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Interpreting the law of the sea 'regime of islands': An opportunity for productive US leadership

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The political geography created by the United Nations Law of the Sea Convention (UNCLOS) includes a basic framework of maritime zones and rules for their delimitation, and a set of dispute settlement mechanisms to assist in clarifying the details. Despite this significant contribution to the formalization of the law of the sea, the vicissitudes of customary international law still determine much of the content of the ocean governance regime. Rulings for the purpose of dispute settlement – by the International Court of Justice, International Tribunal on the Law of the Sea, or arbitral tribunals constituted in accordance with Annex VII of UNCLOS – are technically limited to only the case at hand, although in practice these courts do pay attention to previous jurisprudence.¹ Some issues, such as the principles that guide maritime delimitation, have been fleshed out and clarified by dispute settlement [1]. But many issues remain contentious, and ocean trends associated with climate change are creating new problems for the interpretation (and possible modification) of law of the sea concepts. UNCLOS determines the extent of maritime sovereignty and jurisdiction zones with reference to coastal and insular topography, which is assumed to be stable. But the geography of coasts and islands is changing rapidly and radically, in ways both purposeful and uncontrolled.

Coastal dynamism has intensified as a result of both sea level rise and responses to it, including sand dredging for replenishment, the creation of barrier features, and the construction of new islands. This situation challenges the assumptions of stasis embedded in UNCLOS. It remains an open question whether baselines, and the extent of the zones they generate, are fixed or ambulatory [2-6]. The text of UNCLOS itself is ambiguous [7]. States are likely to advocate for stasis or change depending on their ability to claim resources. Another legal issue concerns how to unambiguously distinguish ‘islands’ from ‘rocks’ (Article 121), and whether an ‘island’ can become a ‘rock’ after being submerged, or a ‘rock’ can become an ‘island’ after being built up by dredged material. Because rocks can claim a 12 nautical mile territorial sea, but islands can claim a 200 nautical mile Exclusive Economic Zone (EEZ), many large maritime territory claims are at stake. China is building new islands on top of reefs in part because it hopes to reinforce and expand its maritime territorial claims in the South China Sea. In contrast, small island developing states are extremely concerned about whether a recently-submerged ‘island’ could be reclassified as a ‘rock’ and therefore lose its 200 nm EEZ [8, 9].

Uncertainty about the durability of maritime boundary claims risks resource conflict, as old claims are challenged and new claims are asserted, all while fish stocks are decreasing. A clear legal interpretation of UNCLOS provisions on baselines, islands, and rocks could mitigate the chance of conflict by providing legal certainty. There are several means through which a clear and stable legal interpretation could be generated, including both formal and informal mechanisms. But the diplomatic resources required for formal augmentations to UNCLOS are currently taken up by the on-going negotiations for a legally binding agreement concerning ‘Biodiversity Beyond National Jurisdiction,’ which address a set of issues far removed from the legal basis of maritime territory claims. And while two committees of the International Law Association (ILA) have undertaken work on some of these topics, they can only recommend legal interpretations that may eventually contribute to the formation of *opinio juris* for customary international law. Similarly, the International Law Commission recently agreed to convene a

¹ Article 292(2) of UNCLOS states that “Any [decision rendered by a court or tribunal having jurisdiction] shall have no binding force except between the parties and in respect of that particular dispute.”

study group on the legal implications of sea level rise, which will produce a report on whether and how development of the law in this area may be advisable. These processes may take many years, and the clarity and strength of their conclusions are uncertain. It may be easier and faster to focus instead on the alteration of customary international law via state practice, which would not preclude the eventual use of more formal mechanisms.

This situation presents an opportunity for the fruitful exercise of US leadership. There are many convincing reasons that the United States should ratify UNCLOS, as recently detailed in this journal [10]. But even without ratification, there is still an opportunity for asserting and supporting an interpretation of customary international law. The ‘regime of islands’ that distinguishes rocks, islands, and artificial islands is indeed a feature of customary international law [11-12]. The United States can forward a specific legal interpretation that serves its own domestic and foreign policy interests, while offering clarity on a broader set of maritime legal issues and taking the lead on a new international challenge created by climate change. Although the United States is not the only maritime actor that could usefully shape customary international law in this area, it may have a significant ability to do so because of its size and visibility. The remainder of this commentary outlines a specific and advantageous interpretation of the UNCLOS ‘regime of islands,’ which has two basic components.

First, the United States ought to assert that the status of baselines, islands, and rocks is permanent or ‘frozen’ in the face of rising sea levels. David Caron first proposed this approach in 1990, and it is regularly considered in the work of Clive Schofield and others. The ILA Committee on International Law and Sea Level Rise concluded in its 2018 Report that freezing existing maritime claims has very limited downsides [13]. This could be done in two ways: either by fixing the outer edges of maritime zones to geographic coordinates, or by making existing baselines permanent even if the coastline shifts [13-15]. Both options would remove “perverse incentives” to spend exorbitant sums on coastal engineering, shield vulnerable states from some adverse effects of sea level rise, and create predictability with regard to the extent and location of high seas [13]. Action must be taken for this interpretation to become customary, because freezing the status of claims is not the default approach, and there is consensus building in the other direction, which argues that baselines are ‘ambulatory’ [7].

An emerging body of state practice supports this interpretation. Pacific island states have called for freezing baselines, and several have recorded their maritime boundaries in a way that seems to freeze their outer extent, although it is unclear whether the intention or effect is to alter customary international law [13-14]. There is also some formal legal precedent for frozen boundaries. The 1969 Vienna Convention on the Law of Treaties established that boundary treaties cannot be nullified or revised because of a “fundamental change of circumstances” (Article 62(2)(a)). Historically, this precedent has extended to international maritime boundaries [8]. There is indirect precedent for frozen baselines in UNCLOS itself, in that baselines drawn across deltas are permanent even if the delta itself changes (Article 7(2)) [5].

The reports of the ILA Committee on International Law and Sea Level rise also support movement in the direction of frozen maritime entitlements. The Committee has carefully examined the advantages and disadvantages of several options, including freezing baselines and freezing the outer edges of maritime claims such as the territorial sea and EEZ. Participants also outlined various avenues for legal change in this area, including formal options such as an ‘implementing agreement’ to UNCLOS, and more informal options such as subsequent practice to effect a change in customary international law. The Committee decided not to propose a specific option, but recommended that the ILA adopt a resolution in support of freezing existing

maritime entitlements as a “first step in bringing its recommendations to a wider audience” [13]. ILA Resolution 5/2018 endorsed the view that “baselines and limits should not be required to be recalculated,” but did not say that they *could* not be recalculated, or that they should be frozen, or how they might be frozen. The United States could take this opportunity to assert a more specific interpretation of UNCLOS wherein existing baselines are not altered as a result of sea level rise, by marshalling existing precedents, and emphasizing the need to avoid future resource conflict as powerful supporting arguments.

Second, the United States should elevate, clarify, and apply the distinction between “naturally formed” islands (Article 121) and ‘artificial islands’ (Article 60). The impact of this distinction is very clear in UNCLOS: artificial islands “do not possess the status of islands,” and cannot therefore generate territorial sea and EEZ claims (Article 60(8)). Despite the recent prevalence of island-building, this distinction rarely appears in scholarly articles, let alone official government statements. The United States is actually responsible for introducing the modifier “naturally formed” in the first place, during the 1958 Geneva Conference, to ensure that artificial islands would be excluded from generating maritime territory [16]. But at the time, there was no discussion of the exact meaning of this phrase, and ambiguity persisted throughout the negotiations over UNCLOS [17-18]. Today, there is no generally accepted definition of ‘artificial islands,’ and distinguishing them from “naturally formed” islands may require “complex assessments of law and fact” [19]. It has been suggested that “naturally formed” refers to the means of creation as opposed to the nature of the material used, and that therefore islands constructed through dredging and deposition are ‘artificial’ [12, 19]. Yet islands formed by accretion are taken to be natural, even if that accretion occurs in part because of artificial structures, as are islands whose erosion is prevented by means of artificial fortification. And the emergence of new islands, and associated maritime claims, is an under-developed area of international law, and one that “may be a destabilizing factor of the existing maritime order” [20].

As more islands are constructed in the South China Sea and elsewhere, it is likely that questions of their status and ability to claim maritime territory will eventually arise. The United States could take the lead on this issue by asserting that the massive dredging campaigns required to construct new islands, which destroy reefs and require extensive infrastructure and maintenance, are not an example of the natural formation of an island, and that new islands created in this way forfeit any claim to maritime territory.

Combined, these interpretations of UNCLOS would clarify the rules for high tide features, specifically the status of rocks, islands, and artificial islands in the face of change (sea level rise and artificial construction). This approach to the law of the sea is in the interest of both the United States and the international community. From the US perspective, attempting to clarify the law of the sea is a productive, low cost leadership opportunity that would provide a service to the international community, while re-affirming support for cooperative internationalism writ large. Clarification also represents a new way to confront China’s activities in the South China Sea without military confrontation, by undermining a central premise of Chinese strategy: that building artificial islands will generate maritime territory claims. None of the competing claimants in the South China Sea have clarified the status of marine elevations as rocks, islands, or artificial islands [21]. Classifying constructed islands as ‘artificial’ sidesteps the debate about historic ownership rights: even if China does own all the reefs it claims in the South China Sea, they cannot generate maritime claims no matter how much infrastructure is

built on top of them. This interpretation would also provide legal support for US ‘freedom of navigation patrols’ by invalidating some Chinese claims to territorial seas.

From the international perspective, this approach to the regime of islands has several clear advantages. The legal certainty created by this interpretation – freezing the status of islands and rocks, and distinguishing between islands and artificial islands – would help mitigate resource conflict by cementing existing claims and discouraging new and disruptive ones. It may also discourage the construction of some artificial islands, which are often built by burying and destroying already-vulnerable coral reefs. Under UNCLOS, states are responsible for environmental and navigational protections related to the construction, existence, and use of artificial islands [19]. In the case of naturally formed islands at risk of submergence by rising sea levels, this approach would guarantee that the loss of habitable island territory does not also cause the loss of valuable maritime territory. Allowing island states to retain their maritime territory in the face of sea level rise may be a lifeline in the century to come, by providing a crucial ‘bargaining chip’ for new land or citizenship, and by connecting the government and people to a territory, which may help them maintain their statehood [15].

The recent ruling made by an arbitral tribunal in the *South China Sea Arbitration* did not provide much clarity on these matters. The part of the ruling that directly addressed Article 60 and artificial islands merely declared that it was illegal for China to build artificial islands in the Philippines EEZ. The Tribunal did address the distinction between ‘islands’ and ‘rocks,’ and ultimately concluded that none of the features in the South China Sea, even the constructed islands, meet the standard of human habitation over a “sustained period” [22]. This downgrades islands to rocks, but does not downgrade rocks to ‘artificial islands’ when they have been subject to dredging and construction. The Tribunal’s findings are limited by their assertion that an elevation’s classification is determined by its status *before* human intervention. Rather than classifying newly-constructed islands as ‘artificial’ under UNCLOS, the Tribunal lamented that construction activities “had the effect of obscuring evidence of the natural status of those features” (1175(a)). The Tribunal understood “naturally formed” as a reference to the “natural condition” before human intervention (305). This interpretation of UNCLOS implies that a low tide elevation or rock cannot legally become something different because of human intervention.

The impact of the ruling is therefore limited, and not just because China disavows it. Even if low tide elevations cannot become islands, the Tribunal did not address the circumstances under which the seabed, a low tide elevation, or a rock become an ‘artificial island,’ thereby nullifying any previous associated maritime entitlements and triggering new environmental and safety obligations. This matters in part because not all constructed islands in the South China Sea were built atop former ‘low tide elevations.’ Discouraging artificial island building, and clarifying the ‘regime of islands,’ requires a statement that a former ‘low tide elevation’ or ‘rock’ should be re-classified as an ‘artificial island’ if it has been subject to dredging, construction, and occupation.

Concerted action is needed to clarify the ‘regime of islands’ and the status of baselines in the face of sea level rise and island construction, and this situation offers an important and advantageous opportunity for the United States. Neither part of the interpretation forwarded here is entirely novel, but both areas of the law of the sea require clarification. The international community would benefit from a maritime entitlement regime that does not penalize states for sea level rise, or reward them for artificial island construction.

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