

Artificial Islands and Territory in International Law

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ABSTRACT

Artificially created islands are a contemporary reality, created and used for military and nonmilitary purposes. Analysis of such islands has largely been limited to their status under the United Nations Convention on the Law of the Sea (UNCLOS) regime. Their position under general international law, however, remains unclear. In particular, the question of whether artificial islands can constitute sovereign territory remains unanswered. This Article analyzes the concept of territory in international law in the context of artificial islands, and argues that neither the doctrine of territory nor the strictures of UNCLOS prevent artificial islands from constituting territory capable of sovereign appropriation. This is further confirmed by examining state practice relating to artificial islands. The Article argues that artificial islands can be considered territory if they meet certain criteria: albeit territory not generating a territorial sea. Understanding artificial islands as capable of constituting territory allows for a more comprehensive and consistent positioning of such islands in regards to other general international law doctrines. The Article demonstrates this through the application of the doctrine of the unlawful acquisition of territory to artificial islands.

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I. INTRODUCTION

The Pentagon estimates that since early 2014, China has reclaimed over 3,200 acres of land in the Spratly Islands archipelago to build new artificial structures around existing maritime features.¹ The Pentagon asserts that these actions “do not provide China with any additional territorial or maritime rights within the South China Sea.”² This is, however, not self-evident. It is clear that the United Nations Convention on the Law of the Sea³ (UNCLOS or the Convention) restricts artificial islands from generating their own

1. U.S. OFFICE OF THE SEC’Y OF DEF., ANNUAL REPORT TO CONGRESS: MILITARY AND SECURITY DEVELOPMENTS INVOLVING THE PEOPLE’S REPUBLIC OF CHINA i (2016).

2. *Id.*; see also U.S. OFFICE OF THE SEC’Y OF DEF., ANNUAL REPORT TO CONGRESS: MILITARY AND SECURITY DEVELOPMENTS INVOLVING THE PEOPLE’S REPUBLIC OF CHINA 13 (2018) [hereinafter SEC’Y OF DEF. 2018 REPORT] (explaining that “China’s land reclamation and artificial islands do not strengthen China’s territorial claims as a legal matter, and artificial islands do not generate territorial sea entitlements”); U.S. OFFICE OF THE SEC’Y OF DEF., ANNUAL REPORT TO CONGRESS: MILITARY AND SECURITY DEVELOPMENTS INVOLVING THE PEOPLE’S REPUBLIC OF CHINA 9 (2017) [hereinafter SEC’Y OF DEF. 2017 REPORT] (making the same point as the 2018 report).

3. United Nations Convention on the Law of the Sea, *opened for signature* Dec. 10, 1982, 1833 U.N.T.S. 397 (entered into force Nov. 16, 1994) [hereinafter UNCLOS].

territorial sea or other maritime rights, save a five-hundred-meter safety zone.⁴ UNCLOS however does not cover issues of territory. The question for this Article is whether certain artificial islands could be considered sovereign territory at international law (albeit territory that generates no territorial sea or extended maritime zones).

Artificial island building is not limited to China, of course.⁵ It has been suggested as a solution to the climate change-driven concerns of small island nations.⁶ It has long been the vanguard of adventurers seeking to create their own new states in the international community.⁷ Historic evidence shows people have engaged in artificial island building for centuries.⁸ Many of these artificial islands are still occupied, such as those in the Lau Lagoon in the Solomon Islands.⁹ However, the recent large-scale island building in the South China Sea has opened, in the words of Jean Gottmann, a new realm of “[a]ccessible [s]pace.”¹⁰ As Gottmann explained in 1952:

Accessibility is the determining factor: areas to which men have no access do not have any political standing or problems. The sovereignty of the moon has no importance whatsoever today, because men cannot reach it nor obtain anything from it. The Antarctic had no political standing before navigators began going there, but since it was made accessible by its discoverers, the icy continent has been divided into portions like an apple pie¹¹

International law has similarly viewed the territorial status of artificial islands as unimportant. As long as artificial islands were

4. *Id.* at 420.

5. Vietnam has also built artificial islands in the South China Sea, albeit on a much smaller scale. Jenny Bender, *China isn't the only one building islands in the South China Sea*, BUS. INSIDER (May 16, 2016), <https://www.businessinsider.com/vietnam-building-islands-in-south-china-sea-2016-5> [<https://perma.cc/3VX5-K3UG>] (archived Mar. 12, 2019).

6. *See generally* JENNY GROTE STOUTENBERG, *DISAPPEARING ISLAND STATES IN INTERNATIONAL LAW* (2015) (explaining small island states are those most affected by climate change). *See also* Michael Gagain, *Climate Change, Sea Level Rise, and Artificial Islands: Saving the Maldives' Statehood and Maritime Claims Through the Constitution of the Oceans*, 23 COLO. J. INT'L ENVTL. L. & POL'Y 77, 81–82 (2012) (describing the Maldives' artificial island built to address the negative effects of climate change); Grigoris Tsaltas et al., *Artificial Islands and Structures as a Means of Safeguarding State Sovereignty Against Sea Level Rise: A Law of the Sea Perspective* (Oct. 2010).

7. *See infra* Part V (discussing contemporary and historic state practice).

8. *See* STEVEN ROGER FISCHER, *ISLANDS: FROM ATLANTIS TO ZANZIBAR* 36–37 (2012); HIRAN W. JAYEWARDENE, *THE REGIME OF ISLANDS IN INTERNATIONAL LAW* 8 (1990).

9. *See* Tomoya Akimichi, *The Ecological Aspect of Lau (Solomon Islands) Ethnoichthyology*, 87 J. POLYNESIAN SOC'Y 301, 303 (1978); Bennie Buga & Veikila Vuki, *The People of the Artificial Island of Foueda, Lau Lagoon, Malaita, Solomon Islands: Traditional Fishing Methods, Fisheries Management and the Roles of Men and Women in Fishing*, 22 SPC WOMEN IN FISHERIES INFO. BULL. 42, 42 (2012).

10. JEAN GOTTMANN, *THE SIGNIFICANCE OF TERRITORY* 11 (1973) [hereinafter GOTTMANN SIGNIFICANCE]; Jean Gottmann, *The Political Partitioning of Our World: An Attempt at Analysis*, 4 WORLD POL. 512, 513 (1952).

11. GOTTMANN SIGNIFICANCE, *supra* note 10.

merely theoretical, or small-scale, one-off creations of ambitious individuals, the value in determining their territorial status was low. Now however, such islands are technologically accessible, and the scale is dramatically different: some artificial islands are larger than populated naturally formed islands.¹² As was the case with Antarctica, and indeed, the moon after it, technology has made artificial island building a modern reality that is causing international debates, tensions, and flashpoints. But what status do these artificial islands have at international law?

In 1977, Nikos Papadakis argued that artificial islands were *de lege ferenda* and would be best dealt with by a new international convention to determine their status in international law.¹³ Over forty years later, while artificial island building has accelerated, no such convention has been forthcoming. This Article cannot provide a comprehensive legal regime covering artificial islands. Rather, in terms of their legal status, it seeks to answer one question: are artificial islands capable of comprising **territory** at international law? The answer to this question is not a mere technicality of language or nomenclature, but one that has important ramifications in *how* and *when* artificial islands can be built, used, and claimed by states, as well as how international law doctrines interact with such islands.¹⁴

In asking this question, consider Malcolm Shaw's work on title to territory. Shaw linked the evolution of the concept of "territory" in international law to both the needs of people and the reality of historical developments.¹⁵ These same factors are present with respect to artificial islands: the changing needs of people in the face of climate change, the technological advances that have made large-scale land reclamation feasible, and the contemporary reality of island building taken all together mean the concept of territory must be reassessed.

Thus, although this Article will analyze traditional doctrines of territory and title to territory, it will also argue for an evolutionary approach to these doctrines, insofar as they must be considered and applied in light of the reality of modern large-scale artificial island building. Indeed, such an evolutionary approach is entirely consistent with historical development of the law regarding sovereignty, territory, and maritime features: for example, sovereign rights were only asserted over the continental shelf after technological developments

12. For example, reclamation at Mischief Reef is reported to be over 5.5 square kilometers. In contrast, Pitcairn Island, situated between Peru and New Zealand, has an area of 5 square kilometers.

13. See NIKOS PAPADAKIS, *THE INTERNATIONAL LEGAL REGIME OF ARTIFICIAL ISLANDS* 103 (1977).

14. See *infra* Part VI.

15. See MALCOM SHAW, *TITLE TO TERRITORY IN AFRICA* 3 (1986) ("The concept of territory will not only express the power balance between coexisting or competing entities, it also reflects the relationship between the people and the geographical space they inhabit.").

made retrieving resources viable.¹⁶ As new areas become accessible, we must consider how the law applies to them.

This Article will do so by first setting out how the UNCLOS regime applies to artificial islands in Part II. It will then consider existing conceptions of territory in Part III, and title to territory in Part IV and assess how these theories might apply to artificial islands. In Part V, the Article will turn to considering existing state practice on artificial islands and territory. In Part VI, the Article will argue that artificial islands can constitute territory, and consider how title to territory will flow in different maritime zones. Finally, Part VII will address the repercussions of this argument using the principal of unlawful territorial situations.

II. ARTIFICIAL ISLANDS AND THE CONVENTION ON THE LAW OF THE SEA

There is no question that UNCLOS contains a binding regime for the law of the sea, including maritime zones and the status of islands, and that its substantive provisions are reflected in customary international law. This Article does not seek to disrupt or reject this regime. However, UNCLOS also contains silences: the juridical status, and in particular the territorial status, of artificial islands is one such silence. It is this silence that this Article is attempting to fill.

UNCLOS does make two distinctions in regards to artificial islands: first, between islands and artificial islands, and second, between artificial islands and installations. UNCLOS also places certain limitations on artificial islands. This Part will consider these two distinctions and the limitations in turn, concluding that these provisions cannot answer the question of whether artificial islands can constitute territory in international law.

A. *Islands and Artificial Islands*

It is clear from the text of UNCLOS that artificial islands are *not* assimilated to islands under the law of the sea:¹⁷ while the term “artificial island” is not defined within the Convention, an “island” is “a naturally formed area of land, surrounded by water, which is above water at high tide.”¹⁸ It should be noted there is ambiguity around where the line between natural formation and artificial intervention

16. See Proclamation No. 2667, 10 Fed. Reg. 12,305 (Sept. 28, 1945) (asserting US jurisdiction and control over the continental shelf beneath the sea but adjoining US coasts); PETER MALANCZUK, *AKEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW* 191 (7th ed. 1997) (“[T]he law began to change when it became technologically and economically feasible to exploit oil deposits beneath the sea by means of offshore oil wells.”).

17. UNCLOS, *supra* note 3, at 420.

18. *Id.* at 442.

precisely sits (as in, for example, an artificial structure that alters natural accretion patterns to cause sand to be deposited where it would not otherwise be).¹⁹ This Article will focus on those artificial islands that are unambiguously artificial, and truly outside the regime of Article 121 of UNCLOS.

This includes artificial islands built by reclamation or other processes around/on existing maritime features, particularly those built around low-tide elevations (LTEs). This Article accepts the argument made by Philippe Sands in submissions before the arbitral tribunal in the South China Sea arbitration: “A low-tide elevation cannot become a ‘rock’ or an ‘island’ merely because it has been subject to some degree of human manipulation. Equally, a ‘rock’ cannot be upgraded to an ‘island’ by human intervention.”²⁰ Human manipulation around such features *can*, however, transform them into artificial islands.²¹

B. Artificial Islands and Installations

The text of UNCLOS draws a distinction between artificial islands and installations,²² although neither term is defined in the Convention.²³ Guidance as to the differences between artificial islands and installations can be gained from commentary. Alfred Soons,

19. See CLIVE R. SYMONS, *THE MARITIME ZONES OF ISLANDS IN INTERNATIONAL LAW* 33 (1979) (“Of course, there may be problem situations where formations may be at least partly due to human activity, such as silt “islands” forming in an estuary because of decreased tidal flow owing to abstraction of water.”).

20. In the Matter of an Arbitration under Annex VII of the United Nations Convention on the Law of the Sea (Phil. v. China), P.C.A. Case No. 2013-19, Hearings on the Merits and Remaining Issues of Jurisdiction and Admissibility, at 18 (Perm. Ct. Arb. 2015), <https://pcacases.com/web/sendAttach/1> [<https://perma.cc/8AU3-CD4T>] (archived Apr. 3, 2019).

21. See, e.g., Robert Beckman, *International Law, UNCLOS and the South China Sea*, in *BEYOND TERRITORIAL DISPUTES IN THE SOUTH CHINA SEA: LEGAL FRAMEWORKS FOR THE JOINT DEVELOPMENT OF HYDROCARBON RESOURCES* 47, 57 (Robert Beckman et al. eds., 2013) (explaining that when a low-tide elevation, normally not an island, is manipulated, it can be transformed into an artificial island). However, note that Beckman does not distinguish between *reclamation* around or on a low-tide elevation and *structures* being built on a low-tide elevation. A comparison can also be drawn to the Okinotorishima islands (or rocks): while Japan argues they are preserving very small islands, China argues that Japan’s construction works have in effect created an artificial island around a rock. See Lilian Yamamoto & Miguel Esteban, *Vanishing Island States and Sovereignty*, 53 *OCEAN & COASTAL MGMT.* 1, 4–5 (2010); see also *infra* Parts IV.B.2 & V.B.

22. See UNCLOS, *supra* note 3, at 419, 430 (identifying artificial islands and installations as separate things that a coastal state has control over in its exclusive economic zone).

23. Neither is the term “artificial island” defined in the various commentaries to UNCLOS. See Am. Branch of the Int’l Law Ass’n Law of the Sea Comm., *Definitions for the Law of the Sea: Terms Not Defined by the 1982 Convention*, in *DEFINITIONS FOR THE LAW OF THE SEA: TERMS NOT DEFINED BY THE 1982 CONVENTION* 85, 104–05 (George K. Walker ed., 2012).

writing in the context of the pre-UNCLOS emerging Law of the Sea, described four types of offshore facilities: “floating structures, kept at the same position by anchors or other means”;²⁴ “fixed structures, resting upon the seafloor by means of piles or tubes driven into the bottom”;²⁵ “[c]oncrete structures”;²⁶ and fourthly, “structures which have been created by the dumping of natural substances like sand, rocks and gravel . . . [or the] so-called artificial islands.”²⁷

There is a clear and obvious delineation between, on one hand, those types of structures made from a non-natural material that are either not attached to the sea bed or attached through artificial means, and, on the other hand, those features created by reclamation processes around an already existing feature, such as a submerged reef or low-tide elevation. The first can be described as “permanent, bottom-based installations”²⁸ and are best understood as artificial installations; the second as “artificially shaped elevations of the seabottom which have an essential island character.”²⁹ It is the latter category that are true artificial islands. This distinction is reinforced by reading “artificial islands” in the context of the definition of island given in Article 121 of UNCLOS. As Oude Elferink states, “it would seem that an artificial island is an area of land that is above water at high tide that is not naturally formed.”³⁰ In truth, the difference is not critical for the application of UNCLOS: artificial islands and installations are subject to the same regime.³¹ However, as it will be seen, this distinction is crucial for the status of such structures as territory in international law.

C. Limitations and Jurisdiction

There are two main ways that UNCLOS regulates artificial islands that could affect their capacity to be territory. These are the

24. Alfred H. A. Soons, *Artificial Islands and Installations in International Law* 1–2 (Law of the Sea Inst., Univ. R.I., Occasional Paper No. 22, 1974). These definitions have since been adopted in subsequent works. See SALAH E. HONEIN, *THE INTERNATIONAL LAW RELATING TO OFFSHORE INSTALLATIONS AND ARTIFICIAL ISLANDS* 1 (1991); Yi-Hsuan Chen, *South China Sea Tension on Fire: China’s Recent Moves on Building Artificial Islands in Troubled Waters and Their Implications on Maritime Law*, 1 MAR. SAFETY & SECURITY L.J. 1, 2 (2015).

25. Soons, *supra* note 24, at 2.

26. *Id.*

27. *Id.*

28. A.M.J. Heijmans, *Artificial Islands and the Law of Nations*, 21 NETH. INT’L L. REV. 139, 140 (1974).

29. *Id.*

30. Alex G. Oude Elferink, *Artificial Islands, Installations and Structures*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW ¶ 3 (2013).

31. The only difference is that Article 60 regulates only those installations that either are for purposes provided in Article 56 or other economic purposes or those that may interfere with the exercise of the rights of the coastal state—no such limitation is placed on artificial islands. UNCLOS, *supra* note 3, at 419.

territorial limitations in Article 60(8) and the jurisdictional limits in Articles 60(2) and 87.

Article 60(8) of UNCLOS states: “They have no territorial sea of their own, and their presence does not affect the delimitation of the territorial sea, the exclusive economic zone or the continental shelf.”³² As such, the territorial consequences that land usually enjoys over the sea do not accrue to artificial islands. Does this mean that such structures are not territory at all? Or has UNCLOS merely “abrogated” the “capacity of artificial islands to generate maritime zones,”³³ without making further statements on the territorial nature of such structures? This Article argues that latter view is correct.

UNCLOS does not address the territorial nature of artificial islands. This is consistent with the discussion leading up to the adoption of UNCLOS, which focused on whether artificial islands should generate a territorial sea, not whether such structures *themselves* could be considered territory.³⁴ Indeed, earlier proposed rules did not distinguish between naturally formed islands and artificial islands: any area of land permanently above the high water mark would qualify as an island and be entitled to a territorial sea.³⁵ The Report of Sub-Committee Number II of the 1930 League of Nations Codification Conference, held at The Hague, expressly remarked that “[t]he definition of the term ‘island’ does not exclude artificial islands provided these are true portions of the territory and not merely floating works, anchored buoys, etc.”³⁶ The difference between true artificial islands, as discussed above, and installations is significant here: the former would have been considered a “true portion of territory,” while the latter would not. This difference is also seen in the discussion surrounding lighthouses: while some commentators argued that lighthouses should generate a territorial sea, criticisms of this proposal rested on the *nature* of lighthouses.³⁷ John Westlake argued that “[i]t would be difficult to admit that a mere rock and building, incapable of being so armed as really to control the neighbouring sea, could be made the source of a presumed occupation of it converting a large tract into territorial water.”³⁸ True artificial islands are much more than mere rock and building and, as can be seen in the South China Sea, are

32. *Id.* at 420. This provision also applies to artificial islands on the continental shelf. *Id.* at 430.

33. JENNY GROTE STOUTENBERG, *DISAPPEARING ISLAND STATES IN INTERNATIONAL LAW* 172 (2015).

34. *See* SYMMONS, *supra* note 19, at 36–37 (“At the Third UNCLOS, no definitions of islands were made which departed from the “natural formation” requirement, and the question of “artificial islands” was specifically included separately as item 18 in the list of topics for the conference.”).

35. D.H.N. Johnson, *Artificial Islands*, 4 INT’L L.Q. 203, 203, 212 (1951).

36. *Id.* at 211.

37. *See* JOHN WESTLAKE, *INTERNATIONAL LAW: PART I: PEACE* 190 (1904).

38. *Id.* at 186.

currently being armed “really to control” the neighboring sea.³⁹ Historic concerns surrounding the territorial status of artificial *installations* such as lighthouses do not present barriers to true artificial islands being considered territory.

It is clear that the restrictions placed on artificial islands in UNCLOS were introduced not because artificial islands *cannot* be territory, but rather because states were concerned about the maritime zone entitlements that *could* flow from such territory.⁴⁰ Both Germany and the Netherlands saw true artificial islands (those resting on the sea bottom) as territory capable of generating a territorial sea.⁴¹ As Jenny Grote Stoutenberg argues, “had the participating states not considered artificial islands as territory capable of engendering a territorial sea, the insertion of the restrictive clause ‘naturally formed’ would not have been necessary in the first place.”⁴²

Thus, international understanding of artificial islands prior to UNCLOS saw them as capable of constituting land territory. It is clear that UNCLOS abrogated any capacity of an artificial island to be an Article 121 island, or to generate maritime entitlements save a five-hundred-meter safety zone.⁴³ It did not, however, attempt to address or alter the territorial status of artificial islands *themselves*.

It must be noted that UNCLOS does cover matters of *jurisdiction* in regard to artificial islands and installations. In the exclusive economic zone and on the continental shelf, the coastal state has “exclusive jurisdiction” over artificial islands and structures.⁴⁴ On the high seas, all states have the “freedom” to construct artificial islands,⁴⁵ but no state is granted jurisdiction over such structures. Although jurisdiction can be seen as a manifestation of state sovereignty, the mere possession of jurisdiction does not render the space it is exercised over as sovereign territory,⁴⁶ or even territory at all.⁴⁷ This is true even in the case of exclusive jurisdiction.⁴⁸ Thus, although UNCLOS divides

39. Indeed, China’s ability to control surrounding waters was central to the Pentagon’s concern in SEC’Y OF DEF. 2017 REPORT, *supra* note 2, at 9–10.

40. See K. JAYARAMAN, LEGAL REGIME OF ISLANDS 37–38 (1982).

41. See Johnson, *supra* note 35, at 212 (discussing Germany and the Netherlands’ statements assimilating artificial islands to natural ones).

42. STOUTENBERG, *supra* note 33, at 172.

43. UNCLOS, *supra* note 3, at 420.

44. *Id.* at 420, 430.

45. *Id.* at 432.

46. The existence of the non-territorial doctrines of jurisdiction make this self-evident.

47. As is the case in the exercise of national jurisdiction over ice islands and sea ice. See *United States v. Escamilla*, 467 F.2d 341, 343 (4th Cir. 1972); *R v. Tootalik*, [1970] 71 W.W.R. 435 (Can.); see also Christopher C. Joyner, *The Status of Ice in International Law*, in *THE LAW OF THE SEA AND POLAR AND MARITIME DELIMITATION AND JURISDICTION* 23, 45–47 (2001).

48. See Agreement Between the United States and Cuba for the Lease of Lands for Coaling and Naval Stations, Cuba-U.S., art. III, Feb. 16–23, 1903, Foreign Relations of the United States 350; see also *Rasul v. Bush*, 542 U.S. 466, 471 (2004) (discussing

the sea into maritime zones, and proscribes jurisdiction over each zone in varying degrees, this does not in itself determine the territorial status of features within these zones.

The preamble of UNCLOS reserves all matters not covered by the Convention to “to be governed by the rules and principles of general international law.”⁴⁹ Given that UNCLOS does not answer whether artificial islands can or cannot be territory, we must then turn to general international law concepts of territory and title to territory.

III. TERRITORY AT INTERNATIONAL LAW

There is no commonly accepted definition of territory at international law. Territory as a concept is “underexamined.”⁵⁰ Rather, most analysis rests on whether a geographical space can be *claimed* by a state—if it can, the implicit assumption is that the space is territory at international law. Indeed, the very concepts of territory and title to territory are, to an extent, inextricably intertwined. However, there is value in trying to separate out the two questions—firstly, what *type* of geographical space is capable of being territory? And secondly, as will be addressed in Part IV below, how can doctrines of title to territory be understood in the context of artificial islands?

Historically, territory was understood as the naturally formed land in which a state performed its essential functions.⁵¹ The Latin root of the word itself is *terra*—the land, or earth.⁵² The traditional territory of a state is its land, along with its lakes and river resources (terrestrial, lacustrine, and fluvial territory respectively).⁵³ Maritime territory has been accepted in some form since at least the seventeenth century,⁵⁴ but was not universally enshrined in the modern sense of the twelve-nautical-mile territorial sea until the advent of UNCLOS in 1982. But is territory necessarily limited to these four spheres? Judge Alvarez, writing in his separate opinion to the *Corfu Channel* case, did not think so:

By sovereignty, we understand the whole body of rights and attributes which a State possesses in its territory, to the exclusion of all other States, and also in its

Cuba’s agreement that the U.S. shall exercise complete control over Guantanamo during so long as the U.S. does not abandon it).

49. UNCLOS, *supra* note 3, at 398.

50. STUART ELDEN, *THE BIRTH OF TERRITORY* 3 (2013).

51. See MARCELO G. KOHEN, *TERRITORIALITY AND INTERNATIONAL LAW* xi (2016).

52. GOTTMANN SIGNIFICANCE, *supra* note 10, at 5.

53. See, e.g., The 1987 Constitution of the Republic of the Philippines, Feb. 2, 1987, art. I.

54. See Tullio Treves, *Historical Development of the Law of the Sea*, in *THE OXFORD HANDBOOK OF THE LAW OF THE SEA* 1, 4–5 (2015).

relations with other States. Sovereignty confers rights upon States and imposes obligations on them.

These rights are not the same and are not exercised in the same way in every sphere of international law. I have in mind the four traditional spheres—terrestrial, maritime, fluvial and lacustrine—to which must be added three new ones—aerial, polar and floating (floating islands). The violation of these rights is not of equal gravity in all these different spheres.⁵⁵

Judge Alvarez thus *extended* the concept of territory to encompass artificial islands. It must be noted that these “floating islands” referred to by Judge Alvarez are not true artificial islands as per Soons’ categorizations, but rather installations.⁵⁶ However, the opinion shows that historically, the idea of recognizing the territorial nature of artificial islands has legal support. Further to this, Jenny Groute Stoutenberg writes:

A look at the genesis of the artificial islands regime, from the 1930 Hague Codification Conference to the International Law Commission’s draft for the first Law of the Sea Conference in 1958, reveals that historically, artificial islands were always assimilated to natural islands when it came to their quality as territory, although their capacity to generate maritime zones was eventually abrogated at UNCLOS I in 1958 Although its status under the law of the sea might differ from that of a natural island, even an artificial island would therefore count as “defined State territory.”⁵⁷

Stoutenberg points out that in contrast to artificial islands, “artificial installations were historically never assimilated to islands, and they do not qualify as territory.”⁵⁸ What is it then that makes a feature territory? Artificial islands *do* fulfill the criteria of some formulations of territory. For example, the competence theory of territory posits that “territory is neither an object nor a substance, it is a framework. What sort of framework? The framework within which the public power is exercised.”⁵⁹ Similarly, Hans Kelsen defined territory as simply the

55. *Corfu Channel (Alb. v. U.K.)*, Judgment, 1949 I.C.J. Rep. 4, 43 (Apr. 9) (separate opinion by Alvarez, J.).

56. An interesting comparison emerges here with floating ice islands, over which questions of territorial sovereignty and criminal jurisdiction emerged when a member of an American research team was murdered on an ice island in 1970. See Donat Pharand, *State Jurisdiction over Ice Island T-3: The Escamilla Case*, 24 ARCTIC 83, 83 (1971).

57. Jenny Grote Stoutenburg, *When Do States Disappear? Thresholds of Effective Statehood and the Continued Recognition of ‘Deterritorialized’ Island States*, in THREATENED ISLAND NATIONS: LEGAL IMPLICATIONS OF RISING SEAS AND A CHANGING CLIMATE 57, 62–63 (2013); see also SYMMONS, *supra* note 19, at 30 (explaining that artificial islands can count as islands for purposes of UNCLOS); Johnson, *supra* note 35, at 211–12 (saying that artificial islands are “true portions of the territory”).

58. Stoutenburg, *supra* note 57, at 63.

59. ENRICO MILANO & CHRISTINE CHINKIN, UNLAWFUL TERRITORIAL SITUATIONS IN INTERNATIONAL LAW: RECONCILING EFFECTIVENESS, LEGALITY AND LEGITIMACY 68 (2006) (citing the pleading of M.A. de La Pradelle on behalf of France in *Nationality*

“spatial sphere of the legal order.”⁶⁰ James Crawford states that “the space which the state occupies in the world is its territory, traditionally thought of as realty, with the state (a person) its proprietor.”⁶¹ Under these conceptions, any form of artificial island, if in fact occupied by a state, or forming the space in which a state’s legal order is exercised, could form part of a state’s territory.

Other formulations of territory import additional restrictions, which artificial islands may not fulfill. This Part will assess the legitimacy of two such restrictions: first, whether territory must be naturally formed, and second, the notion of stability. Stability here encompasses conceptual stability (the permanence of borders and ties to land) and physical stability (the permanence of the land, and the geological composition of it). It must be noted that only the first restriction has previously been applied to the question of artificial islands. The question of stability has been discussed in the context of naturally formed islands, rather than artificial islands: this Part will extend the analysis to artificial islands.

A. *Naturally Formed: A Portion of the Earth’s Surface*

Robert Jennings referred to territory in 1963 as “a portion of the earth’s surface and its resources[.]”⁶² Similarly, the then-US Ambassador to the United Nations, Philip Jessup, argued that “[h]istorically, the concept [of territory] is one of insistence that there must be some portion of the earth’s surface which [a state’s] people inhabit and over which its Government exercises authority.”⁶³ Both Jennings’ and Jessup’s formulations of territory derive of course from Max Huber’s seminal award in the 1928 *Island of Palmas (Miangas)* arbitration,⁶⁴ where Arbitrator Huber described territorial sovereignty as “in relation to a portion of the surface of the globe.”⁶⁵

What then is “a portion of the Earth’s surface” or “a portion of the surface of the globe”? Is it quite literally something on the surface of the earth (which a permanent artificial island formed by reclamation would seem to satisfy)? Or does it mean that only *naturally formed*

Decrees Issued in Tunis and Morocco (French Zone), Advisory Opinion, 1923 P.C.I.J. (ser. B) No. 4 (Feb. 7)).

60. HANS KELSEN, PURE THEORY OF LAW 291–92 (1967).

61. JAMES CRAWFORD, BROWNIE’S PRINCIPLES OF PUBLIC INTERNATIONAL LAW 216 (8th ed. 2012). Although note that Crawford writing in 1989 stated that, in the context of *new* island states, “artificial islands cannot form the basis for territorial States any more than can ships.” James Crawford, *Islands as Sovereign Nations*, 38 INT’L & COMP. L.Q. 277, 279 (1989).

62. R.Y. JENNINGS, THE ACQUISITION OF TERRITORY IN INTERNATIONAL LAW 3 (1963).

63. U.N. SCOR, 3d Year, 383d mtg. at 11, U.N. Doc. S/PV.383 (Dec. 2, 1948) [hereinafter U.N. SCOR 3d Year].

64. See *Island of Palmas (Neth. v. U.S.)*, 2 R.I.A.A. 829, 838 (Perm. Ct. Arb. 1928).

65. *Id.*

parts of the earth's surface can be territory—a contention arguably at odds with the contemporary and common practices of reclamation? Given that large-scale artificial islands did not in exist in 1928, can we cling to a historical formulation of territory in the face of a very different reality of land creation in the twenty-first century?

Indeed, Arbitrator Huber's further comments on the nature of sovereignty over territory suggest the most important indicia for territory are whether a state *can* and *does* exclusively exercise its sovereign powers within a geographical space:

The fact that the functions of a State can be performed by any State within a given zone is, on the other hand, precisely the characteristic feature of the legal situation pertaining in those parts of the globe which, like the high seas or lands without a master, cannot or do not yet form the territory of a State.⁶⁶

No one state can exclusively exercise sovereign powers on the high seas, so they *cannot* be territory. And in the case of unclaimed land (no longer a contemporary reality, save for the unclaimed sector of Antarctica⁶⁷), no one state *yet* exclusively exercises sovereign powers, so it is *not yet* territory. Neither of these concepts require the space to be naturally formed: and indeed, a large reclaimed artificial island could well be under the exclusive control of a state that purports to exercise sovereign powers on and over it.⁶⁸

J. H. Verzijl, writing in 1968, accepted that territory had expanded from traditional land territory to that in the air, the sea, and the continental shelf because of “[a]stounding technical developments,” but insisted that “[b]oth from the angle of historical development and from that of logical priority the nucleus of State territory will always remain a defined portion of the surface of the earth. All other elements of it are dependent on, and inconceivable without, such a basic territorial substratum.”⁶⁹

Similarly, astounding technical developments have opened the new space of artificial islands. But the question arises again as to what consists the surface of the earth—must it be naturally formed? Verzijl did not elaborate.⁷⁰ Even if “the nucleus of state territory” can only be naturally formed land, an artificial island *could* still be considered territory, but only as territory antecedent to territorial claims flowing from that naturally formed land (for example, an artificial island built within the territorial sea, or perhaps the exclusive economic zone

66. *Id.*

67. See PETER J. BECK, THE INTERNATIONAL POLITICS OF ANTARCTICA 135 (1986) (“One sector of Antarctica, that is, the area between 90°W and 150°W remains unclaimed, even if the US government was expected to claim this sector during the 1930s and 1940s.”).

68. For further discussion on title to territory, see *infra* Parts IV, VI.

69. J.H.W. VERZIJL, INTERNATIONAL LAW IN HISTORICAL PERSPECTIVE: PART III: STATE TERRITORY 14 (1970).

70. *See id.*

(EEZ), of a state). As will be discussed below, this view finds support through some traditional doctrines of title to territory.

There are difficulties with this view, however, as it does not answer the fundamental question of this Article: can an artificial island be territory *in its own right*? The situation is easy if State A builds an artificial island in its own territorial sea. But what happens in the hard cases? What happens, for instance, if an artificial island is built within an EEZ of State A, but is occupied by State B?⁷¹ Surely it does not make sense to call a geographical space “territory” if occupied by one state, but to transform that space into something not capable of being territory if occupied by another. This is why a formulation of the *territorial* status (as opposed to the *title* to territory) of artificial islands as only deriving from adjacent land territory is ultimately unsatisfying. It is, as Louis Cavaré states, “impossible to accept that proximity can serve as basis for the creation of a genuine right.”⁷² That is to say: proximity can well determine which state has *rights* to an artificial island. But proximity alone should not determine the fundamental territorial status of artificial islands at international law.

B. Conceptual Stability

Another criterion that has been suggested for territory is that of stability. Charles de Visscher described this as

[t]his stability is above all a factor of security, of the security that peoples feel in the shelter of recognized frontiers—a confidence that has grown in them with the consolidation, in a community of aspirations and memories, of the bonds uniting them to a soil that they occupy.⁷³

There are two concepts here: first, the stability and recognition of set frontiers; and second, the historical connection between people and territory. If these are to be accepted as criteria for territory, could an artificial island satisfy them? The first—the shelter of recognized frontiers—is (theoretically) easily satisfied in the case of large reclaimed artificial islands.⁷⁴ The second is less so. Is this historical connection *necessary* for territory, or does it simply *inform* security and stability? A better understanding is that while stability goes to the

71. This is, of course, the factual situation of the various claims surrounding Mischief Reef in the South China Sea Arbitration, as discussed below.

72. MONIQUE CHEMILLIER-GENDREAU, SOVEREIGNTY OVER THE PARACEL AND SPRATLY ISLANDS 28 (2000) (quoting LOUIS CAVARÉ, DROIT INTERNATIONAL PUBLIC POSITIF 597 (1962)).

73. CHARLES DE VISSCHER, THEORY AND REALITY IN PUBLIC INTERNATIONAL LAW 206 (2d ed. 1968).

74. And indeed, a reclaimed artificial island is much more stable in the long term than polar ice for which there were, at least pre-UNCLOS, arguments that such ice, if immovable, could constitute “polar territory.” See W. Lakhtine, *Rights over the Arctic*, 24 AM. J. INT’L L. 703, 712 (1930).

capability of a feature being territory, a historical connection to the land goes to the *title* to that territory. This is the approach taken in many territorial disputes, where historical use and connection are used as evidence of title, rather than evidence of the territorial status of the feature.⁷⁵ As such, assuming an artificial island is sufficiently stable and its frontiers sufficiently recognized, it could fulfill this requirement for territory.

C. Physical Stability

In addition to conceptual stability, the physical stability of artificial islands may preclude them from being territory at international law. There are two related concepts that arise: the geological composition of the land; and whether the land is sufficiently permanent. Although this analysis has not been applied to artificial islands, both these points have been considered in assessing natural islands, and the reasoning can be applied by analogy to artificial islands.

The strongest international jurisprudence setting out this opinion is the joint dissenting judgment of Judges Badjauoi, Ranjeve, and Koroma in the International Court of Justice (ICJ) case of *Maritime Delimitation and Territorial Questions between Qatar v. Bahrain*.⁷⁶ Judges Badjauoi, Ranjeve, and Koroma challenged the ICJ's finding that Qit'at Jaradah, one of the maritime features in dispute, was an island.⁷⁷ While Qatar had argued that Qit'at Jaradah was an LTE, Bahrain argued that it was dry at high tide, and provided expert evidence to this effect.⁷⁸ Although the top surface of Qit'at Jaradah had been removed by Qatar in 1986 (thus rendering it submerged at high tide), Bahrain successfully argued that Qit'at Jaradah had "recovered its island status by natural accretion."⁷⁹

In contrast to the court's decision, the dissenting judgment argued that "sovereignty, in international law, implies a minimum stable terrestrial base, which is not to be found in maritime features above the waterline which are not islands."⁸⁰ In doing so, the judges differentiated between true islands as "areas of *terra firma*"⁸¹ and atolls ("features or elevations consisting of a mixture of sediment, mud,

75. See, e.g., DE VISSCHER, *supra* note 73, at 209; UNRYU SUGANUMA, SOVEREIGN RIGHTS AND TERRITORIAL SPACE IN SINO-JAPANESE RELATIONS 3–6 (2000).

76. See generally *Maritime Delimitation and Territorial Questions between Qatar and Bahrain* (Qatar v. Bahr.), Judgment, 2001 I.C.J. Rep. 40 (Mar. 16) [hereinafter *Qatar v. Bahr.*].

77. *Id.* at 207–10 (Bedjaoui, J., Ranjeve, J. & Koroma, J., dissenting).

78. See *id.* at 98 (judgment).

79. *Id.* at 99.

80. *Id.* at 210 (Badjauoi, J., Ranjeve, J. & Koroma, J., dissenting).

81. *Id.* at 209.

coral and madrepora”),⁸² and cays (“an islet or elevation composed of sand compacted to a greater or lesser degree”).⁸³ The joint judgment argued that Qit’at Jaradah could not be an island because it was not *terra firma* and because it had a degree of impermanence due to the removal and subsequent regaining of its top surface.⁸⁴

This suggests an artificial island cannot be territory unless it has some degree of permanence—the “minimum stable terrestrial base”—and is composed of *terra firma* “proper,” rather than sediment, mud, coral, madrepora, or sand.⁸⁵ Artificial islands, by their nature made of reclaimed materials, would fail this second criteria. However, this second element is inconsistent with state practice, legal commentary, and other judgments. As Monique Chemillier-Gendreau states:

Article 121 of the Montego Bay Convention of 10 December 1982 uses a geological criterion, “a naturally formed area of land.” Artificial islands are thus excluded. On the other hand, the nature of the area of land matters little. “Mud, silt, coral, sand, madrepora, rocks, etc., anything makes an island.”⁸⁶

State practice further shows numerous examples of territorial recognition of coralline islands and atolls, such as Barbados and the Bahamas, the Republic of the Maldives, Christmas Island and the Cocos-Keeling Islands (Australia), and the Lakshadweep Islands (India).⁸⁷ By their nature such coralline islands are naturally subject to change over time, including, in rare cases, submergence.⁸⁸

As such, it appears the constraints placed on Article 121 of UNCLOS by Judges Badjauoi, Ranjeve, and Koroma cannot stand. This reasoning is further confirmed by the judgment of the ICJ in *Territorial and Maritime Dispute (Nicaragua v. Colombia)*.⁸⁹ The court denied Nicaragua’s assertion that a feature could not be an island because it was composed of coral, stating:

Nicaragua’s contention that QS 32 cannot be regarded as an island within the definition established in customary international law, because it is composed of coral debris, is without merit. International law defines an island by reference to whether it is “naturally formed” and whether it is above water at high tide, not by reference to its geological composition. The photographic evidence shows

82. *Id.*

83. *Id.*

84. *See id.* at 208–09.

85. *Id.* at 210.

86. CHEMILLIER-GENDREAU, *supra* note 72, at 22 (quoting 1 LAREUNT LUCCHINI & MICHEL VOELCKEL, DRIOT DE LA MER 331 (1990)).

87. JAYARAMAN, *supra* note 40, at 11.

88. *See* Jenny Bryant-Tokalau, *Artificial and Recycled Islands in the Pacific: Myths and Mythology of “Plastic Fantastic,”* 120 J. POLYNESIAN SOC’Y 71, 74–75 (2011).

89. *See* Territorial and Maritime Dispute (Nicar. v. Colom.), Judgment, 2012 I.C.J. Rep 624, ¶ 37 (Nov. 19) [hereinafter *Nicar. v. Colom.*] (“Nicaragua’s contention that QS 32 cannot be regarded as an island within the definition established in customary international law, because it is composed of coral debris, is without merit.”).

that QS 32 is composed of solid material, attached to the substrate, and not of loose debris. The fact that the feature is composed of coral is irrelevant.⁹⁰

Just as an island cannot be denied territorial status because of geological structure, it follows that an artificial island also cannot be denied territorial status **solely** on the basis of its geological structure.

D. *Criteria of Territory*

Thus, it can be argued there is nothing in the existing doctrine of territory *per se* that would prohibit certain artificial islands from being considered territory at international law. Rather, a set of criteria can be created whereby an artificial island can be assessed. These include whether the artificial island is a space that a state occupies; whether it is a portion of the earth's surface—in that it is a true artificial island, created around an elevation of the sea bed, rather than a structure or installation; and whether it possess the requisite degree of stability. Certain large artificial islands could fulfill these three criteria, and many existing artificial islands currently occupied and in use certainly do.

The criteria as set out here reject two additional restrictions on territory: that a “portion of the Earth's surface” can only be naturally formed, and that the geological composition of an artificial island can preclude it from being territory. As is discussed above, neither of these restrictions are tenable in light of historical development and contemporary international law.

Given this, the next question is how existing doctrines of title to territory—both how territory is *formed* at international law and how it is *claimed*—could operate in the context of artificial islands.

IV. TITLE TO TERRITORY

This Part addresses the formation of (and subsequent title to) territory: that is, whether artificial islands *are* (or can be) territory. The issue of acquisition of *existing* territory is discussed in Part VI, below. This Part considers the doctrines of accretion, and capability of appropriation in relation to artificial islands. It argues that neither doctrine, as currently applied in international law, satisfactorily answers the question of the territorial status of artificial islands.

90. *Id.*

A. Accretion

While the use of Roman terminologies in describing the processes of claiming territory have been criticized,⁹¹ nonetheless they endure in discussions on newly formed territory. Accretion is the term used “where the shape of the land is changed by the processes of nature.”⁹² But *why* are states held to have title over this newly formed land abutting their coastlines? Malcolm Shaw argues: “territory acquired by accretion, such as additions to land to the seashore by operation of nature, is really acquired as a direct consequence of the sovereignty of the state over the appurtenant land.”⁹³ In doing so, Shaw draws on Georg Schwarzenberger’s argument that “[t]he title to newly created land rests primarily on the unilateral assumption of jurisdiction in situations in which, for all practical purposes, the sovereign has a monopoly of such changes.”⁹⁴ Thus where a state has sovereignty and/or exclusive jurisdiction over the area in which the new land is created by accretion, it gains title to that territory.

The key question here is how do these rationales apply when accretion is not “by operation of nature” but by human intervention? The doctrinal justifications given by Shaw and Schwarzenberger equally apply to artificial reclamation processes that abut land. This is consistent with widespread state practice—many countries engage in reclamation processes around their coastlines, and none have had *territorial* challenges over this new land.⁹⁵ While Malaysia challenged Singapore’s planned reclamation projects before the International Tribunal on the Law of the Sea in 2003, it was not on the basis that such reclaimed land would not constitute the territory of Singapore, but rather that the reclamation would have environmental and navigational impacts on Malaysia.⁹⁶ It seems a simple extension to argue that, just as for accretion, when the shape of land is changed by human intervention, title to territory flows to the newly formed land, and the land is properly capable of being considered territory. This was view of Philip Jessup writing in 1927 (although with a caveated warning attached):

91. See, e.g., Georg Schwarzenberger, *Title to Territory: Response to a Challenge*, 51 AM. J. INT’L L. 308, 313 (1957) (saying Roman law terms have “no technical meaning and are not necessarily accurate abstractions from governing rules”); Malcolm Shaw, *Territory in International Law*, 13 NETH. Y.B. INT’L L. 61, 80 (1982).

92. ROBERT Y. JENNINGS, *THE ACQUISITION OF TERRITORY IN INTERNATIONAL LAW* 6–7 (1967).

93. Shaw, *supra* note 91, at 81.

94. Schwarzenberger, *supra* note 91, at 313.

95. See generally, e.g., Su Yin Chee et al., *Land Reclamation and Artificial Islands: Walking the Tightrope Between Development and Conservation*, 12 GLOBAL ECOLOGY & CONSERVATION 80 (2017).

96. Land Reclamation by Singapore in and around the Straits of Johor (Malay. v. Sing.), Case No.12, Request for Provisional Measures by Malaysia, Sept. 4, 2003.

It would be dangerous doctrine in many parts of the world to allow States to appropriate new areas of water by means of structures on hidden shoals. On the other hand, it should be conceded that where dredging operations or the like result in the formation of permanent “made land” the coast of the State and its territorial waters are extended accordingly.⁹⁷

What happens though when the shape of existing land is not changed or added to, but new land, not abutting existing territory, is created? Again, there is ample state practice of artificial islands being created close to a state’s coast and within its territorial waters, such as Hulhamalé in the Maldives; the Palm Jumeirah in the United Arab Emirates; Port Island and Rokkō Island in Japan; and numerous airport constructions.⁹⁸ And again, by extension, the doctrinal justifications for title given to land created by accretion would attach to artificial islands created within territorial sea. A state has sovereignty and exclusive jurisdiction over the sea in which the island is created. As such, artificial islands within territorial sea can properly be considered the territory of the coastal state within whose sea they are built.

But what of those islands built outside the territorial sea? Those in an EEZ? Those on the high seas? They are created by the same process as those islands within the territorial sea: so are they also capable of being territory? As argued above, proximity alone should not change the fundamental territorial nature of the feature itself. However, it is clear that the doctrine of accretion cannot answer *whose* territory such artificial islands should be. As such, it is necessary to consider other doctrines of title to territory.

B. Capable of Appropriation

A second way of assessing title to territory is whether the feature that a state is claiming to be their territory is “capable of appropriation.” This is how claims to territory over maritime features have often been addressed in the ICJ—not in the context of artificial islands, but in terms of title to territory over islands, islets, low-tide elevations, and rocks.

This was demonstrated in the *Land, Island and Maritime Frontier Dispute*, where the ICJ was called to determine the sovereignty over islands and islets in the Gulf of Fonesca.⁹⁹ In the context of one very small islet, the court stated:

97. PHILIP C JESSUP, *THE LAW OF TERRITORIAL WATERS AND MARITIME JURISDICTION* 69 (1970).

98. For example, the Kansai, Kitakyushu and Chubu Centrair International Airports of Japan, the Hong Kong International Airport, and the Ordu-Giresun Airport of Turkey.

99. Summaries of Judgments, Advisory Opinions and Orders of the International Court of Justice: 1992–1996, U.N. Doc. ST/LEG/SER.F/1/Add.1, at 20 (1998).

That Meanguerita is “capable of appropriation,” to use the wording of the dispositive of the *Minquiers and Ecrehos* case is undoubted; it is not a low-tide elevation, and is covered by vegetation, although it lacks fresh water. The Parties have treated it as capable of appropriation, inasmuch as they each claim sovereignty over it.¹⁰⁰

Thus, the territorial status of a feature relates to whether it is “capable of appropriation”; and further one of the factors in deciding whether a feature is capable of appropriation is whether the states involved view it as such.

1. *Qatar v. Bahrain*

The emphasis on whether a feature is “capable of appropriation” was continued in *Qatar v. Bahrain*. One of the disputes in that case concerned a maritime feature called Fasht ad Dibal, which both parties agreed was a low-tide elevation.¹⁰¹ However, the court noted that

Whereas Qatar maintains . . . that Fasht ad Dibal as a low-tide elevation cannot be appropriated, Bahrain contends that low-tide elevations by their very nature are territory, and therefore can be appropriated in accordance with the criteria which pertain to the acquisition of territory. “Whatever their location, low-tide elevations are always subject to the law which governs the acquisition and preservation of territorial sovereignty, with its subtle dialectic of title and *effectivités*.”¹⁰²

It is clear in the facts of the case that Bahrain accepted that Fasht ad Dibal did not generate a territorial sea of its own.¹⁰³ Nonetheless, Bahrain claimed it as territory, albeit one which would not generate a territorial sea—a position similar to that of artificial islands, if they are considered territory.¹⁰⁴

The ICJ stated that Bahrain’s claim rested on “whether low-tide elevations are territory and can be appropriated in conformity with the rules and principles of territorial acquisition.”¹⁰⁵ The court then stated:

International treaty law is silent on the question whether low-tide elevations can be considered to be “territory.” Nor is the Court aware of a uniform and widespread State practice which might have given rise to a customary rule which unequivocally permits or excludes appropriation of low-tide elevations. It is only in the context of the law of the sea that a number of permissive rules have been

100. *Id.* at 28.

101. Maritime Delimitation and Territorial Questions between Qatar and Bahrain (*Qatar v. Bahr.*), Judgment, 2001 I.C.J. Rep. 40, 100 (Mar. 16).

102. *Id.*

103. *See id.* at 100–01.

104. *Id.*

105. *Id.* at 101.

established with regard to low-tide elevations which are situated at a relatively short distance from a Coast.¹⁰⁶

The few existing rules do not justify a general assumption that low-tide elevations are territory in the same sense as islands. It has never been disputed that islands constitute *terra firma*, and are subject to the rules and principles of territorial acquisition; the difference in effects that the law of the sea attributes to islands and low-tide elevations is considerable. It is thus not established that in the absence of other rules and legal principles, low-tide elevations can, from the viewpoint of the acquisition of sovereignty, be fully assimilated with islands or other land territory.¹⁰⁷

This statement has been interpreted as closing the “lacuna in effective practice” in regards to appropriation of low-tide elevations, as the ICJ chose “not to permit such an acquisition.”¹⁰⁸ Regardless of whether this is correct,¹⁰⁹ in applying the ICJ’s reasoning above to *artificial islands*, there are some similarities and some fundamental differences. Certainly, there is no international treaty law on whether artificial islands can be considered territory. There is some practice of states and individuals claiming artificial islands as territory, but, as set out in the next Part, this is scant and would be neither widespread nor uniform enough to found a norm of customary international law.¹¹⁰ Similarly to low-tide elevations, artificial islands are treated differently than islands by UNCLOS. However, artificial islands are arguably more in the nature of land capable of appropriation than a low-tide elevation could ever be, as they exist permanently above the water line.

Further, the argument in this Article is not that artificial islands be “fully assimilated with islands,” but rather that they could constitute territory in international law, albeit territory restricted by UNCLOS in terms of the generation of territorial sea and other maritime entitlements that normally flow from land territory. This last distinction is crucial, as the ICJ in *Qatar v. Bahrain* concluded that “for the purposes of drawing the equidistance line, such low-tide elevations must be disregarded.”¹¹¹ An artificial island cannot affect

106. *Id.* at 101–02.

107. *See id.* (“International treaty law is silent on the question whether low-tide elevations can be considered to be ‘territory.’”).

108. ROBERT KOLB, *CASE LAW ON EQUITABLE MARITIME DELIMITATION: DIGEST AND COMMENTARIES* 544 (2003).

109. Although the statement made by the ICJ in *Qatar v. Bahr.* was arguably more ambiguous than Kolb’s interpretation, the 2012 decision in *Nicaragua v. Colombia* was more decisive. *See Territorial and Maritime Dispute (Nicar. v. Colom.)*, Judgment, 2012 I.C.J. Rep. 624, 641 (Nov. 19).

110. *See infra* discussion accompanying Part V.

111. *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahr.)*, Judgment, 2001 I.C.J. Rep. 40, 103 (Mar. 16).

the drawing of equidistance lines, even if considered territory.¹¹² Thus in the absence of such a purpose, any conclusion as to the territorial status of artificial islands cannot be drawn from this judgment.

Judge Oda, in his separate opinion, showed remarkable prescience when criticizing the judgment of the court:

My further concern is that modern technology might make it possible to develop small islets and low-tide elevations as bases for structures, such as recreational or industrial facilities. Although the 1982 United Nations Convention does contain some relevant provisions (e.g. Arts. 60 and 80), I consider that whether this type of construction would be *permitted* under international law and, if it were, what the *legal status* of such structures would be, are really matters to be reserved for future discussion.¹¹³

This is, indeed, the heart of this Article. Unfortunately, no future discussion of these points has occurred in judgments of the ICJ. Subsequent judgments have endorsed the approach of the court in *Qatar v. Bahrain*, but none have elaborated on the justifications given.¹¹⁴

2. South China Sea Arbitration

Unlike previous cases, the *South China Sea Arbitration*¹¹⁵ did consider an artificial island—that created by Chinese reclamation activities on Mischief Reef. The Philippines requested that the tribunal declare that these activities both “violate the provisions of the Convention concerning artificial islands, installations and structures”¹¹⁶ and “constitute unlawful acts of attempted appropriation in violation of the Convention.”¹¹⁷ The first claim was easy to dispose of—having decided that Mischief Reef lay within the Philippine’s EEZ, the application of UNCLOS meant the Philippines had the sole right to construct artificial islands within that area.¹¹⁸ It is of note that the tribunal accepted without hesitation that these reclamation activities did in fact create an artificial island:

112. See UNCLOS, *supra* note 3, art. 60(8) (“[Artificial islands, installations, and structures] have no territorial sea of their own, and their presence does not affect the delimitation of the territorial sea, the exclusive economic zone or the continental shelf.”).

113. *Qatar v. Bahr*, 2001 I.C.J. Rep. at 125, ¶ 9.

114. See *Nicar. v. Colom.*, 2012 I.C.J. Rep. at 641; *Sovereignty Over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malay. v. Sing.)*, Judgment, 2008 I.C.J. Rep. 12, 100 (May 23); *Territorial and Maritime Dispute Between Nicaragua and Honduras in the Caribbean Sea (Nicar. v. Hond.)*, Judgment, 2007 I.C.J. Rep. 659, 703 (Oct. 8).

115. See *generally* In the Matter of the South China Sea Arbitration (Phil. v. China), Award (Perm. Ct. Arb. 2016), <https://pcacases.com/web/sendAttach/2086> [<https://perma.cc/W6A6-54ZZ>] (archived Mar. 12, 2019) [hereinafter *South China Sea Arbitration*].

116. *Id.* at 42.

117. *Id.*

118. *Id.* at 462.

China's activities at Mischief Reef have since evolved into the creation of an artificial island. China has elevated what was originally a reef platform that submerged at high tide into an island that is permanently exposed. Such an island is undoubtedly "artificial" for the purposes of Article 60.¹¹⁹

As such, the "true" artificial islands from Soon's categorizations in 1974 received judicial confirmations as artificial islands.¹²⁰

The second question brought more opportunities for the arbitral tribunal. This was the first time an international tribunal had been asked to determine the status of an artificial island.¹²¹ Unfortunately the tribunal chose to focus on the "natural state" of Mischief Reef. Mischief Reef was classified by the tribunal as an LTE before modification.¹²² It is an oval-shaped reef, and prior to modifications was described as having visible rocks "drying" at low tide, supporting a finding that they were submerged at high tide.¹²³ The physical description of Mischief Reef at the time of the arbitration is very different, with "an artificial island covering the entire northern half of the reef"¹²⁴ as well as "fortified seawalls, temporary loading piers, cement plants and a 250-meter-wide channel to allow transit into the lagoon by large vessels."¹²⁵

It is uncontested that artificial manipulation cannot transform an LTE into an island for the purpose of Article 121 of UNCLOS, because of the "naturally formed" requirement. However the tribunal extended this principle well beyond the text of UNCLOS and stated that "[a] low-tide elevation will remain a low-tide elevation under the Convention, regardless of the scale of the island or installation built atop it."¹²⁶ The tribunal then stated that assessment of the feature must be done "on the basis of its earlier, natural condition, prior to the onset of significant human modification."¹²⁷ Thus not only did the tribunal hold an LTE cannot become an *island*, but as became clear in the latter part of the award, it also held an LTE cannot become an artificial island *for the purposes of determining whether it was capable of appropriation*.¹²⁸

119. *Id.* at 414.

120. It should be noted that Alfred Soons was one of the arbitrators on the Arbitral Panel for the South China Sea Arbitration.

121. Although state courts had already done so. These are discussed in Part V, *infra*.

122. See *In the Matter of the South China Sea Arbitration (Phil. v. China)*, Award at 173 (Perm. Ct. Arb. 2016), <https://pcacases.com/web/sendAttach/2086> [<https://perma.cc/W6A6-54ZZ>] (archived Mar. 12, 2019).

123. See *id.* (concluding that the clear evidence from direct observations—to "drying rocks" by HMS Herald and to rocks exposed "during half-tide" in the Chinese sailing directions—is more convincing").

124. *Id.* at 403.

125. *Id.*

126. *Id.* at 131.

127. *Id.* at 132.

128. See generally *id.*

This led to the regrettable legal fiction that the tribunal maintained that the now fully emerged and substantial artificial island on Mischief Reef could not be capable of appropriation because Mischief Reef had once been (but was no longer) an LTE.¹²⁹ There is an unresolved contradiction in the tribunal's judgment: on the one hand, Mischief Reef is enough an artificial island to fall afoul of Article 60 of UNCLOS. On the other, it remains an LTE such that the previous jurisprudence of ICJ relating solely to LTEs and *not* to artificial islands renders it incapable of appropriation. This is particularly jarring as the question of capability of appropriation first turned on whether a feature is *physically* capable of appropriation.¹³⁰ Not only is the reclaimed land at Mischief Reef now permanently above high tide, it houses a functioning air strip, and has construction underway on "fighter-sized hangars, fixed-weapons positions, barracks, administration buildings, and communication facilities."¹³¹ It seems ridiculous to insist the artificial island is not capable of appropriation, when it seems in practical terms it already has been appropriated.

The tribunal's judgment is also problematic because the insistence that a reclaimed artificial island remains a low-tide elevation for the purpose of *territorial* status is at odds with the limited state practice that exists.

V. STATE PRACTICE

Over the years various adventurers, revolutionaries, and prospective tax evaders have sought to establish their own sovereign nations by way of artificial islands. Three of these—the Insulo de la Rozoj off the coast of Italy,¹³² the Duchy of Sealand off the coast of Britain,¹³³ and planned developments on the Grand and Triumph Reefs off the coast of the United States of America¹³⁴—resulted in

129. *See id.* at 415; *see also* Imogen Saunders, *The South China Sea Award, Artificial Islands and Territory*, 34 AUSTL. Y.B. INT'L L. 31, 31 (2016).

130. *See* *Minquiers & Ecrehos (Fr. v. U.K.)*, Judgment, 1953 I.C.J. Rep. 47, 53 (Nov. 17) ("These words must be considered as relating to islets and rocks which are physically capable of appropriation.")

131. *See generally* SEC'Y OF DEF. 2017 REPORT, *supra* note 2.

132. *See generally* *Chierici and Rosa v. Ministry of the Merchant Navy and Harbour Office of Rimini* (Nov. 14, 1969) 71 I.L.R. 258 (1986).

133. *See generally* *In re Duchy of Sealand*, Case No. 9 K 2565/77, 80 I.L.R. 683 (May 3, 1978).

134. *See generally* *United States v. Ray*, 423 F.2d 16 (5th Cir. 1970) (holding that the United States had exclusive rights to the coral reefs that were part of the seabed of the continental shelf); *Atlantis Development Corp v. United States*, 379 F.2d 818 (5th Cir. 1967) (discussing a development company's claims of ownership over coral reefs off the coast of Florida, alleging exclusive dominion and control); *United States v. Ray*, 294 F. Supp. 532 (S.D. Fla. 1969) (saying coral reefs above the continental shelf belong to the United States); *United States v. Ray*, 281 F. Supp. 876 (S.D. Fla. 1965) (temporarily

domestic court cases regarding their status. The fourth, the Republic of Minerva, built between Tonga, Fiji, and New Zealand, did not attract judicial attention.¹³⁵ The Insulo de la Rozoj and the Duchy of Sealand are both examples of artificial installations rather than true artificial islands.¹³⁶ The developments on the Grand and Triumph Reefs never eventuated. The Republic of Minerva stands alone as a true artificial island, built by reclamation around a reef well outside the territorial sea of any state.¹³⁷ This Part will consider all four historic scenarios, as well as assessing contemporary state practice in regards to artificial islands that have been built in the South China Sea.

A. *Historic State Practice*

1. Insulo de la Rozoj

In 1968, two Italian citizens constructed a platform off the coast of Rimini, just outside of the Italian territorial sea.¹³⁸ The citizens declared the platform as an independent nation under the Esperanto name of Insulo de la Rozoj; it is also known by the Italian name of Isole Delle Rosa and the English name, Republic of Rose Island.¹³⁹ The harbor office of Rimini issued a demolition order for the island, and the citizens appealed, arguing that the Geneva Convention on the High Seas gave free rights to the high seas to both states and individuals.¹⁴⁰ As such, the question before the Italian Council of State was not whether the platform was territory, but rather whether individuals had rights under the Geneva Convention on the High Seas. Unsurprisingly, the answer was no. The council stated that the Convention “only creates rights and obligations of an international character for the Italian State with respect to other members of the international community. The appellants cannot deduce from it any rights worthy of protection either according to international law or under Italian municipal law.”¹⁴¹

enjoining dredging operations in a living coral reef area on a continental shelf parallel to the Florida Keys).

135. Robert Trumbull, *Pacific Islanders Fight Reef Plan*, N.Y. TIMES (Feb. 27, 1972), <https://www.nytimes.com/1972/02/27/archives/pacific-islanders-fight-reef-plan-seek-to-halt-the-creation-of.html> [https://perma.cc/G9MJ-BWKQ] (archived Mar. 12, 2019).

136. See generally Andrew H.E. Lyon, *The Principality of Sealand, and Its Case for Sovereign Recognition*, 29 EMORY INT'L L. REV. 637 (2015).

137. See Jenny Bryant-Tokalau, *Artificial and Recycled Islands in the Pacific: Myths and Mythology of “Plastic Fantastic,”* 120 J. POLYNESIAN SOC'Y 71, 73–74 (2011).

138. Samuel Pyeatt Menefee, “Republics of the Reefs:” *Nation-Building on the Continental Shelf and in the World’s Oceans*, 25 CAL. W. INT'L L.J. 81, 105 (1994).

139. *Id.*

140. *Chierici and Rosa v. Ministry of the Merchant Navy and Harbour Office of Rimini* (Nov. 14, 1969) 71 I.L.R. 258, 259 (1986).

141. *Id.*

2. The Duchy of Sealand

The Duchy of Sealand was declared as an independent kingdom by Roy Bates in 1967.¹⁴² Bates had taken control of the abandoned Roughs Fort, first built in 1941–42 to provide defense to Britain from German forces.¹⁴³ The fort sat seven nautical miles off the coast of England—outside the then three-nautical-mile territorial sea.¹⁴⁴ The fort was constructed of two hollow concrete legs topped with a deck, and had been sunk so that the concrete legs rested on the sea floor.¹⁴⁵ As such, it was an artificial structure rather than a true artificial island. Nonetheless, Bates maintained it was an independent entity.¹⁴⁶ In 1968, while visiting the mainland, Bates and his son were arrested on firearms charges (relating to an incident where Bates' son fired on British ships approaching the fort).¹⁴⁷ The judge ruled the matter was outside the court's jurisdiction because the fort was located outside Britain's territorial sea.¹⁴⁸ Bates took this as tacit approval of his nation-state, and purported to exercise the sovereign powers of Sealand, including issuing passports, printing postage stamps, and creating a Sealand dollar.¹⁴⁹

The legal status of Sealand was challenged when Bates purported to grant citizenship of Sealand to a German national in 1975.¹⁵⁰ That national then applied to the German government for determination of his citizenship.¹⁵¹ The government told the national that his German citizenship was still valid as “the ‘Duchy of Sealand’ did not constitute a state within the meaning of international law”¹⁵² and thus could not grant citizenship. The national then sought a declaration from the Administrative Court of Cologne that he had “lost his German citizenship as a result of his acquisition of the citizenship of the so-called ‘Duchy of Sealand.’”¹⁵³ In this context, the administrative court considered whether Sealand could properly be considered a state at international law. The administrative court rejected this proposition on the criteria of both territory and people.¹⁵⁴ In regards to territory,

142. Menefee, *supra* note 138, at 107.

143. *Id.* at 106; *see also* Trevor A. Dennis, *The Principality of Sealand: Nation Building by Individuals*, 10 TULSA J. COMP. & INT'L L. 261, 263 (2002) (“In 1965, Bates occupied Fort Rough Tower in hopes of making it his base for his pirate radio station, Radio Essex.”).

144. Dennis, *supra* note 143, at 263.

145. Menefee, *supra* note 138, at 106–07.

146. *Id.* at 107.

147. Dennis, *supra* note 143, at 266.

148. Lyon, *supra* note 136, at 641.

149. Menefee, *supra* note 138, at 108.

150. *See In re Duchy of Sealand*, Case No. 9 K 2565/77, 80 I.L.R. 683, 684 (May 3, 1978).

151. *See id.*

152. *Id.*

153. *Id.*

154. *See id.* at 687.

the administrative court examined the views of various legal writers and concluded that:

The view expressed by these writers, that State territory consists of “a part of the surface of the earth” or “land territory,” leads to the conclusion that only those parts of the surface of the earth which have come into existence in a natural way can be recognized as constituting State territory. A man-made artificial platform, such as the so-called “Duchy of Sealand,” cannot be called either “a part of the earth’s surface” or “land territory” because it does not constitute a segment of the earth’s sphere.

The fact that the former anti-aircraft platform is firmly connected to the sea-bed by concrete pillars does not transform the platform into a part of the “surface of the earth” or “land territory.” On the contrary the terms “surface of the earth” and “land territory” demonstrate that only structures which make use of a specific piece of the earth’s surface can be recognized as State territory within the meaning of international law. Furthermore both in international law and in colloquial speech the use of the term “*territorium*,” derived from the Latin word “terra,” which is synonymous with “earth,” clearly indicates that State territory within the meaning of international law must be either “mother earth” or something standing directly thereon.¹⁵⁵

This section of the court’s judgment would seem to deny territorial status not just to artificial installations such as Roughs Fort, but also to any artificial island—as it would not have “come into existence in a natural way.” However, the court went onto to consider the view of Professor Waltner Leisner, who had provided an expert opinion on behalf of the German national.¹⁵⁶ Leisner viewed territory as “a legal, not a geographical term, a ‘spatial area in which a state becomes active[.]’”¹⁵⁷ The German administrative court rejected this notion, but did accept that territory can, in some circumstances be created by artificial means:

Finally Leisner’s contention that, under international law, territory can be artificially extracted from the sea, does not provide a basis for the designation of the so-called “Duchy of Sealand” as State territory. The formation of land by the erection of dykes or dams and similar structures on the sea-shore or in coastal waters is not comparable to the construction of artificial islands such as “Sealand.” The positioning of dykes results in the enlargement of existing State territory by the acquisition of a new piece of the surface of the earth directly adjacent to existing State territory, which assumes the same status as that territory. By contrast, the artificial island of “Sealand” did not involve the creation of any new piece of the earth’s surface.¹⁵⁸

155. *Id.* at 685–86.

156. See generally *Law of Nations—Juridical Opinions*, PRINCIPALITY OF SEALAND, https://www.principality-of-sealand.ch/html-2017/archiv/opinion_leisner_e.html (last visited Mar. 12, 2019) [<https://perma.cc/DQF6-DXAG>] (archived Feb. 28, 2019) (discussing the expert opinion of Dr. Walter Leisner on the *ius gentium* situation of the Principality of Sealand).

157. *Id.*

158. *In re Duchy of Sealand*, 80 I.L.R. at 686–87.

In this way, the administrative court followed the same reasoning as Shaw and Schwarzenberger, discussed above in Part IV—the territorial status of the new artificially created land is contingent on the adjacent naturally created land.¹⁵⁹ However, the last sentence seems to open the door to the type of artificial islands being created in the South China Sea—surely such land reclamation efforts create a “new piece of the earth’s surface”¹⁶⁰ as much as those same reclamation activities carried out within territorial waters. Certainly, in the modern context it seems disingenuous to argue that whether dredging and reclamation creates “a portion of the earth’s surface”¹⁶¹ depends solely on its geographical location, rather than the very nature of the thing created.

The judgment in the *Duchy of Sealand* has been relied upon by subsequent commentators to argue that “international law does not allow for wholly man-made structures to constitute territory.”¹⁶² However, the judgment should be treated with a little more caution—first, it is grounded firmly in the facts of an artificial structure, rather than a true artificial island: the realities of Roughs Fort must be kept in mind. Second, when assessing state practice in regards to artificial islands built through reclamation, a different trend emerges. This can be seen both in the cases of the Grand and Triumph Reefs and the Republic of Minerva.

3. Grand and Triumph Reefs

Developments on the Grand and Triumph Reefs off the coast of Florida were contemplated by two separate entrepreneurs: William Anderson and Louis Ray.¹⁶³ Both men intended to dredge around the Grand and Triumph Reefs to build artificial islands hosting new island republics: Anderson’s was to be named Atlantis, Isle of Gold,¹⁶⁴ and Ray’s the Grand Capri Republic,¹⁶⁵ although both had the end goal of building casinos, hotels, and other lucrative industries on their new nations.¹⁶⁶ Ray began dredging work on the reefs, without having a permit to do so.¹⁶⁷ Anderson never reached the stage of dredging, but constructed four prefabricated buildings on the reefs, which were later

159. See *supra* Part IV.

160. In re *Duchy of Sealand*, 80 I.L.R. at 687.

161. U.N. SCOR 3d Year, *supra* note 63.

162. Derek Wong, *Sovereignty Sunk? The Position of ‘Sinking States’ at International Law*, 14 MELB. J. INT’L L. 346, 384 (2013).

163. Menefee, *supra* note 138, at 86–87.

164. *Id.* at 91.

165. *Id.* at 90.

166. *United States v. Ray*, 294 F. Supp. 532, 535–36 (S.D. Fla. 1969); *United States v. Ray*, 281 F. Supp. 876, 877 (S.D. Fla. 1965).

167. Menefee, *supra* note 138, at 86.

destroyed by a hurricane.¹⁶⁸ The U.S. Government took actions against both men.¹⁶⁹ Ultimately, the case turned on the status of the reefs themselves. While both Ray and Anderson argued the reefs were islands, the evidence showed they were submerged at high tide and thus could not be islands.¹⁷⁰ Rather, the court found that the reefs were part of the seabed and subsoil of the United States' outer continental shelf and thus subject both to the Outer Continental Shelf Lands Act (United States)¹⁷¹ and the Convention on the Continental Shelf.¹⁷² The court stated:

Whatever proprietary interest exists with respect to these reefs belongs to the United States both under national (Shelf Act) and international (Shelf Convention) law. Although this interest may be limited, it is nevertheless the only interest recognized by law, and such interest in the United States precludes the claims of the defendants and intervener. . . . The issues of this case are of great public interest, involving not only the preservation of rare natural resources, but the reservation of our very security as a nation. If these reefs were available for private construction totally outside the control of the United States Government, they could conceivably support not only artificial islands and unpoliced gambling casinos, but even an alien missile base, all within a short distance of the Florida Coast. Congress has seen fit to claim this area so that it may be used for the Commonwealth rather than private gain.¹⁷³

It must be acknowledged that the case did not turn on the question of territory. The court held that the operation of US domestic law precluded the building of such islands on reefs part of the United States' outer continental shelf.¹⁷⁴ However, as evidenced above, one concern for the court was that without such domestic law, territory *could* possibly be formed on these reefs—even under foreign control—and then used in a manner detrimental to the United States.¹⁷⁵

4. Republic of Minerva

The North and South Minerva Reefs are situated southwest of Tonga and southeast of Fiji, well outside the territorial sea of either

168. See Craig W. Walker, *Jurisdictional Problems Created by Artificial Islands*, 10 SAN DIEGO L. REV. 638, 643 (1973) (“One company managed to erect four buildings on the reef which were later destroyed by a hurricane.”).

169. Menefee, *supra* note 138, at 88.

170. See *United States v. Ray*, 294 F. Supp. at 538 (“Since the evidence in this case overwhelmingly established that these reefs are completely submerged at mean high water, they cannot be islands.”).

171. Outer Continental Shelf Lands Act, 43 U.S.C. §§ 1331–56 (2012).

172. Convention on the Continental Shelf, *opened for signature* Apr. 29, 1958, 499 U.N.T.S. 311 (entered into force June 10, 1964).

173. *United States v. Ray*, 294 F. Supp. at 542.

174. *Id.*

175. *Id.*

state.¹⁷⁶ Fiji claims that the reefs lie within their EEZ.¹⁷⁷ The reefs were first reported in 1819 and described as having several rocks between ten and twelve feet above water.¹⁷⁸ However, it appears such rocks were simply boulders thrown up by storm surges: historical records show other such boulders mapped that subsequently disappeared.¹⁷⁹ There appeared to be no permanent feature above high tide prior to activities in the 1970s.

In 1971, an organization called the Ocean Life Research Foundation sailed to the reefs with ships containing sand from Australia, proceeded to dredge up land to form two hummocks above high tide, and erected markers with flags bearing the crest of the “Republic of Minerva—the Land of the Rising Atoll.”¹⁸⁰ In 1972, the group issued a Declaration of Sovereignty and sent letters to other countries seeking recognition of the republic.¹⁸¹ These letters caused some consternation in nearby countries due to concerns over interference with traditional fishing grounds; the potential for illegal activities such as drug trafficking;¹⁸² and the precedent of, in the words of the then-Tongan Prime Minister, people “setting up empires on our doorstep.”¹⁸³ As a result of this, in February to June 1972, the government of Tonga undertook various activities to claim the Minervan Reefs as territory, including constructing refuge stations,¹⁸⁴ erecting permanent structures, and creating artificial islands called Teleki Tokelau and Teleki Tonga.¹⁸⁵ On June 15, 1972, Tonga published a territorial claim to the artificial islands by royal proclamation, claiming “rights of the Kingdom of Tonga to these islands” as well as a territorial sea of twelve nautical miles around the islands.¹⁸⁶

176. The reefs lie 402 kilometers south-west of Tongatapu, the main island of Tonga. THE PACIFIC ISLANDS: AN ENCYCLOPEDIA 18 (2000).

177. See, e.g., *Government of Fiji Media Statement*, FIJI MINISTRY OF FOREIGN AFFAIRS (June 14, 2011), <http://www.foreignaffairs.gov.fj/media-resources/media-release/335-minerva-reef-is-within-fijis-eez> [<https://perma.cc/9AHW-KQP7>] (archived Feb. 13, 2019) (“The Minerva Reef falls within the legal and internationally recognized border of Fiji.”).

178. *Ship News*, SYDNEY GAZETTE & N.S.W. ADVERTISER, Jan. 30, 1819, at 3.

179. See, e.g., J.R.V. Prescott, *Maritime Boundaries and Issues in the Southwest Pacific Ocean*, in OCEAN BOUNDARY MAKING: REGIONAL ISSUES AND DEVELOPMENTS 268, 299 (1988) (“There are a number of boulders which have been thrown up onto the reef by storm surges which have broken off parts of the outer reef.”).

180. Lawrence A. Horn, *To Be or Not to Be: The Republic of Minerva—Nation Founding by Individuals*, 12 COLUM. J. TRANSNAT’L L. 520, 521 (1973).

181. Menefee, *supra* note 138, at 97–98.

182. See Horn, *supra* note 180, at 526.

183. Menefee, *supra* note 138, at 99.

184. *Id.* at 100.

185. *Id.*

186. See U.N. FOOD & AGRIC. ORG., REGIONAL COMPENDIUM OF FISHERIES LEGISLATION: VOLUME II at 615 (1984).

This is (limited) state practice of a state claiming artificial islands as territory. Further, as this was pre-UNCLOS, such territory would arguably attract a territorial sea. Tonga took its claim to the artificial islands to the then-named South Pacific Forum in September 1972. The final press communique from the forum stated:

Members of the Forum recognised Tonga's historical association with the Minerva Reefs, welcomed the Tongan Government's continuing interest in the area and agreed that there could be no question of recognising other claims, and specifically that of the Ocean Life Research Foundation, to sovereignty over the reefs.¹⁸⁷

The basis of recognizing Tonga's sovereignty (or, at least, the impossibility of *other* sovereign claims) is unclear. The press communique did not elaborate on whether such recognition was due to historical rights, or whether Tonga's actions in building the artificial islands created rights.¹⁸⁸ Nonetheless, the fact that Tonga took the step of building the islands to boost its claim indicates a view that such artificial island building could provide a territorial basis for sovereignty—and indeed, is a historical echo of China's activities in the South China Sea today.

The main difference between Minerva and the examples of Sealand, Insulo de la Rozoj, and the Grand and Triumph Reefs is that while a group of individuals kickstarted the process of building Minerva, it was ultimately a state that claimed the artificial islands as territory. In this context, Lawrence Horn argued that “only states can acquire sovereignty by occupation over territory not formerly subject to their control.”¹⁸⁹ The state practice that exists supports this: no claim to an artificial structure (in the case of Sealand and Insulo de la Rozoj) or proposed artificial island (the Grand and Triumph Reefs) has been recognized as legitimate when made by an individual. However, a territorial claim over an artificial island was given *some* legitimacy when made by a state. As such, the state practice supports the notion that such islands can be territory: however, they can only constitute the territory of a state already in existence.¹⁹⁰ It should be noted that although Fiji recognized Tonga's claim in 1972, in 2005, Fiji made a declaration to the International Seabed Authority, explicitly denouncing Tonga's claims, and disputes are ongoing between Fiji and Tonga as to the status of the Minerva Reefs.¹⁹¹

187. *South Pacific Forum SUVA, 12–14 September, 1972*, PAC. ISLANDS FORUM SECRETARIAT, <https://www.forumsec.org/south-pacific-forum-suva-12-14-september-1972/> (last visited Mar. 12, 2019) [<https://perma.cc/D9LW-93HT>] (archived Feb. 17, 2019).

188. *Id.*

189. Horn, *supra* note 180, at 529.

190. This distinction finds support from Crawford, *supra* note 61, at 223–26.

191. See, e.g., Teena Brown Pulu, *Off the Deep End: Tonga's Continental Shelf Politics*, 7 TE KAHAROA: E-JOURNAL ON INDIGENOUS PACIFIC ISSUES 173, 216 (2014)

The historic instances of state practice explored above are limited in nature and value: only one concerned a true artificial island, while the others concerned artificial installations or were merely hypothetical. Such examples certainly cannot form the basis for any norm of customary international law that artificial islands *are* territory. However, neither can they support an assertion that artificial islands *cannot* be territory.

B. Contemporary State Practice: Artificial Islands in the South China Sea

Although the decision of the arbitral tribunal has been discussed above, it is important to consider the viewpoints of the states party to the dispute. China declined to participate in the arbitration, arguing that the tribunal lacked jurisdiction. Although China did not lodge pleadings at either the jurisdiction or merits phase, it did publish a position paper on the matter.¹⁹² On the face of this position paper, and the pleading of the Philippines, it is clear both states viewed Mischief Reef as “capable of appropriation” (although neither state explicitly argued that the artificial island built on Mischief Reef was capable of appropriation).¹⁹³ Recalling the ICJ’s words in the *Land, Island and Maritime Frontier Dispute*, the views of the parties are relevant to the territorial status of the feature.¹⁹⁴ As such it can be argued that both the Philippines and China are treating the artificial islands as territory (albeit, in the view of the Philippines, illegitimately created and claimed territory).

Other nations have claimed that the artificial islands are not territory.¹⁹⁵ Some nations have purported to show this by conducting freedom of navigation and direct overflight exercises in the South China Sea. Both of these activities must be examined in terms of implications for the territorial status of the artificial islands. The United States has repeatedly conducted freedom of navigation exercises within the South China Sea, sailing within twelve nautical

(“Backing out on a former agreement, Fiji lodged a complaint with the International Seabed Authority stating it did not recognise Tonga’s maritime claim that Teleki Tokelau and Teleki Tonga were under its state sovereignty.”).

192. See generally *Position Paper of the Government of the People’s Republic of China on the Matter of Jurisdiction in the South China Sea Arbitration Initiated by the Republic of the Philippines*, 15 CHINESE J. INT’L L. 431 (2016) [hereinafter China Position Paper].

193. *Id.* ¶¶ 23–25.

194. *Land, Island and Maritime Frontier Dispute (El Sal. v. Hond.)*, Judgment, 1992 I.C.J. Rep. 351, 570 (Sept. 11).

195. See, e.g., SEC’Y OF DEF. 2018 REPORT, *supra* note 2, at 13 (discussing the dispute between China and the Philippines); SEC’Y OF DEF. 2017 REPORT, *supra* note 2, at 9 (showing China’s nine-dash line).

miles of artificial islands built on reefs within the Spratly Islands.¹⁹⁶ However, as set out above, the operation of UNCLOS means artificial islands will not generate a territorial sea, *even if* they are considered territory.¹⁹⁷ The doctrine of innocent passage is limited to travel through the territorial sea:¹⁹⁸ as such, for an artificial island without a territorial sea, innocent passage would not need to be observed. Thus, freedom of navigation exercises on water would not be inconsistent with such artificial islands being territory themselves.

Freedom of navigation flights *might* be a better challenge to the territorial status, as states have exclusive right of overflight over their territory in international law: territory is defined for this purpose as “the land areas and territorial waters adjacent hereto.”¹⁹⁹ The United States has admitted to at least one direct overflight of artificial islands in the South China Sea in May 2015.²⁰⁰ Australia confirmed a freedom of navigation flight in the general area on November 25, 2015, but gave no details as to whether the flight went directly over any of the artificial islands.²⁰¹ A US B-52 Bomber flew within two nautical miles of one artificial island in December 2015, but media reports state the Pentagon claimed this was against flight plans and the incident was being investigated.²⁰² However, although UNCLOS does not abrogate the exclusive right to overflight over artificial islands the same way the generation of maritime zones is abrogated, UNCLOS *does* allow

196. See, e.g., Sam LaGrone, *U.S. Destroyer Comes Within 12 Nautical Miles of Chinese South China Sea Artificial Island, Beijing Threatens Response*, USNI NEWS (Oct. 27, 2015), <https://news.usni.org/2015/10/27/u-s-destroyer-comes-within-12-nautical-miles-of-chinese-south-china-sea-artificial-island-beijing-threatens-response> [<https://perma.cc/XS2A-7NGA>] (archived Feb. 17, 2019) (“[T]he U.S. has sent a guided missile destroyer within 12 nautical miles of a Chinese artificial island in the South China Sea in a move that practically rejects Chinese claims to the reclaimed reefs and has inflamed Beijing.”).

197. UNCLOS, *supra* note 3, art. 60(8).

198. *Id.*

199. Convention on International Civil Aviation, art. 2, Dec. 7, 1944, 15 U.N.T.S. 102.

200. David Brunnstrom, *U.S. Vows to Continue Patrols After China Warns Spy Plane*, REUTERS (May 21, 2015), <http://www.reuters.com/article/us-southchinasea-usa-china-idUSKBN0060AY20150521> [<https://perma.cc/ZV5F-7Q98>] (archived Feb. 17, 2019).

201. See Jesse Johnson, *Australia Conducts Surveillance Flight in South China Sea; Move Could Focus Attention on Japan*, JAPAN TIMES (Dec. 16, 2015), <https://www.japantimes.co.jp/news/2015/12/16/asia-pacific/australia-conducts-surveillance-flight-south-china-sea-move-focus-attention-japan/> [<https://perma.cc/8D4P-YSPW>] (archived Feb. 17, 2019) (“It was not known if the Nov. 25 flight came within 12 nautical miles (22 km) of China’s artificial islands. International convention allows countries to claim territorial waters within 12 nautical miles of their coastal territory.”).

202. See Jennifer Pak, *China Accuses U.S. of ‘Serious Military Provocation’ Over South China Sea Overflight*, TELEGRAPH (Dec. 19, 2015), <http://www.telegraph.co.uk/news/worldnews/asia/china/12059599/China-accuses-US-of-serious-military-provocation-over-South-China-Sea-overflight.html> [<https://perma.cc/W6NR-4F3Q>] (archived Feb. 17, 2019).

overflight over the EEZ and the high seas.²⁰³ Thus, it is hard to tell whether a direct overflight would be challenge to the *territorial* status of an artificial island, or simply the assertion of UNCLOS rights to overflight over the EEZ and high seas.

VI. ARE ARTIFICIAL ISLANDS TERRITORY?

As has been shown above, there is little contention to suggest that artificial islands built within a state's territorial sea are the territory of that state. The argument this Article makes however is that some artificial islands built *outside* the territorial sea could be viewed as territory. General criteria of territory to be applied to artificial islands were set out in Part III, above. However, the natural state doctrine as explained in Part IV could prevent artificial islands from being assessed in their *current* form—and thus being incapable of fulfilling the criteria of territory. This Part re-examines the natural state doctrine, arguing it cannot be used to preclude artificial islands as being considered territory. Given this, it then examines *how* states can demonstrate title to artificial islands whether built in the territorial sea, the EEZ, or on the high seas. For the purpose of this argument, it is assumed that states have built artificial islands legally. The situation of illegal island building and the consequences for title to territory are considered in Part VII below.

A. Natural State Revisited

It is clear that international law quite happily accepts land territory that has not been naturally formed, as long as it is within the territorial sea of a state.²⁰⁴ The issue is not with *how* the land is formed, *per se*, but *where* the land is created. The argument, as set out in Part IV, is that a state already has sovereignty over the territorial sea; therefore, it has sovereignty over the newly created land. As the state has sovereignty, the newly created land is territory.

The fact is, however, that a simple transference of sovereignty from a formerly maritime area to a newly terrestrial area is not *all* that is happening when a state expands its land mass by reclamation. Reclamation abutting a state's coastline transforms what was sea to land, and, critically, it then extends the territorial sea and the baselines.²⁰⁵ It is not merely a consequence of the state's sovereignty

203. UNCLOS, *supra* note 3, arts. 58(1), 87.

204. Francesca Galea, Artificial Islands in the Law of the Sea 50 (May 2009) (unpublished Doctor of Laws dissertation, Univ. of Malta), <https://www.blue21.nl/wp-content/uploads/2015/10/Artificial-Islands-in-The-Law-of-the-Sea.pdf> [<https://perma.cc/Q23Q-33A8>] (archived Mar. 12, 2019).

205. See, e.g., Coalter G Lathrop, *Baselines*, in THE OXFORD HANDBOOK OF THE LAW OF THE SEA 69, 76 (2015). It should be noted that the creation of an artificial island,

over the sea, but rather the act of making the land itself that gives the state further rights in international law—more rights than the untransformed sea could ever have given it. Properly understood then, it is the very process of creation that makes the new land territory and awards the rights that flow from this territory.

This illustrates why judging the territorial status of an artificial island on its pre-reclaimed nature is a fallacy. Reclaimed land was once sea—but its status in international law is clearly judged on its post-reclamation reality, otherwise baselines could never be affected. Further, as argued above, the notion that an LTE is an LTE regardless of what is done to it, whether acts of reclamation have in fact put it *above* the water line permanently, or whether it is being used in a way an LTE could never be flies in the face of reality. It is the act of reclamation around an LTE that transforms that LTE into something else. International law must not become a fiction, irrelevant to what is actually happening in the world.

The converse of this problem comes in the concept of sinking land due to climate change. If an island is fully submerged, will international law persist in treating it as an unsubmerged island? The question is not whether *some* rights will remain, but will the “natural state” of the island, before the interference of man-made climate change, determine its fixed and unchanging status in international law? It seems ridiculous to suggest that international law would (to use an allegory) declare Atlantis to be *legally* above the waters, but that is what the natural state doctrine is calling us to do. Artificial islands, just like submerged islands, must be judged on their current status, not on what they once were. The factor of permanence will come into play here: how an artificial island is created, how permanent the transformation is of the LTE into something new. However, this should be assessed as a criterion of *whether* the newly created land rises to the level of territory, rather than ignoring the reality of what has been created.

To this end, the decision in *Qatar v. Bahrain* must be understood in light of the historical development of Fasht al Dibal. Although it was judged as an LTE by the ICJ, in fact, reclamation works had been carried out on the reef of Fasht al Dibal in March 1986 by a Dutch company working on behalf of Bahrain:²⁰⁶ “until March 1986 when it was reclaimed, it wasn’t an island at all, but a coral reef, submerged at high tide.”²⁰⁷ Contemporary commentary, and a statement from Qatar,

in contrast, cannot alter baselines, as this right as been abrogated by UNCLOS. See UNCLOS, *supra* note 3, art. 60(8).

206. JILL CRYSTAL, OIL AND POLITICS IN THE GULF: RULERS AND MERCHANTS IN KUWAIT AND QATAR 166 (1990); BRACO DIMITRIJEVIĆ, 32 KEESING’S RECORD OF WORLD EVENTS 34766 (1986).

207. CRYSTAL, *supra* note 206, at 166.

described Fasht al Dibal as an island after the reclamation works.²⁰⁸ Qatar objected to the building of the island, and seized it in April 1986.²⁰⁹ Following mediation between Qatar, Bahrain, and the Netherlands, an agreement was made to “destroy the island,” which the Dutch company did in June 1986.²¹⁰ Hence, by the time the dispute between Qatar and Bahrain was taken to the ICJ in 1991, Fasht al Dibal had begun life as an LTE, had been transformed by reclamation into some form of artificial island, and had subsequently transformed back into an LTE. As such it was entirely appropriate for the ICJ to judge the feature as an LTE—not because it once *had been* an LTE, but because it was transformed back into, and was *at the time of proceedings*, an LTE. The situation is entirely different, however, when dealing with artificial islands that remain artificial islands.

B. Acquisition of Title to Territory of Artificial Islands

If artificial islands are capable of constituting territory, it follows that international law doctrines of acquisition of territory will apply to them. If we consider artificial islands as a type of artificial accretion, then we can apply Gillian Trigg’s explanation of title to such islands: “Changes in territory through accretion, erosion and avulsion are not accurately described as roots of title. Rather, states acquire any new territory formed through such natural processes by effective occupation and acquiescence.”²¹¹

Now, if we consider that artificial islands *are* territory created by artificial accretion, then the question of title to that territory rests on established international law doctrines of effective occupation and acquiescence. This categorization explains why artificial islands within a state’s territorial waters are properly considered the territory of that state: the state itself exercises effective occupation of the island, and state practice shows the international community acquiesces to such title. This framework can also explain what happens with artificial islands created outside the territorial sea. The doctrine of effective control can be applied fairly straightforwardly to all artificial islands: it will mostly be a matter of fact as to whether a state exercises effective control over the newly formed artificial island or not. However, the impact of acquiescence (or a lack thereof) against such occupation presents more legal nuances. In particular, the impact will change depending on whether an artificial island is built within an EEZ, or on the high seas.

208. ITAMAR RABINOVICH & HAIM SHAKED, 10 MIDDLE EAST CONTEMPORARY SURVEY 294–95, 297 (1986).

209. DIMITRIJEVIĆ, *supra* note 206.

210. *Id.*

211. GILLIAN TRIGGS, INTERNATIONAL LAW: CONTEMPORARY PRINCIPLES AND PRACTICES 309 (2d ed. 2011).

This is because the effect of acquiescence changes when applied to territories that are considered *res communis* and territories that are considered *res nullius*.²¹² Where “*res nullius* consists of an area legally susceptible to acquisition by states but not as yet placed under territorial sovereignty”;²¹³ *res communis* are areas that are the common heritage of mankind, incapable of acquisition.²¹⁴ To apply these classifications to the context of artificial islands, those built within the territorial sea are within the territory of the coastal state; those built in an EEZ are not within the territory of any state, and thus upon creation are *res nullius*; and those built on the high seas are in an area of *res communis*.²¹⁵ How this operates in respect to acquiescence is set out by Triggs, with reference to Judge Huber’s famous statement in the *Island of Palmas* case:²¹⁶

It will be recalled that Huber J considered that the “continuous and peaceful display of territorial sovereignty (peaceful in relation to other states) is as good as title.” By this, Huber J is thought not to have meant that sovereignty cannot be established where there is a protest. Rather, he has been interpreted to be concerned about the effects of a lack of protest.²¹⁷

The effect of protest is different, Triggs argues, depending on the status of the territory:

It is quite another step . . . to argue that protests can prevent a state from acquiring territory that is *terra nullius*. On this reasoning, it is unlikely that protests can be a permanent bar to acquisition of territory by effective occupation. If, by contrast, the disputed territory is *res communis*, persistent objections from a majority of the international community could prevent consolidation of title.²¹⁸

So what happens if a state builds an artificial island on the high seas? Article 87 of UNCLOS permits any state the freedom to build an artificial island on the high seas but also provides that “[n]o State may

212. Although the merits of the use of these terms to the Law of the Sea are debated. See, e.g., YOSHIFUMI TANAKA, *THE INTERNATIONAL LAW OF THE SEA* 155 n.2 (2d ed. 2015) (“Concerning the juridical nature of high seas, there is a classical controversy as to whether the high seas should be regarded as *res nullius* (nobody’s thing) or *res communis* (thing of the entire community).”).

213. CRAWFORD, *supra* note 61, at 203.

214. Leticia Diaz, Barry Hart Dubner & Jason Parent, *When is a “Rock” an “Island”?—Another Unilateral Declaration Defies “Norms” of International Law*, 15 MICH. ST. J. INT’L L. 519, 537 (2007).

215. Chierici and Rosa v. Ministry of the Merchant Navy and Harbour Office of Rimini (Nov. 14, 1969) 71 I.L.R. 258, 259 (1986); MALCOLM SHAW, *INTERNATIONAL LAW* 363 (7th ed. 2014). Note the imprecision of the Latin terminology here. D.P. O’CONNELL, *THE INTERNATIONAL LAW OF THE SEA* 792 (1984).

216. See generally *The Island of Palmas Case* (Neth. v. U.S.), Vol. II R.I.A.A. 829, 838 (Perm. Ct. Arb. 1925).

217. TRIGGS, *supra* note 211, at 318.

218. *Id.*

validly purport to subject any part of the high seas to its sovereignty.”²¹⁹ It is further clear that an artificial island on the high seas cannot award “a capacity to generate maritime claims nor does it impact on the delimitation of maritime boundaries.”²²⁰ A question arises though: if a state undertakes reclamation activities around an LTE that was on the high seas, such that the LTE is transformed into a large artificial island—say, one capable of supporting a population, such as residential artificial islands in Dubai²²¹—is that artificial island still part of the high seas, or is it now in fact land territory? The natural state doctrine would answer yes, but as argued above, there are issues with this doctrine. The artificial island is not merely *using* the sea: it has consumed it,²²² to the point of transformation.

A better way to treat such islands created on the high seas is to not to challenge their *territorial* status, but to challenge the *title* to such territory. As the territory itself is created in an area of *res communis*, objection to any claims to the sovereignty over the territory would be enough to prevent the consolidation of title to that territory. The provisions in UNCLOS would seem to make such a challenge a certainty, and indeed could in themselves provide state practice of those signatory states to challenge any purported acquisition of artificial island territory on the high seas.

In contrast, artificial islands legally created in an EEZ are created in an area that *is* capable of appropriation.²²³ As such, if a state can show effective occupation and acquisition to such occupation from the international community, there should be no legal difficulties with accepting that artificial island as part of that state’s territory (albeit without the capacity to generate maritime zones and benefits). Importantly, under Trigg’s analysis, a lack of acquiescence is not necessarily fatal to claims of title to territory, provided the building state can demonstrate effective occupation.²²⁴ This is particularly pertinent when considering the use of artificial islands as offshore airports: while all such airports to date have been built within a state’s territorial sea, the Netherlands government has proposed (although it has not been built) the so called “Schipol at Sea”: an airport built on an artificial island to be constructed outside the Netherlands’ territorial sea.²²⁵ A degree of certainty regarding the territorial status and the

219. UNCLOS, *supra* note 3, arts. 87, 89.

220. DONALD R. ROTHWELL & TIM STEPHENS, *THE INTERNATIONAL LAW OF THE SEA* 166 (2d ed. 2016).

221. Such as the Palm Jumeirah.

222. Heijmans, *supra* note 28, at 145.

223. Although note the operation of Article 58(2) of UNCLOS. If Article 89 of UNCLOS applies to prohibit sovereignty over artificial islands in the EEZ, then the analysis applying to the high seas would also apply in the EEZ.

224. TRIGGS, *supra* note 211, at 318.

225. Erik Jaap Molenaar, *Airports at Sea: International Legal Implications*, 14 INT’L J. MARINE & COASTAL L. 371, 372 (1999).

right to claim title to that territory is important for the ongoing operation of the airport.

The above assumes that the creation of the artificial island is itself legal: the question of an artificial island built within a contested EEZ, or within another state's EEZ entirely is more vexing and leads to greater considerations of legality and artificial islands.

VII. REPERCUSSIONS

The argument so far is that if artificial islands fulfill certain criteria then they can be considered territory at international law. Proximity does not determine *whether* an artificial island is territory, but does determine how title to territory is demonstrated (or if it can be). It must be acknowledged that this argument leads to certain repercussions, some of them negative.²²⁶ In particular it could be argued that treating artificial islands as territory will legitimize the actions of China in the South China Sea—actions that have been found illegal by an arbitral tribunal. How does this serve the coherence of international law? Further and more generally, it could be argued that it may lead to a grab-and-ransack type mentality, where states build artificial islands recklessly to increase their territorial holdings: the very thing that commentators have warned against for decades. However, these problems are addressed when artificial island building is viewed through the lens of *legality*.

To do so, we must employ the principle of unlawful territorial situations in international law.²²⁷ Under this doctrine, the criteria of legality acts to

declare a certain territorial situation unlawful, and they prevent the acquisition of legal title to the territory. However effective control assures the exercise of all functions normally exercised by a state, and often they can lead to the creation of a *de facto* state of affairs. Far from living in sort of limbo, *de facto* entities, both institutionally and at the level of individuals, entertain relations with other international actors.²²⁸

What territorial situation would be unlawful? Certainly, building an artificial island in another country's EEZ would qualify: it is unequivocally a breach of the UNCLOS provisions regarding

226. It should also be noted that there are positive repercussions that flow from this argument, such as the role of territorial artificial islands in maintaining statehood in the face of climate change, and the ability of territorially based doctrines of international law to regulate conduct on such artificial islands, including human rights obligations. Further discussion of these repercussions is beyond the scope of this article.

227. See generally ENRICO MILANO, UNLAWFUL TERRITORIAL SITUATIONS IN INTERNATIONAL LAW (2006).

228. *Id.* at 136–37.

constriction of artificial islands.²²⁹ As such, China's actions on Mischief Reef are, as found by the arbitral tribunal, unlawful for this reason alone. Further than this, building an artificial island in a way that causes environmental harm could also be unlawful²³⁰—indeed, this was also the finding of the arbitral tribunal in respect of China's environmental obligations under UNCLOS.²³¹ These obligations are broader than the restrictions on building artificial islands, as they encompass artificial islands built *within* the building state's EEZ and territorial sea.

In these situations, the act of island building is *itself* illegal because it is in another state's EEZ, or because the way in which the artificial island was created breaches environmental obligations. The artificial island may be territory in itself (providing the criteria set out in Part III are met), but the territorial *situation* is unlawful. As such, and applying the principle of unlawful territorial situations, the building state cannot validly acquire title to the territory.

Viewing the building of artificial islands in this way has three important benefits. Firstly, it reflects the practical reality of the situation: rather than rely on a legal fiction that artificial islands are still, legally speaking, LTEs incapable of appropriation, it allows international law to apply to what is actually happening. In doing so, the same *result* would be reached as was in the South China Sea arbitration: the acts of China in building artificial islands are illegal, and although the land created can be viewed as territory, the illegality of the building itself means China is not able to validly claim legal title. Thus, the coherence of international law is maintained: the arguments in this Article would lead to the same conclusion regarding the illegality of the acts, and China's ability to claim legal title over the artificial islands.

Secondly, an understanding of the artificial islands as unlawful territorial situations can help the international community formulate a legally coherent response. The long-term status of the occupation of the artificial island will depend on the response of the international community to the occupation: regardless of the initial wrongfulness of the island building, such original unlawful occupation of territory can be transformed into lawful occupation by recognition from other states and international organizations.²³² As such, it is critical that if states do not wish to legitimize the unlawful occupation of artificial islands,

229. UNCLOS, *supra* note 3, art. 60(2).

230. See, e.g., Karang Ghaffari et al., *Construction of Artificial Islands in Southern Coast of the Persian Gulf from the Viewpoint of International Environmental Law*, 10 J. POL. & L. 264, 268–70 (2017); Tim Stephens, *The Collateral Damage from China's 'Great Wall of Sand'*, 34 AUSTL. Y.B. INT'L L. 41, 49–50 (2017).

231. In the Matter of the South China Sea Arbitration (Phil. v. China), Award at 397 (Perm. Ct. Arb. 2016), <https://pcacases.com/web/sendAttach/2086> [<https://perma.cc/W6A6-54ZZ>] (archived Mar. 12, 2019).

232. MILANO, *supra* note 227, at 190.

a regime of nonrecognition is vital. In particular, states must insist that the occupying state of the artificial island does not have legal competence “to create rights and obligations concerning that territory.”²³³

Thirdly, because the principle of unlawful territorial situations attaches to unlawful acts more broadly than simply restrictions on which state can build artificial islands, it will actually *decrease* motivations for a “grab and ransack” mentality. If states wish to acquire valid title over their artificial islands, they must ensure the island itself is built in accordance with international law: not just rules relating to the maritime zone in which it is built, but also environmental obligations more generally. This would apply both to islands built within a state’s EEZ and, arguably, islands built within a state’s territorial sea. As such, a state building an artificial island must take care to do so in a way that will preserve the maritime environment, or risk not being able to claim valid title over the land once built. This is a better situation for the international community, as it incentivizes states to undertake best environmental practices in the building of artificial islands.

VIII. CONCLUSION

Hersch Lauterpacht wrote in 1950, “the principle of the freedom of the seas cannot be treated as a rigid dogma incapable of adaptation to situations which were outside the realm of practical possibilities in the period when that principle first became part of international law.”²³⁴ The same is true in respect of artificial islands and the doctrine of territory. Although such islands do not fit within the traditional understanding of land territory, international law must adapt to new possibilities and realities. As such, this Article has argued that while UNCLOS restricts the ability of artificial islands to generate maritime zones, it does not affect their territorial status. The territorial status of such islands is properly understood against an assessment of legal criteria of territory at international law, and the (limited) state practice available. In doing so, it is clear that artificial structures and installations are not capable of constituting territory at international law. However, true artificial islands, those created by a process of reclamation, may be considered territory (provided other criteria, as set out in Part III, are fulfilled). This argument accepts that the act of reclamation fundamentally transforms something that was not territory (such as an LTE) into something that is territory: it is the reclamation itself that creates the new territory. In doing so, the

233. *Id.* at 139.

234. Hersch Lauterpacht, *Sovereignty over Submarine Areas*, 27 BRIT. Y.B. INT’L L. 376, 399 (1950).

argument rejects the natural state doctrine *in this context* as a legal fiction, at odds with the realities of modern, large-scale reclamation and island building.

By accepting that artificial islands are capable of being territory, however, the title to this territory can be assessed. The applications of the doctrines of effective control, acquiescence, and unlawful territorial situations reveal a final conclusion consistent with contemporary state practice. For islands that are built *legally*, those islands within the territorial sea are considered the territory of the state. Those built within an EEZ will be considered the territory of the coastal state, if the state can show effective occupation. Artificial islands built on the high sea are *res nullius*: territory, but incapable of being claimed by any state.

For artificial islands built *illegally* (such as those in another state's EEZ, or those that have been built in breach of international environmental law), the building state is unable to acquire title to the territory, unless their occupation is legitimized by the international community. As such, continued protest around such illegally built artificial islands is vital.

The concept of territory at international law is not a rigid dogma: by expanding it to encompass the new practical possibilities of artificial islands, we are both better positioned to fully understand how other doctrines of international law apply to artificial islands, and to be content that the application of international law is in step with, rather than ignoring, the modern reality of such islands.