm the enduring role of the Convention as a 'constitution for the oceans' establishing the legal framework within which all activities in the oceans and seas must be carried out. The universal character of the Convention was underscored, with some delegations emphasizing that many of its provisions codified customary international law.[22]

[22] SPLOS (n 4) para 79.

On the fortieth anniversary of its adoption later that year the UNSG emphasised that '[t]he legal framework for *all* activities in the oceans and seas is well established in the United Nations Convention on the Law of the Sea, the world's "constitution for the oceans"'.[23] These sentiments were widely repeated in the UNGA sessions of 8–9 December 2022 celebrating the fortieth anniversary.[24] The 'universal character' of the LOSC has also been endorsed in several UNGA resolutions.[25]

The UN Security Council (UNSC) has also previously 'reaffirm[ed] that international law, as reflected in [the LOSC], sets out the legal framework within which all activities in the oceans and seas must be carried out'.[26] However, reflecting the increasing pressure that the LOSC is under, while this phrase was eventually included in UNSC Resolution 2634 in 2022, China questioned its utility, finding it necessary to state that:

> The Convention is not the entirety of international law. The eighth preambular paragraph of the Convention clearly stipulates that matters not regulated by the Convention continue to be governed by the rules and principles of general international law. That shows clearly that the Convention itself recognizes that its scope of application is limited. It does not, and cannot possibly, regulate all maritime issues. … With human activities increasing in the ocean, the international community needs to develop new rules for the law of the sea.[27]

Paradoxically, rather than reflecting an assured position, claims that the LOSC continues to provide a comprehensive stable framework for the law of the sea should be read in the context that they are employed: in response to increasing challenges precisely to this idea. While some find solace in the constitutional claim as a reassertion of the LOSC's influence, this article shows that this provides a false

[23] UNGA, 'Report of the Secretary-General: Oceans and the Law of the Sea' (n 6) para 6 (emphasis added).

[24] See, e.g. Permanent Mission of Singapore to the UN, 'Statement by Mr Nathaniel Khng to the General Assembly' (New York, 8 December 2022) para 2 <https://estatements.unmeetings.org/estatements/10.0010/20221208/k7a1T8gXAeEB/KvghySKP3nl6_en.pdf>: 'UNCLOS is the constitution for the oceans. It sets out the legal framework within which all activities in the oceans and seas must be carried out'; Delegation of the European Union to the UN, 'Statement on Behalf of the European Union and Its Member States' (New York, 8 December 2022) <https://estatements.unmeetings.org/estatements/10.0010/20221208/k7a1T8gXAeEB/UYdgYj6fSoga_en.pdf>.

[25] See, e.g. UNGA Res 77/248 (9 January 2023) UN Doc A/RES/77/248, preamble; UNGA Res 37/66 (3 December 1982) UN Doc A/RES/37/66, para 2, in which the LOSC was described as the 'new legal regime for the uses of the sea and its resources'; UNGA Res 50/23 (22 December 1995) UN Doc A/RES/50/23, preamble; UNGA Res 54/33 (18 January 2000) UN Doc A/RES/54/33, preamble, states that the LOSC 'sets out the legal framework within which all activities in the oceans and seas must be carried out, and with which these activities should be consistent'; UNGA Res 53/32 (6 January 1999) UN Doc A/RES/53/32, preamble, 'emphasiz[ed] the universal character of the Convention and its fundamental importance or the maintenance and strengthening of international peace and security, as well as for the sustainable development of the oceans and seas'. This was repeated in UNGA Res 56/12 (13 December 2001) UN Doc A/RES/56/12, preamble.

[26] UNSC Res 2634 (31 May 2022) UN Doc S/RES/2634 concerned the Gulf of Guinea. The UNSC had previously 'recalled' the same when suppressing illicit crude oil exports from Libya: see UNSC Res 2146 (19 March 2014) UN Doc S/RES/2146, as well as piracy off Somalia's coast before that: see UNSC Res 1816 (2 June 2008) UN Doc S/RES/1816.

[27] UNSC, 'Peace and Security in Africa' (31 May 2022) UN Doc S/PV.9050, 3.

sense of security and that a better approach should be adopted. For a start, as the following Section 2.2 shows, the LOSC cannot correctly be described as a constitution. Further, even where the LOSC is merely compared to, rather than claimed to be, a constitution, this comparison has its limits: Section 2.3 questions whether these claimed resemblances are constitutional and Section 2.4 doubts that treaties can obtain constitutional status in international law generally.

2.2. Core features of constitutions

While there is no single agreed definition of a constitution, it is agreed that, at a minimum, constitutions establish a legal order,[28] introduce the structural rules of the legal system and allocate the powers and duties of subjects and institutions.[29] Consequently, constitutions are more familiar in the municipal context, where they perform a foundational role within the legal system and the governance of the State.[30] This is the so-called 'thin' definition of a constitution as establishing the legal order of a given system of governance.[31]

The 'thick' approach is broader.[32] Raz identified seven elements which must be present.[33] First, genuine constitutions must do everything that the thin approach does but a second, additional requirement is that they are stable and a period of constitutional stability is generated by them. Third, they are founded by one or more written documents. Fourth, constitutional laws are superior to other laws and conflicting laws are invalidated. Fifth, they are justiciable; that is, courts can decide upon the constitutionality of subjects' behaviour and can determine that an act is unconstitutional and without legal validity. Sixth, they are entrenched in the legal system, purposely difficult to amend and even harder to revoke. Seventh, a constitution's provisions should 'include principles of government … that are generally held to express the common beliefs of the population about the way their society should be governed'.[34]

Undoubtedly, the LOSC possesses some of the additional features required by the thick definition. Its provisions reflect common approaches among States as to how

[28] The term is also used more widely, for example, to describe the founding document of an organ including international organisations, courts and tribunals.

[29] For historic constitutional perspectives, see Y Hasebe and C Pinelli, 'Constitutions' in M Tushnet, T Fleiner and C Saunders, *Routledge Handbook of Constitutional Law* (Routledge 2012); M Claes, 'Constitutional Law' in JM Smit, *Elgar Encyclopedia of Comparative Law* (2nd edn, Elgar 2012) 223.

[30] L Alexander (ed), *Constitutionalism: Philosophical Foundations* (CUP 1998); M Rosenfeld and A Sajó, *The Oxford Handbook of Comparative Constitutional Law* (OUP 2012); Z Elkins, T Ginsburg and J Melton, *The Endurance of National Constitutions* (CUP 2009); SE Finer and V Bogdanor, *Comparing Constitutions* (OUP 1995). For an excellent explanation of the Constitution of the United States, see M Tushnet, MA Graber and S Levinson (eds), *The Oxford Handbook of the US Constitution* (OUP 2015).

[31] J Raz, 'On the Authority and Interpretations of Constitutions. Some Preliminaries' in Alexander ibid 152, 153: 'simply the law that establishes and regulates the main organs of government, their constitution and powers, and *ipso facto* it includes law that establishes the general principles under which the country is governed: democracy, if it establishes democratic organs; federalism, if it establishes a federal structure; and so on'.

[32] Elkins, Ginsburg and Melton (n 30) ch 3, identify three core functions incorporating Raz's 'thin' and 'thick' conceptions. See further, Alexander ibid 38–39.

[33] Raz (n 31).

[34] ibid 153–54.

the ocean should be governed. The LOSC is now entrenched, its formal amendment mechanism is restrictive and States have little appetite to unravel the package of tradeoffs accomplished in UNCLOS III.[35] This has resulted in a period of relative legal stability. Many of its provisions have attained customary status and this will only increase. The LOSC is also justiciable: it created its own tribunal and its provisions are frequently the subject of inter-State litigation.

The LOSC and its implementing agreements are foundational legal documents of the modern law of the sea. However, the LOSC does not possess two of the most essential constitutional elements: it neither provides for a constitutional structure of superior laws with invalidating effects, nor can it be said that the LOSC establishes the legal order of the sea. It is not a constitution reflecting a municipal kind of legal architecture according to which other norms can be invalidated on the grounds of them being unconstitutional. Instead, the LOSC is better thought of as one (albeit crucial) element in understanding the applicable law.

The sources of the law of the sea extend beyond the LOSC and include a variety of customary norms (not only those codified by the LOSC), other multilateral and bilateral international treaties,[36] resolutions adopted by UN bodies[37] and an ever-growing body of soft laws and guidance that are issued by specialised organisations.[38] For example, the law applicable to armed conflicts at sea is contained in the customary law of armed force in international law and in the San Remo Manual on International Law Applicable to Armed Conflicts at Sea (San Remo Manual);[39] marine biodiversity is governed by the UN Convention on Biological Diversity;[40] and the protection of underwater heritage is addressed in the 2001 UN Educational, Scientific and Cultural Organization Convention on the Protection of the Underwater Cultural Heritage.[41] It is not that the LOSC has nothing to say on these matters, but that more exact, contemporary and detailed guidance on the applicable law is provided elsewhere and shapes the understanding of States' obligations under the LOSC.

The LOSC does provide a framework within which these other sources apply, but technically they do not owe their existence to the LOSC, although it can be seen to

[35] Scott (n 20) helpfully outlines 12 mechanisms by which the LOSC can be updated both formally and informally.

[36] See, e.g. the International Convention for the Safety of Life at Sea (adopted 1 November 1974, entered into force 25 May 1980) 1184 UNTS 2, which predates the LOSC and currently has 168 States Parties.

[37] These include UNGA and UNSC resolutions, especially the latter in the context of suppressing piracy off Somalia's coasts and which essentially applied a novel definition of 'piratical acts' to that contained in the LOSC.

[38] See, e.g. the various IMO instruments discussed in Section 4.2.

[39] Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) (UN Charter) arts 2(4) (prohibition of the threat or use of force) and 51 (self-defence). The San Remo Manual on International Law Applicable to Armed Conflicts at Sea (International Committee of the Red Cross, 12 June 1994) is considered to identify many customary rules on maritime warfare: see J Kraska, 'Military Operations' in Rothwell et al (n 9) 866.

[40] United Nations Convention on Biological Diversity (adopted 5 June 1992, entered into force 29 December 1993) 1760 UNTS 79.

[41] United Nations Convention on the Protection of the Underwater Cultural Heritage (adopted 2 November 2001, entered into force 2 January 2009) 2562 UNTS 3.

have had a considerable impact on their content, just as the LOSC itself was once shaped by norms, customary or otherwise, which pre-dated it.

2.3. The LOSC's resemblance to a constitution

In the absence of the core elements of a constitution, the constitutional analogy relies more upon the identification of other features of the LOSC which merely resemble a constitution.[42] For example, Churchill, Lowe and Sander, in their treatise on the law of the sea, conclude that:

> Many of the features of the Convention bear out [its description as a constitution]: its comprehensive scope; its framework nature in relation to many issues; its near-universal application, with 85 per cent of UN members being parties, and those that are not parties being bound by many of its provisions on the basis of customary international law; its generally superior status to other sources of the law of the sea; the difficulty of its formal amendment; and, finally, its considerable flexibility which has permitted its development and adaptation to changing circumstances.[43]

Others have reached similar conclusions for similar reasons. Scott observes that the LOSC also generates a 'system of governance', establishes bodies and organs and provides for a relatively comprehensive system of compulsory dispute settlement.[44] She also notes that constitutions emerge from a 'constitutional moment'—i.e. they emerge from struggle and chaos to establish a comprehensive system of order and legality. Scott concludes that this characterises the generation and effects of the LOSC, which resolved many intractable issues which had long been the cause of much contention among States.

However, are these features exclusively constitutional in nature? First, as concerns the comprehensiveness of the LOSC, Section 2.2 noted that the law of the sea also stems from other sources of law. Furthermore, it is not obvious that comprehensiveness is distinctly constitutional. Granted, constitutions establish a legal system, but this does not necessarily imply substantive comprehensiveness of the kind that the LOSC's constitutional claim seems to assert.[45]

Second, as concerns the LOSC's universality, it enjoys broad ratification and incorporates many customary rules which are binding on all States, not only States Parties. Owing to its significance, the LOSC has also generated customary laws of the sea. States and international courts and tribunals consider that many of its provisions reflect customary law, and this shows no signs of abating.[46] It goes without saying, however, that the universality of customary norms finds its basis in general international law and not the LOSC. In any event, the real benefit of universality is not the rigid and dogmatic application of the provisions of a text. More meaningful universality and the longevity of the LOSC can, instead, be

[42] K Scott (n 20) 274–75 seems to reach a similar conclusion but concedes that S Scott's (n 9) analysis of the LOSC as a constitution is 'compelling'.

[43] Churchill, Lowe and Sander (n 9) 43.

[44] Scott (n 9) 15–16.

[45] Scott (n 20) 273.

[46] Churchill, Lowe and Sander (n 9) 35–36; JA Roach, 'Today's Customary International Law of the Sea' (2014) 45 ODILA 239.

found by developing an approach centred less on the constitutionality of a given text, and more on developing an understanding of the legal principles which were incorporated into it. These ideas are explained in Section 4.

Third, the claim that the LOSC is 'generally superior to other sources of the law of the sea' is accurate, though considerably weaker than the superiority which genuine constitutions have over other norms in a domestic legal system. Article 311(2) LOSC states that the Convention 'shall not alter the rights and obligations of States Parties which arise from other agreements *compatible* with this Convention'.[47] This is no article of superior effect[48] and the LOSC has been disapplied where necessary in practice. The LOSC is a peacetime treaty, meaning that it does not apply during an armed conflict. The law of naval armed conflict applies instead, being the customary principles of international humanitarian law, which the San Remo Manual is considered to reflect.

Moreover, jus cogens norms permit no derogation and States are required to cooperate to bring to an end any serious derogation from these. This should mean that the LOSC would have to be suspended from operation in cases where its provisions prevent or impede compliance with such norms. Slavery and torture, for example, can occur just as much at sea as they can on land, yet the LOSC only addresses the first of these and merely states that '[e]very State shall take effective measures to prevent and punish the transport of slaves in ships authorized to fly its flag'.[49] The obligation is much wider than that: States have an obligation to cooperate to end slavery and torture wherever they find it, on board both vessels that fly their flag and those that do not. Should a breach of a jus cogens norm be suspected, then the principle of the exclusive jurisdiction of the flag State over vessels which fly their flag[50] would need to be disapplied. Indeed, the navigational freedoms of the suspected vessel, albeit clearly granted by the LOSC, would also need to be disapplied to permit third States to board, inspect and take any necessary action against the vessel and those individuals involved.

2.4. Treaties as constitutions under international law

A more helpful use of the constitutional analogy in the international context has focused not on individual treaties themselves but, rather, on the broader international legal system. A body of literature has developed the concept of an emerging 'international constitutional order',[51] but it is quite another thing to

[47] LOSC (n 2) art 311(2) (emphasis added).

[48] See, e.g. UN Charter (n 39) art 103, which states that: 'In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.'

[49] LOSC (n 2) art 99.

[50] ibid art 92.

[51] See, e.g. E de Wet, 'The International Constitutional Order' (2006) 55 ICLQ 51; N Tsagourias (ed), *Transnational Constitutionalism* (CUP 2009); JL Dunoff and JP Trachtman (eds), *Ruling the World? Constitutionalism, International Law, and Global Governance* (CUP 2009); JL Cohen, *Globalization and Sovereignty: Rethinking Legality, Legitimacy, and Constitutionalism* (CUP 2012); D Lefkowitz, 'Is a Global Constitutional Order Possible, or Even Desirable?' (*Völkerrechtsblog*, 8 November 2021) <https://voelkerrechtsblog.org/de/is-a-global-constitutional-order-possible-or-even-desirable/>.

claim that a particular treaty is a constitution.[52] This is because the variety of the sources of international law makes it hard to identify where a constitutional document could come from. International conventions bind only those States that are party to them: how, then, can a single treaty be a constitution with universal application?[53] Even if all States agree to be bound by such a constitution, how could this apply to emerging States or indeed all subjects of international law in the same way as constitutions do to all legal persons in municipal systems? Meanwhile, customary laws are concerned more with substantive rules and less with the technical rules which would be needed to establish a system of governance.

Furthermore, international law is uniquely horizontal in nature without a system of governance of the kind constituted by national constitutions. In such a decentralised legal order, who has the authority to establish a constitution? In the sense that a constitution can generally trace its origins to one or more constitutional documents which have been generated between (and typically signed by) representatives of the people (the ruled) and their government (the rulers), who in international law are the 'people' and who is the 'government'? Sir John Laws wrote that 'the term "constitution" [means] that set of laws which in a sovereign State establish the relationship between the ruler and the ruled'.[54] Constitutions thus provide the transfer of power from the community to the government and its institutions—classically identified as a social or political 'contract'.[55]

The idea that a treaty such as the LOSC can be proximate to a constitution might well be true, but it is another thing for it to be one. If we are applying the term 'constitution' to signify a foundational document against which the legitimacy or legality of any action can be tested, challenged and ultimately invalidated, then there is little scope for constitutions in international law as it is currently conceived. The LOSC has quasi-constitutional features in what it proposes to achieve, but not in terms of what it actually is. It is constitutive not in terms of being a constitution-proper, but in terms of setting forth a framework establishing common approaches to the subject and prescribing broad relational and legal objectives that States agree to prosecute collectively.[56] The LOSC is a framework treaty concerned with technically defining legal concepts and with establishing a broader legal architecture and the general rules and principles that are meant to influence future legal developments—i.e. a common frame of reference.

[52] The UN Charter has also been given this characterisation: see, e.g. JL Brierly, 'The Covenant and the Charter' (1946) 23 BYBIL 83; J Habermas, *The Divided West* (Polity Press 2008) Ch 8; B Fassbender, *The United Nations Charter as the Constitution of the International Community* (Martinus Nijhoff 2009).

[53] Exceptionally, some conventions can have an impact on third States: see Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (VCLT) section 4.

[54] J Laws, 'The Good Constitution' (2012) 71 CLJ 567.

[55] For classic expressions of this, see, e.g. J Locke, *Second Treatise of Government* (1690); J Rousseau, *The Social Contract* (1762).

[56] For the same conclusion regarding the UN Charter, see I Johnstone, 'The UN Charter and Its Evolution' in S Chesterman (ed), *The Oxford Handbook of the United Nations Treaties* (OUP 2019) 23, concluding that the UN Charter is 'somewhere between an ordinary treaty and global constitution'.

Framework treaties possess open-textured provisions that impliedly or even expressly delegate clarifying broad, incomplete or purposely vague provisions to subsequent interpretive exercises. The framework nature of the LOSC is often relied on when attempting to explain how it can be responsive to change. The idea is that the LOSC's provisions are capable of being interpreted in dynamic ways to address new challenges, being further developed and clarified through subsequent legal supplements—whether that be through new treaties, implementing agreements or other soft law innovations. A clear example of this is the new BBNJ Agreement. The LOSC established a regime for the regulation of 'resources' in 'the Area'—the seabed in areas beyond national jurisdiction—but limited its application essentially to minerals and not living organisms. This new agreement is designed to provide that which the LOSC did not: a clarification of the rights and duties of States in respect of marine biodiversity and marine genetic resources in areas beyond national jurisdiction. In addition, the LOSC itself identifies international organisations that are 'competent' to develop further measures to implement many of its provisions.[57] The IMO, for example, develops rules and standards which assist States to implement security, environmental and safety standards of international shipping.

It is therefore evident that the LOSC's framework nature does not make it a constitution. In fact, as is explained below, the interpretation of the LOSC and its integration with other areas of international law have relied on the text of the LOSC *not* possessing constitutional superiority. Section 3 demonstrates this by focusing on the ways that the LOSC has had to be interpreted in dynamic ways to meet new challenges, which has relied as much on the text as it has on other factors which, while not expressly within the LOSC's text, influence its application. Section 4 examines the instances when the law of the sea has needed to integrate approaches from other areas of international law into its body of rules. Again, it shows that complementarity, tolerance and the principles underlying the LOSC guide the process, rather than notions of constitutional superiority.

3. The wider matrix (I): interpreting the LOSC as a 'living treaty'

3.1. The unsuitability of constitutional and textual approaches

Ultimately, the LOSC is a treaty, and the ordinary rules of interpretation cannot be suspended even if it is described as a constitution. However, these rules are permissive enough for a variety of approaches to be adopted. Yet, approaches to the LOSC's interpretation must be developed with its background, negotiating history, wide coverage, broad acceptance and the difficulty of its amendment in mind. Together, these suggest which approaches are effective and which are not. This section shows that constitutional interpretation and textualism are ill-suited to the LOSC. Instead, what the LOSC has come to rely on is a wealth of hidden factors beyond the text to inform its meaning and which can facilitate its systemic

[57] See, e.g LOSC (n 2) arts 22, 41, 53 regarding traffic separation schemes in territorial sea, straits used for international navigation, and archipelagic sea lane passage, respectively, and art 211 regarding pollution from vessels.

integration within international law. Section 3.2 identifies some of these factors while recognising its purpose is not to examine all such factors but to illustrate their impact in practice. These factors relate to general principles of treaty interpretation but allow for more specific law-of-the-sea reasoning to apply.

Interpretation bears a considerable burden in applying constitutional provisions to new situations. How this is done is the subject of considerable and fierce debate in the municipal context because 'legitimate interpretation is difficult to distinguish from illegitimate change'.[58] Consequently, approaches to the interpretation of constitutional texts become polarised. On the one hand is an originalist position: 'the view that the Constitution should be interpreted to mean what it originally meant'.[59] On the other is the non-originalist position: the view that the Constitution should be interpreted in light of the meaning of the text today and be responsive to the changes which have taken place since the text was written.[60] Doubtless these are simplifications, but they avoid wading into an unnecessarily complex issue. Indeed, this is precisely the point: unnecessarily importing ill-defined, disputed and frankly unhelpful approaches from one legal system into another should be avoided.[61]

It is inevitable that a text endowed with apparent constitutional status comes to dominate discussion, scholarship and judicial opinions. However, the provisions of the LOSC simply do not provide all the answers to every maritime issue on their own, and focusing too closely on the text runs the risk of developing unsuitable legal approaches. Understanding the aims of the text sheds light on its meaning: what issue did the text try to solve? Equally important is an understanding of how the words are interpreted and applied in practice. Cognisance of the practical and subsequent effects of a given interpretation informs its appropriateness. Such enquiries may not always be clear or illuminating but, together, they can help to make sense of the law.[62]

Constitutional interpretation, even non-originalist approaches, is bound by what is included in the constitution: interpretation can remedy defects and imply unstated powers, but the constitution provides a limit on what can be accommodated.[63] The fear is that the constitutional analogy acts as a brake on integrating new and 'progressive' approaches to the LOSC where novel solutions may well be needed instead.[64]

Considerably more flexible approaches to interpretation have thus been developed. A textually dogmatic approach is inappropriate for the interpretation of the LOSC.

[58] J Goldsworthy, 'Constitutional Interpretation' in Rosenfeld and Sajó (n 30) 689.

[59] ibid 691.

[60] ibid 691–92.

[61] Therefore, no specific method is advocated for here. For the American perspective, see BJ Murrill, 'Modes of Constitutional Interpretation' (Congressional Research Service, 15 March 2018) <https://sgp.fas.org/crs/misc/R45129.pdf>.

[62] While vague, this is reflected in VCLT (n 53) art 31(1): 'A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.'

[63] Raz (n 31) 178 admitted that: '[not] all defects in a constitution can be put right through ingenious interpretation. All I am saying is that sometimes this is possible'.

[64] Scott (n 20).

Many of its provisions are intentionally vague and left open to varying interpretations. This was a product not only of the compromises which were needed at UNCLOS III, but also the view that sometimes it was better to agree along broad lines even when agreement could not be found on the specifics.[65] Thus textualism of the kind employed in the context of constitutions is out of place here and, instead, the LOSC relies upon a host of factors beyond the text for guidance on interpretation. The LOSC is on occasion being interpreted in a dynamic and contextual manner, but this approach needs to be more prevalent and more readily acknowledged. Insisting upon the constitutionality of the LOSC would require constraining such interpretation and returning to a more proper constitutional approach. This would be a mistake.

The constitutional analogy requires that developments in the law of the sea must be seen to have a basis in the LOSC's text, requiring some ingenious interpretations of its provisions in order to retrofit new rules into the Convention. This is not a criticism of this approach; after all, solutions must be found from the available tools. However, all too frequently such interpretation is not followed with the necessary recognition of the expansive and dynamic nature of some of these ingenuities and even less frequent is the admission that some broader rethinking of the existing approaches may well be required. It is better to have an open mind to the many underlying considerations which influence the interpretation and evolution of the LOSC: the matrix of hidden factors beyond the text itself.

3.2. Examples of the influence of wider factors

3.2.1. Continuing effectiveness

Interpretation can help to update the LOSC's dated provisions: again, what matters is a recognition of the considerations that are used to justify this outcome. For example, the arbitral tribunal in the *Arctic Sunrise Case* interpreted the LOSC's requirement for a 'visual' or 'auditory' signal to stop to be given to a foreign vessel, before the coastal State can pursue and arrest it, to include very-high-frequency (VHF) radio communication, even though such technology did not exist at the time the provisions were written. The underlying principle is the continuing effectiveness of the LOSC's provisions when their object and purpose can be identified. Here, the objective and purpose of the requirement for a visual or auditory signal to stop is, according to the tribunal, 'to ensure that the pursued ship is made aware of the pursuit'.[66] Given that VHF messages are now the standard means of communication at sea, they 'can fulfil the function of informing the pursued ship'.[67] Such interpretation permits the result that the purpose of the provision is fulfilled and applied even in a situation not in contemplation when the LOSC was written.

[65] The LOSC's provisions on delimitation essentially leave it open for a variety of approaches to be adopted and this is precisely what has happened in practice: see MD Evans, 'Maritime Boundary Delimitation: Where Do We Go from Here' in Freestone, Barnes and Ong (n 9).

[66] *The Arctic Sunrise Case (Kingdom of the Netherlands v Russian Federation)*, PCA Case No 2014-02 (Award on the Merits of 14 August 2015) para 259.

[67] ibid.

3.2.2. Stability

Discussions of how baselines are affected by rising sea levels clearly demonstrate the importance of taking wider factors into consideration when interpreting the LOSC. Discussions thus far have focused on the terms of the LOSC,[68] agonising over the meaning of the 'normal baseline' defined as the 'low-water line along the coast as marked on large-scale charts',[69] when instead the focus should have been on looking 'squarely at legal stability [and] … evidence of its expression in States' actions and pronouncements'.[70] Only then, as Anggadi suggests, does it become clear that Article 5 LOSC has been applied by States in ways that are compatible with the view that baselines can be fixed in their current form and do not have to ambulate landward as sea levels rise. In truth, the text is open to a variety of interpretive approaches, but their appropriateness is informed by other factors.

The International Law Association (ILA) Committee on International Law and Sea Level Rise and the Study Group of the International Law Commission examining this issue suggest that such interpretation is appropriate and attractive in view of legal certainty and stability. In the words of the ILA Committee: 'The objective of facilitating legal certainty and stability has been at the core of options proposed by the Committee.'[71] Its 2024 report observed that: 'States from various regions of the world have connected the meaning of legal stability with the solution of preserving maritime zones by fixing their baselines and the outer limits as they were before the effects of sea level rise.'[72] Consequently, it 'recommended that, in view of legal certainty, coastal States deposit with the UN Secretary General information specifying also those baselines and outer limits for which the deposit is not strictly required by the Convention'.[73] Again, what sheds meaning on the LOSC and makes it more responsive is to be found in materials beyond the so-called constitution itself.

3.2.3. Context

The treatment of islands in international law also demonstrates the importance of wider considerations beyond the LOSC. Contextual factors have the same impact on the treatment of islands as the legal provisions themselves.[74] It is little surprise that Article 121 LOSC has been pored over as much as it has. Paragraph 1 defines an island as 'a naturally formed area of land, surrounded by water, which is above water at high tide'.[75] Paragraph 2 raises the stakes: it says that anything which can

[68] See, e.g. F Anggadi, 'What States Say and Do about Legal Stability and Maritime Zones, and Why it Matters' (2022) 71 ICLQ 767; AHA Soons, 'The Effects of a Rising Sea Level on Maritime Limits and Boundaries' (1990) 37 NILR 207; D Caron, 'When Law Makes Climate Change Worse: Rethinking the Law of Baselines in Light of a Rising Sea Level' (1990) 17 EcologyLQ 62.

[69] LOSC (n 2) art 5.

[70] Anggadi (n 68) 798.

[71] Committee on International Law and Sea Level Rise, 'Final Report' (International Law Association 2024) 7 <https://www.ila-hq.org/en/documents/01-final-report-committee-on-international-law-and-sea-level-rise>.

[72] ibid 8.

[73] ibid 45.

[74] MD Evans and R Lewis, *Islands, Law and Context: The Treatment of Islands in International Law* (Edward Elgar 2023).

[75] LOSC (n 2) art 121(1).

be described as an 'island' is entitled to generate all maritime zones. However, then paragraph 3 says that: 'Rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf.'[76] From these paragraphs it is entirely possible to reach interpretations that are seemingly consistent with the text but contrary to State practice and have little thought for practical implementation. The terms of Article 121 allow considerations of the size, location or importance of an island from a political, maritime security or economic perspective to be overlooked, yet these are important factors influencing how islands are treated in practice.[77]

The text of Article 121 gives the impression that all islands are treated equally, which is not so in practice. The context matters. When it comes to maritime delimitation, for example, the context determines the impact of an island on the course of the final boundary. An island which generates the need for the delimitation in the first place will generally be given greater significance than an island that is merely incidental to a broader delimitation between mainlands.[78] In the latter scenario is it said that an island is a special or relevant circumstance whose 'distorting',[79] 'extraneous'[80] or 'disproportionate'[81] effect needs to be 'eliminated'[82] from the process. The result is that the courts have altogether 'ignored the presence of islets, rocks and minor coastal projections'[83] or, in other cases, have given them a much-reduced effect on the delimitation line[84] and have sometimes enclaved them on the other side of the line.[85] Even when an island generates the delimitation dispute, the context determines its treatment: its relative smaller size or its perceived lesser significance, as compared to an opposing mainland coast, matters. This meant that Malta, for example, was not given the full effect of its entitlement in the delimitation between it and the mainland Libyan coast. The International Court of Justice (ICJ) considered that the

[76] ibid para 3.

[77] Evans and Lewis (n 74) chs 4, 5.

[78] ibid ch 4, where islands are characterised as being either context-generators or context-disruptors.

[79] *North Sea Continental Shelf (Germany/Denmark and the Netherlands*) (Merits) [1969] ICJ Rep 3, para 47; repeated in, e.g. *Territorial and Maritime Dispute (Nicaragua v Colombia)* (Merits) [2012] ICJ Rep 624, para 202; and *Dispute concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh v Myanmar)* (Judgment of 14 March 2012) ITLOS Reports 2012, para 318.

[80] *Maritime Delimitation in the Black Sea (Romania v Ukraine)* (Merits) [2009] ICJ Rep 61, para 149.

[81] *Continental Shelf (Libyan Arab Jamahiriya/Malta)* (Merits) [1985] ICJ Rep 13, para 64.

[82] *North Sea Continental Shelf* (n 79) para 57.

[83] ibid. See 'Serpents Island' in *Maritime Delimitation in the Black Sea* (n 80) para 187; 'Filfla' in *Libyan Arab Jamahiriya/Malta* (n 81) para 64; 'Jerba' in *Continental Shelf (Tunisia/Libyan Arab Jamahiriya*) (Merits) [1982] ICJ Rep 18, para 120; 'Al-Tayr' and 'Al-Zubayr' in *Sovereignty and Maritime Delimitation in the Red Sea (Eritrea/Yemen)*, PCA Case No 1996-04 (Award of 17 December 1999) para 147.

[84] 'Kerkennah Islands' were given half-effect in *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* (n 83) para 129; and 'Seal Island' in *Delimitation of the Maritime Boundary in the Gulf of Maine (Canada/United States of America)* (Merits) [1984] ICJ Rep 246, para 222.

[85] See, e.g. Channel Islands in *Delimitation of the Continental Shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic (UK/France)* (1977) 18 RIAA 3; Abu Musa Island in *Dubai-Sharjah Border Arbitration* (1993) 91 ILR 543, 674–77; and Quitasueño and Serrana in *Nicaragua v Colombia* (n 79) para 238.

geographic context 'in which the islands of Malta appear as a relatively small feature in a semi-enclosed sea'[86] required a different method than equidistance to achieve an equitable result. The ICJ, quite remarkably, reasoned that if Malta were Italian territory, then it would be given only some effect in a delimitation between Italy and Libya. However, the Court considered that Malta should not be in a 'worse position because of its independence'[87] and so the delimitation line between Malta and Libya had to be south of the median line drawn between Libya and Italy, but north of the median line between Libya and Malta, 'represent[ing] a shift of around three-quarters of the distance between the two outer parameters'.[88] A similar contextual treatment of islands occurred in the delimitation between the French islands St Pierre and Miquelon and the Canadian mainland coast, off which they are located. Rather than giving the islands full entitlement to be delimited on the basis of equidistance, the tribunal considered that the disparity in coastal lengths as compared with the massive Canadian coastline and the overall geographic context meant that St Pierre and Miquelon were only given a narrow but long corridor of southward entitlement measuring 10.5 nm wide by 200 nm long.[89]

These cases demonstrate that while Article 121(2) LOSC says that all islands are fully entitled to generate all maritime zones like 'other land territory',[90] in practice the context might require a different result. The geographic context was important in both cases but so were the political statuses of the islands. The Malta delimitation shows that having the status of a sovereign island State can influence the course of the final boundary—even if this is to be assessed against other factors, such as the geographic context of the area concerned. The St Pierre and Miquelon delimitation might then have produced a different result giving the islands more entitlement, had these not been dependent islands. There are other cases involving dependent islands where it might also be questioned whether they would have ended up with such diminutive entitlements were they island States instead—including the Channel Islands which are dependent island territories of the United Kingdom (UK) and which ended up with a mere 12 nm enclave in the broader delimitation between the coastlines of the UK and France.[91]

This differentiation in treatment depending on the context is not inherently problematic since a more contextually sympathetic law would be more responsive to the mischief that is attempting to be remedied, i.e. in the case of delimitation the geographic, political and economic contextual factors are often determinative of the outcome.[92] What is problematic, however, is the lack of recognition that what is often needed is a much more holistic approach to the interpretation of the LOSC—an approach which includes factors beyond those included in the text and beyond those envisioned by the drafters.

[86] *Libyan Arab Jamahiriya/Malta* (n 81) para 73.
[87] ibid para 72.
[88] ibid para 73.
[89] *Delimitation of the Maritime Areas between Canada and France* (1992) 21 RIAA 265, para 71.
[90] LOSC (n 2) art 121(2).
[91] *Delimitation of the Continental Shelf* (n 85) paras 201–202.
[92] Concerning the importance of context in the legal treatment of islands, see Evans and Lewis (n 74) ch 5.

4. The wider matrix (II): interactions between the law of the sea and other areas of international law

4.1. The unsuitability of constitutional analogies

The role of a wider matrix of factors and considerations is just as important when effectively integrating other areas of international law with the law of the sea as it is in the interpretation of the LOSC. International law is increasingly becoming more specialised in nature. Various regulatory regimes proliferate the legal system, specialised organisations regulate specific areas of law and practice, and specialised courts hear cases involving specialised disputes. This has given rise to fears of regime collision and the fragmentation of international law:

> Collisions between legal norms are merely a mirror of the strategies followed by new collective actors within international relations, who pursue power-driven 'special interests' without reference to a common interest and give rise to drastic 'policy conflicts'.[93]

Attempts have been made to allay these concerns. Global legal pluralists try to explain that regime collisions can be, and are, avoided in practice.[94] Essentially, no one benefits from reasserting the supremacy of one regime over the other, as this encourages rather than mitigates collisions. 'Rather than secure the unity of international law, future endeavors need to be restricted to achieve weak compatibility between the fragments.'[95] Toleration and complementarity are key to systemic integration in international law.[96]

Yet characterising the law of the sea as being subject to some distinct constitutional arrangement encourages a self-referential kind of system in which developments of the law must be internally justified. This is a limited view and has the potential to miss opportunities to develop the law in better ways. The law of the sea might very well be improved by integrating better approaches to the concepts it adopts that emanate from other legal regimes and have no internal basis.[97] For example, the concept of jurisdiction is approached in different ways in the various fields of international law. A functional model of jurisdiction is found in the field of human rights law and it is being transposed into the law of the sea, but with questionable results given that the law of the sea is zonally structured.[98] Again, this suggests that it would be better to develop an approach that more easily permits cross-fertilisation between these models, as opposed to insisting upon the constitutionality of one of them. This is required if a genuinely effective approach to the systemic interpretation of the LOSC with other regimes is to be developed.

[93] A Fischer-Lescano and G Teubner, 'Regime-Collision: The Vain Search for Legal Unity in the Fragmentation of Global Law' (2004) 25 MichJIntlL 999, 1003.

[94] P Capps and D Machin, 'The Problem of Global Law' (2011) 74 MLR 794.

[95] Fischer-Lescano and Teubner (n 93) 1045.

[96] See, e.g. N Krisch, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law* (OUP 2010); AM Slaughter, 'A Global Community of Courts' (2003) 44 HarvIntlLJ 191.

[97] French (n 21).

[98] On maritime migration, see, e.g. V Moreno-Lax, 'The Architecture of Functional Jurisdiction: Unpacking Contactless Control—On Public Powers, *SS and Others v Italy*, and the "Operational Model"' (2020) 21 GermanLJ 385; S Trevisanut, 'The Principle of Non-refoulement and the De-territorialization of Border Control at Sea' (2014) 27 LJIL 661.

The importance of a cross-fertilisation approach is apparent where human rights law, environmental law and the law of the sea overlap in the context of sea level rise. A law of the sea-based solution which does not accommodate human rights law will be impoverished compared to a solution which does and vice versa. In this context, States' human rights obligations ought to be developed in tandem with, or at least with cognisance of, their obligations under the law of the sea. For instance, it cannot be that a State is liable in human rights law for failing to defend its coastlines through artificial construction and protect its coastal populations from rising sea levels,[99] while at the same time being liable for the environmental damage such construction activity would inevitably cause, and simultaneously being denied the possibility of claiming that the feature is 'naturally formed' under the law of the sea.[100] In truth, the law of the sea has much to learn from human rights law and environmental law, and vice versa. Are these interactions really helped by asserting the constitutionality of a text applicable to just one of these regimes?

Constitutions demand superiority and hierarchical structures. Constitutional norms are given superior effect in a legal system: when other norms clash with them, they are invalidated. Subsequent norms find their validity only by reference to their constitutional adherence, so subsequent norms are developed in a way to avoid clashing with constitutional norms. This is neither consistent with the way international law develops, nor helpful in explaining developments in the law of the sea; rather, it challenges the logic of systemic treaty interpretation.

4.2. Development through interaction and complementarity

4.2.1. The LOSC and the IMO

The LOSC expressly establishes forms of hierarchical relationships with other legal sources. For example, it refers to 'international organizations' which are 'competent' or 'appropriate' to assist States Parties in implementing the LOSC.[101] In relation to shipping, the designation of sea lanes, traffic separation schemes and marine pollution, the relevant 'competent international organization' refers to the IMO, though this is not expressly stated in the LOSC. As Beckman and Sun observe:

> [The LOSC] is widely viewed as a 'constitutive' instrument that provides a legal framework that is being filled in, rounded out and complemented by existing and subsequently enacted international agreements and customary international law. The International Maritime Organization (IMO) is the preeminent international organization with competence to establish international rules and standards for the safety, security and environmental performance of international shipping. In other words, on matters relating to international shipping, [the LOSC] outlines the rights and obligations of States parties in various maritime zones that must be exercised and fulfilled through implementation instruments under the auspices of IMO.[102]

[99] *Billy et al v Australia* Comm No 3624/2019 (18 September 2023) UN Doc CCPR/C/135/D/3624/2019.

[100] LOSC (n 2) arts 13(1), 121(1) requires the areas of land of islands, rocks and low-tide elevations to be 'naturally formed'.

[101] Division for Ocean Affairs and the Law of the Sea, 'Law of the Sea: Bulletin No 31' (UN Office of Legal Affairs 1996) 79–95 provides a list.

[102] R Beckman and Z Sun, 'The Relationship between UNCLOS and IMO Instruments' (2017) 2 AsiaPacificJOceanLaw&Pol 201.

The LOSC provides the framework rules which are then clarified through other treaties, soft law, guidelines and codes adopted by other bodies. It is worth remembering that the IMO predates the LOSC and, arguably, the Convention incorporated rather than established the IMO's mandate on shipping matters. Ultimately, the IMO is at the behest of States, not the LOSC. As long as it develops 'measures to improve the safety and security of international shipping and to prevent pollution from ships', it will be legitimate.[103] This is its mandate and in fulfilling this it has, at times, 'expanded beyond what is explicitly stipulated in LOSC'.[104]

Again, to characterise these organisations as implementing the LOSC is something of a misnomer. If States want to develop laws and codes under the auspices of the IMO beyond the role envisaged by the LOSC, they can. The constitutional analogy thus does little to explain the relationship between the LOSC and development of the law of the sea even by so-called 'competent organizations' empowered by the LOSC—despite such an arrangement initially appearing to provide a strong basis for a claim of constitutionality.

4.2.2. Managing 'collisions' with the LOSC

The LOSC contains provisions addressing 'collisions' between its provisions and those of other international conventions. Article 237 specifically concerns the compatibility of the LOSC with obligations arising from other conventions relating to the protection and preservation of the marine environment, but it is Article 311 which governs the LOSC's relationship with other conventions more generally. Article 311(2) provides that:

> This Convention shall not alter the rights and obligations of States Parties which arise from other agreements *compatible* with this Convention and which do not affect the enjoyment by other States Parties of their rights or the performance of their obligations under this Convention.[105]

This applies therefore both to conventions which predate the LOSC and those created after its entry into force. Article 311(3) states that:

> Two or more States Parties may conclude agreements modifying or suspending the operation of provisions of this Convention … provided that such agreements do not relate to a provision derogation from which is incompatible with the effective execution of the object and purpose of this Convention, and provided further that such agreements shall not affect the application of the basic principles embodied herein, and that the provisions of such agreements do not affect the enjoyment by other States Parties of their rights or the performance of their obligations under this Convention.[106]

The Tribunal in the *South China Sea Arbitration* stated that Article 311 also 'applies equally to the interaction of the Convention with other norms of international law, such as historic rights', not only those found in 'agreements'.[107]

[103] IMO, 'About IMO: Frequently Asked Questions' <https://www.imo.org/en/About/Pages/FAQs.aspx>.
[104] Beckman and Sun (n 102) 236.
[105] LOSC (n 2) art 311(2) (emphasis added).
[106] ibid art 311(3).
[107] *South China Sea Arbitration* (n 8) para 235.

The interpretive approach taken to Article 311 resembles the approach specified in Article 293(1), which states that: 'A court or tribunal having jurisdiction under this section shall apply this Convention and other rules of international law not incompatible with this Convention.'[108] Thus, rather than questioning the constitutional superiority of the LOSC, the enquiry is reframed, asking whether the particular norm is compatible with it.

The arbitral tribunal in the *Arctic Sunrise Case* observed that Articles 293 and 311 mean that to 'interpret and apply particular provisions of the Convention, it may be necessary for a tribunal to resort to foundational or secondary rules of general international law'.[109] Further, '[i]n the case of some broadly worded or general provisions, it may also be necessary to rely on primary rules of international law other than the Convention'.[110] Thus Article 293 should not be seen as providing an additional basis of jurisdiction, but rather as permitting courts to have recourse to other international laws that are not incompatible with the LOSC.[111] The BBNJ Agreement reflects this approach, with Article 5 providing that: 'This Agreement shall be interpreted and applied in the context of and in a manner consistent with the Convention.'[112]

4.2.3. The pursuit of 'compatibility'

Having recourse to 'compatible norms' meant to the tribunal in the *Arctic Sunrise Case* that it was able to 'have regard to general international law in relation to human rights in order to determine whether law enforcement action' against the vessel and individuals onboard 'was reasonable and proportionate'.[113] It thus held that it could 'have regard to the extent necessary to rules of customary international law, including international human rights standards, not incompatible with the Convention, in order to assist in the interpretation and application of the Convention's provisions'.[114] The basis for arrest involved weighing up the right of the protestors to scale the oil rig and the right of the State to protect and defend it from criminal damage. Complementarity meant, according to the tribunal, that '[t]he right to protest is not without its limitations, and when the protest occurs at sea its limitations are defined, inter alia, by the law of the sea'.[115] This in turn meant that it needed to be weighed against the principle that the seas 'shall be reserved for peaceful purposes' only,[116] as well as the sovereign right of the State to

[108] LOSC (n 2) art 293(1).
[109] *Arctic Sunrise Case* (n 66) para 190.
[110] ibid para 191.
[111] *MOX Plant Case (Ireland v United Kingdom)* (Order No 3) (2003) 126 ILR 310, para 19; *Kasikili/Sedudu Island (Botswana v Namibia)* (Merits) [1999] ICJ Rep 1045, para 93; *M/T "San Padre Pio" Case (Switzerland v Nigeria)* (Judgment of 6 July 2019) ITLOS Reports 2019, para 27; *M/V "Norstar" Case (Panama v Italy)* (Judgment of 10 April 2019) ITLOS Reports 2019, para 137; *Guyana v Suriname* (2007) 30 RIAA 1, para 406.
[112] BBNJ Agreement (n 10) art 5.
[113] *Arctic Sunrise Case* (n 66) para 197.
[114] ibid para 198.
[115] ibid para 228.
[116] ibid.

establish and use installations for the exploitation of its natural resources.[117] Russia had a valid basis to pursue and arrest the individuals involved, provided this was done in a manner consistent with the right of hot pursuit, but the fact that the pursuit was not continuous meant that it was not.[118] By taking this approach, the tribunal absolved itself of the task of considering the reasonableness, necessity and proportionality of the boarding, seizure and detention of the vessel and the individuals involved under compatible human rights standards: once the pursuit was illegal, everything that flowed from it was too.[119]

In *M/V 'SAIGA' No 2*, ITLOS interpreted compatibility as meaning that it could consider general international law requiring uses of force to be necessary and proportionate when interpreting the LOSC's provisions on the arrest of vessels.[120] It observed that '[c]onsiderations of humanity must apply in the law of the sea, as they do in other areas of international law'.[121] It thus held that it is only after an auditory or visual signal to stop that action can be taken (such as firing shots), and force can only be used when these actions fail, 'as a last resort'.[122] Even in the latter scenario, 'appropriate warning must be issued to the ship and all efforts should be made to ensure that life is not endangered'.[123] These principles have since been reaffirmed and applied,[124] including by the tribunal in *The Duzgit Integrity Arbitration*, which further developed the rule, holding that the principles of necessity and proportionality 'not only apply in cases where States resort to force, but to all measures of law enforcement'.[125]

The constitutional analogy does not fit with the predominant approach to managing these interactions, which can be characterised more as an attempt to explain their complementarity with the LOSC rather than an assertion of its constitutional superiority. This is true even where subsequent agreements have developed the LOSC in ways which find little basis in its text, and even when some of these developments are specifically designed to overcome its provisions.[126] The justification for this approach is that these developments put flesh on the bones of the LOSC, they are not incompatible with it and they implement it better than a straightforward application of the provisions of the Convention could.[127]

[117] ibid para 229.
[118] ibid para 333.
[119] ibid.
[120] *M/V 'SAIGA' No 2 (Saint Vincent and Grenadines v Guinea)* (Judgment of 1 July 1999) ITLOS Reports 1999, para 155.
[121] idem.
[122] ibid para 156.
[123] ibid.
[124] *M/V 'Virginia G' Case (Panama/Guinea-Bissau)* (Judgment of 14 April 2014) ITLOS Reports 2014, para 360.
[125] *The Duzgit Integrity Arbitration (Malta v São Tomé and Príncipe)*, PCA Case No 2014-07 (Award of 5 September 2016) para 209.
[126] See S Trevisanut, N Giannopoulos and R Holst, *Regime Interaction in Ocean Governance* (Brill 2020). cf *South China Sea Arbitration* (n 8) para 235: 'norms will not be incompatible with the Convention where their operation does not conflict with any *provision* of the Convention' (emphasis added).
[127] This is the approach taken in art 7 of the United Nations Fish Stocks Agreement (adopted 4 August 1995, entered into force 11 December 2011) (1995) 34 ILM 1542.

It is not constitutional superiority but the complementarity-based approach to norms competing with the LOSC that is shown in the legal developments relating to the protection and preservation of the marine environment. It is now widely thought that the approach of the LOSC to the environment 'is gradually changing through regime interaction fuelled by subsequent practice'.[128] As Redgwell explains, 'legal responses must and have extended beyond the LOSC in addressing climate change impacts on the oceans'.[129] These include development by subsequent State practice, incorporation by reference to generally accepted international rules and standards and through developing further agreements which now inform interpretations of the broad obligations contained in the LOSC. A complementary approach was applied by ITLOS in its recent *Advisory Opinion on Climate Change and International Law*.[130] It relied on external rules to inform its interpretation of the LOSC, drawing on the climate change treaty regime including the UN Framework Convention on Climate Change and the Paris Agreement to hold,[131] inter alia, that 'pollution of the marine environment' in the LOSC, which 'states must take all necessary measures to prevent, reduce and control', includes human-made greenhouse gas emissions—even though little was known about these at the time the LOSC was drafted.[132] This evidences reliance on the principle of compatibility when integrating new areas of law into the remit of the LOSC. It shows that it is harmonisation and the principle of compatibility with other laws, rather than ideas of constitutional superiority, which permit the LOSC to incorporate novel or dynamic concepts and allow it to continue to address new challenges.[133]

The same is true in the context of maritime security. The principle of the exclusive jurisdiction of the flag State together with the zonal division of jurisdiction presents a challenge to law enforcement at sea. Consequently, States have concluded agreements to circumvent these jurisdictional hurdles. To suppress the illicit traffic of narcotic drugs and psychotropic substances more effectively, some States have altered their boarding practices by entering into agreements with other States. The UN Convention against the Illicit Traffic in Narcotic Drugs and Psychotropic

[128] I Buga, *Modification of Treaties by Subsequent Practice* (OUP 2018) 337.

[129] C Redgwell, 'Treaty Evolution, Adaptation and Change: Is the LOSC "Enough" to Address Climate Change Impacts on the Marine Environment?' (2019) 34 IJMCL 440, 456. This is underscored by Scott (n 20) and is the main reason for her call for transformational change.

[130] *Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law* (Advisory Opinion of 21 May 2024) ITLOS Reports 2024.

[131] Signifying the importance of systemic treaty interpretation in international law today and particularly the law of the sea in this case: see McLachlan, 'The Principle of Systemic Interpretation and Article 31(3)(C) of the Vienna Convention' (n 21); McLachlan, *The Principle of Systemic Integration in International Law* (n 21); French (n 21). See also BE Klerk, 'The ITLOS Advisory Opinion on Climate Change: Revisiting the Relationship between the United Nations Convention on the Law of the Sea and the Paris Agreement' (2025) RECIEL <https://doi.org/10.1111/reel.12588>.

[132] See D Freestone et al, 'Request for an Advisory Opinion Submitted by the Commission of Small Island States on Climate Change and International Law, Case 31' (2024) 39 IJMCL 835.

[133] For this reason, the author is more optimistic than Scott (n 20) that the broader matrix of factors outlined in this article and abandoning the constitutional analogy *can* provide the conditions in which progressive change can occur.

Substances provides that States can request the authorisation of the flag State to board a suspect vessel and, importantly, the flag State is obliged to 'respond expeditiously' to that request.[134] Article 7 of the Council of Europe Agreement on Illicit Traffic by Sea goes even further: 'The flag State shall immediately acknowledge receipt of a request for authorisation … and shall communicate a decision thereon as soon as possible and, wherever practicable, within four hours of receipt of the request.'[135]

Going further still, some States have concluded agreements giving a priori authorisation to other States to board vessels flying their flag when suspected of engaging in drug smuggling. Article 16 of the 2003 Caribbean Regional Agreement provides that the agreement '*constitutes* the authorisation' of the flag State.[136] Several bilateral agreements provide for similar a priori authorisation.[137] States have also entered into so-called shiprider agreements, in which law enforcement officials of one State embark on the vessels of another State. As representatives of that State, they can provide real-time authorisation to the host State to board vessels suspected of engaging in illicit activity.[138]

It could, of course, be claimed that these are expressions of the flag State principle—the flag State is, after all, consenting to the terms of the agreement. However, a priori and deemed authorisation represent significant departures from the principle of the exclusive jurisdiction of the flag State in practice: whereas the latter is premised on the rejection of the jurisdiction of other States, the former provides for it and changes the central assumption between the signatory States that their vessels may be subject to the jurisdiction of another signatory State. Whilst States are within their rights to make such agreements, it is clear that 'implementation' of the LOSC is a misnomer in some of these cases where what is really going on is its modification to better suit the circumstances.

Whilst it may be acceptable for agreements to build upon the LOSC, what should happen when they provide for less than its provisions? The tribunal in *Southern Bluefin Tuna* explained that this 'does not necessarily vacate the obligations imposed by the framework convention upon the parties to the implementing

[134] United Nations Convention against the Illicit Traffic in Narcotic Drugs and Psychotropic Substances (adopted 20 December 1988, entered into force 11 November 1990) 1582 UNTS 95, art 17; Protocol of 2005 to Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (adopted 14 October 2005, entered into force 28 July 2010) IMO Doc LEG/CONF.15/22, art 8 provides for the same concerning migrant smuggling.

[135] Agreement on Illicit Traffic by Sea, implementing Article 17 of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (concluded 31 January 1995, entered into force 1 May 2000) 2136 UNTS 81, art 7.

[136] Agreement Concerning Co-operation in Suppressing Illicit Maritime and Air Trafficking in Narcotic Drugs and Psychotropic Substances in the Caribbean Area (concluded 10 April 2003, not yet in force) art 16(1) (emphasis added) <https://2009-2017.state.gov/s/l/2005/87198.htm>.

[137] An example relating to narcotics is the Treaty between Kingdom of Spain and Italian Republic to Combat Illicit Drug Trafficking at Sea (adopted 23 March 1990, reprinted in (1995) 29 LawSeaBull 77).

[138] See, e.g. Agreement Concerning Maritime Matters: Shiprider in the Caribbean and Bermuda (United Kingdom–United States) (adopted 13 July 1998, entered into force 30 October 2000) TIAS Ser 00-1030; Code of Conduct concerning the Repression of Piracy and Armed Robbery against Ships in the Western Indian Ocean and the Gulf of Aden (adopted 29 January 2009, revised in 2017); Shiprider Agreement (United States–Federated States of Micronesia) (adopted 13 October 2022).

convention'.[139] In other words, the LOSC continues to apply simultaneously with any derogating provision of another agreement. Again, this lack of an invalidating effect provides yet more evidence that the LOSC cannot be called a constitution.

According to the tribunal in the *South China Sea Arbitration*, '[t]he Convention does not include any express provisions preserving or protecting historic rights that are at variance with the Convention'.[140] Historic rights in general are permitted, just not those deemed to be 'at variance' with the LOSC. In that case, China's historic claim to swathes of sea was held to be incompatible with the LOSC's division of jurisdiction at sea.[141] The tribunal held that 'the Convention supersedes earlier rights and agreements to the extent of any incompatibility. The Convention is comprehensive in setting out the nature of the exclusive economic zone and continental shelf and the rights of other States within those zones.'[142] Hence, '[i]nsofar as China's relevant rights comprise a claim to historic rights to living and non-living resources within the "nine-dash line", partially in areas that would otherwise comprise the exclusive economic zone or continental shelf of the Philippines', the tribunal could not agree that these were preserved following the LOSC's entry into force.[143]

This again illustrates that the LOSC does not have an invalidating effect on competing legal bases when they provide for either more or less than the Convention. Other viable legal bases are not automatically invalid, but if their substance is deemed to be incompatible with the LOSC they will be deemed without effect in practice. However, it is up to other States to deem an interpretation or behaviour as incompatible with the LOSC or for such an issue to be the subject of litigation so that a court or tribunal can make such a determination. Even then, this relies on the delinquent to drop their delinquency or for others to be motivated enough to seek its accountability—this is not guaranteed, as demonstrated by China still retaining their historic rights claims even after a tribunal has concluded that they are 'incompatible' with the LOSC. Simply put, the LOSC does not have an automatic invalidating power and it cannot rely on a constitutional court to invalidate an incompatible norm.

In sum, broader international legal norms and principles have been integrated into the LOSC's framework through the concept of compatibility. This illustrates both the importance of wider factors in the development of the law of the sea, but also that something other than the LOSC determines the legitimacy or the importance of these factors. This is the focus of the Conclusion.

5. Conclusion: lessons for a living LOSC

Sections 3 and 4 have demonstrated that the interpretation of the LOSC, and its interaction with other areas of international law, is informed by a wider matrix of factors and considerations. These are equally constitutive of the law of the sea.

[139] *Southern Bluefin Tuna Cases* (n 8) para 52.
[140] *South China Sea Arbitration* (n 8) para 239.
[141] ibid para 246.
[142] ibid.
[143] ibid.

However, the inevitable question emerges: what determines the legitimacy of these wider considerations? What determines whether a norm found in another area of international law is compatible with the LOSC, or not? As was seen in Section 4, many of these norms have been integrated into the law of the sea, not because the LOSC's provisions provide for it, but because their application must be consistent with that external norm. The legal basis for these norms is external to the LOSC itself and from other areas of international law. It is not enough to say that compatibility means consistency with the LOSC's text alone. As shown in Section 3, there might well be more than one viable approach to the interpretation of the LOSC. When deciding between two equally viable interpretations, what determines which is best?

Clearly, there are deeper, hidden principles guiding these determinations, which play an even greater role in formative moments. This is not surprising when the text of the LOSC provides little guidance, and thus when new issues arise for clarification, attention turns to such things as the meaning and principles underlying the text. Subsection 5.1 seeks to shed light on these fundamental guiding principles and show how they can continue to guide responses to new challenges in the law of the sea. Subsection 5.2 reflects on the broader lessons of this article for considering treaties as constitutions for international law.

5.1. Guiding principles and values

Phrases like 'object and purpose' and 'compatibility with the LOSC' are essentially code for: the LOSC reflects values and underlying ideas on how to apply international law to the sea and while these may at times be imperfectly captured in its provisions, from them the best solution can still be identified.[144] These values do not need to be shackled by any attempt at their textual translation. When thought of as such, it becomes clear just how much the claim that the LOSC is *the* constitution fails to grasp how much more to the life of the law of the sea there is—and needs to be. This subsection turns first to the underlying principles that might be discerned from Section 3 (interpretation) and then to those from Section 4 (regime interaction) and analyses how these can continue to be instructive for the development of the law.

5.1.1. Lessons from interpretation

As shown above, purposive interpretation is key to the LOSC's endurance. It is important to prioritise substance over form, to peer behind the terms of a provision and question its meaning: what is the real issue that States sought to address? For example, the requirement for an 'auditory or visual signal' to stop in hot pursuit is essentially a requirement for the pursuing State to communicate validly with the pursued vessel.

This is significant as concerns the question of how to treat maritime autonomous vehicles (MAVs). These do not have a physical crew on board and may well be operated across jurisdictional frontiers and potentially from great distances. The provisions of the LOSC do little to clarify the responsibilities of MAVs and the

[144] See, e.g. D Freestone, 'Modern Principles of High Seas Governance: The Legal Underpinnings' (2009) 39 IntlEnvtlPol&L 44.

jurisdictional competences of coastal States in this context—many of its provisions assume a resident crew onboard.[145] Giving evidence to the House of Lords' Inquiry, Commander Tuckett of the British Royal Navy explained that one of the key aims of the LOSC:

> is to provide for freedom of navigation and to demonstrate accountability for vessels operating under the principle of the freedom of navigation. Those principles do not change because the technology has changed. We just have to make sure that we apply those principles to our new technology.[146]

This is as clear a call as can be made for a purposive approach—of the kind set out above—to the interpretation of the relevant provisions of the LOSC. This is undoubtedly the way forward when faced with new technologies at sea, wherever possible.[147]

The purposive interpretation of the LOSC has also come to rely on purposes beyond the internal logic of the LOSC's provisions. Interpretive exercises have relied on broader goals of international law, and law in general, for their legitimacy. It is not a surprise that interpretations of the LOSC's provisions on baselines which prioritise values such as legal stability and certainty are increasingly being favoured over the traditional theory which holds that the baseline must ambulate with the actual low-water level.[148] Other, broader goals might be suggested in this context too. For example, in relation to the interaction between the law of the sea and other areas of law (discussed below) the principle of tolerance and avoiding collisions rules supreme, following the general approach.[149]

Just as purposive interpretation needs to be responsive to the meaning behind the LOSC's provisions, so too must its provisions be interpreted with the potential consequences in mind. Contextually sympathetic interpretations are more attuned

[145] See, e.g. N Klein et al, 'Maritime Autonomous Vehicles: New Frontiers in the Law of the Sea' (2020) 69 ICLQ 719; AXM Ntovas, 'Functional and Maritime Autonomous Surface Ships' and R Pedrozo, 'Unmanned and Autonomous Warships and Military Aircraft' in J Kraska and Y Park (eds), *Emerging Technology and the Law of the Sea* (CUP 2022).

[146] IRDC, 'UNCLOS: Fit for Purpose in the 21st Century?' (Transcript of Oral Evidence of Commander Caroline Tuckett, 10 November 2021) <https://committees.parliament.uk/oralevidence/3000/html/>.

[147] An example where this might not be possible includes treating new maritime technologies which are fixed to the seabed as ships within the meaning of the LOSC. This is important as concerns the recent attempts (see J Hartmann, 'Piracy and Undersea Cables: An Overlooked Interpretation of UNCLOS?' (*EJIL: Talk!*, 6 March 2025) <https://www.ejiltalk.org/piracy-and-undersea-cables-an-overlooked-interpretation-of-unclos/>) to consider attacks against subsea cables and pipelines as piratical acts, which the LOSC (n 2) art 101 clearly defines as directed against 'another *ship*' (emphasis added).

[148] See, e.g. Pacific Islands Forum, 'Declaration on Preserving Maritime Zones in the Face of Climate Change-Related Sea-Level Rise' (6 August 2021) <https://forumsec.org/sites/default/files/2024-03/2021%20Declaration%20on%20Preserving%20Maritime%20Zones%20in%20the%20face%20of%20Climate%20Change-related%20Sea-level%20rise.pdf>; Ministry of Foreign Affairs of Japan, 'Foreign Minister Hayashi's Meeting with the Delegation of the Pacific Islands Forum' (Press Release, 6 February 2023) <https://www.mofa.go.jp/press/release/press1e_000369.html>. On the traditional ambulatory theory, see, e.g. Caron (n 68).

[149] Slaughter (n 96); A von Bogdandy and I Venzke, 'On the Functions of International Courts: An Appraisal in Light of their Burgeoning Public Authority' (2013) 26 LJIL 49; Fischer-Lescano and Teubner (n 93). This relates to systemic treaty interpretation too: see, e.g. McLachlan, 'The Principle of Systemic Interpretation and Article 31(3)(C) of the Vienna Convention' (n 21); McLachlan, *The Principle of Systemic Integration in International Law* (n 21).

to what really matters, the considerations that are significant and the broader situation in which the legal issue arises. It was shown above that the courts consider wider contextual factors when reaching decisions. It is important to understand these factors and be open minded about what they include. Inevitably, geography matters in the law of the sea but so too do non-geographic realities: economic and political factors play an important role and, while the LOSC might not say so, they have an impact in practice. For example, a stricter interpretation of the definition of an island might well be made in the context of a State that occupies disputed features and then builds on them to claim that the definition of an island is satisfied, such that the State is able to generate swathes of maritime entitlement.[150] In contrast, a more permissive interpretation might be adopted to the question whether a maritime boundary dispute is within ITLOS's jurisdiction when the entitlements are generated from territory that has been improperly decolonised and when its ruling can contribute to the ongoing process of decolonisation.[151] It would be wrong to say that these decisions are solely motivated by the wider geopolitical context, yet our understanding would be equally impoverished if the latter's influence is not acknowledged. This is nothing new, and the same can be said of any court. Much like the ICJ, as an organ of the UN charged with the overall goal of peace and stability,[152] must be sympathetic to the broader geopolitical implications of its findings,[153] so too must courts when dealing with the law of the sea.

5.1.2. Lessons from regime interaction

Similar underlying principles might be learned from interactions between the LOSC and other areas of international law. The experience of its relationship with IMO instruments shows that the following approach works: the LOSC provides the structural framework rules from which more specific rules can be fleshed out. There are limits of course; the regulations must implement the structural rules, rather than undermine them.

Again, the principle of compatibility is key. A broad theme emerges: avoid regime collision and encourage integration. Therefore, when it comes to the treatment of people at sea, it is unsurprising that the law of the sea has not been spared from the rise of human rights law. The LOSC's provisions clearly have an impact on people and so, in practice, the principles of human rights law have an impact on their application. As was explained above, considerations of humanity and the priority to preserve life apply when a State contemplates using force against a vessel, and principles of human rights law make an impact on the entire law enforcement

[150] Arguably explaining the strict approach taken in the *South China Sea Arbitration* (n 8) to the terms 'naturally formed', 'economic life' and 'human habitation' in LOSC art 121: see Evans and Lewis (n 74) ch 3.

[151] *Dispute concerning Delimitation of the Maritime Boundary between Mauritius and Maldives in the Indian Ocean (Mauritius/Maldives)* (Judgment on Preliminary Objections of 28 January 2021) ITLOS Reports 2021, para 173; *Dispute concerning Delimitation of the Maritime Boundary between Mauritius and Maldives in the Indian Ocean (Mauritius/Maldives)* (Judgment of 28 April 2023) ITLOS Reports 2023.

[152] UN Charter (n 39) preamble.

[153] See, e.g. A Skordas, 'ICJ: Guardian of Sovereignty or Catalyst for Integration?' (2002) IntlLegTheory 49, 67–68.

practice at sea, including arrest and detention. However, in the spirit of mutual tolerance, it is not all one way: the law of the sea also has an impact on human rights considerations. The *Arctic Sunrise Case* emphasised that 'when the protest occurs at sea its limitations are defined, inter alia, by the law of the sea'.[154] The sea context necessarily has an impact, and the body of human rights law is modified by it. Compatibility here, then, means applying the law of the sea in a way that is consistent with the core principles from other areas of international law, and vice versa.

This is particularly significant in relation to the emerging question of how to protect human rights at sea. As suggested above, considerations of humanity and principles of human rights law are already being integrated into the law of the sea, but greater clarity is required.[155] Merely observing mutual toleration between these bodies of law does not clarify the nature of their relationship, but this basic principle is nonetheless instructive of how better legal approaches (and even new instruments) must be developed. It is said that human rights 'apply at sea as they do on land',[156] and whilst this might be true, their manner of application will be considerably different, and legal solutions must be responsive to the sea context. The law of the sea is not passive in the relationship.

But what of treaties that States have agreed to which modify how specific provisions of the LOSC operate in practice? What explains, for instance, the compatibility of agreements which essentially give other States jurisdiction over vessels which should be the exclusive prerogative of another State? This is about more than implementing the duties of the flag State in Article 94 LOSC. It is about States agreeing to circumvent the exclusivity principle in specific contexts where it would lead to more effective outcomes: States have agreed to more efficient law enforcement practices to try to prevent the smuggling of narcotics, suspected piracy and instances of armed robbery at sea. Compatibility here, then, means making a rule of the LOSC more functionally effective.

The principle of the exclusive jurisdiction of the flag State has come to be one of the most disliked aspects of the LOSC today.[157] Flag States have not universally respected their obligations, as demonstrated by the endemic use of flags of convenience. Tanaka says that the latter have allowed:

> foreign shipowners, having very little or virtually no real connection with those States, to register their ships under the flags of those States. The flag of convenience States allow shipowners to evade national taxation and to avoid the qualifications required of crews

[154] *Arctic Sunrise Case* (n 66) para 228.

[155] In this issue ((2025) 74 ICLQ) see S Galani 'Human Rights Obligations In Maritime Search And Rescue' and A Rinaldi and SA Teo 'AI Border Technologies and the Subtle Erosion of Human Rights', and elsewhere see, e.g. S Galani, *Hostages and Human Rights: Towards a Victim-Centred Approach* (CUP 2021); S Galani, 'Assessing Maritime Security and Human Rights' (2020) 35 IJMCL 325; I Papanicolopulu, *International Law and the Protection of People at Sea* (OUP 2018); N Klein, 'Geneva Declaration on Human Rights at Sea: An Endeavor to Connect Law of the Sea and International Human Rights Law' (2022) 53 ODILA 232.

[156] See, e.g. Human Rights at Sea, 'Geneva Declaration on Human Rights at Sea' (1 March 2022) forward <https://www.humanrightsatsea.org/sites/default/files/media-files/2022-02/GDHRAS_Jan_2022_Final_online_version_sp%20%281%29.pdf>; and Klein (n 155).

[157] See, e.g. IRDC (n 17) 24–26.

> of their ships. In so doing, flag of convenience States give shipowners an opportunity to reduce crew costs by employing inexpensive labour, while these States receive a registry and an annual fee.[158]

There is nothing stopping States agreeing to additional criteria before States may legitimately flag a vessel (i.e. enhancing the genuine link between the State and the vessel).[159] Other solutions, such as the non-recognition of the status of a vessel as 'flagged' on the basis of the flag State's failure to uphold higher standards onboard their vessels (whether that be human rights, labour standards or environmental compliance), while naturally contentious, might occur—especially if it appeared that a particular rogue nation was exploiting the principle of exclusivity for an illegitimate gain. At this juncture, it is worth reflecting on the considerable speed with which many coastal States acted against Russian-flagged vessels in the wake of the 2022 invasion of Ukraine, varying from seizure to denial of entry.[160] Non-recognition of the flagged status of ships for broader legal reasons would be a test of compatibility with the LOSC. But much like the way in which the exclusivity principle has been modified for the suppression of illicit activity, the above suggestions would also circumvent the exclusivity principle to lead to more effective outcomes and, similarly, to prevent lawlessness. In fact, that would be the entire point: it would pierce beyond the veil of exclusivity to ensure the application of other international laws and prevent their circumvention.

5.2. Lessons for international law generally

When it comes to written constitutions, the text is given an exalted status. It is this which is the focus of interpretative exercises. Subsequent legal developments are assessed according to whether a basis can be found within the written constitution. The law of the sea does not benefit from the LOSC being regarded in such a way. It benefits, instead, from understanding that other considerations are equally important. As a result, when new concerns emerge and when new uses and resources of the oceans demand solutions that are not provided by the LOSC, the principles it reflects and the matrix of considerations which make an impact on its application may continue to provide guidance.

If there are any broader lessons to be learned, it is simply that the object of any legal exercise should not be to reify texts, but rather to give better effect to the principles which they seek to reflect and the ideas which motivated States to create and ratify the convention in question. Framework treaties require this approach. Ironically, then, what legitimises and ensures their endurance is not insisting upon their supremacy and entrenchment, but rather distilling their real essence, unshackling them from constitutional analogies and understanding that they apply within a broader context: the international legal system. As international law becomes more specialised and more capable of addressing complex issues, systemic

[158] Y Tanaka, *The International Law of the Sea* (3rd edn, CUP 2019) 195.

[159] See, e.g. the recent moves by the UK Government to investigate its participation, and strengthen the provisions, of the Convention on Conditions for Registration of Ships (adopted 7 February 1986, not yet in force); see HL Deb 28 November 2022, vol 825, col 155GC.

[160] Notably, the superyachts of Russian individuals with alleged connections to the Putin Administration.

treaty interpretation and regime interaction become more important in maintaining its coherence and holisticness. If seminal treaties in particular fields are to contribute to this broader project, approaches of the kind advocated for in relation to the LOSC in this article will be needed. So, while there are temptations to describe other seminal conventions as 'constitutions'—for example, the Outer Space Treaty,[161] which has come to be called the 'Space Constitution'[162]—to ensure their enduring legitimacy and to ensure that they can be used to better develop international law, such descriptions should be avoided.

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[161] Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies (adopted 27 January 1967, entered into force 10 October 1967) 610 UNTS 205.

[162] See, e.g. PJ Blount, 'Innovating the Law: Fifty Years of the Outer Space Treaty' in M Hofmann and PJ Blount (eds), *Innovation in Outer Space* (Nomos Press 2018); B Wessel, 'The Rule of Law in Outer Space' (2012) 35 HastingsIntl&CompLRev 289.

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