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TOWARDS A LEGAL ERA OF ISLANDS: THE INTERNATIONAL AND CONSTITUTIONAL LEGAL STATUS OF ISLAND TERRITORIES

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Abstract The characterisation, legal status and future of islands are increasingly prominent in international and legal affairs. This emerging 'legal era of islands' demands a clearer understanding of the multiple distinctive legal issues that islands, whether as sub-national political units or as the territory of continental or mainland States, raise. This article conducts the first contemporary study of these issues by examining the international and constitutional legal status of island territories. It finds that although the relationship between islands and mainland States is characterised by incredible diversity, island territories are pursuing a range of innovative strategies to preserve and protect their autonomy.

Keywords: public international law, characterisation, territoriality, sovereignty, federalism, islands, Chagos dispute, Falepili Union, ITLOS, *COSIS Advisory Opinion*.

I. INTRODUCTION

Islands, as either sub-national political units or as the territory of continental or mainland States, raise multiple legal issues. These include foundational international law questions of territoriality and sovereignty, as well as in more recent decades, distinctive issues of self-determination and the human rights of their inhabitants. Many islands also raise unique constitutional and public law issues, either because of their status as sub-national political units or the bespoke legal status they have within a State including how constitutions may list island territories.[1] Such distinctive domestic arrangements may relate to the location and size of the island, its political history, or the cultural and linguistic diversity of the islanders themselves.

[1] O Doyle, 'The Silent Constitution of Territory' (2018) 16(3) IntJConstLaw 887, 892, fn 26.

[*ICLQ* vol 73, July 2024 pp 609–640] doi:10.1017/S0020589324000265

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This article conducts the first contemporary study of these issues and concludes that a legal era of islands is emerging.

Significant recent developments provide a foundation for that claim. In February 2019 the International Court of Justice (ICJ) issued an Advisory Opinion finding that the United Kingdom (UK) unlawfully separated the Chagos Islands from Mauritius in 1965 when both were colonial territories, holding that the UK is obliged to end 'its administration of the Chagos Islands as rapidly as possible'.[2] Despite a subsequent United Nations (UN) General Assembly (UNGA) resolution stating that the Chagos Archipelago is part of Mauritius, and a ruling of the International Tribunal for the Law of the Sea (ITLOS) that the UK has no sovereignty over the Chagos Archipelago,[3] negotiations between the UK and Mauritius remain difficult. On the other side of the world, talks have proven more fruitful. On 10 November 2023, Australia and Tuvalu announced the 'Falepili Union'.[4] The Union is a bespoke treaty negotiated at the request of Tuvalu, which meets the specific interests of Tuvalu while also reflecting Australia's strategic goals and objectives. Building upon a model of 'Free Association', the Agreement develops a distinctive 'Union' arrangement founded on three pillars, one of which effectively provides Australia with a veto over certain aspects of Tuvalu's foreign affairs. The Chagos dispute and the Falepili Union exemplify the broad range of international and constitutional legal questions raised by islands.

The increasing risks posed by climate change present more issues. In 2024 there is an Advisory Opinion request before the ICJ on the *Obligations of States in Respect of Climate Change*, which will in due course address questions of islands, climate change and sea-level rise. On 21 May 2024 ITLOS delivered its own response to a *Request for an Advisory Opinion Submitted by the Commission of Small Island States on Climate Change and International Law* (*COSIS Advisory Opinion*).[5] These developments highlight how the characterisation, legal status and future of islands are increasingly taking centre stage not only in international affairs but also in international

[2] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* (Advisory Opinion) [2019] ICJ Rep 95, 139, para 178.

[3] UNGA Res 73/295 (24 May 2019) UN Doc A/RES/73/295, para 2; *Dispute Concerning Delimitation of the Maritime Boundary between Mauritius and Maldives in the Indian Ocean (Mauritius/Maldives)* (Preliminary Objections, Judgment of 28 January 2021) ITLOS Reports 2021, 17, 87–8, para 246 <https://www.itlos.org/fileadmin/itlos/documents/cases/28/published/C28_PO_Judgment_20210128.pdf>.

[4] A Albanese, 'Joint Statement on the Falepili Union between Tuvalu and Australia' (10 November 2023) <https://www.pm.gov.au/media/joint-statement-falepili-union-between-tuvalu-and-australia>.

[5] *Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law* (Request for Advisory Opinion submitted to the Tribunal) (Case No 31) (Advisory Opinion of 21 May 2024) ITLOS Reports 2024 (*COSIS Advisory Opinion*) <https://www.itlos.org/fileadmin/itlos/documents/cases/31/Advisory_Opinion/C31_Adv_Op_21.05.2024_orig.pdf>.

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and public law. In short, it can be asserted that a 'legal era of islands' is emerging which demands a clearer understanding of the distinctive legal issues islands raise.

In this article, the legal dimensions relating to islands are explored with the aim of developing an understanding of the international and constitutional legal status of islands. Section II begins by exploring key international legal questions. The first concerns characterisation. There has been much contemporary legal analysis and debate as to the distinction between islands and rocks, and there is also growing awareness of the significance of artificial islands and the distinctive issues they raise. While this article does not specifically address artificial islands,[6] the island/rock distinction and its significance for international law is considered. Islands were often discovered by colonial powers and title was assumed by formal proclamations and declarations and the publication of maps, followed by acts of administration, occupation and effective colonisation. Those actions did not always conclusively resolve issues of territoriality under international law, with the result that islands have been a focus of longstanding territorial disputes. Some have been settled peacefully, including through international legal processes, others have been the subject of armed conflict, while others remain disputed.[7] Some of the distinctive international legal issues associated with the maritime entitlements of islands under the law of the sea and the settlement of maritime boundaries will also be considered in this section.

Section III turns to the distinctive constitutional and public law issues raised by islands. Multiple legal processes have been adopted to accommodate islands—and islanders themselves—within the territory of a State. As will be demonstrated, this can extend from the island being simply incorporated within the public law of the State without any distinctive relationship, to the island being subject to some form of local government status, to the island being part of or the sole territorial component of a sub-national political unit. Different models are applied consistent with national legal systems and constitutional mechanisms, with the historical status of the island within the State and whether the islanders seek recognition of their cultural and other human rights emerging as significant factors. Nevertheless, as this study of the political status of islands illustrates, diversity is the rule. Section IV includes an initial analysis of the 2023 Australia–Tuvalu Union and the 2024 ITLOS Advisory Opinion, before Conclusions are drawn in Section V.

[6] There is a growing literature on this topic; see, eg, SD Murphy, *International Law Relating to Islands* (Brill 2017) 62–8, 94–5, 181–2; I Saunders, 'Artificial Islands and Territory in International Law' (2021) 52(3) VandJTransnatlL 643; DR Rothwell, *Islands and International Law* (Hart 2022) 19–37; D Alessio and W Renfro, 'Building Empires Litorally in the South China Sea: Artificial Islands and Contesting Definitions of Imperialism' (2022) 59(4) IntlPol 687; and generally, MD Evans and R Lewis, *Islands, Law and Context: The Treatment of Islands in International Law* (Edward Elgar 2023).

[7] This study excludes islands subject to territorial dispute or political contestation. There are many such examples, including: Cyprus (Greece and Turkey); the Spratly Islands (China, the Philippines, Taiwan, Malaysia, Vietnam and Brunei); and the Kuril Islands (Japan and Russia).

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II. INTERNATIONAL LEGAL ISSUES

International law does not create a distinctive regime for islands in the same way that it does for the ocean in the law of the sea, or outer space in the various space treaties and instruments. Rather, international law has traditionally considered islands to be part of the land mass subject to international law, without distinguishing between various forms of land such as a continent, islands and rocks. It is possible to identify some distinctive international legal issues that arise regarding islands as a result of bespoke trading and financial arrangements that have been developed to allow for their economic growth and survival,[8] and environmental measures adopted to address in some instances their unique environments due to their rich biodiversity, location and isolation.[9] Islands have particularly been a focal point in seminal cases before both the Permanent Court of International Justice and the ICJ. Islands have also gained a distinctive position in international law under the 1982 UN Convention on the Law of the Sea (UNCLOS).[10] To begin this analysis it is appropriate to commence with some discussion of the characterisation of islands under UNCLOS, followed by issues associated with territoriality, and their maritime entitlements. This discussion informs the examination of constitutional legal issues in Section III.

A. *Characterisation*

The National Geographic identifies six different types of islands—continental, tidal, barrier, oceanic, coral and artificial.[11] These are all salt-water islands, and care must be taken not to exclude islands that are located in lakes and rivers,

[8] This has particularly been the case with the development of free ports, free zones and free island arrangements; see A Lavissière, 'The Experience of Islands with Free Ports and Free Zones' in J Randall and L Brinklow (eds), *Annual Report on Global Islands 2018* (Institute of Island Studies 2019) 125, 128, 134–5; and the 'Free Trade' islands of Hainan (People's Republic of China), Jeju (Republic of Korea) and Penang (Malaysia); see Y Zhang et al, 'The Influence of the Service Quality and Image of the Free Trade Island on Tourists' Purchase Intention: A Comparative Study of Hainan Island and Jeju Island' (2020) 112 JCoastRes 279; HES Nesadurai, 'The Free Trade Zone in Penang, Malaysia: Performance and Prospects' (1991) 19(1/2) SoutheastAsianJSocSci 103.

[9] This is particularly reflected by the manner in which islands have been listed under the Convention concerning the Protection of the World Cultural and Natural Heritage (adopted 16 November 1972, entered into force 17 December 1975) 1037 UNTS 151; see UN Educational, Scientific and Cultural Organization (UNESCO), 'World Heritage List' (n.d.) <https://whc.unesco.org/en/list/>; and particularly in the case of the 72 Southern Ocean islands and groups comprising the French Austral Lands and Seas (France), Heard and McDonald Islands, and Macquarie Island (Australia), and the New Zealand sub-Antarctic Islands (New Zealand); see SL Chown et al, 'World Heritage Status and Conservation of Southern Ocean Islands' (2001) 15(3) ConservBiol 550; AG Verdier, 'The French Austral Lands and Seas Biodiversity Haven in the Southern Ocean' (2020) 96 WorldHeritRev 24.

[10] United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 397 (UNCLOS).

[11] J Evers (ed), 'Islands', *National Geographic Encyclopedia* (2023) <https://education.nationalgeographic.org/resource/island/>.

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some of which have had significance in international law especially in boundary matters.[12] UNCLOS principally deals with islands in Part VIII, titled 'Regime of Islands'.[13] Article 121(1) of UNCLOS defines an island as 'a naturally formed area of land, surrounded by water, which is above water at high tide'. The characteristics of an island are therefore that it be: (i) naturally formed, and therefore cannot be artificial; (ii) comprised of land; (iii) surrounded by water; and (iv) above water at high tide. The following observations can be made regarding this definition. For the island to be naturally formed suggests that it has existed in some form or another for time immemorial, or it may have been recently formed as a result of natural events such as volcanic activity.[14] As such, an artificial island does not meet the relevant criteria, though a naturally formed island may be legitimately subject to land reclamation.[15] As to the nature of land comprising the island, there is nothing in international law requiring the island to be comprised of any particular natural materials. An island can be legitimately comprised of coral, gravel, rocks and sand or any combination of these and other natural substances.

An island does not lose its status because it is connected to the mainland, or to another island. Islands may be connected to another area of land by way of a bridge,[16] causeway,[17] or even a sandbar that is evident at low tide. Nevertheless, features that have the characteristics of an island and are connected to the mainland by a land bridge, are not true islands. This was a point of distinction with respect to the Hawar Islands in the *Qatar v Bahrain* case before the ICJ.[18] A critical component, and one that has gained increasing significance because of sea-level rise, is that the island must be above water at high tide. This distinguishes an island from other geographic

[12] Discussed in Murphy (n 6) 147–60.

[13] As to whether there truly exists a regime of islands either in UNCLOS, or generally in international law, see Rothwell (n 6) 253–61.

[14] J McCurry, 'Japan Gets a New Island after Undersea Volcano Erupts' *The Guardian* (London, 9 November 2023) <https://www.theguardian.com/world/2023/nov/09/japan-gets-a-new-island-after-undersea-volcano-erupts>; Jji Press, 'Tokyo's Iwoto Island Expands about 6 Square Kms Since 2015' *The Japan News* (6 June 2023) <https://japannews.yomiuri.co.jp/society/general-news/20230606-114501/>.

[15] See *Case Concerning Land Reclamation by Singapore in and around the Straits of Johor (Malaysia v Singapore)* (Provisional Measures, Order of 8 October 2003) ITLOS Reports 2003, 10 <https://www.itlos.org/fileadmin/itlos/documents/cases/case_no_12/12_order_081003_en.pdf>, where neither ITLOS nor the parties contested the capacity of coastal States, one of which in this instance was an island State (Singapore), to engage in land reclamation.

[16] The Canadian province of Prince Edward Island is connected to the mainland province of New Brunswick by the 12.9 km Confederation Bridge; 'Confederation Bridge' <https://www.confederationbridge.com/site/about>.

[17] Singapore is connected to Malaysia by a 1 km 'Causeway' that crosses the Strait of Johor: A Chua, 'The Causeway' *National Library Board* (Singapore, 2012).

[18] *Maritime Delimitation and Territorial Questions between Qatar and Bahrain* (Merits) [2001] ICJ Rep 40 (Joint Dissenting Opinion of Judges Bedjaoui, Renjeva and Koroma) 173, para 87, where it was observed that 'The Hawar "Islands" are not actually islands but an indivisible part of the land mass of Qatar, cut off by the sea when the tide comes in and joined to the land when the tide goes out.'

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features such as low-tide elevations referenced in Article 13 of UNCLOS. The island must therefore be permanently above water at all times. The consequence is that an island may lose its status as a result of sea-level rise, which in turn raises issues of land reclamation and the building of sea barriers and walls in an effort to keep out rising water levels.[19] These elements of Article 121(1) comprise a juridical island for the purposes of UNCLOS and the law of the sea. A juridical island enjoys the same maritime entitlements as a continental landmass, and territory located within a continental landmass. This includes under Article 121(2) of UNCLOS a 12-nautical mile (nm) territorial sea, a 24-nm contiguous zone, and a minimum entitlement to a 200-nm continental shelf and an exclusive economic zone (EEZ).

An aspect of the definition of a juridical island that has been the focus of attention is that no reference is made in Article 121(1) of UNCLOS to the size of the feature. This is relevant for the purposes of Article 121(3) which refers to rocks as follows: 'Rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf.' This effectively recognises that in addition to juridical islands, there exists a sub-category of islands—juridical rocks—which, while being a naturally formed area of land and surrounded by water and above water at high tide do not enjoy the same maritime entitlements as juridical islands. That distinction has become increasingly significant because of UNCLOS and the vast maritime entitlements it grants to land features which far exceed those that were originally envisaged and recognised under the law of the sea post-World War II,[20] and as originally recognised in the 1958 Geneva Conventions.[21]

International courts and tribunals have given only limited consideration to the elements that distinguish juridical islands from juridical rocks under UNCLOS, with the leading authority being the 2016 *South China Sea Arbitration* between the Philippines and China.[22] For the purposes of this review, what can be observed is that the critical issue is the natural capacity of the land to support and economically sustain an indigenous or non-indigenous population creating a community of people who call the island their home.[23] Consequently the size

[19] JG Stoutenburg, 'When Do States Disappear?: Thresholds of Effective Statehood and the Continued Recognition of "Deterritorialized" Island States' in MB Gerrard and GE Wannier (eds), *Threatened Island Nations: Legal Implications of Rising Seas and a Changing Climate* (CUP 2013).

[20] See generally, DR Rothwell and T Stephens, *The International Law of the Sea* (3rd edn, Hart 2023) 2–5.

[21] Convention on the Territorial Sea and Contiguous Zone (adopted 29 April 1958, entered into force 10 September 1964) 516 UNTS 206; Convention on the Continental Shelf (adopted 29 April 1958, entered into force 10 June 1964) 499 UNTS 311.

[22] *In the Matter of the South China Sea Arbitration before an Arbitral Tribunal constituted under Annex VII of the 1982 United Nations Convention on the Law of the Sea (Philippines v China)*, PCA Case No 2013-19, Merits (12 July 2016).

[23] For analysis, see C Schofield, *The Regime of Islands Reframed: Developments in the Definition of Islands under the International Law of the Sea* (Brill 2021); Saunders (n 6) 676–8

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of the feature may become determinative as to whether it is assessed as being an island or a rock. Rockall, located off the northwest coast of Scotland, provides an example of a State (the UK) adjusting its position from asserting that feature to be an island, to its current position that it is a juridical rock.[24] Though Anderson has asserted 'there are no rules regarding minimum sizes for islands',[25] in many instances size will be determinative of the juridical status of an island and this is reflected in State practice. Maritime boundary delimitations are an indicator of such State practice, where the delimiting States have negotiated boundaries that reflect the juridical status of an island which in turn has been recognised *de facto* or *de jure* by other States.[26] While the tribunal in *South China Sea* unanimously determined that all of the contested features were not islands and were either juridical rocks or low-tide elevations, China has not accepted that decision.[27] Nevertheless, the Award gave considerable clarity as to how Article 121(3) is to be interpreted.

A further issue of characterisation is whether a group of islands comprises an 'archipelagic State' consistently with Article 46 of UNCLOS. The status of mid-ocean archipelagos was unresolved following the 1958 First UN Conference on the Law of the Sea.[28] However, during the 1960s Indonesia and the Philippines actively promoted the recognition of certain islands as archipelagic States, and this was eventually reflected in Part IV of UNCLOS.[29] For an island State to assert archipelagic status consistently with UNCLOS, the State must be wholly comprised of one or more archipelagos which together 'form an intrinsic geographical, economic and political entity, or which historically have been regarded as such'.[30] To be able to enjoy the status of an archipelagic State, the main islands comprising the archipelago must be capable of being connected by archipelagic baselines drawn according to a very precise UNCLOS formula.[31] To date, 22 island States have been able to attain the status of recognised archipelagic States extending from the very largest of the group in Indonesia and the Philippines, to the much smaller Saint Vincent and the Grenadines, and Grenada.[32] Because of the UNCLOS

refers to this as the 'natural state doctrine'; see also, R Lewis, 'International Legal Fictions: Lessons from the South China Sea Award' (2021) 11(2) AsianJIL 261.

[24] V Prescott and C Schofield, *The Maritime Political Boundaries of the World* (2nd edn, Brill Nijhoff 2005) 375–6, 613; D Anderson, 'Some Aspects of the Regime of Islands in the Law of the Sea' (2017) 32(2) IJMCL 316, 326.

[25] Anderson ibid 327.

[26] See Agreement on Maritime Delimitation between the Government of Australia and the Government of the French Republic (adopted 4 January 1982, entered into force 10 January 1983) [1983] Australian Treaty Series 3, which recognises the uninhabited sub-Antarctic islands of Heard Island and McDonald Island (Australia) as juridical islands from which the full suite of maritime entitlements can be asserted; see also discussion in Rothwell (n 6) 17–18.

[27] See, eg, Chinese Society of International Law, 'The South China Sea Arbitration Awards: A Critical Study' (2018) 17(2) Chinese JIL 207.

[28] DP O'Connell, 'Mid-Ocean Archipelagos in International Law' (1971) 45 BYIL 1.

[29] See generally, M Munavvar, *Ocean States: Archipelagic Regimes in the Law of the Sea* (Martinus Nijhoff 1995).

[30] UNCLOS (n 10) art 46(b).

[31] ibid, art 47.

[32] K Baumert and B Melchior, 'The Practice of Archipelagic States: A Study of Studies' (2015) 46 OceanDev&IntlL 60.

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archipelagic baseline constraints, Japan and New Zealand, for example, are not entitled to archipelagic status. Likewise, Hawaii does not enjoy archipelagic status due to it being a geographical unit of the continental United States (US). The law of the sea significance for archipelagic States is that the waters that fall on the landward side of the archipelagic baselines are 'archipelagic waters' over which the State enjoys extensive sovereignty akin to internal waters excepting for the navigational rights of foreign vessels. In addition, the archipelagic State can assert all of its maritime entitlements from the archipelagic baselines, which extends the outer limits of all its maritime zones.

B. *Territoriality*

Islands have been the subject of some of the most significant decisions of international courts and tribunals dealing with territoriality. Decisions predating the UN Charter dealt with the territorial claims and entitlements of colonial powers that were distant from their metropolitan territories. Post-1945 decisions gradually began to focus more on newly independent States, and contemporary island territorial disputes before international courts and tribunals are between parties that have emerged as a result of decolonisation, but who are seeking to reconcile island territorial disputes over colonial boundaries. There remain important exceptions to this general characterisation, as highlighted above by the dispute over the status of the Chagos Archipelago,[33] and the ongoing disagreement between Argentina and the UK over the Falkland/Malvinas Islands.[34]

The earlier cases dealing with territoriality and islands often addressed what at the time were remote and isolated islands, especially for the colonial powers. This included Palmas (Miangas) Island (*USA v Netherlands*) (1928)[35] in the Celebes Sea south of the Philippines, Clipperton Island (*France v Mexico*) (1932)[36] 1,120 km offshore the Mexican coast in the Pacific Ocean, and Greenland (*Denmark v Norway*) (1933).[37] The decisions in these cases laid down important principles with respect to how discovery of an island only confers an inchoate title, which requires more activity and conduct from a claimant to perfect a title over distant islands, and that a different standard is applicable to polar lands incapable of the same level of occupation as more temperate lands and islands. While islands have gradually become less isolated due to advances in transportation and technology, the principles laid

[33] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* (n 2); S Allen, 'Self-Determination, the Chagos Advisory Opinion and the Chagossians' (2020) 69 ICLQ 203.

[34] LS Gustafson, *The Sovereignty Dispute over the Falkland (Malvinas) Islands* (OUP 1988); and, for recent analysis, R Petrović, 'Argentina's Struggle to Preserve Sovereignty and Territorial Integrity on the Malvinas Islands' (2022) 73(1185) RevIntlAff 73.

[35] *Island of Palmas Case (United States of America v the Netherlands)* (1928) 2 RIAA 829.

[36] *Clipperton Island (France v Mexico)* (1931) 2 RIAA 1105.

[37] *Legal Status of Eastern Greenland (Denmark v Norway)* PCIJ Rep Series A/B No 53.

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down in these cases have continued to have resonance in more contemporary island territorial disputes determined by the ICJ.[38]

The principles developed over time from what is now nearly 100 years of jurisprudence and associated State practice remain significant in some prominent island disputes that remain unsettled. Examples are Dokdo/Takeshima between Japan and South Korea, the Matthew and Hunter Islands between France and Vanuatu, and the Senkaku/Diaoyu Islands between China and Japan. While some of these territorial disputes appear intractable, there are contemporary examples of States settling island territorial disputes through diplomacy. A long-running, albeit relatively minor, island territorial dispute existed between Canada and Denmark over uninhabited Hans Island/Tartupaluk in the Nares Strait between Ellesmere Island (Canada) and Greenland. The dispute only became apparent in 1973 as a result of the need to delimit the maritime boundary in the strait. After nearly 50 years of friendly exchanges and negotiations which recently actively involved Greenland and Canadian Inuit, in 2022 an innovative and elegant solution was reached on a boundary that effectively divided the island between Canada and Denmark.[39]

The international law resolving territorial disputes over islands needs to be seen against the backdrop of the general international law of territoriality. Contemporary international courts and tribunals make little distinction between territorial disputes over different types of lands, territorial disputes between continental and island States,[40] and whether an island is proximate or distant from a coast or located mid-ocean.[41] What can be observed is that in the case of some island territorial disputes the legacies of twentieth-century conflict loom large. This is especially the case with islands that were removed from Japanese control under the 1951 San Francisco Peace Treaty,[42] and which have resulted in ongoing tensions between Japan and its neighbours. Colonial and post-colonial interests over islands have also been significant, as is evident

[38] See, eg, *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v Bahrain)* (Merits) [2001] ICJ Rep 40; *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia v Malaysia)* (Merits) [2002] ICJ Rep 625; *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v Honduras)* (Merits) [2007] ICJ Rep 659; *Case Concerning Sovereignty over Pedra Branca/Pulau Betu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)* (Merits) [2008] ICJ Rep 12; *Territorial and Maritime Dispute (Nicaragua v Colombia)* (Merits) [2012] ICJ Rep 624.

[39] Government of Canada, 'Canada and the Kingdom of Denmark, together with Greenland, Reach Historic Agreement on Long-Standing Boundary Disputes' (14 June 2022) <https://www.canada.ca/en/global-affairs/news/2022/06/canada-and-the-kingdom-of-denmark-together-with-greenland-reach-historic-agreement-on-long-standing-boundary-disputes.html>.

[40] As highlighted in *Malaysia/Singapore* (n 38), where the ICJ was determining a territorial dispute between an island State—Singapore—and Malaysia, a continental and island State.

[41] As highlighted in *Territorial and Maritime Dispute (Nicaragua v Colombia)* (n 38), where the ICJ was determining a territorial dispute between two continental States concerning islands in the Caribbean Sea.

[42] Treaty of Peace with Japan (adopted 8 September 1951, entered into force 28 April 1952) 136 UNTS 45.

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in disputes in the Indian (Chagos Archipelago), Pacific (Matthew and Hunter Islands) and Atlantic (Falklands/Malvinas) Oceans. What has also become a significant impetus for seeking resolution of island territorial disputes, because of the contemporary importance attached to islands beyond their land mass, is their maritime entitlements generated under UNCLOS, which are discussed below.

C. Maritime Entitlements

As noted above, providing a feature is a juridical island, which also includes archipelagic States, it will enjoy the full suite of UNCLOS maritime entitlements, subject only to constraints of geography arising from neighbouring adjacent or opposite continental lands or other islands. What has been underappreciated as a result of developments in the law of the sea and UNCLOS especially has been the potential maritime entitlements that a juridical island enjoys. As Prescott and Schofield have observed:

> If no maritime neighbours were within 400 nm of the feature, an island has the potential to generate 125,664 nm^2 (431,014 km^2) of territorial sea, EEZ and continental shelf rights, making the potential value of disputed islands difficult to underestimate.[43]

The importance of location of islands and the constraints imposed by geography are highlighted by comparing Singapore (an island of 709 km^2 and a maritime zone of 714 km^2) with Nauru (an island of 21 km^2 and a maritime zone of 309,261 km^2).[44] Notwithstanding Nauru's much smaller size, it enjoys a maritime entitlement that is over 400 times greater than that of Singapore. Some small island States can therefore enjoy very significant maritime entitlements that are considerably larger than those of coastal continental States whose maritime entitlements are constrained by geography and their settled maritime boundaries.

Two issues arise from this dynamic that are important for islands, and island States in particular. The first is to ensure a juridical island gains its full suite of maritime entitlements consistent with UNCLOS.[45] For island States principally comprised of a number of large co-located islands this may not be too challenging, such as in the case of New Zealand and the UK. However, for island States comprising many islands separated by some considerable distances this can be problematic. These island States will have a particular incentive to ensure that they gain their maximum maritime entitlements,

[43] Prescott and Schofield (n 24) 249.

[44] CIA, *The World Fact Book* <https://www.cia.gov/the-world-factbook/>; and Marine Conservation Institute, *Marine Protection Atlas* (Marine Conservation Institute) <https://mpatlas.org/>.

[45] See generally, D Scott, 'Small Island Strategies in the Indo-Pacific by Large Powers' (2021) 8(1) JTerritMaritStud 66.

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particularly because of the economic and resource benefits that may arise from access to fish stocks and seabed resources. The distinction between juridical islands and juridical rocks noted above can become significant in some instances. Over the past 20 years this dynamic has been particularly highlighted in diplomatic exchanges before the Commission on the Limits of the Continental Shelf (CLCS). The CLCS is an UNCLOS institution tasked with assessing and making recommendations to coastal States regarding their continental shelf entitlements consistent with Article 76 of UNCLOS. Submissions before the CLCS have sought to assert continental shelf entitlements from juridical islands which have been challenged by other States in diplomatic exchanges via the UN Secretary-General.[46] The most prominent instance of such a diplomatic challenge arose in the case of Japan's claim that Okinotorishima, an atoll located approximately halfway between Okinawa and Guam, is a juridical island entitled to a continental shelf.[47] However, as the CLCS is a scientific body it has no capacity to resolve legal issues associated with the characterisation of a feature as either a juridical island or a juridical rock.[48]

Islands can also potentially distort the direction of a maritime boundary, especially when a small island is located offshore of a mainland coast. When confronted with these geographical challenges international courts and tribunals have typically sought to diminish the impact an island or islands have upon the direction of a maritime boundary in order to achieve an equitable solution consistent with UNCLOS.[49] Multiple variables are taken into account including the size and population of the islands, economic and historical factors, the impact granting islands their full maritime entitlement would have on the direction of the maritime boundary, and if the coastal States are continental or island States.[50]

A particular environmental issue for islands in recent decades has been the impact of climate change, and the consequences for certain islands of

[46] The 2019 submission by Malaysia to the CLCS relating to an extended continental shelf in the South China Sea resulted in 27 diplomatic notes being submitted in 2019–2022, many of which responded to China's legal position on certain South China Sea law of the sea issues including islands; see MS Gau, 'The Most Controversial Submission before the CLCS: With Reference to the 2019 Malaysia Submission' (2022) 37(2) IJMCL 256.

[47] CLCS, 'Outer Limits of the Continental Shelf Beyond 200 Nautical Miles from the Baselines: Submissions to the Commission: Submission by Japan' (27 December 2013) <https://www.un.org/depts/los/clcs_new/submissions_files/submission_jpn.htm>; discussed in Y Song, 'The Application of Article 121 of the Law of the Sea Convention to the Selected Geographical Features Situated in the Pacific Ocean' (2010) 9(4) Chinese JIL 663.

[48] TL McDorman, 'The Role of the Commission on the Limits of the Continental Shelf: A Technical Body in a Political World' (2002) 17(3) IJMCL 301.

[49] See UNCLOS (n 10) arts 73, 83.

[50] Recent decisions of the ICJ where these issues were considered are *Territorial and Maritime Dispute (Nicaragua v Colombia)* (Judgment) [2012] ICJ Rep 624; *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica v Nicaragua)* and *Land Boundary in the Northern Part of Isla Portillos (Costa Rica v Nicaragua)* (Judgment) [2018] ICJ Rep 139; *Maritime Delimitation in the Indian Ocean (Somalia v Kenya)* (Judgment) [2021] ICJ Rep 206.

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associated sea-level rise. Additional environmental impacts arising from these events are saltwater inundation, crop failures, environmental damage from storm surges, and fish-stock migration.[51] This has resulted in small island States particularly taking a proactive position on climate change in various international fora, including the UN and before international courts and tribunals. In 2024 both the ICJ[52] and ITLOS[53] have considered Advisory Opinion requests actively promoted by small island Caribbean and Pacific States. The outcome of those proceedings may have a profound impact on how the international community views the legal consequences of climate change and the legal obligations that developed States may owe small island States.

A very particular concern for some island States has been the potential impact of sea-level rise on their maritime entitlements.[54] Sea-level rise will result in adjustments to the normal baseline from which all maritime entitlements are asserted, and features such as rocks, reefs, and low-tide elevations relied upon for the drawing of straight baselines may become subsumed.[55] There is a real prospect that some islands and parts of island States may be left permanently underwater. This would have an impact on the status of archipelagic States and require revisiting of archipelagic baselines.[56] In response to the lack of legal certainty as to how to respond to this phenomenon, in 2021 the Pacific Islands Forum (PIF) and the Alliance of Small Island States issued separate Declarations calling for the stability of baselines under UNCLOS.[57] These small island States have made a plea for the recognition of their very particular situation, the impact that sea-level rise

[51] S Veron et al, 'Vulnerability to Climate Change of Islands Worldwide and its Impact on the Tree of Life' (2019) 9(1) SciRep 14471; L Kumar et al, 'Climate Change and the Pacific Islands' in L Kumar (ed), *Climate Change and Impacts in the Pacific* (Springer 2020).

[52] 'Request for an Advisory Opinion transmitted to the Court pursuant to General Assembly Resolution 77/276 of 29 March 2023: Obligations of States in Respect of Climate Change' (12 April 2023) <https://www.icj-cij.org/case/187/request-advisory-opinion>.

[53] *COSIS Advisory Opinion* (n 5). See further below, Section IV.

[54] The issue of islands and sea-level rise has been under consideration by the International Law Commission since 2019; see International Law Commission, 'Sea-Level Rise in Relation to International Law: First Issues Paper by Bogdan Aurescu and Nilüfer Oral, Co-Chairs of the Study Group on Sea-Level Rise in Relation to International Law' (28 February 2020) UN Doc A/CN.4/740.

[55] C Schofield and D Freestone, 'Islands Awash Amidst Rising Seas: Sea Level Rise and Insular Status under the Law of the Sea' (2019) 34 IJMCL 391.

[56] D Freestone and C Schofield, 'Sea Level Rise and Archipelagic States: A Preliminary Risk Assessment' (2021) 35 OceanYB 340.

[57] Pacific Islands Forum, 'Declaration on Preserving Maritime Zones in the Face of Climate Change-related Sea-Level Rise' (6 August 2021) <https://www.forumsec.org/2021/08/11/declaration-on-preserving-maritime-zones-in-the-face-of-climate-change-related-sea-level-rise/>; Alliance of Small Island States, 'Alliance Of Small Island States Leaders' Declaration' (22 September 2021) <https://www.aosis.org/launch-of-the-alliance-of-small-island-states-leaders-declaration/>; see discussion in F Anggadi, 'Establishment, Notification, and Maintenance: The Package of State Practice at the Heart of the Pacific Islands Forum Declaration on Preserving Maritime Zones' (2022) 53 OceanDev&IntlL 19.

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will have on their maritime entitlements, and the need for legal certainty. Since their circumstances remain under active consideration, a final legal resolution of these issues has yet to be reached.

III. CONSTITUTIONAL LEGAL ISSUES

Islands are a valuable unit of study to explore a range of constitutional legal issues. Geographic separation can nurture a unique sense of identity distinct from neighbouring territories. Where an island falls within a larger political community, that distinctive identity may create pressure for discrete political and legal arrangements that differ from other regions within the State. These arrangements could provide for enhanced degrees of autonomy or self-administration, or recognise the cultural, linguistic and other human rights of the islanders themselves.[58] In short, the character of islands *qua* islands leads to more varied constitutional settlements than mainland territories.

The legal and political autonomy of islands can be mapped along a spectrum. At one end can be placed islands entirely integrated within the metropole with no unique constitutional or political status, while at the other end sit independent sovereign States that happen to be islands (such as the Pacific island State of Nauru).[59] Within this band an incredible variety of constitutional and legal arrangements exist[60]—one study suggests that more than 100 sub-national island jurisdictions 'are known to enjoy a degree of autonomy without sovereignty'.[61] This section provides an overview of this diversity through an illustrative survey of the political status of island territories.[62]

Two points should be borne in mind at the outset. First, examining the political status of islands is akin to taking a snapshot in time; the legal relationship between islands and their metropole is a story of change and adaptation, and not simply in one direction. Indeed, despite confident predictions in the 1980s that a flurry of sub-national islands would soon pursue independent Statehood,[63] the opposite has occurred. However, this

[58] G Baldacchino, *Island Enclaves: Offshoring Strategies, Creative Governance, and Subnational Island Jurisdictions* (McGill-Queen's University Press 2010) 32–3.

[59] J Crawford, 'Islands as Sovereign Nations' (1989) 38 ICLQ 277.

[60] RL Watts, 'Island Jurisdictions in Comparative Constitutional Perspective' in G Baldacchino and D Milne (eds), *The Case for Non-Sovereignty: Lessons from Sub-National Island Jurisdictions* (Routledge 2009); J Connell and R Aldrich, *The Ends of Empire: The Last Colonies Revisited* (Palgrave Macmillan 2020) 37; J Overton et al, 'Reversing the Tide of Aid: Investigating Development Policy Sovereignty in the Pacific' (2012) 2(135) JSocOcéan 237.

[61] Baldacchino (n 58) 4–5. On 'autonomy', see H Hannum and R Lillich, 'The Concept of Autonomy in International Law' (1980) 74 AJIL 858.

[62] On the classificatory method, see V Jackson, 'Comparative Constitutional Law: Methodologies' in M Rosenfeld and A Sajo (eds), *The Oxford Handbook of Comparative Constitutional Law* (OUP 2012) 54.

[63] P Sutton, 'Introduction: Non-Independent Territories and Small States: Retrospect and Prospect' in P Clegg and E Pantojas-García (eds), *Governance in the Non-Independent Caribbean* (Ian Randle Publishers 2009) 23.

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does not mean that islands have largely been content to cede control and decision-making to the metropole; rather, many have instead opted to pursue greater autonomy within their existing State.[64]

Second, processes of colonisation, human migration, and political and strategic concerns challenge easy analysis. Consistent with their malleable relationship, there is no simple formula for devising an appropriate status. More common are countless *sui generis* arrangements that have emerged in the interaction between island and metropole, and which do not fit neatly into a schematic framework. As Eve Hepburn notes, a 'plethora of terms' characterises these arrangements, including autonomous province, associate State, overseas territory, special region, external territory, overseas department, federal province, and autonomous region.[65] Such terminology can obscure rather than illuminate the division of legislative and executive responsibilities in each case.

A. No Distinct Political Status

Islands are detached physically from mainland States, but they are not always detached politically.[66] Indeed, many islands have no unique constitutional or political status within the State that exercises jurisdiction and authority over the territory. Often this appears to be a consequence of geographic and population factors. Lightly populated islands proximate to a mainland coast may be less likely to be governed under distinct arrangements. This is the case for many islands off the coast of Australia, including North and South Stradbroke Islands (Queensland), Bruny Island (Tasmania), Kangaroo Island (South Australia) and Rottnest Island (Western Australia). It is not always true, however. The island of Sandwip along the south-eastern coast of Bangladesh is home to around 450,000 people but enjoys no distinctive status within Bangladesh. Similarly, no distinctive status is afforded to the North and South Islands of New Zealand.

Historical factors may also complicate the search for bright line rules. In the UK the lightly populated Isles of Scilly off the southwest of Cornwall are administered under a *sui generis* form of local government,[67] which can be traced to the islands' strategic position during the Middle Ages.[68] Similarly, the Channel Islands off the French coast are remnants of the Duchy of Normandy and are largely autonomous political communities, though part of

[64] J Corbett, *Statehood à la Carte in the Caribbean and the Pacific: Secession, Regionalism, and Postcolonial Politics* (OUP 2023) 10; E Hepburn, 'Recrafting Sovereignty: Lessons from Small Island Autonomies' in AG Gagnon and M Keating (eds), *Political Autonomy and Divided Societies* (Palgrave Macmillan 2012); G Baldacchino and E Hepburn, 'A Different Appetite for Sovereignty? Independence Movements in Subnational Island Jurisdictions' (2012) 50(4) CommonwealthCompPol 555.

[65] Hepburn ibid 118.

[66] EC Semple, *Influences of Geographic Environment: On the Basis of Ratzel's System of Anthropo-Geography* (H. Holt and Co. 1911) 436.

[67] *Local Government Act 1992* (UK), excluding the Isles of Scilly. See also *Isles of Scilly Order 1930* (UK).

[68] A Brodie, 'The Tudor Defences of Scilly' (2010) 5(1) EnglHeritHistRev 24.

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the English Crown.[69] In contrast, the more heavily populated Isle of Wight which lies closer to the mainland in the English Channel is treated in the same manner as all other local authorities.[70]

Islanders may chafe against the absence or abolition of distinctive arrangements. Consider the case of Norfolk Island, an Australian external territory which lies some 1,400 km off the mainland in the Pacific Ocean between New Zealand and New Caledonia. In 1979, the Australian Parliament conferred self-government on Norfolk Island.[71] The Act provided for an Administrator, appointed by the Governor-General of Australia, and an Executive Council and Legislative Assembly, elected by residents. The Assembly was empowered with a broad range of responsibilities that were supplemented over the years.[72] The Territory could enact legislation covering subjects consistent with local government, such as roads, rubbish and fencing, as well as larger 'national' subjects, such as postal services and civil defence, as well as fields such as environmental protection, criminal law and public works.[73] In areas in which the national government had a particular interest, such as fishing, immigration and social security, the Commonwealth Minister for Territories exercised an oversight function.[74] In 2015, however, the Territory's Legislative Assembly was abolished and its self-government powers removed.[75] Today, Norfolk Island is run by an Administrator appointed by the Governor-General of Australia and an elected advisory council exercising limited powers of local government in line with arrangements on the mainland. On the island, many continue to advocate for reform, including adding Norfolk Island to the UN list of non-self-governing territories.[76]

B. Delegated Autonomies

A central government may confer a degree of political or governmental authority beyond local government powers on an island jurisdiction. Once again, a wide spectrum exists. In some cases, a government may establish a special economic zone (SEZ) on a portion of their territory, that may or may

[69] See below, Section III.E.

[70] *Local Government Act 1992* (UK).

[71] *Norfolk Island Self-Government Act 1979* (Cth).

[72] See H Irving, 'Autonomies of Scale: Precarious Self-Government on Norfolk Island' in Y Ghai and S Woodman (eds), *Practising Self-Government: A Comparative Study of Autonomous Regions* (CUP 2013) 200.

[73] ibid. See further, *Norfolk Island Self-Government Act* (n 71) Sch 2.

[74] *Norfolk Island Self-Government Act* (n 71) Sch 3.

[75] *Norfolk Island Legislation Amendment Act 2015* (Cth).

[76] Radio New Zealand, 'Solid "Yes" Vote in Referendum on Norfolk Island Governance' (*Radio New Zealand*, 9 May 2015) <https://www.rnz.co.nz/international/pacific-news/273213/solid-%27yes%27-vote-in-referendum-on-norfolk-island-governance>; O Dehen, 'Residents of a Tiny Australian Island are Calling for a Return to Self-Rule to Save their Culture' (*SBS News*, 17 April 2021) <https://www.sbs.com.au/news/article/residents-of-a-tiny-australian-island-are-calling-for-a-return-to-self-rule-to-save-their-culture/mlvs8w2po>.

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not encompass an entire island.[77] In other cases, a unitary State may delegate certain substantive functions and responsibilities in view of the inhabitants' distinctive culture, administrative efficacy or due to larger strategic and political factors. Often any delegation is limited, providing minimal powers of self-government, and ensuring the metropole retains considerable authority. However, as will be seen, in a few cases, a unitary State may devolve substantial legislative and executive power to an island community. Delegation may be set out solely in legislation or have constitutional backing.

Some islands might form an SEZ. SEZs are geographically delineated autonomous regions within States that operate under distinct rules, particularly around taxation, customs and labour regulations.[78] While SEZs are not confined to islands, owing to their geographic delineation islands are particularly apt hosts. In some cases, an SEZ may not have its own legislative competences, but rather administer distinctive laws enacted by the central government. For example, the small Iranian islands of Kish and Qešm in the Persian Gulf are both free-trade zones which are administered semi-autonomously.[79] Many other cases exist. The Honduran Island of Roatán, for instance, is home to a libertarian-inspired SEZ under which an investing company is permitted to impose and collect taxes, incur debts, establish its own education, health, civil service and social security systems, and impose property taxes.[80] An earlier version of this regime even allowed companies to engage in international relations. In other cases, particularly in more populated territories, an island SEZ may have a greater degree of legislative and executive responsibility. For instance, the Chinese island of Hainan is both a province with its own (minimal) legislative powers and an SEZ. So too is the Archipelago of San Andrés, Providencia and Santa Catalina in Colombia.

The variety of delegated authority that islands may exercise is usefully illustrated by the 'kaleidoscope'[81] of different legal statuses of the French Overseas Territories. There are 13 territories outside Europe administered by

[77] One study found that around three-quarters of all States host SEZs: T Bell, 'Special Economic Zones in the United States: From Colonial Charters, to Foreign Trade Zones, Toward USSEZs' (2016) 64(5) BuffLRev 959, 968

[78] T Farole and G Akinci, 'Introduction' in T Farole and G Akinci (eds), *Special Economic Zones: Progress, Emerging Challenges, and Future Directions* (The World Bank 2011).

[79] G Baldacchino and D Milne, 'Success Without Sovereignty: Exploring Sub-National Island Jurisdictions' in Baldacchino and Milne (n 60) 1; A Kershavarzian, 'Kish Free Trade Zone', *Encyclopaedia Iranica Online* (Brill) <https://referenceworks.brillonline.com/entries/encyclopaedia-iranica-online/kish-free-trade-zone-COM_365167>.

[80] *Ley Orgánica de las Zonas de Empleo y Desarrollo Económico*, Decree No 33,222. See H Hobbs and G Williams, *Micronations and the Search for Sovereignty* (CUP 2022) 64–5; I Simpson and M Sheller, 'Islands as Interstitial Encrypted Geographies: Making (and Failing) Cryptosecessionist Exits' (2022) 99 PolGeog 102744, 6–7.

[81] C David, 'French Overseas Territories: Constitutional Statuses and Issues' (*IACL Blog*, 10 November 2020) <https://blog-iacl-aidc.org/constitutionalism-and-pluralism-in-overseas-france/2020/11/10/zlemu8zm2zu7beiuijw4t99iki6qt1>.

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France with five broad legal designations: (1) *départments et regions d'outre-mer* (DROM); (2) *collectivités d'outre-mer* (COM); (3) *pay d'outre-mer au sein de la République* (POM); (4) the *sui generis* territory of New Caledonia; and (5) uninhabited territories.[82] The DROM territories include the Caribbean islands of Guadeloupe and Martinique, the Indian Ocean islands of Mayotte and Réunion, and French Guiana (on the northern coast of continental South America). Article 73 of the French Constitution confirms that DROM territories have no distinct legal status—they have the same powers and responsibilities as France's mainland regions.[83] DROM residents are French citizens, send representatives to the National Assembly, and are subject to the same laws and regulations as metropolitan France. However, amendments in 2003 and 2008 tentatively expanded the capacity of elected DROM Regional Councils to modify certain laws and regulations relating to 'the particular characteristics and constraints' of each territory.[84] Nevertheless, this procedure is not available for 'national' laws, such as those relating to civil rights, the administration of justice and criminal law. Owing to strategic concerns, even this limited degree of autonomy is expressly denied to Réunion.[85]

Unlike DROM, COM/POM enjoy a degree of legislative autonomy.[86] Despite the different terminology, the legal status of COMs and POMs is identical. There are four COMs and one POM: the Pacific islands of French Polynesia (POM), and Wallis and Futuna (COM), the Caribbean islands of Saint Barthélemy (COM), the French half of the island of Saint Martin (COM), and the Atlantic Ocean islands of Saint Pierre and Miquelon (COM).[87] Each community elects a Legislative Assembly that is empowered to pass laws, except in areas of national concern, such as foreign affairs, defence, currency and security.[88] This is not a federal system,

[82] For a broad overview, see N Mrgudovic, 'The French Overseas Territories in Transition' in P Clegg and D Killingray (eds), *The Non-Independent Territories of the Caribbean and the Pacific: Continuity or Change?* (University of London Press 2012). See also, Rothwell (n 6) 92–3.

[83] *La constitution du 4 octobre 1958* [French Constitution of 4 October 1958] art 73, para 1. This is limited. As France is a unitary State, French regions have no legislative competence but may enact regulations within certain domains such as high school education, economic development and cultural heritage.

[84] F Mélin-Soucramanien, 'Les collectivités territoriales régies par l'article 73 : nouveaux Cahiers du Conseil constitutionnel no 35 (Dossier : La Constitution et l'outre-mer) – avril 2012' <https://www.conseil-constitutionnel.fr/nouveaux-cahiers-du-conseil-constitutionnel/les-collectivites-territoriales-regies-par-l-article-73>.

[85] *La constitution du 4 octobre 1958* (n 83) art 73, para 5.

[86] ibid, art 74.

[87] Note that in Saint Barthélemy, Saint Martin and Saint Pierre and Miquelon, metropolitan laws apply directly, while in French Polynesia and Wallis and Futuna, metropolitan laws do not apply unless expressly provided for: Local Authorities General Code: arts LO 6213-1 for Saint Barthélemy, LO 6313-1 for Saint Martin and LO 6413-1 for Saint Pierre and Miquelon; art 4 of Act No 61-814 of 29 July 1961 as amended for Wallis and Futuna.

[88] See, eg, *Law Conferring on the Islands of Wallis and Futuna the Status of Overseas Territory* (Law No 61-814).

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however.[89] These political units do not have their own constitutions; although their status is guaranteed in the French Constitution, the authority they exercise is conferred by statute and therefore subject to revision by the National Assembly.

Similar varied arrangements exist for the British Overseas Territories (BOTs), the US Overseas Territories, and the Dutch Caribbean which will each be considered in turn. The UK does not formally differentiate between its overseas territories, classifying each as a BOT. There are 14 BOTs, 11 of which are permanently inhabited.[90] Excluding Gibraltar and the Sovereign Base Areas of Akrotiri and Dhekelia (on Cyprus) leaves nine permanently inhabited BOTs that are also islands.[91] The Overseas Territories are separate to the UK and have their own Constitutions.[92] The British monarch is the head of State and appoints a representative on the advice of the British government to exercise executive power in each territory. However, the monarch acts in his role as king of each territory rather than King of the UK,[93] meaning territorial governors act on the advice of the territory's executive, and the UK government is not able to disallow legislation passed by territorial legislatures.[94] Nevertheless, the UK Parliament retains the authority to expand or contract the powers and self-governing authority of BOTs. While each permanently inhabited BOT enjoys a degree of representative government that exercises powers delegated by the UK Parliament, the size and scope of government is correlated to the population and political development of each territory. For instance, although Bermuda enjoys 'almost complete internal self-government', in Tristan da Cunha and the Pitcairn Islands 'the Governor is the law-making authority and there are only advisory councils'.[95] In all BOTs, the UK remains responsible for defence and external affairs, though some aspects of the latter have been delegated to the larger territories.

The US characterises territories neither part of a State nor Federal district as an 'insular area'. This generic term encompasses considerable diversity; an

[89] A Moyrand and A Angelo, 'Administrative Regimes of French Overseas Territories: New Caledonia and French Polynesia' in YL Sage and A Angelo (eds), *Gouvernance et autonomie dans les sociétés du Pacifique Sud* (New Zealand Association of Comparative Law 2010) Vol X, 193, 195.

[90] The non-permanently inhabited BOTs are the British Indian Ocean Territory (Indian Ocean), the British Antarctic Territory (Antarctica) and the South Georgia and South Sandwich Islands (South Atlantic Ocean).

[91] In order of population size, they are the Cayman Islands (Caribbean), Bermuda (North Atlantic Ocean), Turks and Caicos Islands (North Atlantic Ocean), British Virgin Islands (Caribbean), Anguilla (Caribbean), Saint Helena, Ascension and Tristan da Cunha (South Atlantic Ocean), Montserrat (Caribbean), Falkland Islands (South Atlantic Ocean) and Pitcairn Islands (Pacific Ocean).

[92] See, eg, *The Pitcairn Constitution Order 2010* (UK).

[93] *Ex parte Quark* [2005] UKHL 57.

[94] See, eg, *Virgin Islands Constitution Order 2007* (2007) section 40(1).

[95] UK House of Commons Foreign Affairs Committee, *Overseas Territories* (Seventh Report of Session 2007–08, 18 June 2008) 16.

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insular area may be organised or unorganised, and incorporated or unincorporated. Organisation relates to self-government; organised territories are lands under federal authority that have been granted a degree of self-governance by Congress through an Organic Act, while unorganised territories are directly administered by the federal government. Even for organised territories, however, Congress retains plenary power to revise the delegation of legislative and executive responsibilities.[96] An organised territory that has established a more developed political relationship with the federal government is classified as a Commonwealth. Incorporation relates to the application of the US Constitution. The Constitution applies in its full extent to incorporated territories; in unincorporated territories Congress has determined that only selected aspects of the Constitution apply.[97]

The US possesses five permanently inhabited island territories: Puerto Rico and the US Virgin Islands (Caribbean Sea), Guam and the Northern Mariana Islands (North Pacific) and American Samoa (South Pacific). All five territories are unincorporated. Each is organised except for American Samoa,[98] while Puerto Rico and the Northern Mariana Islands are Commonwealths. Notwithstanding these distinctions, each territory has a locally elected legislature and executive and exercises a degree of political autonomy. For the two Commonwealths, this appears extensive—the legislative power of the Northern Mariana Islands, for instance, extends to 'all rightful subjects'.[99] Nevertheless, ultimate governance authority is vested in the US Congress and the President—institutions within which Territory residents have no direct influence. Citizens may elect a non-voting delegate to the US House of Representatives but have no representation in the Senate and do not vote for the President.[100] As many have noted, the peculiar relationship these insular areas have with the federal government remains 'essentially colonial'.[101]

The Dutch Caribbean consists of six entities divided into two political collectivities.[102] The islands of Bonaire (in the Leeward Antilles off the coast of Venezuela), and Sint Eustatitus and Saba (in the Lesser Antilles group) (known as the BES islands) are formally 'public bodies', or special municipalities within the Netherlands proper.[103] This arrangement aims at

[96] *United States Constitution*, art IV, section 3, cl 2.

[97] See *Downes v Bidwell* 182 US 244 (1901); *Balzac v Puerto Rico* 258 US 298 (1922).

[98] Note that American Samoans are only US nationals rather than citizens: *Tuaua v United States* 951 F Supp 2d 88, 91; *Tuaua v United States* 788 F3d 300 (DC Cir 2015).

[99] Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America, U.S. Public Law No 94-241, March 24, 1976, 48 USC § 1801, section 203(c); *Constitution of the Commonwealth of the Northern Mariana Islands*, art II, section 1.

[100] See, eg, *Constitution of the Commonwealth of the Northern Mariana Islands*, art V, section 1.

[101] 'Developments in the Law: The U.S. Territories' (2017) 130(6) HarvLRev 1617, 1624.

[102] On the complexities and practical challenges inherent to this structure, see W Veenendaal, 'Why Do Malfunctioning Institutions Persist? A Case Study of the Kingdom of the Netherlands' (2017) 52(1) ActaPol 64.

[103] *The Constitution of the Kingdom of the Netherlands 2008*, art 134.

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integrating these territories into the metropolitan Netherlands while recognising that geographic, demographic and administrative factors necessitate distinct measures. Dutch laws do not automatically apply to the territories; the Dutch government chooses when and how metropolitan laws are to be implemented.[104] Similarly, powers of governance and administration are shared between elected island councils headed by a mayor appointed by the Dutch Crown, and the central government's National Office for the Caribbean Netherlands. Nevertheless, 'inherent inequalities' in resources, capacity and political power mean that relations between these institutions are 'characterised by huge asymmetries'.[105] In contrast to the BES islands which have sought integration, the Caribbean territories of Aruba, Curaçao and Sint Maarten (the southern half of the French COM) have pursued greater autonomy. Alongside the Netherlands itself, each is a constituent country within the Kingdom of the Netherlands.[106] Given this arrangement is more akin to a federal structure, the political status of these islands is considered in more detail below.

Even within unitary States, many islands may exercise substantial powers of autonomy. This could be a result of one of several factors. In cases of decolonisation, a central government might accede to the demands of residents to devolve legislative and executive powers in view of the cultural and ethnic distinctiveness of the inhabitants. This may eventually lead to separate Statehood but could also remain at the level of a federacy.[107] In other cases, international legal instruments may guarantee the island's autonomy, inhibiting the central government from undertaking certain actions. Relatedly, the central government may have only recently assumed effective control of an island jurisdiction and may be in the process of regularising its administration.

The island of Greenland, or Kalaallit Nunaat in Greenlandic, illustrates the first approach. Governed by Denmark as an overseas colony from 1814,[108] Greenlanders had little influence over the development of their island. Following the conclusion of World War II, Greenland was listed as a 'non-self-governing territory' under Chapter IX of the UN Charter. In 1953, this status was terminated as Greenland was integrated into the Kingdom of Denmark as a county, and Greenlanders obtained the same legal rights and entitlements as Danish citizens.[109] In the years since, however, Greenland has steadily sought and gained substantive autonomy. In 1979, the island was granted home rule,[110] and assumed legislative and executive authority over a

[104] W Veenendaal, 'The Dutch Caribbean Municipalities in Comparative Perspective' (2015) 10(1) IslStudJ 15.
[105] ibid 22.
[106] *Charter for the Kingdom of the Netherlands* (1954) art 1.
[107] A Stepan, 'Federalism and Democracy: Beyond the U.S. Model' (1999) 10(4) JDemocr 19, 20.
[108] Though note that Norway unsuccessfully sought to assert jurisdiction over a portion of eastern Greenland under the basis of *terra nullius*: *Legal Status of Eastern Greenland* (n 37).
[109] UNGA Res 849 (IX) (22 November 1954) UN Doc A/RES/849(IX).
[110] *Greenland Home Rule Act 1978* (Act No 577) section 4.

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wide range of domestic domains, including taxation, fisheries, education, cultural affairs and environmental protection, while Denmark retained authority over the Constitution, foreign policy, currency, the judicial system and defence.[111] Even so, Greenland enjoyed some degree of distinctive foreign relations: in 1985 the island left the European Economic Community.[112] Autonomy was subsequently extended further. Under the Greenland Self-Government Act 2009, the island took control of law enforcement and the legal system, as well as natural resources,[113] and gained the capacity to negotiate and conclude international agreements that exclusively concern the island.[114] The Act also allows Greenland to pursue independent Statehood if it so desires.[115] A similar regime applies to the Faroe Islands, an autonomous Danish territory located in the North Atlantic Ocean between the UK, Norway and Iceland. For islands like Greenland, the process of decolonisation may eventually lead to independence and separate Statehood. Although islands subject to political contestation are not the focus of this study, examples exist, including New Caledonia (France) and Bougainville (Papua New Guinea).

The Åland Islands exemplify the second category. Åland is an archipelago in the Baltic Sea between Finland and Sweden. The largely Swedish-speaking Finnish territory consists of around 30,000 people across more than 6,500 islands (60–80 are inhabited). Åland's location is strategically significant and various Nordic and European powers have exercised authority over the archipelago since the twelfth century, with Sweden holding sway for most of this period. In 1809, Sweden ceded Åland to the Russian Empire, which formally incorporated the region into the semi-autonomous Grand Duchy of Finland.[116] In 1917, Finland declared independence, and Åland residents petitioned the new government to allow them to join Sweden. Finland declined to cede the territory. The dispute was ultimately resolved by the League of Nations in 1921, which held that Finland must guarantee the right of residents to maintain the Swedish language, as well as their own culture and local traditions.[117] Åland thus enjoys significant autonomy under both Finnish and international law. The Åland Self-Government Act outlines the areas in which the Åland Parliament and Provincial Government exercise responsibilities. The main areas are education, culture, the environment, health, local government, police and communications. Finnish laws apply in most areas of civil and criminal law, courts, customs and taxation.[118] In other

[111] R Kuokkanen, '"To See What State We Are In": First Years of the *Greenland Self-Government Act* and the Pursuit of Inuit Sovereignty' (2017) 16(2) Ethnopolitics 179, 182–3.

[112] F Harhoff, 'Greenland's Withdrawal from the European Communities' (1983) 20 CMLRev 13.

[113] *Act on Greenland Self-Government* (Act No 473, 2009) Ch 2, Schedule II.

[114] ibid, Ch 4.

[115] ibid, section 21.

[116] P Joenniemi, 'The Åland Islands: Neither Local nor Fully Sovereign' (2014) 49(1) Coop&Conflict 80.

[117] League of Nations, 'Decision of the Council of the League of Nations on the Åland Islands Including Sweden's Protest', Minutes of the Fourteenth Meeting of the Council, 24 June 1921, 669.

[118] *Act on the Autonomy of Åland* (1991) section 18.

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areas, such as shipping, Finland and Åland share legislative power.[119] The islands also exercise a limited degree of international relations: Åland is a member of the Nordic Council and has its own postage stamps.[120] The islands elect one representative to the Finnish Parliament.

Hong Kong[121] and Macau illustrate the third approach. A British colony was established on Hong Kong Island in 1841 during the First Opium War between the British and Qing Empires, but the island was not formally ceded to the UK until the 1842 Treaty of Nanking. In 1984, following several years of discussions, the UK and People's Republic of China (PRC) agreed that the colony would be transferred to Chinese control on 1 July 1997.[122] Under the treaty, the PRC accepted that Hong Kong would retain a significant degree of legislative and executive autonomy as a 'Special Administrative Region'.[123] Hong Kong maintains its own government, legislature, legal system, police force, immigration policies, national sports teams, customs territory, and substantial competence in external affairs.[124] Hong Kong also has a limited international presence. It is a member of the World Trade Organization and may conclude and implement international agreements in areas such as shipping, fishing and communication. However, consistent with the transfer, ultimate authority rests with the National People's Congress in Beijing. In 2017, the PRC declared it considers the treaty is no longer of any legal effect.[125] In recent years, the central government has sought to exercise greater control over the island, limiting Hong Kong's autonomy.[126] The former Portuguese colony of Macau has a similar history and contemporary political status.

C. Federations

A federation is distinct from a unitary State. A unitary State may devolve certain functions and responsibilities to a sub-national region, but the national government retains the capacity to alter or revoke any delegated authority

[119] ibid, sections 18(21), 27(13), 29(2). [120] The Nordic Council <https://www.norden.org/en/nordic-council>.

[121] The political unit of Hong Kong consists of the Kowloon Peninsula on mainland China, and 263 islands over 500 m^2. The largest islands are Lantau Island and Hong Kong Island itself.

[122] Joint Declaration on the Question of Hong Kong (signed 19 December 1984, entered into force 27 July 1985) 1399 UNTS.

[123] 《中华人民共和国宪法》 [Constitution of the People's Republic of China] art 31.

[124] See *Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China* (1997); *Basic Law of the Macau Special Administrative Region of the People's Republic of China* (1999).

[125] Reuters, 'China Says Sino-British Joint Declaration on Hong Kong No Longer Has Meaning' (*Reuters*, 30 June 2017) <https://www.reuters.com/article/us-hongkong-anniversary-china-idUSKBN19L1J1>.

[126] See, eg, 《中華人民共和國香港特別行政區維護國家安全法》 [Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region] (People's Republic of China) Standing Committee of the National People's Congress of the People's Republic of China, 1 July 2020; Government of the Hong Kong Special Administrative Region, *Gazette*, L.N. 136 of 2020, 1 July 2020.

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unilaterally. In contrast, a federation is a political entity composed of self-governing regions that retain certain powers not exercisable by the national government.[127] The division of powers is constitutionally entrenched and cannot be unilaterally altered. Nevertheless, although autonomy sits on a firmer legal footing (except in cases like the Åland islands where it is protected by international law), this does not necessarily mean it is more substantive in practice. It is important to understand the precise division of legislative power between the centre and its peripheries. As will be seen, even within federal systems, diversity is the rule.

Federal systems can be divided several ways. One approach focuses on the respective powers of each constituent political unit. Under systems of symmetric federalism, such as Australia and the US, each political unit possesses equal powers of self-rule and shares identical legal entitlements in institutions of shared rule. In asymmetric federations, conversely, constituent political units enjoy varied degrees of legislative and executive autonomy and/or dissimilar representation in central institutions. Asymmetry may emerge because one or more sub-State communities is more powerful, influential, or insistent on attaining or ensuring measures of political autonomy.[128] Given that their geographic isolation and relatively smaller population often leads islands to develop and maintain a distinctive culture, asymmetrical federalism may be particularly appropriate.

A federation may be comprised entirely of islands. The Union of the Comoros is situated in the Mozambique Channel in the Indian Ocean between Madagascar and the African mainland. Having proclaimed its independence from France in 1975, the Union comprises the three main islands of Grande Comore, Anjouan and Mohéli, and a number of smaller islands. Reflecting the political history of the Comoros, each major island has significant legislative and executive autonomy. The three islands elect their own parliament and government and enjoy executive and legislative authority in areas not assigned to the Union government.[129] More commonly, a federal State may comprise a mix of territories on a mainland and one or more discrete islands with identical legal and political status. Numerous examples exist, including Australia (Tasmania), the US (Hawaii) and Canada (Prince Edward Island).

In practice, many federations combine aspects of both symmetry and asymmetry. The island of Tasmania is a constituent political unit of Australia, and it enjoys an identical degree of self-rule as sub-State communities on the mainland such as Victoria and Queensland. However, no other Australian island is treated similarly. The inhabited islands of Norfolk

[127] See further, D Halberstam, 'Federalism: Theory, Policy, Law' in Rosenfeld and Sajo (n 62) 576.
[128] N Aroney, 'Types of Federalism' in R Grote, F Lachenmann and R Wolfrum (eds), *Max Planck Encyclopedia of Comparative Constitutional Law* (OUP 2016).
[129] *Constitution of the Comoros*, Title IV.

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Island, Christmas Islands and Cocos/Keeling Island, among others, are formally designated external territories. They possess no legislative powers, are administered by authorities on the mainland and have no direct representation in shared-rule institutions. Similar arrangements exist in the US. While Hawaii achieved statehood in 1960, other islands, such as Puerto Rico and Guam, are unincorporated territories. Although these islands have some degree of autonomy (unlike Australia's external territories), powers are not inherent but delegated and subject to the US government.[130]

The islands of Aruba, Curaçao and Sint Maarten (the southern half of the French COM) inhabit a curious position. These three territories are, alongside the Netherlands itself, constituent countries within the Kingdom of the Netherlands. Each has their own legislature and government empowered to manage their own affairs independently,[131] while the Kingdom is responsible for administering laws relating to foreign relations, nationality, safeguarding fundamental human rights, and other similar fields.[132] Although suggestive of a federation comprising four autonomous and equal countries, the significant disparities in economic strength and population size between the Netherlands (which accounts for 98 per cent of the population of the Kingdom) and the Caribbean communities mean that in practice the Netherlands dominates Kingdom affairs. This is also reflected in the absence of true shared-rule institutions: there is no Kingdom Parliament; the Council of Ministers of the Kingdom comprises a Minister Plenipotentiary from each Caribbean country and the entire Netherlands cabinet; and the Netherlands Supreme Court is the ultimate judicial authority for legal disputes. Considering these and other features, Dutch constitutional scholars have described the relationship as a 'quasi- or pseudo-federation or of a sui generis construction'.[133] Within the Caribbean countries themselves, it is often not clear 'who is in charge, the government of the Netherlands or the Kingdom government?'.[134]

D. Associated States

The regimes considered thus far encompass sub-national island political communities that enjoy varied degrees of autonomy within a metropolitan State. They are not independent, even if they possess significant authority. Islands within this fourth category fundamentally differ in legal status: they are independent States. Nonetheless, the exercise of their autonomy may be more constrained in practice.

Independent States may negotiate relationships with larger powers, ceding certain attributes of sovereignty, responsibilities, or functions 'in exchange

[130] *United States Constitution*, art IV, section 3, cl 2.
[131] *Charter for the Kingdom of the Netherlands* (1954) art 41.
[132] ibid, arts 3, 43(2).
[133] C Borman, *Het Statuut voor her Koninkrijk* (Kluwer 2005) 23–4.
[134] L de Jong, 'The Implosion of the Netherlands Antilles' in Clegg and Pantojas-García (n 63) 90.

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for benign protection'.[135] While this does not impinge upon the sovereign status of the smaller State as they retain the authority to revoke or alter the agreement, it does affect their capacity to exercise the full range of sovereign functions. Such agreements are not confined to islands—under the Treaty of Vicinage, for instance, the European State of Andorra has agreed not to act inconsistently with the 'fundamental interests' of France or Spain.[136] Nevertheless, several remote islands small in population and territory have sought to exploit 'the advantages of both sovereignty and an autonomy supported by a benign patron state'.[137]

There are five States currently in free association with a larger power, all located in the Pacific Ocean. They are the Cook Islands and Niue (New Zealand), and the Marshall Islands, Micronesia, and Palau (US).[138] The three States associated with the US are UN Member States, but the Cook Islands and Niue are not. Indeed, these two States have a peculiar international legal status. Consider the Cook Islands as an example.

Under the terms of their agreement, the Cook Islands has full autonomy over its internal affairs, but New Zealand is responsible for its defence and may support and assist the Cook Islands to engage in external affairs.[139] This legal relationship has left the international legal status of the Cook Islands somewhat unclear. The New Zealand Ministry of Foreign Affairs and Trade issued a memo in 2005 declaring that 'the Cook Islands has developed a separate international identity from that of New Zealand' but cautioning that it did not consider that 'the Cook Islands is, in constitutional terms, an independent sovereign state'.[140] James Crawford also noted in passing that the Cook Islands is not a State but has some degree of 'separate international status'.[141] At the same time, New Zealand courts have found that 'the Cook Islands is a fully sovereign independent state and that the special relationship between the Cook Islands and New Zealand does not affect this issue'.[142] The Cook Islands has been

[135] Z Dumienski, *Microstates as Modern Protected States: Towards a New Definition of Micro-Statehood* (Centre for Small State Studies 2014) 22.

[136] *Treaty of Vicinage 1993*, art 4. Republished in (1994) 98 RGDIP 525.

[137] Baldacchino (n 58) 46.

[138] See *Compact of Free Association Act of 1985*, 48 USC 1681.

[139] *Cook Islands Constitution Act 1964* (NZ) section 5. For discussion, see C McDonald, 'An Exemplary Leader?: New Zealand and Decolonization of the Cook Islands and Niue' (2020) 55(3) JPacHist 394; A Quentin-Baxter, 'The New Zealand Model of Free Association: What Does it Mean for New Zealand?' (2008) 38 VUWLR 607. For the evolution of these arrangements, see A Quentin-Baxter, 'Pacific States and Territories: Cook Islands' in R Smellie (ed), *The Laws of New Zealand* (LexisNexis 2016) sec 29.

[140] New Zealand Ministry of Foreign Affairs and Trade, Legal Division, 'Cook Islands: Constitutional Status and International Personality' (May 2005).

[141] J Crawford, *The Creation of States* (2nd edn, OUP 2007) 492. cf SE Smith, 'Uncharted Waters: Has the Cook Islands become Eligible for Membership in the United Nations?' (2010) 8 NZJPubIntlL 169.

[142] *Controller and Auditor-General v Sir Ronald Davison* [1996] 2 NZLR 278, 288 (CA); affirmed by the Judicial Committee of the Privy Council in *Brannigan v Sir Ronald Davison* [1997] 1 NZLR 140, 144 (PC); [1997] AC 238, 247.

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admitted to a range of UN agencies, including the World Health Organization, membership of which is open to 'all States'.[143] It also maintains diplomatic relations with 52 States and the European Union, and is a party to several international treaties. Although not a UN member—New Zealand does not support membership—the Cook Islands is characterised as a 'non-member state',[144] and for all intents and purposes appears to be a State.[145] Nevertheless, there is no Cook Island citizenship—all inhabitants are New Zealand citizens.[146]

E. Sui Generis Categories

Examining the political status of islands reveals that, despite incredible diversity, a broad framework to understand the constitutional and legal status of island jurisdictions is possible. Nevertheless, several islands do not fit neatly on this scale. This final section explores islands whose distinctive histories leave them unique among island jurisdictions. Three broad factors influencing their unique status can be identified: history, international law and politics.

Three island territories within the British Isles sit within this *sui generis* category. The Bailiwick of Jersey and the Bailiwick of Guernsey which make up the Channel Islands, and the Isle of Man in the Irish Sea are known as the Crown Dependencies. The Crown Dependencies are akin to 'miniature states';[147] they are not part of the UK but are self-governing possessions of the British Crown. They have their own elected assemblies, administrative, fiscal and legal systems, and are not represented in the British Parliament. The UK Government, however, remains constitutionally responsible for their defence and diplomatic representation. Unlike the BOTs which were formally part of the British Empire, the Crown Dependencies were never colonial possessions but 'feudatory kingdoms'.[148] Perhaps consistent with this ancient political status, the constitutional relationship between the Crown Dependencies and the UK is not enshrined in any formal document. Rather, the Crown acting through the Privy Council is responsible for their good government. Given their status as self-governing jurisdictions, UK legislation

[143] Constitution of the World Health Organization (opened for signature 22 July 1946, entered into force 7 April 1948) 14 UNTS 185, art 3.
[144] United Nations, *Repertory of Practice of United Nations Organs* (Supplement No 8, Volume VI, 1989–1994) 10, paras 10–11.
[145] A Quentin-Baxter and J McLean, *This Realm of New Zealand: The Sovereign, the Governor-General, the Crown* (Auckland University Press 2017) 111.
[146] For some of the complications that can arise, see discussion in E Perham, 'Citizenship Laws in the Realm of New Zealand' (2011) 9 NZYBIntlL 219.
[147] Royal Commission on the Constitution 1969–1973, Vol 1, Cmnd 5460 (The Kilbrandon Report) para 1360.
[148] MM Bosque, 'The Sovereignty of the Crown Dependencies and the British Overseas Territories in the Brexit Era' (2020) 15(1) IslStudJ 151, 153.

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rarely applies to the Crown Dependencies, and is only extended after consulting the island authorities and obtaining their consent.[149] This ensures a substantial degree of autonomy. The Isle of Man, for instance, has its own controls on immigration and housing, and relatively low taxes, encouraging a major offshore financial sector that accounts for most of its gross domestic product. Despite this significant autonomy, the Crown Dependencies are not internationally recognised States, but 'territories for which the United Kingdom is responsible'.[150]

The Norwegian Svalbard archipelago, situated in the High Arctic between 74° and 81° north and between 10° and 35° east, also operates under a unique political and legal status. Rather than an historic feudal possession, however, this status is drawn from a treaty signed in the aftermath of World War I. Originally uninhabited, from the seventeenth century onwards several European States asserted rights to hunt and whale within the archipelago and its surrounding seas. It was not until 1920 that the 'full and absolute sovereignty of Norway over the Archipelago' was confirmed.[151] However, the Svalbard Treaty granted certain rights to the other signatories. Norway's qualified sovereignty over the islands is reflected in a series of rights and entitlements enjoyed by other State parties including: fishing and hunting in the islands and 'territorial waters'; access and entry for 'any reason or object whatever' to the waters, fjords and ports of the islands; and continued recognition of certain rights previously acquired by foreign nationals, including mining rights.[152] Notwithstanding this unique status, the jurisdiction is an integral unit of the unitary Kingdom of Norway.[153] The Norwegian Government appoints a Governor to administer the archipelago. The Governor acts as both the chief of police and county governor.

A third category of *sui generis* island jurisdictions emerges directly from politics rather than history or law. The Republic of China (ROC, or Taiwan) 'appears to comply in all respects with the criteria for statehood … but is universally agreed not to be a separate state'.[154] This is a consequence of the complex political relationship between the ROC and the PRC. The ROC is the *de facto* government of Taiwan, but the PRC asserts that it is the sole legitimate government of all China—including Taiwan. In 1971, the UNGA

[149] UK Ministry of Justice, 'Annex A: How to Note: Extension of UK Primary Legislation to the Crown Dependencies' <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/361538/extension-uk-legislation-crown-dependencies.pdf>. This is in contrast to the BOTs, for which the UK Parliament has unlimited power to legislate: UK Foreign and Commonwealth Office, *The Overseas Territories: Security, Success and Sustainability* (June 2012).

[150] D Torrance, 'How Autonomous are the Crown Dependencies' (*UK Parliament: House of Commons Library*, 5 July 2019) <https://commonslibrary.parliament.uk/how-autonomous-are-the-crown-dependencies/>.

[151] Treaty Concerning the Archipelago of Spitsbergen (opened for signature 9 February 1920, entered into force 14 August 1925) 2 LNTS 7, art 1.

[152] Rothwell (n 6) 98–9.

[153] Ø Jensen, 'The Svalbard Treaty and Norwegian Sovereignty' (2020) 11 ArcticRevL&Pol 82.

[154] Crawford (n 141) 198.

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accepted this position, voting to eject representatives of Taiwan from the UN and admitting the PRC as 'the only legitimate representative of China to the United Nations'.[155] However, complications remain. Under its 'One-China' policy, the PRC refuses to maintain diplomatic relations with any State that formally recognises Taiwan. Owing to the PRC's political, economic and military strength, many States have broken off formal diplomatic relations with Taiwan over the years. Only 11 States and the Holy See recognise Taiwan, and that number has been slowly decreasing.[156] Nonetheless, many States that formally recognise the PRC maintain unofficial consular links with Taiwan.

F. Brief Reflections

The constitutional legal status of islands is marked by diversity. But what accounts for the specific approaches adopted? One comprehensive survey found that three factors were significant in explaining whether an island territory obtained an autonomous position within a larger State. For Pär Olausson, geographic separation of at least 1,000 km from the mainland, cultural distinctiveness, and a previous history of self-rule or self-administration were key indicators in determining whether an island exercised autonomy.[157] The present study largely explores gradations of autonomy rather than the threshold question of whether autonomy exists but is nonetheless consistent with Olausson's findings. It is noted that the political and legal culture of the mainland State is also significant in determining the constitutional status of an island territory. As has been seen, colonial powers have adopted varied approaches to managing the efficacy of governance in island territories according to their own understanding of authority.

International law also plays a role. In some cases, governance arrangements are protected by treaties. More common, however, is the recognition that islanders themselves have the right to determine their political status. While some islands pursued their own independent Statehood (with or without the acquiescence of their former colonial power), most have been content with fine-tuning their political and legal authority within the State. Nonetheless, as has been emphasised, firm rules are difficult to excavate. Although particularly visible in relation to islands subject to political contestation, larger geo-strategic concerns overlay the approaches adopted in all cases.

[155] UNGA Res 2758 (25 October 1971) UN Doc A/RES/2758.
[156] See ABC News, 'Nauru Ceases to Recognise Taiwan as Separate Country as it Seeks Full Resumption of Diplomatic Relations with China' (*ABC News*, 15 January 2024) <www.abc.net.au/news/2024-01-15/nauru-severs-diplomatic-ties-with-taiwan/103322150>.
[157] PM Olausson, *Autonomy and Islands: A Global Study of the Factors that Determine Island Status Autonomy* (Åbo Akademi University Press 2007). As Olausson noted, these factors are linked by colonisation.

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IV. RECENT DEVELOPMENTS

The authors earlier described this survey as providing a snapshot in time. Two recent developments in 2023 and 2024 reflect that snapshot. The first is the outcome of 2023 negotiations between Australia and Tuvalu which demonstrate the fluidity and diversity of the legal issues raised by islands. The 'Falepili Union', announced on the sidelines of the 2023 Pacific Islands Forum, has been described as the most significant development for Australia and a Pacific Island nation for decades.[158] The Union is a tailored treaty that builds upon the model of 'Free Association' discussed above, and develops a distinctive 'Union' arrangement founded on three pillars.

First, the Union is based on 'values of good neighbourliness, care and mutual respect'. While Australia and Tuvalu are Pacific neighbours, they do not share land or maritime boundaries and are some 3,500 km apart. In this respect the use of the term 'good neighbourliness' is notable. It has a distinctive meaning in international environmental law where neighbouring States have responsibility for environmental harm, impact and damage that one may cause to the other.[159] Given that context, the use of the term in this instance would have been intentional.

Second, the Union recognises Tuvalu's particular challenges arising from climate change. Climate cooperation is provided for while recognising that Tuvalu's Statehood and sovereignty will continue, and the desire of Tuvaluans to continue to live in their territory. Direct reference is made to, 'more recent technological developments [which] provide additional adaptation opportunities'. While no detail is given as to what this may entail, clearly there is the potential for Australia to assist Tuvalu in combatting sea-level rise including by way of land reclamation and artificial island building within its existing maritime zones. Closely aligned with this initiative is the concept of 'human mobility with dignity', which envisages a special pathway for Tuvaluans to live, study and work in Australia, including access to education, health and social security.[160] A special visa category will need to be developed to facilitate this. No mention has been made, for the time being, of a fast track to Australian citizenship.

Third, the Union provides for mechanisms for Australia to come to the aid and assistance of Tuvalu following military aggression, natural disaster or a

[158] P Wong, 'Interview with David Speers, ABC Insiders' (12 November 2023) <https://www.foreignminister.gov.au/minister/penny-wong/transcript/interview-david-speers-abc-insiders>.

[159] See discussion of the principle in D Kochenov and E Basheska (eds), *Good Neighbourliness in the European Legal Context* (Brill 2015); and generally in J Brunnée, 'Sic utere tuo ut alienum non laedas' in R Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (January 2022) <https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e1607?prd=MPIL>.

[160] Australia has initially announced that visas will be available for 280 Tuvaluans per year to access permanent residency in Australia: D Hurst and J Butler, 'Australia to Offer Residency to Tuvalu Citizens Displaced by Climate Change' *The Guardian* (London, 10 November 2023) <https://www.theguardian.com/australia-news/2023/nov/10/australia-to-offer-residency-to-tuvalu-residents-displaced-by-climate-change>.

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public health emergency. Tuvalu will also provide Australia with territorial rights of access, presence and overflight. A distinctive aspect of the enhanced security relationship is that Tuvalu will agree with Australia any form of proposed legal or political security or defence-related engagement with another State, effectively giving Australia decision-making power over certain aspects of Tuvalu's foreign affairs.[161]

The second recent development is the Advisory Opinion sought by the Commission of Small Island States (COSIS)[162] which was delivered in 2024 by ITLOS. COSIS requested an advisory opinion regarding two UNCLOS obligations: (1) the obligation to prevent, reduce and control pollution of the marine environment in relation to the deleterious effects that result or are likely to result from climate change, including through ocean warming and sea-level rise, and ocean acidification, which are caused by anthropogenic greenhouse gas (GHG) emissions into the atmosphere; and (2) the obligation to protect and preserve the marine environment in relation to climate change impacts, including ocean warming and sea-level rise, and ocean acidification.[163]

The unanimous findings of ITLOS in the *COSIS Advisory Opinion* were that anthropogenic GHG emissions into the atmosphere constitute pollution of the marine environment for the purposes of Article 1(1)(4) of UNCLOS,[164] that applying a due diligence standard UNCLOS parties have obligations to prevent this source of marine pollution,[165] that these and related obligations can be found within Part XII of UNCLOS,[166] and that Article 192 of UNCLOS creates a specific obligation to protect and preserve the marine environment from climate change impacts and ocean acidification. ITLOS was also of the view that Article 203 'reinforces the support to developing States, in particular those vulnerable to the adverse effects of climate change' in providing preferential funding, technical assistance and services from international organisations.[167] With respect to islands, ITLOS particularly observed that it was 'conscious of the deleterious effects climate change has on the marine environment and the devastating consequences it has and will continue to have on small island States, considered to be among the most

[161] For further discussion, see DR Rothwell, 'A Pacific Union: Australia–Tuvalu Deal Goes Well Beyond Climate' (*The Interpreter*, Lowy Institute, 14 November 2023) <https://www.lowyinstitute.org/the-interpreter/pacific-union-australia-tuvalu-deal-goes-well-beyond-climate>; J McAdam, 'Australia's Offer of Climate Migration to Tuvalu Residents is Groundbreaking – and Could be a Lifeline Across the Pacific' (*The Conversation*, 11 November 2023) <https://theconversation.com/australias-offer-of-climate-migration-to-tuvalu-residents-is-groundbreaking-and-could-be-a-lifeline-across-the-pacific-217514>; L Moore, 'A Dysfunctional Family: Australia's Relationship with Pacific Island States and Climate Change' (2024) 78(3) AustJIntlAff 286.

[162] The members of which are Antigua and Barbuda, the Bahamas, Niue, the Republic of Palau, Saint Christopher (Saint Kitts) and Nevis, Saint Lucia, Saint Vincent and the Grenadines, the Republic of Palau, Tuvalu, and the Republic of Vanuatu.

[163] *COSIS Advisory Opinion* (n 5) para 3.

[164] ibid, para 441.

[165] ibid.

[166] ibid, particularly paras 197, 200–207, 211–213, 217, 222.

[167] ibid, para 441(k).

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vulnerable to such impacts'.[168] While the impact of sea-level rise upon maritime boundaries was not directly addressed, ITLOS acknowledged that the science accepted that sea-level rise 'posed an existential threat for some Small Islands'.[169] Although it remains important to acknowledge its status as an Advisory Opinion, the ITLOS response to COSIS points to a new legal direction in how UNCLOS obligations will be interpreted with respect to anthropogenic GHGs and pollution of the marine environment, and how these obligations will be assessed with respect to small island States.

V. CONCLUSION

There has always been a fascination with islands, whether they be just offshore or far distant from the coast, including in oceans on the other side of the world. Colonial powers sought to acquire islands as a means of asserting their global influence, with resulting and ongoing legal legacies. International law initially dealt with that phenomenon through consideration of territoriality and associated sovereignty, which in turn focused on maritime entitlements with the development of the law of the sea. In recent decades, State practice under UNCLOS has resulted in, at times, a forensic assessment of the characterisation of islands and associated features such as rocks, as highlighted by the *South China Sea Arbitration*. The combination of disputed island territoriality and maritime entitlement has made islands a focal point of international attention in East Asia, the South China Sea, and the Atlantic and Indian Oceans. Some distinctive island international law practices have also emerged regarding trade and finance, and environmental protection and management.

Governance of islands has also raised complex constitutional legal questions and three clear lessons can be drawn from this survey. First, the relationship between sub-national islands and mainland States is characterised by an incredible diversity. Not only is there no single approach, but States with multiple islands adopt varied legal and political arrangements that do not necessarily relate to the size of the island's population nor its distance from the metropole. A range of factors, including these but also encompassing history, politics, strategic concerns, and the determination of islanders themselves influence the contours of the relationship. Often the rationale for the division is unclear. Recall that unlike residents of all other insular areas (and indeed the 50 states and federal districts), residents of American Samoa are US nationals but not citizens. Second, while the content and scope of authority and jurisdiction islands exercise are subject to change, it appears that many islands are largely content to seek greater autonomy within States, rather than external self-determination.

[168] ibid, para 122.

[169] ibid, para 59.

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Nonetheless, there are important exceptions, as unrest in New Caledonia[170] and evolving arrangements in Greenland suggest. Finally, as the recently concluded Falepili Union demonstrates, island territories are pursuing a range of innovative strategies to preserve and protect their autonomy.[171]

Securing territory is a critical precondition for autonomy. However, while island land reclamation has a long history, that strategy may not be adequate to address threats posed by sea-level rise. With the ICJ reviewing an Advisory Opinion request and ITLOS now having delivered the *COSIS Advisory Opinion*, and bodies such as the International Law Commission[172] and International Law Association[173] completing studies on climate change, sea-level rise, human mobility and Statehood, a forensic analysis is taking place of issues critical to the future of islands. The remainder of the 2020s will continue to bring some clarity to unresolved legal questions posed by island peoples, which in turn may create a new diplomatic and legal agenda in which existing, new and innovative international and constitutional law solutions will prove critical.

The twenty-first century has witnessed a proliferation of island territorial and maritime disputes before international courts and tribunals, the march of climate change and sea-level rise and its implications for small island States, and calls by islanders for self-determination. A legal, political and diplomatic maelstrom has developed around these issues extending from international courts and tribunals, to the UN, to regional and sub-regional institutions, and bilateral relations. These events demonstrate that islands and islanders are raising some of the most fundamental issues of global political and legal concern. A 'legal era of islands' is emerging.

ACKNOWLEDGEMENTS

This article benefited from valuable comments at the 2023 Comparative Constitutional Law Workshop, held at the University of New South Wales Faculty of Law and Justice in Sydney, Australia in November 2023. Thanks to Tracey Robinson, Rosalind Dixon, Elisabeth Perham, Elisa Arcioni, Lynsey Blayden, Joel Colon-Rios, David Kenny, Scott Stephenson, Lael Weis and others for helpful discussion. The authors also thank the anonymous reviewers and editorial team at the *International and Comparative Law Quarterly* for their insight and preparation of the manuscript.

[170] Y Zhuang, 'Curfew Imposed Amid Protests in Pacific Territory of New Caledonia' *New York Times* (New York, 14 May 2024) <https://www.nytimes.com/2024/05/14/world/asia/new-caledonia-curfew-protests.html>.

[171] R Herr, 'The Falepili Union and the Question of Pacific Sovereignty' (*The Strategist*, Australian Strategic Policy Institute, 24 November 2023) <https://www.aspistrategist.org.au/the-falepili-union-and-the-question-of-pacific-sovereignty/>.

[172] International Law Commission (n 54).

[173] International Law Association, Lisbon Conference, 'International Law and Sea Level Rise' (2022) <https://www.ila-hq.org/en/committees/international-law-and-sea-level-rise>.

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