The rule of law and maritime security: understanding lawfare in the South China Sea

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Does the rule of law matter to maritime security?[1] One approach to the question is to examine the extent to which states exhibit a discursive commitment to compliance with international law in respect of their maritime security practices, and engage in legal argument for or against the validity of given security policies.[2] The claims pursued here, borrowing from David Kennedy, are essentially threefold. First, law has a 'legitimacy effect', such that 'when people accept that something is "legal", it seems legitimate'. Second, as a consequence, 'legal claims are often an effective tool for defeating rivals and consolidating gains'. Third, international law 'provides a [shared] language for advocacy, negotiation and conflict resolution', thus 'shaping the terrain on which [states] come into conflict'.[3] The proposition is that not only does international law matter to maritime security, legal argument does as well.

This article examines the role of international legal argument in the South China Sea dispute. At its simplest, the dispute involves China's claim to enjoy special rights within the area demarcated by the 'nine-dash line' on official maps, which includes great swathes of the South China Sea. Indeed, the line appears to come within 34 nautical miles of the Philippines coastline, constituting a substantial intrusion into maritime zones that country might otherwise enjoy under international law.[4] Within this area, sovereignty over numerous groups of islands, rocks and reefs remains disputed. While many of the claimant states have engaged in island-building or land reclamation activities in the South China Sea, none has

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1 This article approaches maritime security as a question of traditional sea power. For broader conceptions, see other articles in this special section; Christian Bueger, 'What is maritime security?', *Marine Policy*, vol. 53, 2015, p. 161; Douglas Guilfoyle, 'Maritime security', in Jill Barrett and Richard Barnes, eds, *Law of the sea: UNCLOS as a living treaty* (London: British Institute of International and Comparative Law, 2016), pp. 329–62.

2 Abram Chayes and Antonia Handler Chayes, *The new sovereignty: compliance with international regulatory agreements* (Cambridge, MA: Harvard University Press, 1995), p. 119; Ian Johnstone, *The power of deliberation: international law, politics and organizations* (Oxford: Oxford University Press, 2011), p. 33.

3 David Kennedy, *A world of struggle: how power, law, and expertise shape global political economy* (Princeton: Princeton University Press, 2016), pp. 173, 175, 175–6.

4 See map in Permanent Court of Arbitration, *The South China Sea arbitration (the Republic of Philippines v. the People's Republic of China)*, award on jurisdiction and admissibility, 29 Oct. 2015, p. 51, https://pca-cpa.org/en/cases/7/. Unless otherwise noted at point of citation, all URLs cited in this article were accessible on 12 July 2019.

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done so on the scale of China. It is estimated that since 2013 'China has developed more than 3200 acres across the area', especially in the Spratly Islands group, where it has created at least six artificial islands, including one built on Mischief Reef that features a 3-kilometre runway capable of landing military aircraft.[5]

In such contests, ideas matter. Ideas affect our perceptions not only of reality, but of what is possible given our circumstances. In the realm of international relations, international law provides one such set of ideas. It provides tools a state may use in promoting the legitimacy of its own actions, or disputing those of another. While the effectiveness of international law in the South China Sea dispute may be contested, its relevance cannot. For China, law is a key domain through which it seeks to consolidate control over the South China Sea. Beijing has gambled on being able to pursue this strategy against perceived US encroachment without disrupting regional stability.[6] It has, however, potentially underestimated the extent to which its policy impinges on other states' national interests in the maritime domain—interests they conceptualize in legal terms.[7]

The rest of this article will proceed by first considering the content of the rule of law at the international level as an *ideology* capable of being both a site of struggle and a mechanism for change. It will then consider the implications of this approach in the South China Sea. It will examine the *lawfare* aspect of the South China Sea dispute, understanding lawfare in the broad sense of using legal norms to try to achieve or consolidate political gains.[8] This necessitates examining historic Chinese approaches to the law of the sea.[9]

The international rule of law as ideology and international law as a tool for change

The international rule of law

At the national level, the 'rule of law' is typically considered as a bundle of principles that guide the application of laws to constrain state power.[10] The rule of

[5] Megan Specia and Mikko Takkunen, 'South China Sea photos suggest a military building spree by Beijing', *New York Times*, 8 Feb. 2018, https://www.nytimes.com/2018/02/08/world/asia/south-china-seas-photos.html.

[6] Christopher Layne, 'The US–Chinese power shift and the end of Pax Americana', *International Affairs* 94: 1, Jan. 2018, pp. 89–112; Wu Xinbo, 'China in search of a liberal partnership international order', *International Affairs* 94: 5, Sept. 2018, pp. 995–1018; Doug Stokes and Kit Waterman, 'Security leverage, structural power and US strategy in east Asia', *International Affairs* 93: 5, Sept. 2017, pp. 1039–60 (here it is interesting to contrast China's response in different environments); Christian Kreuder-Sonnen, 'China vs the WHO: a behavioural norm conflict in the SARS crisis', *International Affairs* 95: 3, May 2019, pp. 535–52; Martin Hearson and Wilson Prichard, 'China's challenge to international tax rules and the implications for global economic governance', *International Affairs* 94: 6, Nov. 2018, pp. 1287–308.

[7] Katherine Morton, 'China's ambition in the South China Sea: is a legitimate maritime order possible?', *International Affairs* 92: 4, July 2016, p. 911.

[8] Orde Kittrie, *Lawfare: law as a weapon of war* (New York: Oxford University Press, 2016), p. 5; Oona A. Hathaway and Scott J. Shapiro, 'International law and its transformation through the outlawry of war', *International Affairs* 95: 1, Jan. 2019, pp. 45–62.

[9] Maximilian Mayer, 'China's historical statecraft and the return of history', *International Affairs* 94: 6, Nov. 2018, pp. 1217–36.

[10] John Tasioulas, 'The rule of law', in John Tasioulas, ed., *The Cambridge companion to the philosophy of law* (Cambridge: Cambridge University Press, 2019), https://www.ssrn.com/abstract=3216796.

law at an international level is different.[11] International law provides tools for mutual cooperation and coexistence, processes whose importance can easily be overlooked given that they operate in the background, underpinning international affairs. This article takes the rule of law at the international level to mean the function of international law in achieving cooperative ends and placing normative constraints on the perceived legitimacy of state policies. This is not, however, to claim for international law an exclusive competence either in aiding policy coordination or as a yardstick of legitimacy.

A values-orientated international rule of law, which would be closer to the rule of law as understood at the national level, is difficult to sustain in a pluralistic international system ostensibly unconcerned with the internal political constitution of states. That said, the process of rule-making and norm creation through continual interaction does allow a thin moral consensus with deeper pockets of normativity to emerge: agreed human rights standards, the prohibitions on torture and genocide, and so on.[12] Without a thicker common moral framework, the ability to categorize acts as legal or illegal is a powerful political tool in attacking an adversary's legitimacy.

While there are numerous accounts of how international law may affect state behaviour, it is sufficient for present purposes to focus on constructivist accounts, particularly the idea of international law, or 'the international rule of law', as ideology.[13] Broadly, the insight of constructivism is that we must be taught what we want.[14] Our values, self-conception, and how we want others to perceive us matter. Power is not exercised in a vacuum: one must have ideas about why and when to exercise power, and what the anticipated results will be. International law is one means of transmitting such ideas: law does not 'simply remain an exogenous factor, but becomes an endogenous variable in the determination of national interests' and helps 'constitute strategic calculations as to what to expect from other states'.[15] Scott has argued that international law is best understood as an ideology embedded within the international political system. As such, not only does it help to structure and maintain power relationships, but adherence to the ideology *confirms group membership*: 'demonstrated acceptance of the ideology … is a criterion for membership of the international system.'[16] This requires that states demonstrate support for two propositions (irrespective of their truth): first, the

[11] See e.g. Richard Collins, 'Two idea(l)s of the international rule of law', *Global Constitutionalism* 8: 2, 2019, pp. 191–226; Hersch Lauterpacht, *International law: being the collected papers of Hersch Lauterpacht*, ed. E. Lauterpacht (Cambridge: Cambridge University Press, 2009), chs 1, 8.

[12] Jutta Brunnee and Stephen J. Toope, *Legitimacy and legality in international law: an interactional account* (Cambridge: Cambridge University Press, 2010), p. 34.

[13] Shirley V. Scott, 'International law as ideology: theorizing the relationship between international law and international politics', *European Journal of International Law* 5: 3, 1994, pp. 313–25; Ian Hurd, *How to do things with international law* (Princeton: Princeton University Press, 2017), ch. 3.

[14] Jutta Brunnee and Stephen J. Toope, 'Constructivism and international law', in Jeffrey L. Dunoff and Mark A. Pollack, eds, *Interdisciplinary perspectives on international law and international relations: the state of the art* (Cambridge: Cambridge University Press, 2012), pp. 121–5; Monica Hakimi, 'The work of international law', *Harvard International Law Journal* 58: 1, 2017, p. 10.

[15] Shirley V. Scott, *International law, US power: the United States' quest for legal security* (Cambridge: Cambridge University Press 2012), p. 204.

[16] Scott, 'International law as ideology', p. 322.

existence of rules which permit 'the categorization of political positions as either "legal" or "illegal"'; second, 'that international law is a set of binding rules'—a proposition that is 'reinforced whenever an international actor emphasizes the legality of its own position'.[17] International law is a key arena 'within which the normal conduct of politics and contestation takes place'.[18] Thus, 'power is not a consideration distinct from international law … the idea of international law is an important form of power in international politics'.[19]

This analysis makes the 'legitimacy effect' or 'compliance pull' of international law more readily comprehensible. Law 'structures a particular kind of argumentative practice' and 'cultivates the expectation that [actions] must be rooted in authority'.[20] Thus, the almost invariable practice of invoking international law to justify or criticize state action demonstrates the existence of a rule of law ideology under which states believe that 'acting lawfully is a determinant of state legitimacy'.[21] In cases where there would 'be little doubt as to a legally "correct" course of action', then rational foreign policy would suggest a state should comply with the rule of law if only to avoid compromising 'its position within the international order'.[22] Adherence is not always onerous. In the space between clearly illegal and clearly legal actions, an argument can often be mounted for the legal validity of any chosen course of action.[23] Nonetheless, the burden of persuasion rests on the actor 'who seeks to deviate from collective understandings of the law',[24] and not all arguments are equally persuasive; a characteristic of legal argument is that there is a wide epistemic community of technical experts who are generally able to distinguish good legal argument from bad.[25]

International law is not merely a fig leaf for policy. Constructivist approaches point us to the manner in which 'norms may constitute or even trump interests'.[26] Consider, for example, the *So San* incident in 2002 in which the Spanish Navy (acting on US intelligence) intercepted on the high seas a cargo of Scud missiles that had left North Korea bound for Yemen.[27] Despite the interest in preventing North Korean proliferation activities, the vessel was allowed to sail on because there was no basis in international law to seize the shipment. It was not in the interests of the United States and its allies to undermine the freedom of navigation upon which they depend both militarily and economically. International law

[17] Scott, 'International law as ideology', p. 322.
[18] Hurd, *How to do things with international law*, p. 46.
[19] Scott, 'International law as ideology', p. 324.
[20] Monika Hakimi, 'Why should we care about international law?', *Michigan Law Review* 118: 1, 2020 (forthcoming, copy on file with author).
[21] Hurd, *How to do things with international law*, pp. 12, 48; cf. Neta C. Crawford, *Argument and change in world politics: ethics, decolonization, and humanitarian intervention* (Cambridge: Cambridge University Press, 2002), ch. 1.
[22] Scott, 'International law as ideology', p. 323.
[23] Shirley V. Scott, *International law in world politics: an introduction*, 3rd edn (Boulder, CO: Lynne Rienner, 2017), ch. 7; Scott, *International law, US power*, p. 210.
[24] Brunee and Toope, 'Constructivism and international law', p. 132.
[25] Chayes and Chayes, *The new sovereignty*, p. 119.
[26] Brunee and Toope, 'Constructivism and international law', p. 129.
[27] Douglas Guilfoyle, *Shipping interdiction and the law of the sea* (Cambridge: Cambridge University Press, 2007), pp. 244–5.

thus provides 'the language that states use to understand and explain their acts, goals, and desires'.[28] Managerialist accounts explain how such norms formed at the international level become internalized in national decision-making processes, thus becoming self-enforcing in the ordinary course of events.[29]

International law as a tool for change

International law may thus be used by states or decision-makers as a tool for change in the same manner as any other set of ideas. 'The power of an idea [to create change] can be said to reside in people's acceptance of that idea as a basis for action'—or, indeed, inaction.[30] Legal ideas may be particularly powerful as, by their nature, they are designed both to persuade and to change socio-political realities.[31] In other words, 'legal argument is essentially instrumental because it aims to have a practical effect'.[32] It seeks to exercise this effect by securing 'the assent … of those to whom the argument is addressed rather than demonstrating the truth of the proposition … advanced'.[33] Hathaway and Shapiro, for example, argue that the prohibition on acquisition of title by conquest reduced the instances of interstate war, saying that 'when law is most effective, it does not induce states to act contrary to incentives; it changes those incentives themselves'.[34] More prosaically, the idea of the exclusive economic zone (EEZ) effected a substantial redistribution of fisheries resources in the 1970s. The EEZ had its origins in the broad fisheries jurisdiction zones proclaimed by Latin American states in the 1950s. These proclamations were, in part, a response to the US Truman Proclamation on rights in the continental shelf. Lacking broad continental margins, Latin American states declared alternative maritime zones within which they claimed jurisdiction over resources, reaching out to 200 nautical miles (nm), as a form of self-granted compensation for their geological disadvantages.[35] This often resulted in assertions of territorial seas extending to 200 nm from coastlines,[36] which were seen by developed states as representing impermissible infringement of navigational freedoms.[37]

Latin American and African ideas on the necessity of a special resource-orientated maritime zone began to converge in the early 1970s. The 1972 Declaration

[28] Hurd, *How to do things with international law*, p. 45.
[29] Harold Koh, 'Why do nations obey international law?', *Yale Law Journal* 106: 8, 1997, pp. 2599–659.
[30] Scott, 'International law as ideology', p. 317.
[31] Philip Allott, 'Interpretation: an exact art', in Andrea Bianchi, Daniel Peat and Matthew Windsor, eds, *Interpretation in international law* (Oxford: Oxford University Press, 2018), p. 386.
[32] Iain Scobbie, 'Rhetoric, persuasion, and the object of interpretation in international law', in Bianchi et al., eds, *Interpretation in international law*, p. 64.
[33] Scobbie, 'Rhetoric, persuasion, and the object of interpretation', p. 64.
[34] Hathaway and Shapiro, 'International law and its transformation', p. 46.
[35] H. Shirley Amerasinghe, 'The Third United Nations Conference on the Law of the Sea', in Myron H. Nordquist, ed., *United Nations Convention on the Law of the Sea 1982: a commentary*, vol. 1 (Dordrecht: Nijhoff, 1985), p. 2.
[36] Yoshifumi Tanaka, *The international law of the sea*, 2nd edn (Cambridge: Cambridge University Press, 2015), p. 127; Dolliver Nelson, 'Exclusive economic zone', *Max Planck Encyclopedia of Public International Law* (last updated March 2008), paras 3–5, http://opil.ouplaw.com/home/EPIL.
[37] Especially the US: J. Ashley Roach and Robert W. Smith, *Excessive maritime claims*, 3rd edn (Leiden: Nijhoff, 2012), pp. 138–43.

of Santo Domingo advocated the concept of a 'patrimonial sea',[38] which would confer 'sovereign rights over the renewable and non-renewable natural resources, which are found in the waters, [and] in the seabed … adjacent to the territorial sea'.[39] A similar exclusive economic zone was proposed by Kenya in 1972, and the idea was taken up by the Organization of African Unity in 1973. The African EEZ and the Latin American patrimonial sea had 'effectively merged' by the time negotiations on the UN Convention on the Law of the Sea (UNCLOS) began in 1973,[40] and the proposal 'attracted the support of most developing states'.[41] The tactic of defining the EEZ as a resource jurisdiction and not an expanded territorial sea defused the major objections of naval powers. The idea was so successful, indeed, that national legislation proclaiming EEZs was enacted by at least 67 coastal states before UNCLOS entered into force,[42] thus providing evidence that the proposed rule had been accepted as one of customary international law. It was a brilliant piece of norm entrepreneurship that redistributed access to fisheries from highly developed distant water fishing nations (which had been able to fish off foreign coasts outside the territorial sea as a freedom of the high seas) to coastal states (as EEZ proprietors).[43]

Legal ideas may thus be a midwife to change. In Allott's conception, all societies—including international society—have a triple constitution. A society continually (re-)makes itself '*ideally* in the form of ideas, *really* through the day-to-day exercise of social power by society members, and *legally* in the form of law'.[44] Allott's conception is dynamic: the three constitutions exist as a triad within which change in one element leads to changes in the others. New ideas may be given expression in new laws which may in turn help to crystallize social change. The idea of decolonization/self-determination perhaps traced such a path.[45] The conventional history of the decolonization movement emphasizes the impact of the 1941 Atlantic Charter drawn up by Churchill and Roosevelt and its reference to the 'right of all peoples to choose the form of government under which they will live'.[46] Despite its ambiguity, this language was nonetheless seized upon by

[38] R. R. Churchill and A. V. Lowe, *The law of the sea*, 3rd edn (Manchester: Manchester University Press, 1999), p. 161; Declaration of Santo Domingo, UN Doc A/AC.138/80, 7 June 1972.

[39] Nelson, 'Exclusive economic zone', para. 8 (quoting the Declaration of Santo Domingo).

[40] The treaty was concluded on 10 Dec. 1982 and came into force on 16 Nov. 1994; as at 31 March 2018 it had 168 state parties. The text is available at 1833 UN Treaty Series 397 or via https://www.un.org/depts/los/ (hereafter UNCLOS).

[41] Churchill and Lowe, *Law of the sea*, p. 160.

[42] I include in this figure exclusive fishing zone claims: Churchill and Lowe, *Law of the sea*, p. 160 and table of zone declarations at appendix 1. On customary law status resulting from consistent state practice accompanied by relevant legal belief (*opinio juris*), see *The delimitation of the maritime boundary in the Gulf of Maine (Canada/United States of America)* (1984), International Court of Justice (ICJ) report 246 at para. 94; *Continental shelf (Libyan Arab Jamahiriya/Malta)* (1985), ICJ report 13 at para. 34.

[43] Ironically, principal beneficiaries included developed coastal states such as Australia, Canada, France, Japan, Norway, Russia and the US. See Churchill and Lowe, *Law of the sea*, p. 178; Per Magnus Wijkman, 'UNCLOS and the redistribution of ocean wealth', *Journal of World Trade* 16: 1, 1982, pp. 31–2.

[44] Philip Allott, *The health of nations: society and law beyond the state* (Cambridge: Cambridge University Press, 2002), p. 341.

[45] Michael N. Barnett and Martha Finnemore, 'The politics, power, and pathologies of international organizations', *International Organization* 53: 4, 1999, p. 713.

[46] The text of the Atlantic Charter, signed on 14 Aug. 1941, is reproduced at http://avalon.law.yale.edu/wwii/atlantic.asp.

African activists 'to frame arguments for self-determination and independence'.[47] These arguments in turn helped secure a steady procession of legal instruments and practices, including the obligation to promote self-government of non-independent territories under article 73 of the UN Charter; the UN General Assembly's 1960 Declaration on the Granting of Independence to Colonial Countries and Peoples (Resolution 1514); and the work of the UN's Special Committee on Decolonization.[48] The International Court of Justice has noted of this period:

> In 1960 … 18 countries, including 17 in Africa, gain[ed] independence. During the 1960s, the peoples of an additional 28 non-self-governing-territories exercised their right to self-determination and achieved independence. In the Court's view, there is a clear relationship between resolution 1514 … and the process of decolonization following its adoption.[49]

In part through these processes, 'colonialism became delegitimised and was replaced with new normative beliefs—namely, that states should not keep colonies because it is wrong to deny nations … political self-determination'.[50]

International law in its very formalism provides a 'fragile surface' on which political antagonists can recognize each other as equals and play out their conflicts; indeed, law provides a useful space in which to conduct politics precisely because if law is not merely to be the coercive imposition of rules it must hold out the (eternally deferred) promise of justice.[51] The gap between the promise of justice (as an ideal) and law (as it exists) opens a space for the 'politics of law' and makes law dynamic and contestable.[52]

Chinese lawfare in the South China Sea

As noted, the South China Sea dispute involves China's claim to enjoy special rights within its self-proclaimed 'nine-dash line'. That line comes very close to China's neighbours, including the Philippines, Vietnam, Malaysia, Brunei Darussalam and Indonesia (the Riau Islands). Within the line the dispute encompasses contested claims to various maritime features, as well as an ambitious Chinese campaign of land reclamation and building military bases on the artificial islands thus created. This contest matters: every year, 40 per cent of global sea trade passes through the South China Sea, and these resource-rich waters are vital to the 'economic security [of] neighbouring states'.[53] In particular, there is increasing competition for the region's rapidly declining fish stocks, 'leading to escalating tensions over overlapping maritime claims'.[54]

[47] Crawford, *Argument and change in world politics*, p. 297.
[48] See discussion in ICJ, *Legal consequences of the separation of the Chagos Archipelago from Mauritius in 1965 (advisory opinion)* (The Hague, 25 Feb. 2019), paras 140–62, https://www.icj-cij.org/files/case-related/169/169-20190225-01-00-EN.pdf.
[49] ICJ, *Legal consequences of the separation of the Chagos Archipelago from Mauritius*, para. 150.
[50] Crawford, *Argument and change in world politics*, p. 138.
[51] Martti Koskenniemi, 'What is international law for?', in Malcolm Evans, ed., *International law*, 5th edn (Oxford: Oxford University Press, 2018), p. 56.
[52] Koskenniemi, 'What is international law for?', p. 56.
[53] Morton, 'China's ambition in the South China Sea', p. 915.
[54] Morton, 'China's ambition in the South China Sea', p. 915; Clive Schofield, Rashid Sumaila and William

Arguments over such maritime claims, and whether they can genuinely be said to overlap, can only be assessed through the international law of the sea. The law of the sea may be understood as a regime in the classic sense of being a set 'of implicit or explicit principles, norms, rules, and decision making procedures around which actors' expectations converge'.[55] A central component of this regime is UNCLOS, a comprehensive treaty designed to 'settle all issues relating to the law of the sea',[56] commonly called the 'constitution of the oceans'.[57] For present purposes, it is important to examine the Chinese history of engagement with the law of the sea and UNCLOS, and to establish whether there are any unique Chinese understandings of either.

China and UNCLOS

The People's Republic of China took its seat at the UN in 1971. It was thus in place to participate in the drafting of UNCLOS throughout the marathon Third UN Conference on the Law of the Sea (UNCLOS III) that ran from 1972 to 1982 (even though preliminary work had commenced in the UN Seabed Committee in 1967). China was hampered by having few trained international lawyers—indeed, it had shown little interest in law of the sea issues since 1949—and sent only a small delegation of 20 or so to UNCLOS III.[58] Nonetheless, China's first statements on the law of the sea in 1972 made its core concerns clear.[59] First, it wanted to align itself closely with—and to lead—the developing world.[60] Second, it opposed 'maritime hegemony'. Third, it had several substantive legal propositions to advance. (The first two of these concerns are intertwined and are discussed together.)

China was keen to stress its common position with developing states.[61] China's conception of 'maritime hegemony' started from a simplistic binary: the developing world, especially Latin American and African states, wished to assert 200-nm economic zones to control their offshore resources, while the United States and the Soviet Union (as superpowers) wished to restrict them to a 12-nm

Cheung, 'Fishing, not oil, is at the heart of the South China Sea dispute', *The Conversation*, 16 Aug. 2016, http://theconversation.com/fishing-not-oil-is-at-the-heart-of-the-south-china-sea-dispute-63580. See also Greg Austin, *China's ocean frontier: international law, military force and national development* (St Leonards, New South Wales: Allen & Unwin, 1998), pp. 264–7.

[55] Stephen D. Krasner, 'Structural causes and regime consequences: regimes as intervening variables', *International Organization* 36: 2, 1982, p. 185.

[56] Preamble, UNCLOS.

[57] Tommy Koh, 'A constitution for the oceans', in Nordquist, ed., *United Nations Convention on the Law of the Sea 1982*, p. 11.

[58] Hugdah Chiu, 'China and the law of the sea conference', in James Hsiung and Samuel Kim, eds, *China in the global community* (New York: Praeger, 1980), pp. 201, 210 (the Chinese delegation was smaller than that of either Denmark or the Netherlands); Austin, *China's ocean frontier*, pp. 19–21, 48.

[59] 'People's Republic of China statement on the law of the sea', *International Legal Materials* 11: 3, 1972, p. 655.

[60] Charles Bethill, 'People's China and the law of the sea', *International Lawyer* 8: 4, 1974, p. 739.

[61] Bethill, 'People's China and the law of the sea', p. 739. See further *Official records of the Third United Nations Conference on the Law of the Sea 1973–1982* (hereafter *Official records*), vol. 17 (New York, 1984), UN Doc A/CONF.62/SR.191, p. 102; speech by Kuan-hua Chiao (China), UN General Assembly, General Debate, UN Doc A/PV.2137, 2 Oct. 1973, p. 6.

territorial sea.[62] China thus presented itself as a champion of an EEZ granting exclusive jurisdiction 'for the purpose of protecting, using, exploring and exploiting' the 'living and non-living resources of the whole water column, sea-bed and its subsoil' to a maximum of 200 nm from a state's baseline (generally the low-water line).[63] China depicted the freedom to fish on the high seas as little more than a licence to send 'pirate fishing vessels everywhere to … plunder the fishery resources of other countries' and as a means of denouncing as illegal steps taken by 'small and medium-sized countries' towards 'defending their sea and fishery resources' by proclaiming new zones.[64] The point was put strongly in a 1972 Chinese speech to the UN Seabed Committee:

> While talking glibly about the 'joint exploitation of sea-bed [and other] resources', [the superpowers] are in fact sending out their so-called 'research vessels' and 'fishing fleets' everywhere for brazen intrusion into the territorial seas and unbridled plunder of the [adjacent] sea-bed resources and coastal fishing areas of other countries.[65]

For China, maritime hegemonism was a contest between the superpowers' assertions of control through 'building up naval forces, establishing military bases, and plundering other countries' off-shore fishery and sea-bed resources'[66] and a legalized pattern of resistance from developing states.[67] Nonetheless, as a state with aspirations to naval power and distant water fishing fleets, China did little of substance to oppose high seas freedoms at UNCLOS III,[68] considering the expansion of coastal state jurisdiction over maritime resources, with its potential to exclude access by developed states, to be sufficient.[69]

Finally, China had several legal positions of its own to advance. These concerned the width of the territorial sea (which it saw as inherently variable and an exclusive prerogative of sovereignty); whether warships had a right of innocent passage through territorial seas and straits; and claims that its own Chiungchow Strait and vast Bohai Bay were internal waters.[70] It also took the view that 'an archipelago or an island chain consisting of islands close to each other may be taken as an integral whole in defining the limits of the territorial sea around it'.[71] This was understood by commentators to mean that a continental state with sovereignty over an outlying archipelago could draw straight baselines around it and use these to measure a territorial sea (rather than projecting a territorial sea from the

[62] Speech by Kuan-hua Chiao, p. 6. Negotiations were, naturally, more complex than simple North–South confrontation: see William Wertenbaker, 'The law of the sea—I', *New Yorker*, 1 Aug. 1983, p. 51.
[63] 'Working paper submitted by the Chinese delegation: sea area within the limits of national jurisdiction' (hereafter 'First Chinese working paper'), UN Doc A/AC.138/SC.II/L.45, para. 2(1)–(2); repr. in *Report of the Committee on the Peaceful Uses of the Sea-Bed and the Ocean Floor Beyond the Limits of National Jurisdiction*, UN Doc A/9021, 1973, vol. 3, p. 71.
[64] 'People's Republic of China statement on the law of the sea', p. 657.
[65] 'People's Republic of China statement on the law of the sea', p. 655.
[66] *Official records*, vol. 1, UN Doc A/CONF.62/SR.25 (New York, 1975), p. 80.
[67] Rob McLaughlin, 'UNCLOS and the question of artificial islands beyond national jurisdiction', unpublished conference paper, 22 Nov. 2018 (copy on file with author).
[68] Bethill, 'People's China and the law of the sea', pp. 734–5.
[69] Bethill, 'People's China and the law of the sea', p. 741.
[70] Bethill, 'People's China and the law of the sea', pp. 728 n. 20, 730.
[71] 'First Chinese working paper', para. 1(6).

low-water line of each individual island).[72] This was part of a 'long and intensive debate within international law as to whether there should be a special regime for archipelagos and if so … which States should be entitled to the privileges granted therein'.[73] The Chinese position had momentary success when in 1975 an article was included in the first informal single negotiating text at UNCLOS III stipulating that the draft provisions on archipelagic states were 'without prejudice to the status of oceanic archipelagos which form an integral part of the territory of a continental State'.[74] However, this article was omitted from later negotiating texts. China was thereafter 'silent' on the issue, 'apparently in deference to opposition from Third World countries' which favoured making special provision only for states consisting entirely of one or more mid-ocean archipelagos.[75] Thus no 'without prejudice' provision found its way into the Convention, leaving the archipelagic regime in UNCLOS applicable only to archipelagic states and denying the outlying archipelagos of continental states the right to claim the benefit of any special rule.[76] The significance of these claims regarding special statuses for certain Chinese bodies of water and special rules applying to outlying archipelagos will recur below.

Otherwise, however, China did little to advance any uniquely Chinese conception of the law of the sea. Its position on high seas fisheries and the management of seabed resources beyond national jurisdiction, for example, was described at the time as 'rather bland' and 'more regulatory than radical'.[77] At the conclusion of negotiations, China noted that it had 'actively participated' in drafting the Convention, had voted in favour of its adoption, and had decided to sign the final text.[78] It further noted, however, that UNCLOS, while a considerable improvement on earlier law of the sea treaties, still contained 'shortcomings and … defects' concerning whether warships could exercise innocent passage in territorial seas; the law dealing with 'delimitation of the exclusive economic zones and the continental shelf between opposite and adjacent States' (where China favoured mutual consultation over compulsory dispute settlement procedures); and the granting of 'privileges and priorities' regarding deep seabed mining to 'pioneer investors' from industrialized states.[79]

There are two notable points about Chinese participation in UNCLOS III: first, that no special status for the South China Sea was ever advocated; and second, how readily claims regarding rules applicable to outlying continental archipelagos

[72] Chiu, 'China and the law of the sea conference', p. 203.
[73] Till Markus, 'Article 46', in Alexander Proelß, ed., *The United Nations Convention on the Law of the Sea: a commentary* (Munich: Beck, Hart, Nomos, 2017), p. 335.
[74] *Official records*, vol. 4, UN Doc A/CONF.62/WP.8/Part II (New York, 1977), p. 170 (draft article 131).
[75] Chiu, 'China and the law of the sea conference', p. 203.
[76] Markus, 'Article 46', pp. 336–7.
[77] Bethill, 'People's China and the law of the sea', pp. 735, 738. See 'Working paper submitted by the Chinese delegation: general principles for the international sea area' (hereafter 'Second Chinese working paper'), UN Doc A/AC.138/SC.II/L.45, 6 August 1973, repr. in *Report of the Committee on the Peaceful Uses of the Sea-Bed*, vol. 3, p. 101.
[78] *Official records*, vol. 17, p. 102.
[79] *Official records*, vol. 17, p. 102. On delimitation, see 'Second Chinese working paper', paras 2(8), 3(5); UNCLOS, arts 74(2), 83(2).

were abandoned. Indeed, the only 'special rule' China insisted should continue to apply under the UNCLOS text as concluded was its preferred interpretation that the right of innocent passage was not available to warships.[80] China's 1996 declaration upon ratification of UNCLOS addressed only its right to a continental shelf and 200-nm EEZ; its position on innocent passage of foreign warships; its intention to resolve maritime boundaries through 'consultations'; and its sovereignty over those islands listed in its Territorial Sea and Contiguous Zone Law 1992 (henceforth 'Territorial Sea Law').[81] Again, no mention was made of special rules governing outlying archipelagos or the South China Sea. China's relevant national laws, its Territorial Sea Law, and its Exclusive Economic Zone and Continental Shelf Act 1998 (henceforth 'EEZ Act') also make no such express claims. At best the EEZ Act refers to EEZ rights 'not stipulated in this Act … exercised in accordance with international law' and ambiguously states that the Act 'shall not affect the [PRC's] historical rights'.[82] Importantly, when in 1996 China defined the baselines from which it measures its territorial sea, it drew straight baselines around the Xisha Qundao (Paracel Islands) but not around any other outlying maritime features.[83]

The nine-dash line dispute

China's present claims in the South China Sea within its nine-dash line appear to result from a combination of pressures. There is the assertion of a genuinely held view that China has a right to become a 'great maritime nation'.[84] There is also a degree of 'maritime nationalism',[85] which can be understood as an elite-driven process of 'constructing an emotional claim' to certain islands as part of the 'imagined territory' of China.[86] This in turn allows those elites to harness 'nationalism to legitimize their political positions'.[87] Nonetheless, the belief that various maritime features belong to the imagined territory of China is largely sincere.[88] Hayton concludes that, in the period up to the 1940s,

> Chinese officials … [held] a collective belief that islands off the coast and regularly visited by Chinese fishermen were naturally Chinese territory … but gave almost no consideration … to the possibility that these islands may be equally near other coastlines … or that other fishing communities might use them as well. [89]

[80] *Official records*, vol. 17, p. 102.
[81] See the list of declarations appended to UNCLOS at: https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21.
[82] *Exclusive Economic Zone and Continental Shelf Act* 1998 (China), arts 13, 14, https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/STATEFILES/CHN.htm.
[83] Declaration of the Government of the People's Republic of China on the baselines of the territorial sea, 15 May 1996, https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/STATEFILES/CHN.htm.
[84] Morton, 'China's ambition in the South China Sea', p. 911.
[85] Morton, 'China's ambition in the South China Sea', p. 911.
[86] Bill Hayton, 'The modern origins of China's South China Sea claims: maps, misunderstandings, and the maritime geobody', *Modern China* 45: 2, 2019, pp. 164–5.
[87] Hayton, 'The modern origins of China's South China Sea claims', pp. 164–5.
[88] Austin, *China's ocean frontier*, p. 4.
[89] Hayton, 'The modern origins of China's South China Sea claims', p. 165.

Finally, China has adopted an area denial strategy in its 'near waters' inside the first island chain,[90] both as a matter of traditional 'offshore waters defence' and to ensure the mobility of an increasingly advanced submarine fleet.[91] Creating this 'Chinese lake'[92] requires both area denial and surveillance denial capabilities—capabilities provided by its campaign of island-building within the nine-dash line. Consolidating these claims requires a legal justification.

China, or rather its ruling Chinese Communist Party (CCP), appreciates the power of law. Its 'three warfares' doctrine outlines a triad of non-kinetic methods of achieving China's national goals: public opinion warfare, psychological warfare and legal warfare.[93] Among these, the function of legal warfare ('lawfare') is explained by Livermore as 'leveraging of existing legal regimes and processes to constrain adversary behavior, contest disadvantageous circumstances, confuse legal precedent, and maximize advantage in situations related to the PRC's core interests'.[94] The CCP has a broad conception of the PRC's core interests which includes the Party's own power to govern; thus, 'many of the threats to the CCP and its political system occur in the realm of ideas'.[95] The function of the three warfares is to strengthen the political position of the CCP both internally and externally. Therefore, contesting China's claims in the South China Sea is seen directly as an 'attempt to undermine the legitimacy of the Party'.[96] This is not an overstatement. It is a logical corollary of Chinese insecurity: the CCP sees itself as beset by internal and external threats, vulnerable to both conventional and information warfare. Given that it sees legal argument as a major element in its struggle to secure its position, it understands legal argument mounted against it to be a form of strategic, even existential, conflict.

Lawfare and the nine-dash line

The precise nature of Chinese claims within the nine-dash line has proved elusive. The first hint at a legal characterization came in the Chinese *note verbale* of 7 May 2009 to the UN Commission on the Limits of the Continental Shelf which (appending a map featuring the line) referred to China's 'indisputable sovereignty over the islands in the South China Sea' and its 'sovereign rights and jurisdiction' over adjacent waters.[97] The origins of the line itself are contestable, as it did not

[90] The first island chain consists of the major archipelagos closest the east Asian continental mainland. It is usually considered to include the Kuril Islands, the Japanese Archipelago, Ryukyu Islands, Taiwan, the northern Philippines and Borneo.

[91] Yves-Heng Lim, 'China's naval strategy', in Howard M. Hensel and Amit Gupta, eds, *Naval powers in the Indian Ocean and the western Pacific* (New York: Routledge, 2018), pp. 24–5.

[92] Lim, 'China's naval strategy', p. 24.

[93] See Doug Livermore, 'China's "three warfares" in theory and practice in the South China Sea', *Georgetown Security Studies Review*, 25 March 2018, http://georgetownsecuritystudiesreview.org/2018/03/25/chinas-three-warfares-in-theory-and-practice-in-the-south-china-sea/; Peter Mattis, 'China's "three warfares" in perspective', *War on the Rocks* blog, 30 Jan. 2018, https://warontherocks.com/2018/01/chinas-three-warfares-perspective/.

[94] Doug Livermore, 'China's "three warfares"', quoting Kittrie, *Lawfare*, ch. 1.

[95] Mattis, 'China's "three warfares" in perspective'.

[96] Livermore, 'China's "three warfares"'.

[97] A translation of the *note verbale*, with its annexure, may be found at https://www.un.org/depts/los/clcs_new/

appear on government maps earlier than 1947 or on private cartographical maps earlier than 1933.[98] Whatever its origins, the nine-dash line subsequently 'took on a life of its own without the PRC government ever coming to an agreed official position' on what it represented.[99]

In an important article of 2013, prominent Chinese scholars Gao and Jia acknowledged that the legal significance of the nine-dash line had never been defined.[100] This is significant. If a claim is not articulated, it cannot be opposed, and it becomes hard to plead that other states have acquiesced in it. Nonetheless, Gao and Jia considered it could represent a claim to sovereignty over all enclosed maritime features, all rights under UNCLOS attaching to those features, and 'historic rights … in respect of fishing, navigation' and resource exploitation.[101] However, they rejected the idea the nine-dash line claimed the enclosed area as Chinese internal waters. Their article suggested the line might also represent a claimed maritime boundary between China and neighbouring states, given the 'nascent notion of the continental shelf' at the time of its emergence in the 1930s. To underscore the point, two of the best, and best-connected, legal minds in China held in 2013

- that China had never defined the legal significance of the nine-dash line;
- that the line nonetheless signalled an ambit claim of sovereignty over the enclosed islands, thereby conferring the associated UNCLOS rights and certain historic rights; and
- that China did not consider the enclosed area as part of its internal waters.[102]

I shall return to the significance of these points below.

Philippines vs China: UNCLOS arbitration

China's nine-dash line cuts deep into the 200-nm EEZ that the Philippines, all else being equal, is entitled to project from its baselines. In addition, Chinese island-building on Mischief Reef in the Spratly Islands put a permanent military installation only 130 nm from the Philippines' Palawan island. The Philippines attempted to invoke international law to (at least rhetorically) level the playing field in its dispute with China and commenced arbitration proceedings under UNCLOS in 2013. The strategy was to use a legal forum to seek a political advantage not available to the Philippines by other means.

submissions_files/mysvnm33_09/chn_2009re_mys_vnm_e.pdf.

[98] Zhiguo Gao and Bing Bing Jia, 'The nine-dash line in the South China Sea: history, status, and implications', *American Journal of International Law* 107: 1, 2013, pp. 101–102; Hayton, 'The modern origins of China's South China Sea claims', pp. 158–62.

[99] Austin, *China's maritime frontier*, pp. 14–15 n. 6.

[100] Gao and Jia, 'The nine-dash line in the South China Sea', pp. 98–124. Gao is, notably, a judge of the International Tribunal for the Law of the Sea. See also Permanent Court of Arbitration, *The South China Sea arbitration (the Republic of Philippines v. the People's Republic of China)*, award on the merits, 12 July 2016, para. 181, https://pca-cpa.org/en/cases/7/ (hereafter *The South China Sea arbitration*).

[101] Gao and Jia, 'The nine-dash line in the South China Sea', p. 110.

[102] Gao and Jia, 'The nine-dash line in the South China Sea', pp. 98–124.

In its case against China, the Philippines made several claims. The most significant was to contest the basis of the nine-dash line by disputing the characterization of certain features—irrespective of which party was sovereign over them—as islands capable of generating 200-nm EEZs or continental shelf claims that could be opposed to those of the Philippines. In this it was successful: the tribunal effectively held that all of the very small features in the South China Sea—even Itu Aba, the largest of the Spratlys—were at best 'rocks which cannot sustain human habitation or economic life of their own', and that none was entitled to generate an 'exclusive economic zone or continental shelf'.[103] Indirectly, the Philippines succeeded in disputing China's asserted sovereignty over features such as Mischief Reef: the tribunal found that features not continuously above water at low tide lacked even the legal status of 'rocks' and were not capable of sovereign appropriation; such features thus belonged to the EEZ (or continental shelf) within which they were situated, which in the case of Mischief Reef was presumptively that of the Philippines. This led to the finding that China had illegally built an artificial island (and military base) on a reef within the Philippines' EEZ.[104]

The tribunal's ruling also painted various Chinese actions in an unfavourable, even lawless, light. In particular, it found that China, 'by virtue of the conduct of Chinese law enforcement vessels in the vicinity of Scarborough Shoal, created serious risk of collision and danger to Philippine vessels and personnel'.[105] The 2012 incidents in question involved aggressive manoeuvring and attempts by Chinese government vessels to cross Philippines naval vessels' bows at close quarters and high speed, in violation of the universally accepted international Collision Regulations.[106] The tribunal further found Chinese actions in building atop (and blasting into) fragile coral reefs a violation of its environmental obligations under UNCLOS.[107]

While China refused to participate in the arbitration proceedings, it did issue a position paper and engaged in some correspondence with the tribunal.[108] In each case it asserted both sovereignty over maritime features and unspecified historic rights predating UNCLOS in their surrounding waters. The core of China's legal argument, however, was that the tribunal lacked jurisdiction because the Philippines case concerned two subject-matters outside UNCLOS jurisdiction: sovereignty over maritime features; and 'historic titles'. The tribunal dismissed the first objection on the technical basis that the Philippines had expressly (and cleverly) brought before it a dispute as to the correct legal characterization of maritime features, not which state was sovereign over them. On the second point, while the tribunal acknowledged that under UNCLOS it did indeed lack jurisdiction to adjudicate historic *titles*, it asserted that this exclusion applied only to claims of full sovereignty (equivalent to a territorial sea or internal waters) and not to

[103] UNCLOS, art. 121(3); *The South China Sea arbitration*, paras 615–26.
[104] *The South China Sea arbitration*, paras 1025, 1029–43.
[105] *The South China Sea arbitration*, para. 1109.
[106] *The South China Sea arbitration*, para. 1081; Convention on the International Regulations for Preventing Collisions at Sea 1972, United Nations Treaty Series, vol. 1050, p. 16.
[107] *The South China Sea arbitration*, paras 857, 976–83.
[108] *The South China Sea arbitration*, para. 13.

lesser claims of historic *rights*. This case was justiciable as only historic rights were claimed; there was no claim that waters inside the nine-dash line were internal waters or one vast territorial sea (a point accepted in 2013 by Gao and Jia). The tribunal then attempted to deduce the content of the asserted historic rights by looking for evidence of claims by China that exceeded rights under UNCLOS.[109] It found that China had asserted rights over 'living and non-living resources' within the line, while acknowledging that its claims did not exclude other states' freedom of navigation.[110] It concluded that any claimed historic rights would necessarily be extinguished by UNCLOS to the extent that they were incompatible with rights it allocated to coastal states over their EEZs or continental shelves.[111] The combined effect of the findings was, effectively, a determination that the nine-dash line has no legal basis.

The Chinese response to the arbitration award has been a sustained campaign to de-legitimate it. The most convincing argument available is that de facto the award determined questions of sovereign title to territory and maritime boundaries, neither of which should have been possible without China's consent.[112] The argument is not without merit, and some scholarship takes the view that recent arbitrations have expanded UNCLOS dispute settlement further than was intended.[113] However, the Chinese conclusion built on this premise is that the award is therefore void and can be ignored;[114] this is an argument with little traction outside China. If accepted, it would fatally wound international dispute settlement, as any state which contested a tribunal's jurisdiction could walk away from the final result.

The role of the Chinese Society of International Law

More interesting has been China's next legal manoeuvre. In 2018, the Chinese Society of International Law published a 500-page 'critical study' of the award as a single article in its *Chinese Journal of International Law* (henceforth 'the critical study').[115] While it lists some 70 academic authors, and was peer-reviewed, it is not independent scholarship in the ordinary sense.[116] The relevant periodic report of

[109] *The South China Sea arbitration*, para. 207.
[110] *The South China Sea arbitration*, para. 214.
[111] *The South China Sea arbitration*, para. 243.
[112] This results from China's optional declaration under UNCLOS, art. 298(1)(a). On UNCLOS arbitration and sovereignty disputes, see Permanent Court of Arbitration, *Chagos Marine Protected Area arbitration (Mauritius v. United Kingdom)*, award, 18 March 2015, paras 215–21, https://pca-cpa.org/en/cases/11/.
[113] See Natalie Klein, 'The vicissitudes of dispute settlement under the Law of the Sea Convention', *International Journal of Marine and Coastal Law* 32: 2, 2017, pp. 332–63; Stefan Talmon, 'The Chagos Marine Protected Area arbitration: expansion of the jurisdiction of UNCLOS Part XV courts and tribunals', *International and Comparative Law Quarterly* 65: 4, 2016, pp. 927–51.
[114] 'Statement of the Ministry of Foreign Affairs of the People's Republic of China on the award on jurisdiction and admissibility of the South China Sea arbitration by the arbitral tribunal established at the request of the Republic of the Philippines', 30 Oct. 2015, https://www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1310474.shtml.
[115] Chinese Society of International Law, 'The South China Sea arbitration awards: critical study', *Chinese Journal of International Law* 17: 2, 2018, pp. 207–748 (hereafter CSIL, 'Critical study'). This argument draws on: Douglas Guilfoyle, 'Taking the party line on the South China Sea arbitration', *EJIL: talk!* blog, 28 May 2018, https://www.ejiltalk.org/taking-the-party-line-on-the-south-china-sea-arbitration/.
[116] On the close ties between the society and the Chinese Foreign Ministry, see Anthea Roberts, *Is international law international?* (Oxford: Oxford University Press, 2017), p. 241.

the society's board notes that the society's activities, including the critical study, were carried out 'under the supervision and leadership of the Foreign Ministry' and claims among its achievements 'the Society mobiliz[ing] the academic community [in 2016] to cooperate with the overall deployment of diplomacy to carry out the juridical struggle and actively respond … to the "Philippine South China Sea Arbitration Case" … effectively refuting … the temporary arbitration tribunal'.[117] Listed activities in this respect include organizing 'domestic experts and scholars to write a "Critique of the South China Sea Arbitration Award" report in both Chinese and English'.[118]

A new argument put forward in the critical study is that the Nansha Qundao (Spratly Islands) constitute an 'outlying archipelago' capable of generating substantial maritime zones.[119] Indeed, the argument is made that there are three other such archipelagos: Dongsha Qundao (Pratas Islands); Xisha Qundao (Paracel Islands); and Zhongsha Qundao (Macclesfield Bank and Scarborough Shoal).[120] The significance of this argument is that UNCLOS, as noted above, allows archipelagic states composed *entirely* of islands (such as Indonesia and the Philippines) to draw long, straight baselines to enclose their constituent islands.[121] This can substantially expand such a state's EEZ claim and create an enclosed area of 'archipelagic waters'. However, UNCLOS does not allow continental states to declare themselves archipelagos *in part* and use straight baselines to lay claim to maritime areas surrounding outlying island possessions.

The critical study, however, effectively revives the Chinese position at UNCLOS III in arguing that there is a parallel customary international law concept of 'outlying archipelagos' which permits what UNCLOS does not.[122] The substantiating examples given include the drawing of straight baselines around the Faroe Islands, Galapagos Islands, Svalbard and Canary Islands.[123] In particular, the critical study asserts that the Nansha Qundao (Spratly Islands) and Zhongsha Qundao (Macclesfield Bank and Scarborough Shoal) should each have been treated as an integral unit under such a rule.[124] Setting to one side whether such a rule exists, and survives UNCLOS, the question is whether these maritime features could qualify under it. The Spratlys consist of over 140 maritime features, only 40 or so of which have areas that are above water at high tide and the largest 13 of which have a total area of less than 1.7 square kilometres.[125] Itu Aba, the largest feature in the group, at present controlled by

[117] *Report of the Council of Chinese Society of International Law*, 2013–18, 22 May 2018, https://mp.weixin.qq.com/s/Xv8Kij_bDuqMETULvUfMqg. The quotations provided here were generated by Google Translate and verified by two legally trained native Mandarin speakers.

[118] *Report of the Council of Chinese Society of International Law*. My conclusion is contested in Sienho Yee, 'Attention to the Chinese Society's critical study and our standing invitation to respond', *Chinese Journal of International Law* 17: 3, 2018, pp. 757–60.

[119] CSIL, 'Critical study', para. 67.

[120] CSIL, 'Critical study', para. 67.

[121] UNCLOS, arts 46–50.

[122] CSIL, 'Critical study', paras 558, 574.

[123] Useful tables are included in CSIL, 'Critical study', at p. 492.

[124] CSIL, 'Critical study', paras 554–64.

[125] Robert Beckman, 'The UN Convention on the Law of the Sea and the maritime disputes in the South China Sea', *American Journal of International Law* 107: 1, 2013, p. 143.

Taiwan, has an area of 46 hectares or about 0.46 square kilometres. The Scarborough Shoal in its natural state consisted of, at high tide, a small rock of approximately 3 square metres, while Macclesfield Bank is 'totally submerged even at low tide'.[126] Compare these figures with the total area of the Faroe Islands (1,400 square kilometres), Galapagos Islands (8,000 square kilometres), Svalbard (61,000 square kilometres) and the Canary Islands (7,500 square kilometres). Setting aside the law, the claim lacks any credible analogy with available factual 'precedents'. The claim to straight baselines around such features is also belied by China's own domestic law: straight baselines have only ever been claimed around the Xisha Qundao (Paracel Islands), which at least boasts Woody Island with a 2.1 square kilometre surface area.[127]

Leaving aside its questionable legal merits,[128] the 'outlying archipelago' argument was clearly constructed *after and in response to* the arbitration award. It did not feature in any relevant Chinese position paper prior to the award, or in any Chinese scholarship in English. The legal strategy involved has been to claim there is a pre-existing customary rule not regulated by UNCLOS which legitimates, at least in part, substantial maritime claims in the South China Sea. This is now the standard Chinese government line in international forums.[129] The argument seeks both to revive a Chinese position on outlying archipelagos which was consciously abandoned at UNCLOS III and to apply it in an unprecedented manner to vast areas containing little land territory.

Why make such an argument? In Allottian terms, China has changed the geopolitical *reality* of the South China Sea, and is now attempting to promote a new *legal* order to consolidate its gains, thus changing the applicable *ideas* about its conduct. By claiming it is relying on legal norms found outside UNCLOS, China can claim nonetheless in *all other matters* to be upholding UNCLOS. Nonetheless, by arguing that UNCLOS can be displaced by special rules of customary international law, China inevitably undermines the status of UNCLOS as the 'constitution for the oceans'.[130] This may in fact be China's strategic objective: to open up spaces in which it can act as a norm entrepreneur and in so doing consolidate its 'rightful' regional position. In this as in other matters the Chinese leadership has 'adopted a mixed strategy … treading a fine line' between

> consolidat[ing] its growing maritime power … and acting upon the pragmatic imperative to engage cooperatively with its neighbours and the United States to maintain regional stability. In practice, Beijing has overestimated its capacity to maintain this equilibrium by underestimating the legitimate concerns of other states.[131]

[126] Beckman, 'The UN Convention on the Law of the Sea', p. 145.
[127] Beckman, 'The UN Convention on the Law of the Sea', p. 144.
[128] For supportive arguments by a non-Chinese scholar, see Stefan A. G. Talmon, *The South China Sea arbitration: observations on the award of 12 July 2016*, Bonn Research Papers on Public International Law, paper no. 14/2018, 17 May 2018, https://ssrn.com/abstract=3180037.
[129] Julian Ku and Chris Mirasola, 'The South China Sea and China's "four sha" claim: new legal theory, same bad argument', *Lawfare* blog, 25 Sept. 2017, https://www.lawfareblog.com/south-china-sea-and-chinas-four-sha-claim-new-legal-theory-same-bad-argument.
[130] Koh, 'A constitution for the oceans', p. 11.
[131] Morton, 'China's ambition in the South China Sea', p. 930.

Nonetheless, the very making of such arguments is designed to assert that China remains a legitimate actor within the international legal–political system. China takes the view that its national interests are furthered by the maintenance of many aspects of the existing order, including the centrality of the UN to the international system and the centrality of the WTO to international trade.[132] Its interest in promoting such 'core' principles of international law is not furthered if it is considered a rule-breaker.

Conclusion

The international rule of law does not directly constrain state behaviour; but it does, in part, shape it. The impact on China's behaviour of international law generally, and the South China Sea arbitration award in particular, is manifest. First, China is mobilizing considerable legal resources to argue its case. Indeed, under the 'three warfares' doctrine China sees legal legitimation as essential to CCP rule, and legal contestation as a domain of existential struggle. Second, what is gained by force must be consolidated by law. Over the past 20 years the problem for China has not been how to (re)take disputed maritime features, but how to hold them.[133] Avoiding an indefinite campaign of low-level operations and harassment by weaker neighbours requires that other states accept the legitimacy of China's maritime expansion. The arbitration award represents a continuing obstacle to this goal, irrespective of China's compliance with it.

Full legal consolidation of China's claims cannot occur while China's neighbours believe they are entitled to what UNCLOS promises them: 200-nm EEZs and control of the resources and fish stocks therein. The arbitration award only reinforces this view. China, from the perspective of the other, weaker claimant states, increasingly looks like the maritime hegemon it denounced at UNCLOS III.[134] In their eyes it is now China that is 'building up naval forces, establishing military bases, and plundering other countries' off-shore fishery and sea-bed resources'.[135] China is thus open to charges of hypocrisy: having been an advocate of the rights of less developed states to have EEZs and control them, it now encroaches upon them.

China's position is also constrained, in part, by its own realm of ideas and approach to international law. The nine-dash line, released into cartographic imagination, has assumed a life of its own. Further, the belief in unique Chinese entitlements in the South China Sea is genuinely (if myopically) held. Such ideas,

[132] EU External Action, *Joint statement of the 21st EU–China summit*, 10 April 2019, paras 2, 10, 13, 18, 22–3, https://eeas.europa.eu/delegations/china/60836/joint-statement-21st-eu-china-summit_en; Ministry of Foreign Affairs of the Russian Federation, *The declaration of the Russian Federation and the People's Republic of China on the promotion of international law*, 25 June 2016, http://www.mid.ru/en/foreign_policy/position_word_order/-/asset_publisher/6S4RuXfeYlKr/content/id/2331698.

[133] Austin, *China's ocean frontier*, pp. 292–3.

[134] McLaughlin, 'UNCLOS and the question of artificial islands'.

[135] *Official records*, vol. 1, UN Doc A/CONF.62/SR.25, p. 80; Francis Chan, 'Beijing using fishing boats to stake claims in South China Sea: Indonesia rear-admiral', *Straits Times*, 22 June 2016, https://www.straitstimes.com/asia/beijing-using-fishing-boats-to-stake-claims-in-south-china-sea-indonesia-rear-admiral.

however, require legitimization through law. While the Chinese revival of the outlying archipelago argument is ahistorical and opportunistic, there are other embedded Chinese ideas about the law of the sea underlying its behaviour. China has long thought that the extent of a state's maritime domain should principally be a question of sovereign decision informed by national economic and security needs, subject only to broad constraints of reasonableness and neighbourly accommodation.[136] China has also consistently advocated joint development in disputed areas, even to the extent of such arrangements being a substitute for final delimitation.[137] The difficulty with the first proposition is its having been superseded by UNCLOS. As for the second, joint development in disputed areas has some foundation in UNCLOS,[138] but requires China's neighbours to concede the genuineness of the dispute. Such agreements are hard enough to operationalize when the parties can agree there are overlapping claims to delimit.[139]

At a broader level, the South China Sea dispute shows that China takes international law seriously, but wishes to remake certain elements while retaining much of the current framework. We can anticipate its pursuit of a similar pattern in other areas, where changing facts on the ground may be accompanied both by arguments that there is a gap in international law which may be filled with new (or old) ideas and by attempts to use such arguments to consolidate the legitimacy of China's position.

[136] 'First Chinese working paper', paras 1(2), 2(1); Bethill, 'People's China and the law of the sea', p. 724.
[137] Austin, *China's ocean frontier*, p. 55.
[138] UNCLOS, art. 74(3).
[139] Clive Schofield, 'Blurring the lines: maritime joint development and the cooperative management of ocean resources', *Issues in Legal Scholarship* 8: 1, 2009, https://www.degruyter.com/view/j/ils.2009.7.issue-1/ils.2009.7.1.1103/ils.2009.7.1.1103.xml.