



**IMEL**  
INSTITUTE OF MARINE  
& ENVIRONMENTAL LAW

**Islands and Rocks:**

**Moving Towards Certainty on the Interpretation of Article 121 of the Law of the Sea  
Convention?**

by

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## **Abstract**

The regime of islands, as captured in Article 121 of the United Nations Convention on the Law of the Sea (LOSC) grants a 200 nautical mile exclusive economic zone and continental shelf to all islands apart from “rocks which cannot sustain human habitation or economic life of their own.” The provision was undoubtedly drafted in an intentionally ambiguous manner in order to strike a compromise between the contrasting views of States surrounding the regime of islands. Consequently, Article 121 is riddled with textual ambiguities. For example, the text does not further define the word “rock”; nor does the provision explain what it means to “sustain human habitation or economic life”.

As a result of these ambiguities, many States are of the opinion that Article 121 allocates a 200 nautical mile zone to every piece of land that protrudes above water. This provision is problematic as it potentially allocates vast amounts of ocean space to nations claiming sovereignty over tiny uninhabited islands speckled throughout the oceans, severely limiting the space that remains for the “common heritage of mankind”. In addition, the ambiguous wording of Article 121 has resulted in various territorial disputes between nations in relation to both the interpretation and application of the Article.

This dissertation seeks primarily to investigate whether the international community is moving towards certainty on the interpretation of Article 121 of the LOSC, with particular reference to the distinction between islands and rocks. In doing so, this dissertation will explore the body of jurisprudence of international courts and tribunals insofar as it relates to Article 121 of the LOSC. This is a fruitful exercise as any clarification in this regard will undoubtedly unify State practice surrounding the application of Article 121. This may have the effect of reducing conflict between States and ensuring that ocean spaces around insular formations are apportioned in an equitable and standardised manner.

### **List of Abbreviations**

CCAMLR	The Convention on the Conservation of Antarctic Marine Living Resources
CLCS	The Commission on the Limits of the Continental Shelf
CTSCZ	The Convention on the Territorial Sea and Contiguous Zone
DOALOS	The Division of Ocean Affairs and the Law of the Sea
EEZ	Exclusive Economic Zone
ICJ	The International Court of Justice
ISA	The International Seabed Authority
ITLOS	The International Tribunal on the Law of the Sea
LOSC	The United Nations Convention on the Law of the Sea
UN	The United Nations
UNCLOS III	Third United Nations Conference on the Law of the Sea
UNCLOS	United Nations Conference on the Law of the Sea

## Chapter 1

### *Let's Rock and Roll*

#### 1.1 Background and Context:

The regime of islands has been an issue of great interest for several decades. Consequently, the issue received special attention at the Third United Nations Conference on the Law of the Sea (UNCLOS III). During the negotiations it became apparent that the nations present had differing views on how the regime of islands should be formulated. While certain States were eager to reduce the impact of small islands on maritime jurisdiction claims, other States held a vested interest in maximising jurisdictional claims from these insular formations.<sup>1</sup> After nine arduous years of negotiations, a single provision regarding islands was adopted – Article 121 of the United Nations Convention on the Law of the Sea (LOSC). The provision reads as follows:<sup>2</sup>

#### *“Regime of Islands*

1. *An island is a naturally formed area of land, surrounded by water, which is above water at high tide.*
2. *Except as provided for in paragraph 3, the territorial sea, the contiguous zone, the exclusive economic zone and the continental shelf of an island are determined in accordance with the provisions of this Convention applicable to other land territory.*
3. *Rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf.*<sup>3</sup>

Article 121 provides rules for the recognition of islands in addition to the maritime space that may be generated by islands. However, Article 121 has done little to eradicate the complexity and

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<sup>1</sup> For a comprehensive overview of the drafting history of Article 121 and the differing interests of the States present at the negotiations see R.D. Hodgson & R.W. Smith, “The Informal Single Negotiation Text (Committee II): A Geographical Perspective,” *Ocean Development and International Law*, Vol. 3, 1976.

<sup>2</sup> U.N. Doc. A/CONF.62/122, (1982), United Nations, Official Text of the United Nations Convention on the Law of the Sea with Annexes and Index. It is recognized that this treaty goes by a number of different acronyms, “LOSC” (as above), “UNCLOS” (United Nations Convention on the Law of the Sea) or, by its opponents, “LOST” (Law of the Sea Treaty). LOSC is preferred to UNCLOS in order to avoid confusion with the three United Nations Conferences on the Law of the Sea of 1958 (resulting in the four Conventions), 1960 and 1974-1982 (resulting in LOSC). The terms “UNCLOS I”, “UNCLOS II”, and “UNCLOS III” are used to refer to the three United Nations Conferences on the Law of the Sea.

<sup>3</sup> Article 121 of the LOSC.

problems surrounding insular formations. At its core, Article 121 strikes a compromise between the divergent interests of the States present at UNCLOS III. Thus, there is little doubt that the text of Article 121, and in particular paragraph 3, was designed to be intentionally ambiguous.<sup>4</sup> Ultimately, Article 121 comprises of lowest common denominator language to which States with vastly different interests would assent.<sup>5</sup> As the text of Article 121 is designed to be interpreted in a variety of ways, many critical issues regarding insular formations remain to be settled. An assessment of the impact of article 121(3) of the LOSC on the extent of maritime zones is seriously hampered by the fact that it has raised a number of complex issues of interpretation.<sup>6</sup> These concerns include, *inter alia*, what size leads to the classification of an island as a rock, and what qualifies as “human habitation”, “economic life” or “of their own.” These questions have attracted significant scholarly attention, emphasising the intricacies involved in answering them.

Arguably, the most complex issue of interpretation is distinguishing between different types of insular formations. In particular it is necessary to discern what constitutes an “island”, which is capable of generating extended maritime claims (an exclusive economic zone [EEZ] and continental shelf), and what constitutes a “rock” which is incapable of generating such claims. This distinction is of great importance as islands autonomously generate the full package of maritime jurisdictional zones offered under the LOSC<sup>7</sup>, whereas rocks are only entitled to generate a 12 nm territorial sea and a 24 nm contiguous zone.<sup>8</sup> Consequently, even minute islands – insofar as they exist - have the potential to generate massive maritime jurisdictional zones with significant security/resource implications.

To put things in perspective, if an island has no maritime neighbours within 400 nm, it may generate 125,664 sq.nm (431,014km<sup>2</sup>) of territorial sea, EEZ and continental shelf rights. In stark contrast, a mere rock, incapable of generating EEZ and continental shelf rights, may only generate a territorial sea of 452 sq.nm (1,550km<sup>2</sup>).<sup>9</sup> Not only does the status of an insular feature have enormous consequences in terms of the scope of the maritime claims that can be made, it

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<sup>4</sup> C.H. Schofield, “The Trouble with Islands” *A thesis submitted in partial fulfilment of the requirements for the degree of Master’s in law* (The University of British Columbia, 2009) at 88.

<sup>5</sup> *Ibid.*

<sup>6</sup> A.G.O. Elferink, “Clarifying Article 121(3) of the Law of the Sea Convention: The Limits Set by the Nature of International Legal Processes,” *IBRU Boundary and Security Bulletin*, 1998 at 58.

<sup>7</sup> In accordance with Article 121(2) of the LOSC.

<sup>8</sup> In accordance with Article 121(3) of the LOSC.

<sup>9</sup> C.H. Schofield *op cit* note 4. It should be noted that these theoretical calculations assume that the island or rock in question has no area. As such features inevitably comprise some territory and therefore area, the potential maritime claims that can be generated from them are likely to be greater.

also has an impact on the role of such features in maritime boundary delimitation.<sup>10</sup> As a result, it is not surprising that almost all States with sovereignty over insular formations have taken the position that their insular formations are islands and are thus capable of generating an EEZ and continental shelf.<sup>11</sup> Over the past few years, many nations have bolstered their claims to insular formations, emphasising the importance of clarifying Article 121.<sup>12</sup>

The practical effect of the ambiguous text of Article 121 was acutely seen when the United Kingdom claimed Rockall, a barren and windswept rock structure that protrudes out of the rough ocean northwest of the British Isles, as an island. The United Kingdom used Rockall to define its 200 nm fishery zone limit in 1977, but encountered strong opposition from Denmark, Iceland and Ireland who objected to Rockall being used as a basepoint for the United Kingdom's fishery zone as Rockall was, in their view, an Article 121(3) rock.<sup>13</sup> Subsequently the United Kingdom acceded to Rockall's classification as a rock and relinquished around 60 000 square nm of its previously claimed fishery zone.<sup>14</sup> Currently the small Paracel and Spratly Islands in the South China Sea are in active dispute amongst Vietnam, China, Taiwan and the Philippines as the status of these insular features will determine the maritime jurisdictional zones which may be claimed and subsequently who has jurisdiction over nearby underwater petroleum.<sup>15</sup> The very recent *South China Sea Arbitration*<sup>16</sup>, the first instance of international jurisprudence which engages meaningfully with an interpretation of Article 121, deals with this issue in detail and the extent to which the judgement of the Tribunal has clarified the interpretational issues surrounding Article 121 will be explored in detail in chapter 5. Furthermore, Japan has spent millions of dollars in an attempt to develop Okinotorishima, two minute and uninhabited insular formations in the Western Pacific Ocean, in order to classify the formations as islands and claim a 200 nm EEZ around the features. However, China has objected to such classification and asserts that Okinotorishima are

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<sup>10</sup> Ibid at 74.

<sup>11</sup> Ibid.

<sup>12</sup> Ibid.

<sup>13</sup> D.H. Anderson, "British Accession to the UN Convention on the Law of the Sea," *International and Comparative Law Quarterly*, Vol. 46, 1997 at 761-786.

<sup>14</sup> The United Kingdom's 200nm fishery zone limit was instead "rolled-back" to a limit measured from basepoints located on the Outer Hebrides group of islands fringing the Scottish mainland coast.

<sup>15</sup> For more on the status of insular features in the South China Sea see A.G.O. Elferink, "The Islands in the South China Sea: How Does Their Presence Limit the Extent of the High Seas and the Area and the Maritime Zones of the Mainland Coasts," *Ocean Development and International Law*, Vol. 32, 2001; B.H. Dubner, "The Spratly 'Rocks' Dispute – A 'Rockapalago' Defies Norms of International Law," *Temple International and Comparative Law Journal*, 1995; C. Schofield & D. Wang, "The Regime of Islands Under UNCLOS: Implications for the South China Sea" *Maritime Energy Resources In Asia: Legal Regimes and Cooperation*, 2012.

<sup>16</sup> *The South China Sea Arbitration* (Philippines v. China), [2016] PCA case No. 2013-19.

Article 121(3) rocks. China has repeatedly conducted activities within Japan's claimed EEZ around the features without seeking Japan's permission, souring diplomacy between the two States.<sup>17</sup>

These are but a few of the many island-related disputes across the globe and it is uncertain how many more disputes of this nature will occur in the future. However, what is certain is that insular features (even those small, remote, uninhabited and seemingly worthless fly specks on the map) have the potential to sour neighbourly relations, leading to military posturing, sabre-rattling and gun-boat diplomacy, often leading States to the brink of armed conflict.<sup>18</sup> There is little doubt that ironing out some of the ambiguities of the regime of islands in Article 121 will do much to resolve many island related disputes in the future and unify State practice regarding insular formations. However, it remains to be seen if the international community is moving towards a clear interpretation of Article 121.

## 1.2 Purpose and Scope of Dissertation

It is evident from the above that Article 121 of the LOSC is riddled with ambiguities. Although it is possible to limit the range of interpretations of the text of Article 121 to a certain degree, literature on the subject generally concedes that it is impossible to arrive at an authoritative interpretation of Article 121 based on the existing legal materials.<sup>19</sup> A recent discussion regarding the regime of islands concludes that only State practice and case law will serve to clarify Article 121.<sup>20</sup> Thus, the practice of States in their application and interpretation of Article 121 and the rulings of international courts and tribunals play a pivotal role in clarifying the regime of islands and in particular, the distinction between islands and rocks. However, thus far, international

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<sup>17</sup> For a detailed discussion of Japan's claims to Okinotorishima and China's opposition see L. Diaz, B.H. Dubner and J Parent, "When is a "Rock" an "Island" – Another Unilateral Declaration Defies "Norms" of International Law" *Michigan State University College of Law Journal of International Law*, Vol. 15, No. 3, 2007.

<sup>18</sup> Perhaps the most noteworthy military conflict over islands is that between Argentina and the United Kingdom over the Falkland Islands (Islas Malvinas) and South Georgia. Argentina's occupation of the disputed islands in 1982 resulted in a conflict which cost the lives of 655 Argentine and 236 British troops. For more on this dispute see, P. Armstrong & V. Forbes, "The Falkland Islands and their Adjacent Maritime Area," *Maritime Briefing*, Vol. 2, No. 3, 1997 at 4-12.

<sup>19</sup> A.G.O. Elferink op cit note 6 at 58.

<sup>20</sup> B. Kwiatkowska & A.H.A. Soons "Entitlement to Maritime Areas of Rocks which Cannot Sustain Human Habitation or Economic Life of Their Own," *Netherlands Yearbook of International Law*, Vol. 21, 1990 at 139-181; J.M. Van Dyke, J.R. Morgan and J. Gurish, "The Exclusive Economic Zone of the Northwestern Hawaiian Islands: When Do Uninhabited Islands Generate an EEZ?," *San Diego Law Review*, Vol. 25, 1988 at 425-494.

jurisprudence and State practice have proved largely unhelpful as both international courts and tribunals and States have often adeptly side-stepped the issue. Nevertheless, a number of developments in the rulings from international courts and tribunals have emerged which give rise to prospects for clarification.

Against this backdrop this dissertation seeks to investigate the following question:

*Is the international community moving towards certainty on the interpretation of Article 121 of the LOSC, with particular reference to the distinction between islands and rocks?*

In answering this question, it is necessary to define the parameters of this dissertation. This dissertation only deals with insular features insofar as Article 121 of the LOSC is concerned.<sup>21</sup> In investigating whether the international community is moving towards certainty on the interpretation of Article 121 of the LOSC, an analysis of Article 121 will be conducted through a consideration of the jurisprudence of international tribunals and courts dealing with the regime of islands and in particular the distinction between rocks and islands. Ultimately, this thesis seeks to address whether after 25 years since the LOSC came into force, the international community is moving towards a uniform interpretation of Article 121 with particular emphasis on the distinction between islands and rocks.

### **1.3 Overview of Structure**

In answering this question this dissertation will first provide the general context in which the regime of islands is supposed to function (chapter 2). Chapter 2 will also outline the theoretical implications of distinguishing between islands and rocks in the context of Article 121. Examples of cases and scenarios where the distinction has been of importance will be provided to illustrate that this distinction has real life implications, stressing the need to investigate whether the international community is moving towards certainty in this regard.

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<sup>21</sup> The author is aware that there are two types of insular formations dealt with in the LOSC namely, islands and low tide elevations. Article 13 of the LOSC deals specifically with low-tide elevations which differ from islands in their zone generative capacity. Generally, low-tide elevations may only constitute a baseline from which to draw maritime zones from if they are wholly or partly in the territorial sea of their owning State, unless the low-tide elevation constitutes an appropriate fixing point under Article 7(4) of the LOSC.

Chapter 3 commences with a brief overview of the drafting history of Article 121. Unfortunately, the drafting history of Article 121 does little to assist in ascertaining the intention of the drafters of the Article however, it provides some insight into the diversity of views that the regime of islands provoked. Ultimately, the drafting history of Article 121 illustrates that the current regime of islands was formulated a compromise between the vastly different interests of the States present at the negotiations. The implications of Article 121 being drafted in such manner will then be discussed. Finally, the elements of Article 121 will be dissected. This will reveal where the ambiguities in the text lie.

Chapter 4 will commence with an analysis of relevant jurisprudence of international courts and tribunals. In this regard, it must be borne in mind that international courts and tribunals have often shied away from delivering a definitive interpretation of Article 121, even when the opportunity has arisen. However, there are some exceptions to this trend which give rise to prospects of clarifying Article 121. These exceptions will be analysed in order to gauge whether the international community is moving towards certainty on its interpretation of Article 121, with particular reference to the distinction between islands and rocks.

Chapter 5 will be dedicated to an analysis of the recent *South China Sea Arbitration*. As this award canvasses a variety of issues, only the relevant sections on the Tribunal's interpretation of the regime of islands, as encapsulated in Article 121, will be examined. Ultimately, an exploration of the relevant sections of the award will be undertaken in an attempt to reveal whether the *South China Sea Arbitration* has finally contributed towards a clearer interpretation of Article 121 with particular reference to the distinction between rocks and islands.

Chapter 6 will provide a succinct summary of what has been canvassed in this dissertation and answer the primary research question of this dissertation - Is the international community moving towards certainty on the interpretation of Article 121 of UNCLOS, with particular reference to the distinction between islands and rocks? Where uncertainty persists, recommendations will be made on how to achieve certainty in these areas.

## Chapter 2

### *Why the fuss? Implications of the distinction between rocks and islands*

#### 2.1 Insular Formations in General

The world's oceans are littered with islands. Islands vary in their origin, size, ecological conditions, geographical location and political status. In regard to their geomorphological origin, two types of islands exist: continental and oceanic.<sup>22</sup> Continental islands are formed from granite, gneiss or slate being exposed to sweltering temperatures and severe pressure, whereas mid-ocean islands are generally volcanic or volcanic-coral in nature.<sup>23</sup> Furthermore, some islands may also be formed by a specific configuration of the ocean floor and underwater currents and ranges, resulting in the sedimentation of organic or mineral matter.<sup>24</sup> It has been estimated that there are over half a million islands scattered across the globe, canvassing a land area of 3 823 000 square miles.<sup>25</sup> These islands range from hardly measurable peaks to geomorphological giants such as Greenland with an area of over 840 000 square miles.<sup>26</sup> They can fringe continents or be completely isolated out in the ocean. Islands can exist in isolation or be arranged in clusters of various geometrical patterns. Certain islands may be rich in mineral resources and boast abundant fauna and flora, while others may be poor beyond the point of sustaining any form of habitation and economic life.<sup>27</sup>

Furthermore, the political status of the world's islands is not uniform.<sup>28</sup> Some islands or archipelagos form part of archipelagic States. There are nearly fifty archipelagic States, which are inhabited by a quarter of the world's population.<sup>29</sup> In contrast, islands may belong to or be associated with continental States, they may constitute a trusteeship territory, or remain under foreign control or domination despite great advances in decolonisation.<sup>30</sup>

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<sup>22</sup> Islands and their Capacity to Generate Maritime Zones, thesis, University of Oslo, 5.

<sup>23</sup> Ibid.

<sup>24</sup> Ibid.

<sup>25</sup> See R. D. Hodgson, *Normal and Special Circumstances in Law of the Sea: The Emerging Regime of the Oceans*, Proceedings, Law of the Sea Institute, Eight Annual Conference, June 18-21, (1973), ed. by J. K. Gamble, G. Pontecorovo, Cambridge Mass (1974) at 139.

<sup>26</sup> Ibid.

<sup>27</sup> Ibid.

<sup>28</sup> F. Moise, "Islands and their Capacity to Generate Maritime Zones", thesis, University of Oslo, 2008, at 5.

<sup>29</sup> Ibid.

<sup>30</sup> Ibid at 6.

There is an inextricable link between islands and the territory of States. As such the international community needed to formulate rules for distinguishing between maritime features and the maritime jurisdictional zones that they are capable of generating.

## **2.2 The Significance of the Distinction between Rocks and Islands**

Islands are important as they provide a basis for maritime jurisdictional claims in terms of the LOSC. There are two main ways in which disputes have arisen regarding islands: sovereignty disputes over who owns islands themselves, their land territories and their associated maritime zones; and disputes arising over the maritime jurisdictional claims generated by islands and the role of a specific insular feature in the bilateral delimitation of maritime boundaries. However, these factors are often inextricably linked as the potential role of an island in delimitation and the generation of maritime jurisdictional claims can be a pivotal factor in informing and influencing disputes over sovereignty.

Many of these sovereignty disputes involve possession of a handful of remote, barren, small and often uninhabited islands, rocks, low-tide elevations and reefs. Nevertheless, these insular features have the ability to prompt fierce diplomatic interactions between States, embitter bilateral relations and, in exceptional circumstances, provoke military confrontation.<sup>31</sup>

Additionally, these disputes need to be viewed in their overall context. Often the history of the relationship between the parties to disputes over insular features informs the nature of the exchange. Although the territory at stake may be insignificant, the dispute may be representative of a pressure point evidencing an already strained or historically antagonistic relationship.<sup>32</sup> Often it is also the case that a State in possession of disputed insular feature completely denies the existence of any dispute on historical grounds, claiming that its sovereignty over the feature is

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<sup>31</sup> Perhaps the most noteworthy military conflict over islands is that between Argentina and the United Kingdom over the Falkland Islands (Islas Malvinas) and South Georgia. Argentina's occupation of the disputed islands in 1982 resulted in a conflict which cost the lives of 655 Argentine and 236 British troops. See P. Armstrong and V. Forbes *The Falkland Islands and their Adjacent Maritime Area, Maritime Briefing, Volume 2, No. 3*, (1997) 4-12. Similarly, in the "Battle of Fiery Cross Reef" between China and Vietnam in March 1988. In this engagement over possession of one of the disputed Spratly Islands 75 Vietnamese personnel were reported to have lost their lives and three Vietnamese ships were set ablaze. Chinese casualties were reported to be slight. See D.J. Dzurek *The Spratly Islands: Who's On First?, Maritime Briefing, Vol.2, no.1*, (1996) at 23.

<sup>32</sup> Greece and Turkey's 1996 confrontation over the small islets of Imia (to Greece) or Kardak Rocks (to Turkey) can be seen in this light. See M.A. Pratt and C.H. Schofield "The Imia/Kardak Rocks Dispute in the Aegean Sea" *Boundary and Security Bulletin, Vol.4, No.1* (Spring 1996) 62-69.

“indisputable” and established from “time immemorial”, so that there is no room for debate.<sup>33</sup> Such language has been used recently in the South China Sea disputes, in which China responded to submissions to the Commission on the Limits of the Continental Shelf (CLCS) by Malaysia and Vietnam, by issuing a protest note stating that it had “indisputable sovereignty over the islands in the South China Sea”.<sup>34</sup> Vietnam responded with a diplomatic note of its own stating that it had “indisputable sovereignty” over both the Paracel (Hoang Sa) and Spratly (Truong Sa) Islands.<sup>35</sup>

Sovereignty disputes over insular features have proved capable of being resolved, as evidenced by a growing number of disputes being settled in recent years, often by means of international arbitration or the International Court of Justice (ICJ).<sup>36</sup> Examples of such include the international arbitration and tribunal decisions resolving the dispute between Eritrea and Yemen concerning the sovereignty over the Hanish Islands in 1998 and 1999, the ruling of the ICJ on the dispute over the Hawar Islands between Bahrain and Qatar in 2001, as well as the ICJ decision of 2003 ruling on Indonesia and Malaysia’s dispute over the Sipadan and Ligitan Islands in 2002.<sup>37</sup>

However, disputes over sovereignty of insular features have limited relevance to the primary research question of this dissertation. It is the second class of disputes, those concerned with the maritime jurisdictional zones associated with islands that truly emphasise the importance of clarifying Article 121 of the LOSC and distinguishing between rocks and islands in this context. In respect of these disputes surrounding the maritime jurisdictional zones generated by islands, Article 121(2) of the LOSC states that islands, in an identical fashion to mainland coasts, are capable of generating the full suite of maritime zones:

*“...the territorial sea, the contiguous zone, the exclusive economic zone and the continental shelf of an island are determined in accordance with the provisions of this convention applicable to other land territory.”*

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<sup>33</sup> See *Note from the Permanent Mission of the People’s Republic of China addressed to the Secretary General of the United Nations*, CML/17/2009, 7 May 2009, available at, [http://www.un.org/Depts/los/clcs\\_new/submissions\\_files/submission\\_mysvnm\\_33\\_2009.htm](http://www.un.org/Depts/los/clcs_new/submissions_files/submission_mysvnm_33_2009.htm), accessed on 1 December 2016; *Note from the Permanent Mission of the Socialist Republic of Vietnam to the United Nations addressed to the Secretary General of the United Nations*, 86/HC-2009 available at [http://www.un.org/Depts/los/clcs\\_new/submissions\\_files/submission\\_mysvnm\\_33\\_2009.htm](http://www.un.org/Depts/los/clcs_new/submissions_files/submission_mysvnm_33_2009.htm), accessed on 1 December 2016.

<sup>34</sup> *Ibid.*

<sup>35</sup> *Ibid.*

<sup>36</sup> C.H. Schofield (2009) *op cit* note 4 at 67

<sup>37</sup> *Ibid.*

On the other hand, Article 121(3) of the LOSC provides that:

*“Rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf.”*

As a result of these provisions, theoretically, even minute islands have the potential capacity to generate massive maritime jurisdictional zones. These claims often also have significant resource and security implications. To put thing in perspective, if an island has no maritime neighbours within a 400 nm radius, it may generate 431,014 km<sup>2</sup> of territorial sea, EEZ and continental shelf rights. However, a mere “rock” with no nearby maritime neighbours may only generate a significantly reduced maritime jurisdictional zone of 1,550 km<sup>2</sup>.<sup>38</sup>

The problematic issue of distinguishing between “fully-fledged” islands, which are capable of generating the full suite of maritime zones, and mere rocks, which are incapable of generating such extensive claims, is explored more thoroughly in the next chapter. Indeed, it is clear that the distinction between islands and rocks in Article 121 of the LOSC is pivotal in determining the potential capacity of an insular feature to act as a basepoint for claiming maritime zones. This, perhaps, explains the significance attached to insular features and the rise in the number of international disputes involving insular features.

States with sovereignty over insular features are, unsurprisingly, eager to claim these formations as islands as opposed to mere rocks as the possibility of establishing a full 200 nm EEZ places numerous mid-ocean islands in a very advantageous position. The ratio of the area of the island to the area of the EEZ is nothing short of impressive. For example, the Cook Islands encompass a territory of 94 square miles, but generate a 1.360 thousand square mile EEZ; Nauru canvasses a 8.2 square mile territory, but has an EEZ of over 125 thousand square miles; and the Bermuda's occupy a 21 square mile territory, but enjoy a 123 thousand square mile EEZ. The vast maritime zones that can be claimed around “fully-fledged” islands present States with the opportunity to exploit both living<sup>39</sup> and non-living<sup>40</sup> resources within them, making the distinction between islands

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<sup>38</sup> These theoretical calculations, however, assume that the relevant island or rock in question has no area. As such features inevitably comprise some territory and therefore area, the potential maritime claims that can be generated from them are likely to be greater.

<sup>39</sup> S. Arico and C. Salpin ‘Bioprospecting of Genetic Resources in the Deep Seabed: Scientific, Legal and Policy Aspects’ *UNU-IAS Report* (2005) at 17.

<sup>40</sup> Traditionally, seabed hydrocarbon resources (oil and natural gas). It is notable in this context that offshore energy resources are becoming increasingly important: it has been estimated that around 60 per cent of global oil production now comes from offshore exploitation operations. See, “Offshore oil and gas around the World”, Ministry of Energy, Mines and Petroleum Resources, Government of British Columbia, available at,

and rocks an issue of great importance. Furthermore, the distinction between islands and rocks can have significant security and strategic dimensions.<sup>41</sup> Most notably, fisheries play a significant role for food security in coastal States, as well as other living resource opportunities derived from marine genetic resources.<sup>42</sup> For example, it has been estimated that marine biotechnology related products were estimated to be worth US\$100 billion in 2000 alone.<sup>43</sup>

Another important implication of the distinction between islands and rocks in Article 121 of the LOSC relates directly to the area of ocean that falls under the domain of the “high seas” and the “common heritage of mankind”. The world’s oceans are currently being divided amongst States in multilateral bargaining sessions that have been underway for some time.<sup>44</sup> These negotiations commenced under the pretense that the wealth of the world’s oceans would be the “common heritage” of humankind. However, the LOSC allocates the vast majority of ocean resources to the closest coastal States, significantly reducing the area designated for the common heritage of mankind and the high seas.

This issue has been exacerbated as the vast majority of coastal States have, unsurprisingly, proved to be eager claimants of maritime jurisdictional zones.<sup>45</sup> The majority of coastal States claim a 12 nm territorial sea and a 200 nm exclusive economic zone. If every coastal State makes a 200 nm maritime jurisdictional claim, it is estimated that these claims would embrace 43 million square nautical miles of marine space.<sup>46</sup> This constitutes a considerable 41 percent of the area of the oceans and 29 percent of the surface area of the Earth.<sup>47</sup> Thus, the area subject to maritime

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<http://www.empr.gov.bc.ca/OG/offshoreoilandgas/Pages/OffshoreOilandGasAroundtheWorld.aspx>, accessed on 29 November 2016.

<sup>41</sup> For example, the proximity of the contested Spratly Islands in the South China Sea to a strategic waterway of global significance, providing the key maritime link between the Indian Ocean and East Asia, is often cited as an example of this consideration. See R Emmers ‘Maritime Disputes in the South China Sea: Strategic and Diplomatic Status Quo’ *Institute for Defence and Strategic Studies (IISS) Working Paper No. 87* (2005) at 7-9. It is also the case that disputes over islands frequently give rise to overlapping maritime claims and this jurisdiction uncertainty may have implications for maritime security, undermining maritime security enforcement efforts. This is a potentially problematic issue given global dependence on sea-borne trade: over 80 per cent of world trade by volume being transported by sea. See, United Nations Conference on Trade and Development (UNCTAD), *Review of Maritime Transport 2008*, (Geneva: UNCTAD, 2008): xiii and 5.

<sup>42</sup> S. Arico and C. Salpin op cit note 39 at 17.

<sup>43</sup> Ibid.

<sup>44</sup> Ibid at 18.

<sup>45</sup> See Division for Ocean Affairs and the Law of the Sea, Office of Legal Affairs, United Nations, *Table of Claims to Maritime Jurisdiction* (2008) available at [http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/table\\_summary\\_of\\_claims.pdf](http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/table_summary_of_claims.pdf), accessed on 28 November 2016.

<sup>46</sup> C.H. Schofield, “The Trouble with Islands” op cit note 4 at 88.

<sup>47</sup> Ibid.

jurisdictional claims up to 200 nm is equivalent to the total land territory on the Earth's surface.<sup>48</sup> Furthermore, it has been estimated that continental shelf claims extending beyond 200 nm may possibly cover an additional 5 percent of the world's oceans.<sup>49</sup> Consequently, the area of the world's oceans left for the common heritage of mankind and the high seas is already relatively small. Any further reduction of these areas, resulting from excessive claims surrounding insular features, could be construed as a travesty of justice. This makes the need to clarify the ambiguities surrounding Article 121 even more poignant.

### 2.3 Mixed State Practice Surrounding Insular Formations

The need to obtain clarity regarding the interpretation of Article 121 is far from a theoretical issue. This issue is borne out in real life and is evidenced best by mixed State practice surrounding the regime of islands. It is no surprise that States tend to claim the greatest maritime jurisdictional zones available within the confines of international law. Accordingly, States in possession of insular features have generally advanced expansive maritime jurisdictional claims, even from tiny, remote and uninhabited insular features.<sup>50</sup>

The most extreme case of this practice is, possibly, Japan's continuous claims relating to the islets that constitute Okinotorishima.<sup>51</sup> Okinotorishima is a group of features, also known as Douglas Reef, forming a reef platform which is surrounded by a cluster of minute rocks, which marginally protrude above the high-tide level.<sup>52</sup> Although the actual reef platform is rather substantial in size, only two small rocks, just a few meters in area, remain above water at high tide. These two features have been described as no "larger than king-size beds" at high tide.<sup>53</sup>

Nevertheless, Japan has controversially asserted that these features are islands and thus, capable of generating a 200 nm exclusive economic zone. Furthermore, Japan made submissions

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<sup>48</sup> Symonds, P.A. Senior Adviser – Law of the Sea at Geoscience Australia (personal communication, July 2008).

<sup>49</sup> P.J. Cook and C.M. Carleton, *Continental Shelf Limits*, (2000) at 3.

<sup>50</sup> C.H. Schofield & D.K. Wang, "Regime of Islands under UNCLOS: Implications for the South China Sea", *Maritime Energy Resources in Asia: Legal Regimes and Cooperation*, NBR Special Report #37 (2012) at 68.

<sup>51</sup> See Y.H. Song, "Okinotorishima: A 'Rock' or an 'Island'? Recent Maritime Boundary Controversy between Japan and Taiwan/China," in *Maritime Boundary Disputes, Settlement Processes, and the Law of the Sea*, ed. S.Y. Hong and Jon. M. Van Dyke (The Hague: Martinus Nijhoff, 2009), 145-176.

<sup>52</sup> J.R.V. Prescott and C.H. Schofield, *The Maritime Political Boundaries of the World* (2005) at 84-85. Yann-huei Song states that at "highest tide the two above-tide features are only 16 and 6 centimetres above the surface of the water, respectively.

<sup>53</sup> See Jon Van Dyke, "Speck in the Ocean Meets Law of the Sea," letter to the editor, *New York Times*, January 21, 1988; A.L. Silverstein, "Okinotorishima: Artificial Preservation of a Speck of Sovereignty," *Brooklyn Journal of International Law* 16 no. 2 (1990): 409.

to UN Commission on the Limits of the Continental Shelf including additional continental shelf areas from these features.<sup>54</sup> However, it must be noted that China objected to these claims with the wording that “State Parties shall also have the obligation to ensure respect for the extent of the International Seabed Area...which is the common heritage of mankind, and not to affect the overall interests of the international community as a whole.”<sup>55</sup>

One need look no further than the unfolding events in the South China Sea for further examples of this expansionist trend. The status of numerous insular features under international law and thus, their capacity to generate maritime zones is a critical source of dispute in the South China Sea.<sup>56</sup> Due to the region’s complex geographical, geological, geopolitical and legal features, it is considered a key potential “flashpoint” in East Asia and is viewed as an indicator for Southeast Asian Security.<sup>57</sup> The Philippines initiated arbitral proceedings against China under Article 279 of the LOSC and has urged the Permanent Court of Arbitration in The Hague to clarify the status of various insular formations claimed by China.<sup>58</sup>

However, there are also instances of State practice, albeit more rare, which stand in contrast to this expansionist approach. In rare instances, certain States have chosen to adopt a more restrained approach to the generation of maritime jurisdictional claims from their insular features. Perhaps, the most notable example in this regard is the United Kingdom’s reclassification of Rockall, a tiny remote insular feature in ocean northwest of the British Isles. The United Kingdom initially used Rockall as a valid basepoint for a 200 nm maritime jurisdictional claim, but subsequently conducted a “roll-back” of these extensive claims in the face of mounting international objections. As a result, the United Kingdom relinquished around 60 000 nm<sup>2</sup> of its previously claimed fishery zone.<sup>59</sup>

Mixed State practice concerning the regime of islands emphasises the need to rid Article 121 of its prevailing ambiguities. Obtaining a certain and clear interpretation of Article 121 is the first

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<sup>54</sup> Japan’s Submission to the Commission on the Limits of the Continental Shelf, available at [http://www.un.org/Depts/los/clcs\\_new/submissions\\_files/jpn08/jpn\\_execsummary.pdf](http://www.un.org/Depts/los/clcs_new/submissions_files/jpn08/jpn_execsummary.pdf), accessed on 30 November 2016.

<sup>55</sup> See China’s reaction to Japan’s submission at [http://www.un.org/Depts/los/clcs\\_new/submissions\\_files/jpn08/chn\\_6feb09\\_e.pdf](http://www.un.org/Depts/los/clcs_new/submissions_files/jpn08/chn_6feb09_e.pdf), accessed on 30 November 2016.

<sup>56</sup> C.H. Schofield & D.K. Wang (2012) op cit note at 61.

<sup>57</sup> Ibid.

<sup>58</sup> The implications of this arbitration on the interpretation of Article 121 of the LOSC will be explored thoroughly in chapter 5 of this dissertation.

<sup>59</sup> C.H. Schofield & D.K. Wang (2012) op cit note 50 at 69.

logical step in attempting to unify State practice relating to the maritime jurisdictional claims based on insular features. This understanding elevates the research question of this dissertation out of the realm of theory and plants it firmly in our global reality, illustrating that ascertaining a clear interpretation of Article 121 has very real implications. The following chapter will dissect Article 121 in order to illuminate the ambiguities in the Article.

## Chapter 3

### *Dissecting Article 121 in Theory*

Article 121 of the LOSC reads as follows:

#### *“Regime of Islands*

1. *An island is a naturally formed area of land, surrounded by water, which is above water at high tide.*
2. *Except as provided for in paragraph 3, the territorial sea, the contiguous zone, the exclusive economic zone and the continental shelf of an island are determined in accordance with the provisions of this Convention applicable to other land territory.*
3. *Rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf.*<sup>60</sup>

Articles 121(1) and 121(2) are largely unproblematic. However, Article 121(3) has been the source of great controversy due to its ambiguous textual composition. Article 121(3) is made up of various textual elements which are capable of a variety of contrasting interpretations. Issues such as what is meant by “human habitation”, “economic life” and “of their own” riddle the provision, making it an interpretational nightmare. These are but a few of the ambiguous elements contained within the provision.<sup>61</sup> The ambiguity contained in Article 121(3) seriously hampers any attempt to distinguishing between rocks and islands in the context of Article 121, the importance of which has been canvassed in detail in the previous chapter. Given the practical importance of the distinction between rocks and islands, it is surprising that Article 121 was drafted in an intentionally ambiguous manner. The drafting history of Article 121 will be explored below in order to illustrate why intentional ambiguity was elected over certainty.

#### **3.1 The Drafting History of Article 121: The Birth of Ambiguity**

As will be illustrated below, the drafting history of Article 121 of the LOSC does very little in shedding light on the intention of the drafters. If anything, an examination of the *travaux préparatoires* only exhibits the diversity of views provoked by the issue of islands.<sup>62</sup> Nonetheless,

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<sup>60</sup> Article 121 of the LOSC.

<sup>61</sup> The exact nature of Article 121(3)'s textual ambiguity is fleshed out later in this chapter.

<sup>62</sup> See, United Nations, United Nations Conferences on the Law of the Sea, Official Records, Third Conference, (Buffalo, New York: Williams. Hein & Co., 1980, reprinted 2000). See also S.N. Nandan and S. Rosenne *United*

the main themes evident during the negotiations surrounding the regime of islands at UNCLOS III are outlined below.

### 3.1.1 Size

The geographical size of an insular feature in relation to its capacity to generate maritime claims was a prominent theme in the negotiations regarding the regime of islands. Arguments regarding the size of insular features were even evident during the drafting process of Article 10 of the 1958 Convention on the Territorial Sea and Contiguous Zone (CTSCZ).<sup>63</sup> Although it was popularly asserted that the definition of an island should be coupled with a size limit in order to impede the ability of small, “pin-prick[s] of rocks”, to generate disproportionately large maritime claims<sup>64</sup>, ultimately, a size criterion was not incorporated into the 1958 CTSCZ.

The size of an island as a basis for distinguishing between their maritime entitlements was raised again during the early sessions of UNCLOS III. Notably, Malta proposed that there should be a distinction between “islands” and “islets” based on the size of the feature. Malta asserted that islands should be more than one square kilometre in areas, whereas islets should be less than one square kilometre in area.<sup>65</sup> Similarly, Ireland also proposed a size criterion in order for an insular feature to qualify as an island it must possess at least 10 percent of the population and land area of the State to which it belongs.<sup>66</sup> A host of 14 African States<sup>67</sup> also suggested that the ability of islands to generate maritime space should hinge on “equitable principles” which take into account “all relevant factors and circumstances”. The size of the island was forwarded as one of these “relevant factors and circumstances”.<sup>68</sup> Furthermore, Romania also made proposals aimed at denying small insular features within their maritime zones from obtaining “true” island status.<sup>69</sup>

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*Nations Convention on the Law of the Sea 1982: A Commentary*, Volume III (Dordrecht: Kluwer Law International, 1995) at 321-339.

<sup>63</sup> H.W. Jayewardene, *The Regime of Islands in International Law* (1990) at 4-5.

<sup>64</sup> D.H.N. Johnson, D.H.N., “Artificial Islands”, *International Law Quarterly* Vol 4, 2 (1951) at 4.

<sup>65</sup> UN Doc.A/AC.138/SC.II/L.28, Article 1. See S.N. Nandan and S. Rosenne (1995) op cit note 62 at 328.

<sup>66</sup> UN Doc.A/CONF.62/C.2/L.43 (1974).

<sup>67</sup> The 14 States included Algeria, Cameroon, Ghana, Ivory Coast, Kenya, Liberia, Madagascar, Mauritius, Senegal, Sierra Leone, Somalia, Sudan, Tunisia and Tanzania.

<sup>68</sup> UN Doc.A/AC.138/SC.II/L.40. S.N. Nandan and S. Rosenne (1995) op cit note 62 at 329-330.

<sup>69</sup> S.N. Nandan and S. Rosenne (1995) op cit note 62 at 330; UN Doc.A/AC.138/SC.II/L.53. Romania’s proposals concerned both size and habitability. Romania wanted to create a new category of insular features – “islets and small islands”, which should be “uninhabited and without economic life, which are situated on the continental shelf of the coast, do not possess any of the shelf or other marine space of the same nature.”

Differing national interests were obviously at play during these negotiations on size, as contrary views were also prevalent. Most notably, Greece, possessing many small insular features, responded to Malta's proposal by asserting that "the regime of islands could not be legally based on criteria of size, population, geographical location or geological configuration without jeopardising the principles of sovereign equality and the integrity of territorial sovereignty."<sup>70</sup> In addition, Greece produced draft articles that emphasised that islands constitute an important contingent of the territory of the State which owns them and that the maritime zones claimable from the continental areas of the State should also apply to islands, regardless of their size.<sup>71</sup> Similarly, China proposed that all islands belonging to a State should enjoy the same breadths and limits of the territorial sea that the State enjoys.<sup>72</sup>

There were also several nations present at UNCLOS III who counteracted the impetus towards connecting the definition of an island with size and habitability in order to maintain the *status quo*. These nations argued that there should be no distinctions of any kind as long as an island was above the high-water mark as it would be impossible to practically apply a list of criteria for islets or small islands in every geographical circumstance without resulting in inequitable outcomes in certain cases.<sup>73</sup>

In a similar vein, small island States, with limited land resources, argued that all of their islands should generate an EEZ, regardless of characteristics such as size.<sup>74</sup> Four Pacific island States made a proposal to ensure that all islands should generate maritime entitlements "in accordance with provisions of the Convention applicable to other land territory."<sup>75</sup>

### 3.1.2 Diverse National Interests

Upon examination of the *travaux préparatoires* it becomes apparent that the issue of islands provoked diverse views amongst the States present at the negotiations.<sup>76</sup> It is clear that the

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<sup>70</sup> UN Doc.A/AC.138/SC.II/L.29. See S.N. Nandan and S. Rosenne (1995) op cit note 62 at 329.

<sup>71</sup> Ibid.

<sup>72</sup> C.R. Symmons, *The Maritime Zones of Islands in International Law*, (1979) at 40.

<sup>73</sup> Ibid. The United Kingdom delegate asserted that "...there was an immense diversity of island situations, ranging from large and populous islands of even larger continental States to small islands with self-sufficient populations, and that, inter alia, the attempt by some delegations to categorise islands in terms of size would not result in any generally applicable rules which would be equitable in all cases; and there was grave danger of discounting many islands of both absolute and relative importance."

<sup>74</sup> Schofield (2009) op cit note 4 at 87.

<sup>75</sup> UN Doc.A/CONF.62/C.2/L.30. See Nandan and Rosenne op cit note 62 at 331.

<sup>76</sup> See United Nations, 'United Nations Conferences on the Law of the Sea, Official Records, Third Conference' (1980, reprinted 2000). S.N. Nandan and S. Rosenne (1995) op cit note 62 at 321-339.

drafters of the Article were faced with the challenge of bridging the rift between certain States which were keen to reduce the impact of small insular features on claims to maritime jurisdiction and other States which had a vested interest in maximising the maritime jurisdictional claims afforded to insular features.

A key feature of the debates surrounding insular features at UNCLOS III centered on the specific national interests of many of the key contributors. These interests were not only linked to the ability of small insular features to generate large maritime jurisdictional claims, but also on the capacity of these insular features to impact on the delimitation of maritime boundaries.<sup>77</sup> Certain coastal States, such as Romania, Turkey and Denmark, wanted to reduce the impact of islands on maritime jurisdictional claims and maritime boundary delimitation as they stood to benefit from such a minimisation. However, other States who possessed insular features, were pushing to maximise the potential claims afforded to these features.

The separate national interests of the major contributors were rather transparent. Romania was particularly concerned with the potential of Ukraine's possession of Ostrov Zmeiny (Serpents' or Snake Island), a small island, situated 19nm of its coast, to influence the delimitation of maritime boundaries in the Black Sea.<sup>78</sup> In a similar vein, Turkey wanted to restrict the potential maritime claims of insular features, a majority of which fall under Greek sovereignty, in the Aegean Sea.<sup>79</sup> Similarly, Denmark's interest where twofold- safeguarding its maritime claims stemming from the Faeroe Islands, while also minimising the United Kingdom's potential claims in the northeast Atlantic Ocean from Rockall.<sup>80</sup> On the other hand, Greece had a vested interest in protecting and maximising the ability of its many insular features to generate maritime space. Venezuela was also anxious to preserve the ability of small insular features to generate extended maritime jurisdictional claims, as this would be beneficial to its claims surrounding Aves Island (Bird Rock) in the eastern Caribbean Sea.<sup>81</sup>

All of the vested interests of the major contributors had to be taken into account by the drafters of Article 121. The draft for the final text of Article 121 was proposed in 1975 at the third session of

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<sup>77</sup> R. Beckman and C.H. Schofield, 'Moving Beyond Disputes over Island Sovereignty: ICJ Decision Sets Stage for Maritime Boundary Delimitation in the Singapore Strait', *Ocean Development and International Law*, Volume 40 (2009) 1-35 at 9-10.

<sup>78</sup> J.R.V. Prescott and C.H. Schofield op cit not 52 at 335.

<sup>79</sup> Ibid at 68-70.

<sup>80</sup> Ibid at 70-72.

<sup>81</sup> Ibid at 72-75.

UNCLOS III.<sup>82</sup> However, it was decided that during the course of the informal and formal consultations, the scope of the draft article should be narrowed to exclude insular features held by colonial powers<sup>83</sup> and the effect of insular features on the delimitation of maritime boundaries. A large group of nations, spearheaded by Ireland, were particularly concerned with the latter issue as it impacted on their geographical situations and national interests.<sup>84</sup> As a result the role of islands in maritime boundary delimitation was excluded from the regime of islands and was rather set aside for States to determine politically as they set their maritime boundaries.<sup>85</sup>

The draft text that emerged in 1975 consisted of 3 paragraphs. Paragraph one echoed verbatim the text of Article 10 of the 1958 Convention on the Territorial Sea and the Contiguous Zone:

*“1. An island is a naturally formed area of land, surrounded by water, which is above high tide.”*

The second paragraph was a simple restatement of the principle that islands should generate maritime zones in the same way as other land territory:

*“2. Except as provided for in paragraph 3, the territorial sea, the contiguous zone and the continental shelf of an island are determined in accordance with the provisions of this Convention applicable to other land territory.”*

The third, and problematic, paragraph seemed to be an adaption of Romania’s proposals regarding small islands and islets<sup>86</sup>:

*“3. Rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf.”*

Although various amendments were proposed, the 1975 draft text remained unaltered throughout later negotiating documents. Various amendments were proposed, even to the extent of deleting

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<sup>82</sup> Article 132 of the Informal Single Negotiating Text of 1975 proposed by Reynaldo Galindo Pohl, of El Salvador, Chairman of the Second Committee of UNCLOS III at the time.

<sup>83</sup> See J.R.V. Prescott and C.H. Schofield op cit note 52 at 335; The issue of “islands under colonial dependence or foreign domination or control” was raised by Trinidad and Tobago, and reflected concerns on the part of many newly independent developing States over the remaining colonial territories of former colonial powers, including far flung and often small island possessions.

<sup>84</sup> Ibid at 332. Ireland’s observation that: “it is generally agreed that offshore islands should not be used as the base point for measuring an equidistance boundary line in all circumstances”, was supported by most nations.

<sup>85</sup> Schofield (2009) op cit note 4 at 89.

<sup>86</sup> J.R.V. Prescott and C.H. Schofield (2005) op cit note 52 at 336-338.

the third paragraph of the Article in its entirety.<sup>87</sup> Many delegations present at the negotiations pointed out that the third paragraph was ambiguous and would breed problems.<sup>88</sup> However, all of the proposed amendments to the draft Article 121 were ultimately rejected. Consequently the *status quo* prevailed, resulting in the ambiguous 1958 definition being left intact and incorporated into Article 121 of the LOSC.

The above exhibits that the text of Article 121, especially paragraph three, was formulated in an intentionally ambiguous fashion.<sup>89</sup> There is little doubt that Article 121 is constructed from lowest common-denominator language in order to encourage States, often with divergent views on the issue, to assent.<sup>90</sup> The text of Article 121 was designed to be interpreted in a variety of ways, making any attempt at arriving at a clear interpretation of Article 121 a herculean task. Whilst Articles 121(1) and 121(2) are relatively straight forward, Article 121(3) is largely ambiguous. Article 121(3) comprises of a host of textual elements that can all be interpreted in different ways, making interpreting the Article a complex task. Thus, correctly distinguishing between islands and rocks in the context of Article 121 will be impossible until the various textual elements of Article 121(3), discussed below, have been clarified.

### **3.2 Dissecting the Textual Elements of Article 121(3)**

Article 121(3) of the LOSC incorporates various textual elements that need to be considered. These elements include the terms “rocks”, “cannot”, “sustain”, “human habitation”, “or”, and “economic life of their own”. These elements can be interpreted in a variety of ways, making Article 121(3) the source of much ambiguity. Each aforementioned element will be discussed below. Whether or not a concrete interpretation of these elements has been reached through State practice, particularly that of national legislation on islands and insular status, and the jurisprudence of international (and national, where appropriate) courts and tribunals will be analysed in the following chapter.

First, the use of the word “rocks” in Article 121(3) of the LOSC is contentious as it raises the question of whether the drafters of the LOSC intended any form of geomorphological or geological

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<sup>87</sup> The United Kingdom suggested a complete removal of the third paragraph during the eleventh session of UNCLOS III, but this proposal was strongly opposed by Turkey among others. J.R.V. Prescott and C.H. Schofield (2005) *op cit* note 52 at 70.

<sup>88</sup> *Ibid* at 330-336; R. Beckman and C.H. Schofield (2009) *op cit* note 77 at 10.

<sup>89</sup> Schofield (2009) *op cit* note 4 at 90.

<sup>90</sup> *Ibid*.

criteria. Put simply, is Article 121(3) only supposed to apply to insular features that are made up of solid rock or that are alternatively rock-like in nature?<sup>91</sup>

Second, the word “cannot” in Article 121(3) can be construed as ambiguous as it is uncertain whether the word indicates a concept of capacity.<sup>92</sup> In other words, in order for an insular feature to be classified as a rock should the enquiry be concerned with whether the feature actually sustains human habitation and economic life at the present time, or should the enquiry rather hinge upon an objective assessment of the feature’s ability to sustain human habitation and economic life.<sup>93</sup> Does the fact that an insular feature is currently uninhabited and does not currently sustain economic life prove that the feature is incapable of ever sustaining a population or economic life?<sup>94</sup>

Third, the word “sustain” can be interpreted in a variety of ways. Does the word “sustain” indicate a time or qualitative element, or both?<sup>95</sup> Exactly what is meant by the word will have a significant impact on how terms like “human population” and “economic life” are in turn interpreted.

Fourth, the term “human habitation” can be interpreted in a various ways. The ordinary meaning of “human habitation” needs to be discerned in order to bring clarity to Article 121(3). Furthermore, does the term “habitation” imply a qualitative element?<sup>96</sup> It is uncertain whether the mere survival of a group of people on an insular feature would be sufficient to satisfy the threshold of human habitation or whether the feature must also provide conditions which are sufficiently conducive for human life so that people can actually inhabit, as opposed to merely survive, on the feature.<sup>97</sup>

Additionally, forms of human habitation and livelihood may differ greatly. Should a particular culture or mode of habitation be assumed for the purposes of Article 121(3)?<sup>98</sup> If not, then surely there should be certain factors that are constant wherever human habitation occurs.<sup>99</sup> If this is the case then the exact nature of these factors also has to be discerned.

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<sup>91</sup> *The South China Sea Arbitration* supra note 16 at para 479.

<sup>92</sup> *Ibid* para 483.

<sup>93</sup> *Ibid*.

<sup>94</sup> *Ibid*.

<sup>95</sup> *Ibid* para 485.

<sup>96</sup> *Ibid* para 488.

<sup>97</sup> *Ibid* para 489.

<sup>98</sup> *Ibid* para 490.

<sup>99</sup> *Ibid*.

Another source of confusion in this regard is whether the term “human habitation” implies a minimum number of people.<sup>100</sup> As Article 121(3) does not specify any specific number of people, would the existence of a single person on an insular feature fall within the ordinary understanding of human habitation?<sup>101</sup>

Fifth, Article 121(3) of the LOSC states that “rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf”. Thus, the question that arises is whether the criteria of capacity to sustain “human habitation” and “economic life of its own” are both required for an insular feature to generate an EEZ and continental shelf, or if either one of these criteria in isolation will be sufficient.<sup>102</sup>

Finally, the next element of the text of Article 121(3) that requires consideration is the term “economic life of their own”. This phrase is particularly contentious as it includes two elements that will need to be interpreted in order to clarify Article 121(3). First, what is meant by economic life needs to be unpacked and then, second, what is intended by the term “of their own” will also need to be interpreted.

What is meant by “economic” and “life” can create ambiguity in the Article. Furthermore, as “economic life” needs to be read in conjunction with the time component of “sustain”, would a once off transaction be sufficient or would the economic activity need to be ongoing?<sup>103</sup> As the drafters of the Article chose not to import any reference to the value of the economic activity, would the need for the economic activity to be sustained over a period of time imply that the economic activity must be viable?<sup>104</sup>

A further question that needs to be answered is whether economic activity centered on the exploitation of the resources in the territorial sea, the EEZ and the continental shelf is a sufficient to endow and insular feature with economic life.<sup>105</sup>

Additionally, the term “of their own” raises further questions that need to be clarified. Must the insular feature be able to support an independent economic life without relying largely on the

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<sup>100</sup> Ibid para 491.

<sup>101</sup> Ibid.

<sup>102</sup> Ibid para 493.

<sup>103</sup> Ibid para 499.

<sup>104</sup> Ibid.

<sup>105</sup> Ibid para 500.

infusion of outside resources or serving only as an object for extractive activities, which do not incorporate the local population?<sup>106</sup>

An exploration of the textual elements of Article 121(3) illustrates and explains the complexity of the provision. A bare reading of the text of Article 121(3) points towards the inescapable conclusion that a textual interpretation alone will never yield exact answers on how to distinguish between rocks and islands in the context of Article 121. However, in order to avoid conflict between States and create much needed legal certainty, a definitive interpretation of Article 121(3) is crucial. State practice regarding the issue is simply too veined to aid in creating a clear interpretation of Article 121(3).<sup>107</sup> Perhaps, mixed State practice relating to the distinction between rocks and islands is an unavoidable symptom of the ambiguous nature of Article 121(3). The only remaining meaningful avenue for clarifying Article 121 is through international jurisprudence on the issue. The following chapter is dedicated to an exploration of international jurisprudence insofar as it relates to the distinction between rocks and islands and seeks to determine if international jurisprudence has arrived at a clear interpretation of Article 121 with particular reference to the distinction between rocks and islands.

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<sup>106</sup> Ibid para 501.

<sup>107</sup> See the discussion relating to mixed State practice in chapter 2.

## Chapter 4

### *Past Sources of Clarification – A Dead End?*

#### 4.1 Sources of Clarification

As seen in the previous chapter, it is impossible to interpret Article 121 through the lens of current existing materials on the subject. It is only through the practice of States in the way they interpret Article 121 and the rulings of international courts and tribunals that some form of clarity may emerge regarding Article 121. However, up until this point State practice and international jurisprudence has proved largely unhelpful as both international courts and States have unfortunately opted to side-step the issue.

However, there have been various developments in international jurisprudence in recent years which offer prospects for clarifying Article 121. In the realm of international jurisprudence, For the purposes of answering the primary research question of this dissertation, five cases which have direct implications on the interpretation of Article 121 of the LOSC will be examined in further detail. These cases are the *Anglo-French Arbitration*,<sup>108</sup> the *Jan Mayen Case*,<sup>109</sup> the *Volga Case*,<sup>110</sup> the *Pedra Branca Case*,<sup>111</sup> and the more recently concluded *Black Sea Case*.<sup>112</sup>

These cases will be presented in chronological order as this is a logical method of analysis when considering whether, over time, the international community is moving towards certainty regarding Article 121, with particular reference to the distinction between rocks and islands. It will be evidenced below that international courts and tribunals have been reluctant to interpret Article 121, but an attempt will be made to investigate whether the aforementioned cases present prospects for clarifying one or more of the textual elements of Article 121(3), as referred to in the previous chapter.

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<sup>108</sup> *Arbitration between the United Kingdom and France on the Delimitation of the Continental Shelf*, Decision of 30 June 1977, International Legal Materials, Volume XVIII (1979): 3-129.

<sup>109</sup> *Case Concerning Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway)*, [1993] ICJ Reports, 38 (hereinafter, Jan Mayen Case).

<sup>110</sup> *The "Volga" Case (Russian Federation v. Australia) (Prompt Release)* (2002) ITLOS Case No. 11 (hereinafter, the Volga Case).

<sup>111</sup> *Case concerning Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)*, Judgment of 23 May 2008.

<sup>112</sup> *Case concerning Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, [2009] ICJ Reports 3.

#### 4.1.1 The *Anglo-French Arbitration*

The *Anglo-French Arbitration* concerned the delimitation of the continental shelf boundary between France and the United Kingdom in the English Channel. A Court of Arbitration was established by France and the United Kingdom for this purpose. During the arbitration the Court had the opportunity to address the question of the insular status of Eddystone Rock, a key basepoint in the English Channel.

The United Kingdom asserted that Eddystone Rock constituted an island and was thus a valid basepoint that could be used for the creation of a median line between the British and French coasts. To bolster this claim, the United Kingdom referred to vertical datum on British Admiralty nautical charting to evidence that Eddystone Rock was above high tide. In particular, during the oral arguments, counsel for the United Kingdom stated that “Eddystone Rocks do constitute an island” as they “only cover entirely at high water equinoctial springs” and protrude from the water at mean high water spring tides which reflect the United Kingdom’s choice of vertical datum.<sup>113</sup> In opposition, France asserted that Eddystone Rocks was a mere low-tide elevation as the formation was not uncovered throughout the duration of the year.<sup>114</sup>

In regard to their election of vertical datum, the United Kingdom asserted that both customary law and Article 10 of the Convention on the Territorial Sea and Contiguous Zone held that “the relevant high-water line is the line of mean high-water spring tides.” The United Kingdom claimed that this was in fact the high-water line depicted on all British Admiralty Charts and that many other States supported this view. Additionally, The United Kingdom recognised that it was possible to have different interpretations of the high-water line, but still asserted that that the mean high-water spring tides is the only precise interpretation and that House Rock protruded two feet above this level and 0.2 feet above the highest astronomical tide.<sup>115</sup> In rebuttal, the French government responded that “the British concept of high-water is very questionable” and that a vast number of States interpret high-water to mean “the limit of the highest tides.”<sup>116</sup> France claimed that even

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<sup>113</sup> Arbitration between the United Kingdom and France on the Delimitation of the Continental Shelf, Decision of 30 June 1977, International Legal Materials, Volume XVIII (1979): para 122, p. 66. Counsel for the United Kingdom also remarked that Eddystone Rocks were marked on relevant British Admiralty charts “without having provoked any objection from the French authorities.” The United Kingdom subsequently backed up its contention by supplying both the French authorities and the Court with a series of hydrographic surveys and charts indicating that at least one feature among the Eddystone Rock group, House Rock, was above the United Kingdom’s definition of high tide by several metres (a drying height of 5.5 metres on the then current Admiralty Chart No.1613).

<sup>114</sup> Ibid para 125 at 68.

<sup>115</sup> Ibid para 127.

<sup>116</sup> Ibid.

based on the United Kingdom's own data, that Eddystone Rocks were "only very slightly above highest full-tides and may be covered by them."<sup>117</sup> Furthermore, France drew the court's attention to the fact that the United Kingdom had not included Eddystone Rocks into its straight baseline system, undermining its assertions that the formations were indeed islands.<sup>118</sup>

Unfortunately, the court side-stepped any analysis of an interpretation of Article 121. The court established that France had acquiesced with regard to the United Kingdom's use of Eddystone Rocks use as a basepoint for the delimitation of the United Kingdom's fishery zone and in regard to its use as a basepoint for the creation of median lines in the Channel.<sup>119</sup> Ultimately, the court concluded that Eddystone Rock should be treated as a valid basepoint for the delimitation of the continental shelf boundary in the English Channel. However, the court did not take a position pertaining to the parties' different views on the precise legal status of Eddystone Rock.<sup>120</sup> This presents an example of the reluctance of international courts and tribunals to tackle the issue of interpreting Article 121 of the LOSC. This trend has been echoed in all of the subsequent cases discussed in this chapter. At best, only certain hints on the interpretation of Article 121 of the LOSC can be gleaned from the cases that follow.

#### **4.1.2 The *Jan Mayen Case***

The *Jan Mayen Case*, between Norway and Denmark, involved the delimitation of the maritime boundary of Jan Mayen Island, owned by Norway, and Greenland. The ICJ was called upon by the concerned States to draw a definitive line of delimitation for their respective continental shelf and fishing zone areas.<sup>121</sup> Unfortunately, Denmark did not claim that Jan Mayen was an Article 121(3) rock, precluding it from generating continental shelf rights. Thus, the court did not have to address the issue of island classification and the distinction between islands, which are capable of generating extended maritime zones, and rocks which are incapable of generating such claims. Consequently, as in the *Anglo-French Arbitration*, very little information relating to the interpretation of Article 121 can be gleaned from this case.

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<sup>117</sup> Ibid para 138 at 72.

<sup>118</sup> Ibid para 125 & 138 at 67 and 72.

<sup>119</sup> Ibid paras 132 and 137 at p 70-73.

<sup>120</sup> Ibid para 144 at p 74. See also N.S.M Antunes, *Estoppel, acquiescence and recognition in territorial and boundary dispute settlement*, *Boundary and Territory Briefing*, Vol.2, no.2, (Durham: International Boundaries Research Unit, 2000) at 22-23.

<sup>121</sup> *Jan Mayen* casesupra note 109 at paras 9-10.

However, the case is relevant to the present discussion as Jan Mayen was generally considered to be an island, which was capable of generating extended maritime claims, based purely on its size.<sup>122</sup> Perhaps, this reasoning was based on the fact that Jan Mayen is 54.8 km long, which is far larger than the formations under consideration for inclusion in Article 121(3) at UNCLOS III.<sup>123</sup> This may, arguably, suggest that any insular formations equal or greater in size to Jan Mayen will automatically be considered islands and not mere rocks. The argument that size alone should determine the status of an insular formation carries very little weight in light of the drafting history of Article 121 and its lack of popularity in subsequent jurisprudence.

The issue of the size of insular formations as it relates to distinguishing between rocks and islands is an issue that was debated thoroughly during the negotiations at UNCLOS III. Ultimately, no size criterion was included in the final text of Article 121. This could suggest that size alone should not be a determinative factor when distinguishing between rocks and islands. However, the issue of the size of an insular formation as it relates to the capacity of the formation to sustain human habitation and an economic life of its own has been raised in subsequent cases. Most notably, the issue was raised in the *Black Sea Case*, but the Court chose not to explore the issue. The issue was later explored in the *South China Sea Arbitration* where it was found that size can be determinative in distinguishing between rocks and islands, only insofar as the size of the insular formation relates to its capacity to sustain human habitation and an economic life of its own. These two elements – human habitation and economic life – are fundamental in distinguishing between rocks and islands and the size of an insular formation should only be considered when it has a direct correlation to the capacity of the insular formation to sustain these two elements.

#### **4.1.3 The Volga Case**

The *Volga Case* was brought before ITLOS and concerned the prompt release of a Russian fishing vessel that was apprehended for alleged illegal fishing in the waters surrounding Australia's Heard and McDonald Islands. The *Volga Case* is relevant to the present discussion, as Judge Budislav Vukas pronounced specifically on the issue of islands and Article 121 of the LOSC. In his separate declaration, Judge Vukas clearly recorded his opposition to the extensive EEZ claims that Australia had made around McDonald and Heard Islands. He reasoned that Australia should not have made such extensive claims around the formations as:

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<sup>122</sup> M. Gjetnes, "The Spratlys: Are they Rocks or Islands?," *Ocean Development and International Law*, Vol.32, No. 191, 2001 at 193 and 199.

<sup>123</sup> *Jan Mayen* casesupra note 109 para 61.

*“The reason for giving exclusive rights to the coastal states was to protect the economic interests of the coastal communities that depended on the resources of the sea, and thus to promote their economic development and enable them to feed themselves. This rationale does not apply to uninhabited islands, because they do not have coastal fishing communities that need such assistance.”<sup>124</sup>*

Judge Vukas acknowledged that declaring an EEZ around insular formations may be useful for preserving the marine environment, however, he disagreed that Australia needed exclusive rights to meet this objective. He reasoned that there are alternative methods to preserve and protect the fragile resources around the formations, such as by way of the Convention on the Conservation of Antarctic Marine Living Resources (CCAMLR).<sup>125</sup> Judge Vukas had previously taken a similar stance in regard to France’s extensive EEZ claims around the Kerguelen Island, which adjoins Australia’s claims around Heard and McDonald Islands.<sup>126</sup>

Both Heard and McDonald Islands are undoubtedly inhospitable and remote in character. Heard Island is situated in the sub-Antarctic waters 2200 nm southwest of Perth, while McDonald Island is located 23 nm further west.<sup>127</sup> Although these formations lack permanent inhabitants, they are rather large in size. McDonald Island and its associated islets encompass around 2.5 km<sup>2</sup> in area, while Heard Island canvasses a far greater area of 368 km<sup>2</sup>. Australia claimed its 200 nm fishing zone around Heard and McDonald Islands in 1979 and had encountered no known formal protests from other States. Even the Russian Federation did not challenge Australia’s claims around Heard and McDonald Islands. Additionally, the majority views of the ITLOS may be interpreted as validating Australia’s claim to an EEZ around the formations.

Judge Vukas’ objections were raised through a separate declaration. However, it is likely that the majority were of the view that Australia’s claims around the Heard and McDonald Islands were not of direct relevance to the prompt release of the fishing vessel which the ITLOS had to consider without delay. This reasoning is strengthened in light of Russia’s non-challenge to Australia’s EEZ claims around the formations.<sup>128</sup> Thus, it remains somewhat unclear as to the extent that Judge

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<sup>124</sup> Declaration of Vice-President Vukas in *Volga* case supra note 110 para 6.

<sup>125</sup> Ibid para 7; Convention on the Conservation of Antarctic Marine Living Resources (CCAMLR), Canberra, 20 May 1980, in force 7 April 1982, (1980) 19 ILM 837.

<sup>126</sup> *The “Monte Confurco” Case (Seychelles v. France)* (2000) ITLOS Case No 6, Declaration of Judge Vukas.

<sup>127</sup> See, Geoscience Australia, “Heard and McDonald Islands” available at <http://www.ga.gov.au/education/facts/dimensions/externalterr/heard.htm>, accessed on 20 December 2016.

<sup>128</sup> It can be argued, however, that Russia would have little incentive to challenge Australia’s EEZ claim, since if the vessel had, in fact, been apprehended on the high seas, it is doubtful whether ITLOS would have had jurisdiction to

Vukas' objection clarifies Article 121 of the LOSC. However, the objection of Judge Vukas seems to signify that the distinction between an Article 121(1) island and an Article 121(3) rock hinges primarily on whether the island is inhabited or capable of habitation. Unfortunately, Judge Vukas stopped short of exploring what is actually meant by the element of human habitation mentioned in Article 121(3) of the LOSC. Arguably, all that can be discerned from Judge Vukas' objection is that when the status of an insular feature is in question, the most important factor to be considered is whether the insular feature sustains human habitation or is capable of doing so. This could imply that the other elements of Article 121(3), such as economic life and size should be attributed a diminished importance in determining the status of insular features.

Although this may shed light on the weight to be attributed to the elements of Article 121(3) when distinguishing between rocks and islands, what is meant by human habitation was left unaddressed. Furthermore, because Judge Vukas' reasoning centres solely on the element of human habitation and the issue of distinguishing between rocks and islands was overlooked by the other Judges, the *Volga Case* does little to clarify the ambiguous elements of Article 121(3).

#### **4.1.4 The *Pedra Branca Case***

The *Pedra Branca Case* concerned the sovereignty over three tiny insular formations (Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge) situated where the Singapore Strait opens into the South China Sea. The ICJ ruled that Singapore enjoyed sovereignty over Pedra Branca/Pulau Batu Puteh (Pedra Branca)<sup>129</sup>, while Malaysia enjoys sovereignty over Middle Rocks. The court did not specifically determine who enjoys sovereignty over South Ledge.<sup>130</sup>

Pedra Branca is the largest of the three disputed features. It is a small island made of granite, covering an area of roughly 8560 m<sup>2</sup> at low tide. A British Admiralty Pilot described Pedra Branca as "a rock, 7m high, on the southeast side of the Middle Channel" adorned by Horsburgh Light which was constructed on the island in 1850.<sup>131</sup> Additionally, navigational facilities and a helicopter pad were built on the island.<sup>132</sup> Middle Rocks is located 0.6 nm to the south of Pedra Branca and comprises of two clusters of rocks which are about 250 m apart and are permanently, ever so

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hear the case and, consequently there would have been no prompt release at the behest of that court for the *Volga*.

<sup>129</sup> Singapore referred to the island as Pedra Branca while Malaysia referred to it as Pulau Batu Puteh. The Court made use of both names throughout its judgment. However, as the Court concluded that Singapore enjoys sovereignty over the island, reference here will be to Pedra Branca.

<sup>130</sup> *Pedra Branca* cases *supra* note 111 paras 149-163

<sup>131</sup> *Ibid*.

<sup>132</sup> *Ibid* para 249.

slightly, above water at high tide.<sup>133</sup> South Ledge is a low-tide elevation, located 2.2 nm southwest of Pedra Branca.<sup>134</sup>

Unfortunately, the question before the ICJ in the *Pedra Branca Case* was one of territorial sovereignty. The legal status of the three disputed features was not at issue. Notably, however, in the judgement the ICJ referred to Pedra Branca as “a tiny uninhabited and uninhabitable island.”<sup>135</sup> The ICJ’s characterisation of Pedra Branca as “tiny” certainly is not controversial. However, the ICJ’s declaration that Pedra Branca is “uninhabited and uninhabitable” is interesting. As mentioned earlier, Pedra Branca has been the site of an important lighthouse for many years and boasts a number of other facilities. It has also been under continuous British and, more recently, Singaporean occupation since the 19<sup>th</sup> century.

The ICJ’s use of the term “uninhabited” to describe Pedra Branca thus, implies that the government personnel stationed on the formation, even for an extended period of time, do not qualify as a population. This suggests that occupying a small formation with what amounts to a garrison does fail to render the formation capable of human habitation in terms of Article 121(3) of the LOSC. The ICJ’s declaration on human habitation in the context of Article 121(3) of the LOSC could have implications for various small islands scattered across the globe whose only population comprises of research scientists and government personnel. Examples of such islands include many of the formations in the Spratly group as well as Japan’s Okinotorishima.

Although the *Pedra Branca Case* did more than the *Volga Case* to unpack the meaning of the element of human habitation, it cannot be said that the *Pedra Branca Case* truly illuminates what the drafters of the LOSC intended when they inserted the element of human habitation into Article 121(3). The *Pedra Branca Case* sheds some light on what is not meant by the element of human habitation, but falls short of clarifying what is meant by the element of human habitation. The *Pedra Branca Case* certainly does more than the *Volga Case* to engage with the element of human habitation, but fails to bring much needed clarity to the element of human habitation as all that can be discerned from the judgement is that government personnel stationed on a formation, even for an extended period of time, do not qualify as a population for the purposes of human habitation. It is evident that the element of human population is attributed great significance in determining the status of insular features and therefore a more wholesome exploration of the

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<sup>133</sup> Ibid para 18.

<sup>134</sup> Ibid.

<sup>135</sup> Ibid para 66.

element of human habitation would have been desirable in order to bring clarity to Article 121(3) of the LOSC.

#### 4.1.5 The *Black Sea Case*: A Missed Opportunity?

In the *Black Sea Case* the insular status of Ostrov Zmeinyy (Serpents' Island) was disputed between Romania and Ukraine. The Serpents' Island belongs to Ukraine and is located around 19 nm from the terminus of the land boundary between Ukraine and Romania. Serpents' Island is described as a sheer-sided formation that rises to a height of 39.6 m and has a surface area of 1.135 km<sup>2</sup>.<sup>136</sup> Romania has long been concerned about the presence of Serpents' Island off its mainland coast and the possible effect of the formation on the delimitation of maritime boundaries. This was evidenced by the multiple interventions and draft articles issued by Romania during the course of the negotiations at UNCLOS III, which sought to minimise the capacity of small islands and islets to generate maritime claims and their effect on maritime boundary delimitation. It was no secret that Romania issued these interventions during the negotiations at UNCLOS III as it was concerned about minimising the potential impact of Serpents' Island in regard to the delimitation of its maritime boundaries with the Soviet Union.<sup>137</sup>

The *Black Sea Case* is of importance to the current discussion as both Romania and Ukraine explicitly addressed the issue of Article 121 of the LOSC and its application to the Serpents' Island in both their written pleadings and oral arguments.<sup>138</sup> A central argument in Romania's case was that Serpents' Island was a mere rock and is therefore only entitled to generate a territorial sea and, additionally, should not form a valid basepoint for the construction of the equidistance line for the EEZ/continental shelf boundary. Romania made consistent attacks on the insular status of Serpents' Island and particularly cast doubt on the ability of the formation to sustain human habitation or an economic life of its own.

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<sup>136</sup> J.R.V. Prescott and C.H. Schofield (2005) op cit note 52 at 65.

<sup>137</sup> Serpent's Island only fell under the sovereignty of the Ukraine upon the breakup of the Soviet Union in 1991.

<sup>138</sup> See *Black Sea case* supra note 112, specifically Memorial submitted by Romania, 19 August 2005 paras 8.48-41, at 84-98 and paras.10.1-10.132, at 141-194; Counter-Memorial submitted by Ukraine, 19 May 2006, paras. 7.27-7.88 at 177-197; Reply submitted by Romania, 22 December 2006, paras.5.1-5.184, at 127-187 and paras.6.16-6.36, at 193-200; and, Rejoinder submitted by Ukraine, 6 July 2007, paras.5.18-5.28 and 6.57-6.72 at 93-96 and 114-119, available at, <http://www.icjci.org/docket/index.php?p1=3&p2=3&k=95&case=132&code=ru&p3=1>, accessed on 20 December 2016.

Counsel for Romania emphasised in its oral arguments that Article 121(3) “rocks” are a sub-category of islands.<sup>139</sup> Thus, counsel for Romania asserted that all “rocks” meet the definition of islands as expressed in Article 121(1) as they are naturally formed areas of land, which are surrounded by water and above water at high tide.<sup>140</sup> In this regard, Romania referred to Article 121 as a “carefully crafted provision which *distinguishes between two different categories of island.*”<sup>141</sup>

In relation to the interpretation of Article 121, Romania took note of the fact that Article 121 included no size criterion in the definition of “rocks”, but asserted that there is a link between the size of an insular formation and its ability to sustain human habitation or an economic life of its own.<sup>142</sup> Thus, the larger the insular formation, the more likely it is to be able to sustain human habitation and an economic life of its own. In contrast, the smaller an insular formation, the less likely it will be to sustain human habitation and an economic life of its own. Furthermore, Romania observed that applying any of the various proposals regarding the size-based criteria for distinguishing between rocks and islands that were raised during UNCLOS III would “plainly have left Serpents’ Island in the ‘paragraph 3’ category.”<sup>143</sup> Particular reference was made to Malta’s 1km<sup>2</sup> criterion<sup>144</sup> in comparison to the meagre area of the Serpents’ Islands (0.17 km<sup>2</sup>); and the Irish proposal that islands should at least possess 10 percent of the land area and the population of the State<sup>145</sup>, in comparison with the area of the Serpents’ Islands only amounting to “less than one three-millionth of 1 per cent” of Ukraine’s land territory.<sup>146</sup>

In its written pleadings Ukraine asserted that “for the purposes of Article 121, the ability to sustain human habitation is to be understood as meaning that, as a matter of practice over a number of years, human habitation has been shown to be possible on the island, while the ability to sustain an economic life of its own is to be understood as meaning that, as a matter of practice over a

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<sup>139</sup> See *Black Sea* case supra note 112, specifically Public sitting held on Friday 4 September 2008, “Serpents’ Island under the 1982 Convention”, Oral argument on behalf of Romania of Professor Vaughn Lowe, at 41, available at <http://www.icj-cij.org/docket/files/132/14707.pdf>, accessed on 20 December 2016.

<sup>140</sup> Ibid.

<sup>141</sup> Ibid. Emphasis mirrors the original.

<sup>142</sup> Ibid para 42.

<sup>143</sup> Ibid.

<sup>144</sup> UN Doc.A/AC.138/SC.II/L.28, Article 1. See S.N. Nandan and S. Rosenne (1995) op cit note 62 at 328.

<sup>145</sup> UN Doc.A/CONF.62/C.2/L.43 (1974) and *Black Sea* case, Public sitting held on Friday 4 September 2008, “Serpents’ Island under the 1982 Convention”, Oral argument on behalf of Romania of Professor Vaughn Lowe, at 42.

<sup>146</sup> *Black Sea* case, Public sitting held on Friday 4 September 2008, “Serpents’ Island under the 1982 Convention”, Oral argument on behalf of Romania of Professor Vaughn Lowe at 42.

number of years, life on the island has proved economically sustainable.”<sup>147</sup> However, in its oral arguments, Romania objected to this statement as it felt that certain aspects were “tendentious and highly problematic”.<sup>148</sup> The Romanian Counsel asserted that evidencing the possibility of human habitation on a feature does not amount to proof that the feature can actually sustain human habitation.<sup>149</sup>

Additionally, Ukraine asserted that human habitation is not equivalent to a permanent resident population and argued that notional occupation of tiny insular features by military personnel for the purpose of staking vast maritime jurisdictional claims is not what the drafters of the LOSC intended.<sup>150</sup> Romania responded to this by stating that “Article 121 requires that the rock should be capable of sustaining human habitation or economic life of its own. It is not enough that the mainland State can keep people alive on the rock, and persuade, or order, people to stay on it for a period of time.”<sup>151</sup> In advancing these arguments, Romania noted that it would be “idle to pretend that the Law of the Sea Convention defines precisely what is necessary in the way of human habitation, or that the *travaux préparatoires* give clear guidance on that question. They do not.”<sup>152</sup>

Romania then went on to emphasise that in order to qualify as an island within the meaning of Article 121, human habitation needs to be sustained over an extended period of time. Romania bolstered this argument by referring to the ICJ’s characterization of Pedra Branca/Pulau Batu Puteh as “a tiny uninhabited and uninhabitable island”.<sup>153</sup>

In relation to the “economic life” criterion in Article 121(3), Ukraine argued that “economic life” is not the same as viability as an independent, self-contained and self-sufficient economy involving the development of natural resources, since these terms refer to lesser forms of economic activity.”<sup>154</sup> Additionally, Ukraine felt that “in relation to small maritime features, these criteria can be satisfied by small-scale activities generating income and expenditure and the flow of goods and services (such as scientific research and tourism).”<sup>155</sup>

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<sup>147</sup> *Black Sea case*, Counter-Memorial submitted by Ukraine, 19 May 2006, para 7.42, at 183.

<sup>148</sup> *Black Sea case*, “Serpents’ Island under the 1982 Convention”, Oral argument on behalf of Romania of Professor Vaughn Lowe, 4 September 2008, at 43.

<sup>149</sup> *Ibid* 44.

<sup>150</sup> *Black Sea case*, “Serpents’ Island under the 1982 Convention”, Oral argument on behalf of Romania of Professor Vaughn Lowe, 4 September 2008 at 44.

<sup>151</sup> *Ibid*.

<sup>152</sup> *Ibid*.

<sup>153</sup> *Ibid* at 45-46.

<sup>154</sup> *Ibid* at 47 and *Black Sea case*, Counter-Memorial submitted by Ukraine, 19 May 2006, para 7.41, at 183.

<sup>155</sup> *Ibid* at 47.

It is worth noting that Ukraine emphasized that considerable ambiguity plagues the meaning of the terms “human habitation” and “economic life of its own”.<sup>156</sup> However, Romania asserted that even in the face of such ambiguity the Serpent’s Island is “bleak, inhospitable with no fresh water” and “no more capable of sustaining human life and habitation than a steel oil platform would be.”<sup>157</sup> Romania also noted that the small-scale economic activities that Ukraine referred to were simply perfunctory and did not meet the threshold of meaningful economic life.<sup>158</sup> Furthermore, Romania asserted that the economic life of the Serpents’ Island does not exist outside of Ukrainian government’s budget and that “if the Government stops pouring money into the rock, the people currently paid to be there will undoubtedly pour out.”<sup>159</sup>

In an attempt to counter the arguments made by Romania, Ukraine emphasised the importance of the Serpent’s Islands as being a prominent feature in the Black Sea and that map makers consistently referred to the feature as an island.<sup>160</sup> Furthermore, Ukraine asserted that based on the presented graphic evidence that Serpents’ Island was certainly not a rock within the meaning of Article 121(3).<sup>161</sup> Noting the ambiguity in Article 121(3), Ukraine argued that the Article does not refer only to actual human habitation or economic life, but rather the capacity of the feature to sustain human habitation or economic life.<sup>162</sup>

Additionally, Ukraine argued that the fact that an island relies on the mainland for the provision of resources should not disqualify it from having an economic life of its own. Ukraine stated that this was common practice and that a restrictive interpretation, like the one advanced by Romania, would disqualify a large number of small islands around the globe.<sup>163</sup>

Finally, Ukraine pointed towards the failure of Romania’s proposal to secure special status for islets at the negotiations at UNCLOS III. Ukraine asserted that this proposal was undoubtedly made with the Serpents’ Islands in mind, however, this proposal was rejected. In raising this argument, Ukraine stated that “It is no secret that these proposals were aimed at Serpents’

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<sup>156</sup> *Black Sea case*, Counter-Memorial submitted by Ukraine, 19 May 2006, para 7.41, at 183.

<sup>157</sup> *Black Sea case*, “Serpents’ Island under the 1982 Convention”, Oral argument on behalf of Romania of Professor Vaughn Lowe, 4 September 2008, at 46-47.

<sup>158</sup> *Ibid.*

<sup>159</sup> *Ibid* at 47-48.

<sup>160</sup> *Ibid* at 10-11.

<sup>161</sup> *Black Sea case*, Oral argument on behalf of Ukraine of Ms Loretta Malintoppi, 12 September 2008, at 12.

<sup>162</sup> *Ibid* at 16.

<sup>163</sup> *Ibid* at 17.

Island... Romania itself did not consider Serpents' Island as a rock within the meaning of Article 121 (3)".<sup>164</sup>

As seen above, both Ukraine and Romania advanced arguments that applied directly to the interpretation of Article 121 of the LOSC, inviting the Court to engage meaningfully with an interpretation of the provision. The issues laid before the Court by the parties canvassed more than just the element of human habitation. The parties raised issues relating to the various other unclear elements of Article 121(3), such as the element of economic life and that of the link between the size of an insular formation and its ability to sustain human habitation and an economic life of its own. The averments made by the parties encouraged the Court to explore the other elements of Article 121(3) and not just the element of human habitation, which was the only element dealt with, and in a limited sense, by the Courts in the *Volga* and *Pedra Branca* cases.

However, the Court side-stepped the issue in its judgment. Ultimately, the Court ruled that the Serpents' Island was not capable of serving as a basepoint for the construction of a provisional equidistance line. Accordingly, the Court found that the presence of Serpents' Islands "does not call for an adjustment of the provisional equidistance line and, further, that "[i]n view of the above the Court does not need to consider whether Serpents' Island falls under paragraphs 2 or 3 of Article 121 of UNCLOS nor their relevance to this case."<sup>165</sup>

Strictly speaking, if the Court had made a ruling on the interpretation of Article 121, it would only bind Romania and Ukraine as parties to the dispute. However, had the Court decided whether Serpents' Island was an Article 121(3) rock, the Court's reasoning would hold authoritative value and be afforded considerable weight by other courts and tribunals and States. Consequently, it is difficult to view the reluctance of the Court to meaningfully tackle this issue as anything more than a frustrating missed opportunity to aid in the clarification of Article 121 of the LOSC.

#### **4.2 A Dead End, Indeed – Conclusions to be Drawn from State Practice and International Jurisprudence**

As evidenced above, the past jurisprudence of international courts and tribunals has, unfortunately, done little to offer an authoritative interpretation of Article 121. Such an interpretation remains lacking as international courts and tribunals have proven adept at

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<sup>164</sup> Ibid at 17-19.

<sup>165</sup> Ibid para 187.

effectively side-stepping the complex interpretational issues which riddle the regime of islands. Consequently, coastal States were still frequently confronted with challenging issues regarding islands.

However, the recent *South China Sea Arbitration* has marked a significant shift in the trend of side-stepping the important interpretational issues that vex the regime of islands. The following chapter is dedicated to an analysis of the South China Sea Arbitration and how the Tribunal interpreted Article 121 of the LOSC.

## Chapter 5

### *The South China Sea Arbitration – A Step in the Right Direction*

#### 5.1 Context and Background

The South China Sea constitutes a semi-enclosed sea within the Western Pacific Ocean.<sup>166</sup> The South China Sea spans an area of 3.5 million kilometers and includes hundreds of insular features, both below and above water.<sup>167</sup> The South China Sea abuts several States – lying to the south of China and the islands of Taiwan and Hainan, to the east of Vietnam, to the west of the Philippines and to the north of Brunei, Malaysia, Indonesia and Singapore.<sup>168</sup> Recently the Philippines has objected to the expansive maritime jurisdictional claims made by China in the South China Sea. The Philippines approached the Permanent Court of Arbitration at The Hague for a declaratory award on a host of issues related to China's actions in the South China Sea. However, for the purposes of this dissertation, only the second matter raised, relating to whether the insular features claimed by China and the Philippines have been correctly characterized, and the maritime claims these features are capable of generating, will be analysed as it has a direct bearing on the interpretation of Article 121 of the LOSC. Ultimately, the Tribunal agreed with the Philippine's assertion that all of the high tide features in the Spratly Island group were rocks and not islands, invalidating China's expansive claims to marine jurisdiction in the region.

The *South China Sea Arbitration* has marked a monumental shift in the trend of side-stepping the important interpretational issues that vex the regime of islands. The Tribunal employed a three-pronged approach in interpreting Article 121, relying on an analysis of the textual elements of the Article; a consideration of the context, object and purpose of the Article; and an exploration of the drafting history of Article 121(3). The manner in which the Tribunal addressed these three elements will be explored below.

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<sup>166</sup> S.R. Pemmaraju, "The South China Sea Arbitration (The Philippines v. China): Assessment of the Award on Jurisdiction and Admissibility", *Chinese Journal of International Law*, Vol. 15, 2016, at 2.

<sup>167</sup> Ibid.

<sup>168</sup> Ibid.

## 5.2 The Textual Elements

### 5.2.1 “Rocks”

The Tribunal expressly addressed the question of whether the term “rocks” implies a geomorphological or geological criteria.<sup>169</sup> In this regard, the Tribunal was of the view that no such restriction was intended by the drafters of Article 121(3).<sup>170</sup> This was based on the dictionary definition of “rock” which states that rocks may “consist of aggregates of minerals . . . and occasionally also organic matter . . . . They vary in hardness, and include soft materials such as clays.”<sup>171</sup> The Tribunal also referred to the decision in *Territorial and Maritime Dispute (Nicaragua v. Colombia)* to bolster its conclusion, in which it was held that Quitasueño, a miniscule protrusion of Coral, held by Colombia was an Article 121(3) rock as “International law defines an island by reference to whether it is ‘naturally formed’ and whether it is above water at high tide, not by reference to its geological composition . . . . The fact that the feature is composed of coral is irrelevant.”<sup>172</sup>

Furthermore, the Tribunal also recognised that the imposition of any such geological criteria on Article 121(3) would result in absurdity.<sup>173</sup> This is because rocks are deemed a category of islands within Article 121. Article 121 defines an island as a “naturally formed area of land” and does not incorporate any geomorphological or geological qualification.<sup>174</sup> If such a qualification was included in paragraph 3, any high-tide features composed of mud, sand, coral or gravel – regardless of their other characteristics – would always produce extended maritime claims.<sup>175</sup> This would always be the case, irrespective of the feature’s ability to sustain human habitation and economic life of its own.<sup>176</sup> As such features are more transient than features composed of geological rock, a geological criterion would mean that greater entitlements are afforded to features that are less stable and permanent.<sup>177</sup> This, in the view of the Tribunal, could not have been the intent of the Article.

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<sup>169</sup> *The South China Sea Arbitration* supra note 16 at para 479.

<sup>170</sup> Ibid.

<sup>171</sup> Ibid.

<sup>172</sup> See *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Merits Judgment, ICJ Reports 2012 at 624 & 645.

<sup>173</sup> *The South China Sea Arbitration* supra note 16 at para 481.

<sup>174</sup> Ibid.

<sup>175</sup> Ibid.

<sup>176</sup> Ibid para 482.

<sup>177</sup> Ibid.

Accordingly, “rocks” within the context of Article 121(3) do not necessarily have to be composed of geological rock. The Tribunal noted further that the name of an insular feature will play no role in determining whether the feature qualifies as an Article 121(3) rock.<sup>178</sup> Insular features may be entirely submerged and still have “Rock” or “Island” in their name.<sup>179</sup> Equally, insular features with “Reef” or “Shoal” in their names may protrude above water at high tide.<sup>180</sup> Ultimately, the name of an insular feature offers no guidance in a determination of whether it is capable of sustaining human habitation or an economic life of its own.<sup>181</sup>

### 5.2.2 “Cannot”

The Tribunal noted that the word “cannot” in Article 121(3) implies a concept of capacity.<sup>182</sup> In other words, does the insular feature in its natural form possess the capacity to sustain human habitation or economic life? Ultimately, if it does not then it is a rock.<sup>183</sup> In the view of the Tribunal, this enquiry does not centre on whether the insular feature actually does sustain human habitation or economic life, but rather whether the insular feature is, objectively, able to or lends itself to sustaining human habitation or economic life.<sup>184</sup> The fact that an insular feature is currently uninhabited and has no economic life does not serve as proof that it is uninhabitable or incapable of sustaining an economic life.<sup>185</sup>

However, the Tribunal noted that evidence of past habitation or economic life may be relevant in determining the capacity of an insular feature.<sup>186</sup> An insular feature that is known and proximate to a populated land mass has always been uninhabited and never sustained an economic life, is likely to show that the feature is uninhabitable or incapable of sustaining economic life.<sup>187</sup> On the other hand, historical evidence that humans inhabited an insular feature and that it was the location of economic activity would likely serve to show that the feature does, indeed, have the capacity to sustain human habitation and economic life.<sup>188</sup>

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<sup>178</sup> Ibid.

<sup>179</sup> Ibid.

<sup>180</sup> Ibid.

<sup>181</sup> Ibid.

<sup>182</sup> Ibid para 483.

<sup>183</sup> Ibid.

<sup>184</sup> Ibid.

<sup>185</sup> Ibid.

<sup>186</sup> Ibid para 484.

<sup>187</sup> Ibid.

<sup>188</sup> Ibid.

### 5.2.3 “Sustain”

In the view of the Tribunal, “sustain” is comprised of three pillars.<sup>189</sup> The first pillar is the concept of the provision and support of essentials.<sup>190</sup> The second pillar is a temporal concept. The support and provision of essentials must take place over an extended period of time and should not be short-lived or one-off.<sup>191</sup> The third pillar is a qualitative concept, which entails that the support and provision of essential must at least be of a “proper standard”.<sup>192</sup>

The Tribunal then went on to define what “sustain” means in the context of sustaining human habitation and economic life.<sup>193</sup> In regard to sustaining human habitation, “sustain” must mean to provide the essentials to keep humans alive and healthy, over an extended period of time and according to a proper standard.<sup>194</sup> In relation to sustaining economic life, “sustain” must mean to provide the essentials to continue an economic activity over an extended period of time in a manner that is feasible on an ongoing basis.<sup>195</sup>

### 5.2.4 “Human habitation”

In determining what is meant by human habitation, the Tribunal looked at the ordinary dictionary definition of the term.<sup>196</sup> Human habitation is defined as the “action of dwelling in or inhabiting as a place of residence; occupancy by inhabitants” or “a settlement”.<sup>197</sup> The Tribunal also referred to the dictionary definition of “inhabit”, which is to “dwell in, occupy as an abode, to live permanently or habitually in a region”.<sup>198</sup> From these definitions, the Tribunal recognised that the use of the term “habitation” in Article 121(3) must incorporate a qualitative element.<sup>199</sup> In the view of the Tribunal, the presence of a small group of people on an insular feature does not equate to permanent or habitual residence or habitation.<sup>200</sup> The Tribunal noted that the term habitation must mean a non-transient presence of humans who reside on an insular feature in a settled fashion.<sup>201</sup>

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<sup>189</sup> Ibid para 487.

<sup>190</sup> Ibid.

<sup>191</sup> Ibid.

<sup>192</sup> Ibid.

<sup>193</sup> Ibid para 488.

<sup>194</sup> Ibid.

<sup>195</sup> Ibid.

<sup>196</sup> Ibid para 489.

<sup>197</sup> Ibid.

<sup>198</sup> Ibid.

<sup>199</sup> Ibid para 490.

<sup>200</sup> Ibid.

<sup>201</sup> Ibid para 491.

Accordingly, human habitation requires the elements necessary to keep people alive on an insular feature.<sup>202</sup> Additionally, the conditions on an insular feature must be sufficiently conducive for habitation and not just mere survival.<sup>203</sup>

The Tribunal recognised that there are various forms of human habitation and no specific culture or sort of habitation should be assumed under an international instrument like the LOSC.<sup>204</sup> However, there are certain factors that are always constant when human habitation is concerned.<sup>205</sup> The Tribunal determined that in order for an insular feature to sustain human habitation, it must at a minimum be able to maintain, support and provide drink, food and shelter to people so that they may reside there permanently or habitually for an extended time period.<sup>206</sup>

Furthermore, it was noted that humans need company and community over an extended period of time.<sup>207</sup> The Tribunal was of the view that “habitation” also implies that the insular feature must be inhabited by a group or community.<sup>208</sup> Although Article 121(3) does not specify any specific number of people, the habitation of an insular feature by a sole person would not typically be considered human habitation in the ordinary sense.<sup>209</sup>

### 5.2.5 “Or”

The Tribunal was also tasked with determining whether the capacity to sustain “human habitation” and an “economic life of its own” are both necessary for an insular feature to obtain island status and generate an EEZ and continental shelf, or whether either of these criteria in isolation would suffice. The Tribunal first applied logic in its interpretation of Article 121(3) and found that formal logic would require that an insular feature that does not meet both criteria should be denied island status.<sup>210</sup> This is because the text creates a cumulative requirement, that when coupled with the overall negative structure of Article 121(3) implies that the cumulative criteria detail the instances in which an insular feature will be denied island status.<sup>211</sup> Thus, the Tribunal concluded that the

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<sup>202</sup> Ibid.

<sup>203</sup> Ibid.

<sup>204</sup> Ibid para 492.

<sup>205</sup> Ibid.

<sup>206</sup> Ibid.

<sup>207</sup> Ibid para 493.

<sup>208</sup> Ibid.

<sup>209</sup> Ibid.

<sup>210</sup> Ibid para 494.

<sup>211</sup> Ibid.

logical outcome would be that if an insular feature has the capacity to sustain human habitation or an economic life of its own, it will be considered a fully entitled island.<sup>212</sup>

However, the Tribunal recognised that the application of formal logic to linguistic usage does not always result in the correct outcome. The Tribunal considered whether an implied second negation, omitted for the purposes of reducing the length of the cumbersome clause, existed upon a natural reading of the phrase - in simpler terms, “rocks which cannot sustain human habitation or [which cannot sustain] economic life of their own shall have no exclusive economic zone or continental shelf.”<sup>213</sup> However, the Tribunal was of the opinion that this possibility was barred by the remainder of the Article. The Tribunal noticed that the same construction was employed in the second half of paragraph 3, where it is stated that rocks “shall have no exclusive economic zone or continental shelf.”<sup>214</sup> The Tribunal noted that a logical construction in this regard must be unequivocally correct as the only possible interpretation of this phrase could be that a rock which does not meet the criteria set out in the paragraph “shall have no exclusive economic zone [and shall have no] continental shelf.”<sup>215</sup> The Tribunal recognised that any alternative interpretation would result in such rocks generating an entitlement to either an exclusive economic zone or a continental shelf, but not both.<sup>216</sup> This, in the view of the Tribunal results in an absurd outcome and is contrary to the intent of Article 121(3).<sup>217</sup>

### **5.2.6 “Economic life of their own”**

The final textual element of Article 121(3) that the Tribunal explored was the term “economic life of their own”. The Tribunal determined that there are two elements of the phrase that require attention. The first element is the term economic life”.<sup>218</sup> Second, the Tribunal recognised that the text does not only state that insular features must have an “economic life”, but also that they must have an economic life of “their own”.<sup>219</sup>

In regard to the first element, the Tribunal looked at the ordinary meaning of the word “economic”. The Tribunal declared that “economic” relates to “the development and regulation of the material

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<sup>212</sup> Ibid.

<sup>213</sup> Ibid para 495.

<sup>214</sup> Ibid.

<sup>215</sup> Ibid.

<sup>216</sup> Ibid para 496.

<sup>217</sup> Ibid.

<sup>218</sup> Ibid para 498.

<sup>219</sup> Ibid.

resources of a community”.<sup>220</sup> The term may also relate to a system by which goods and services are produced and exchanged.<sup>221</sup> The Tribunal also realised that the word “life” implies that basic presence of resources is insufficient and that a certain form of human activity is necessary to develop, exploit and distribute these resources.<sup>222</sup> Furthermore, the tribunal also made it clear that “economic life” must be coupled with the temporal component of ‘sustain’.<sup>223</sup> Accordingly, a short-lived or one-off economic venture, in the view of the Tribunal, would not constitute a sustained economic life.<sup>224</sup> Article 121(3) intends some form of continuous economic activity. The Tribunal also noted that although the drafters of Article 121(3) did not make reference to the value of the economic activity in question, a basic degree of viability for the economic activity is generally necessary for it to be sustained over an extended period.<sup>225</sup>

The Tribunal recognised that the second element under consideration, “of their own” is crucial for a wholesome interpretation as it implies that an insular feature must have the capacity to independently support an economic life.<sup>226</sup> Accordingly, the Tribunal found that the infusion of resources from the outside or activities based solely on extraction, without the infusion of the local population, would not constitute an economic life “of their own”.<sup>227</sup> The Tribunal was of the view that in order for an economic activity to be classified as the economic life of an insular feature, the resources on which the economic activity centres must be local as opposed to imported and must also be to the benefit of the economic activity in question.<sup>228</sup> Thus, any form of economic activity that relies on the injection of external resources for its continuation does not fall within the scope of “an economic life their own”. Economic activity of this kind would not constitute the insular feature’s own economic life, but rather an economic life which is reliant on outside support.<sup>229</sup> In the same token, economic activity based purely on extraction and result in no benefit to the insular feature and its population do not represent the feature’s own economic life.<sup>230</sup>

The Tribunal also, importantly, addressed the role of economic activity derived from an insular feature’s territorial sea, exclusive economic zone and continental shelf in endowing the feature

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<sup>220</sup> Ibid para 499.

<sup>221</sup> Ibid.

<sup>222</sup> Ibid.

<sup>223</sup> Ibid.

<sup>224</sup> Ibid.

<sup>225</sup> Ibid.

<sup>226</sup> Ibid para 500.

<sup>227</sup> Ibid.

<sup>228</sup> Ibid.

<sup>229</sup> Ibid.

<sup>230</sup> Ibid.

with economic life.<sup>231</sup> The Tribunal concluded that economic activity derived from the continental shelf and exclusive economic zone of an insular feature must be excluded.<sup>232</sup> The Tribunal reasoned that Article 121(3) is about determining whether an insular feature will or will not be awarded an exclusive economic zone and continental shelf.<sup>233</sup> Accordingly, if the presence of economic activity in the area which may possible constitute the insular feature's exclusive economic zone and continental shelf was adequate to endow the feature with these zones, Article 121(3) would be circular and absurd.<sup>234</sup>

However, the Tribunal noted that a similar calculus is not applicable in regard to economic activity derived from a feature's territorial sea.<sup>235</sup> The same circularity resulting from economic activity derived from the exclusive economic zone and continental shelf would not result from economic activity derived from the territorial sea as all high-tide features, irrespective of their status under Article 121(3), automatically generate a territorial sea.<sup>236</sup> Nonetheless, the Tribunal made it clear that Article 121(3) requires that the economic life be the insular feature's own.<sup>237</sup> In the view of the Tribunal, this means that there must be some link between the economic activity and the actual insular feature and not just its adjacent waters.<sup>238</sup> As a result, economic activity derived from an insular feature's territorial sea may constitute the economic life of the feature only if it is connected to the feature itself, be it via the local population or via other mediums.<sup>239</sup> This means that the exploitation of the territorial sea by distant fishermen or extractive enterprises which operate in the territorial sea of an insular feature, but make no use of the actual feature, will not be sufficient in bestowing the insular feature with an economic life of its own.<sup>240</sup>

### **5.3 The Context of Article 121(3)**

In exploring the context of Article 121(3), the Tribunal identified two aspects which required consideration. First, the Tribunal recognised that fully-entitled islands and rocks exist within a system of classifying other features, such as submerged features, islands, rocks and low-tide

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<sup>231</sup> Ibid para 501.

<sup>232</sup> Ibid para 502.

<sup>233</sup> Ibid.

<sup>234</sup> Ibid.

<sup>235</sup> Ibid para 503.

<sup>236</sup> Ibid.

<sup>237</sup> Ibid.

<sup>238</sup> Ibid.

<sup>239</sup> Ibid.

<sup>240</sup> Ibid.

elevations.<sup>241</sup> Accordingly, Article 121(3) needs to be interpreted in light of the entirety of Article 121 and Article 13, which concerns low-tide elevations.<sup>242</sup> Second, the Tribunal identified that as Article 121(3) deals with the instances in which an insular feature will not generate an exclusive economic zone and continental shelf, Article 121(3) must therefore be interpreted in conjunction with the context of these maritime areas and with regard for the initial purpose for introducing the concept of the exclusive economic zone.<sup>243</sup>

### **5.3.1 The Context of Islands, Rocks and Low-tide Elevations**

The Tribunal took a wholesome view of the status of insular features as below or above water as encapsulated in Articles 13 and 121 and recognised that both these Articles apply to a “naturally formed area of land”.<sup>244</sup> The Tribunal was of the opinion that just as a low-tide elevation may not achieve island status through human effort, a rock may not be changed into a fully-entitled island via the process of land reclamation.<sup>245</sup> Accordingly, the Tribunal held that the status of an insular feature must be assessed in relation to its natural condition.<sup>246</sup>

The Tribunal found that not only does the aforementioned conclusion maintain the apparent structure across Articles 13 and 121, it is also consistent with purpose and object of Article 121(3).<sup>247</sup> The Tribunal noted that if States could transform a mere rock, incapable of sustaining human habitation and economic life, into a fully-fledged island by introducing technology and extraneous materials, the object of Article 121(3) as a clause of limitation would be thwarted.<sup>248</sup> This would result in a situation where the provision could no longer be employed as a practical restraint to impede States from laying claim to potentially vast maritime spaces. The Tribunal agreed with the position of the Philippines that allowing this would detrimentally reduce those areas reserved for the common heritage of mankind.<sup>249</sup> If an insular feature’s ability to sustain human habitation and economic life could be determined by technological adjustments, “every high-tide feature, no matter . . . its natural conditions, could be converted into an island generating

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<sup>241</sup> Ibid para 506.

<sup>242</sup> Ibid.

<sup>243</sup> Ibid.

<sup>244</sup> Ibid para 508.

<sup>245</sup> Ibid.

<sup>246</sup> Ibid.

<sup>247</sup> Ibid para 509.

<sup>248</sup> Ibid.

<sup>249</sup> Ibid para 510.

a 200-mile entitlement if the State that claims it is willing to devote and regularly supply the resources necessary to sustain a human settlement.”<sup>250</sup>

The Tribunal, accordingly, interpreted the term “cannot sustain” as “cannot, without artificial addition, sustain.”<sup>251</sup> In the view of the Tribunal, this interpretation is aligned with the “naturally formed” limitation on the definition of an “island” and the phrase “of their own” which qualifies an “economic life”.<sup>252</sup>

### **5.3.2 The Link Between Article 121(3) and the Purpose of the Exclusive Economic Zone**

Although the Tribunal analysed the textual elements of Article 121(3) in order to interpret the provision, it recognised that a basic textual analysis of the terms “human habitation” and “an economic life of its own” offered very little guidance in terms of the nature and scale of the activity that would be sufficient to satisfy the requirements of the Article.<sup>253</sup> The Tribunal felt that the meaning of the text of Article 121(3) is, undoubtedly, influenced by its context within the LOSC and by the nexus between the provision and the reason for having an exclusive economic zone.<sup>254</sup> The Tribunal recognised that the 1958 Geneva Conventions limited the rights and jurisdiction of States to a territorial sea and continental shelf.<sup>255</sup> It did not include any provisions that were similar to Article 121(3). This, in the view of the Tribunal, means that the genesis of Article 121 must have been a response to expanding State jurisdiction through the emergence of the concept of the exclusive economic zone.<sup>256</sup>

The Tribunal identified that the purpose of the exclusive economic zone was to expand the jurisdiction of States in the waters adjacent to their coasts and to conserve the resources found in these waters in order to benefit the coastal State’s population.<sup>257</sup> The Tribunal looked closely at various regional declarations<sup>258</sup> made by proponents of expanded coastal State jurisdiction

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<sup>250</sup> Ibid.

<sup>251</sup> Ibid para 511.

<sup>252</sup> Ibid.

<sup>253</sup> Ibid para 512.

<sup>254</sup> Ibid para 513.

<sup>255</sup> Ibid.

<sup>256</sup> Ibid.

<sup>257</sup> Ibid para 515.

<sup>258</sup> The Tribunal looked at the Declaration on the Maritime Zone, signed at Santiago, 18 August 1952, 1976 UNTS 326 (Chile, Ecuador and Peru); The Declaration of Montevideo on Law of the Sea, signed at Montevideo, Uruguay, 8 May 1970 (Argentina, Brazil, Chile, Ecuador, El Salvador, Panama, Peru, Nicaragua, and Uruguay), reproduced in 9 ILM 1081 (1970); see also Declaration of Latin American States on the Law of the Sea, Lima, 4-8 August 1970 (Argentina, Brazil, Colombia, Chile, the Dominican Republic, Ecuador, El Salvador, Guatemala, Honduras, Panama, Peru, Mexico, Nicaragua, and Uruguay), reproduced in 10 ILM 207 (1971); Conclusions in the General Report of the

prior to UNCLOS III and the positions taken by coastal States during the Seabed Committee negotiations and UNCLOS III<sup>259</sup> in order to deduce aforementioned purpose for the genesis of the exclusive economic zone.<sup>260</sup>

The Tribunal found, that like most of the provisions in the LOSC, the provisions regarding the exclusive economic zone were a compromise.<sup>261</sup> These provisions had to strike a delicate balance between the interests of the populations of developing coastal States with the interests of traditional maritime States and States which boast long-range fishing industries and objected to the extension of coastal State jurisdiction. However, the initial impetus for extending coastal State jurisdiction in the first place was, undoubtedly, linked to the need of preserving marine resources for the benefit of the people of coastal States.<sup>262</sup> Furthermore, the Tribunal identified that the Preamble to the LOSC places a particular emphasis on the needs of developing States.<sup>263</sup> The Preamble to the LOSC states that the legal order for the oceans, which the LOSC seeks to achieve, would “contribute to the realization of a just and equitable international economic order which takes into account the interests and needs of mankind as a whole and, in particular, the special interests and needs of developing countries, whether coastal or land-locked.”

In this regard, the Tribunal found that Article 121(3) was designed to act as counterpoint to the increasing jurisdiction of the exclusive economic zone in that it limits excessive expansion.<sup>264</sup> Article 121 disables small insular features from inequitably and unfairly generating large entitlements to jurisdiction over marine space, that would accrue no benefit to the local population of the feature, but rather act as a windfall to the (potentially distant) State to which the feature belongs.<sup>265</sup> Accordingly, the Tribunal felt that any interpretation of Article 121(3) should act to

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African States Regional Seminar on the Law of the Sea, held in Yaoundé, 20-30 June 1972, reproduced in 12 ILM 210 (1973); Declaration of the Organization of African Unity on the issues of the Law of the Sea, 1973, reproduced as UN Doc. A/CONF.62/33.

<sup>259</sup> For example, see Committee on the Peaceful Uses of the Sea-Bed and the Ocean Floor Beyond the Limits Of National Jurisdiction, Sub-Committee II, “Summary Record of the Twenty-Seventh Meeting,” UN Doc. A/AC.138/SC.II/SR.27, p. 25 at p. 40 (22 March 1972) (Statement of the Representative of Iceland); Committee on the Peaceful Uses of the Sea-Bed and the Ocean Floor Beyond the Limits Of National Jurisdiction, Sub-Committee II, “Summary Record of the Fortieth Meeting,” 4 August 1972, UN Doc. A/AC.138/SC.II/SR.40, p. 43 at p. 44 (Statement of the Representative of Norway).

<sup>260</sup> *The South China Sea Arbitration* supra note 16 at para 516.

<sup>261</sup> Ibid para 517.

<sup>262</sup> Ibid.

<sup>263</sup> Ibid.

<sup>264</sup> Ibid para 518.

<sup>265</sup> Ibid.

bolster, as opposed to counter, the purposes that the exclusive economic zone and Article 121(3) were designed to fulfill.<sup>266</sup>

The best way to interpret Article 121(3) to achieve this outcome, in the view of the Tribunal, is to recognise the nexus between the criterion of “human habitation” and the coastal State’s population, for whom the resources in the exclusive economic zone are to be preserved.<sup>267</sup> The Tribunal did however, note that preserving the resources in the exclusive economic zone for the local population of an insular feature is not the sole purpose for endowing the feature with an exclusive economic zone.<sup>268</sup> However, without human habitation (or an economic life), the possibility of establishing a link between the insular feature and the people of the coastal State is significantly reduced.<sup>269</sup>

Accordingly, the Tribunal concluded that the form of human habitation which the drafters of Article 121(3) intended is the habitation by a percentage of the population for whose advantage the exclusive economic zone was introduced.<sup>270</sup> Coupled with the notions of residence and settlement and the qualitative element inherent in the word habitation, human habitation for the purposes of Article 121(3) should be interpreted as habitation of an insular feature by a settled community or group for whom the feature serves as a home.

#### **5.4 The Drafting History of Article 121**

In interpreting Article 121(3), the Tribunal considered the circumstances that culminated in the adoption of Article 121. However, the Tribunal noted that the *travaux préparatoires* of Article 121 are not a perfect guide for the interpretation of paragraph (3) of the Article.<sup>271</sup> Critically, the fundamental compromise that resulted in the final formulation of Article 121(3) was achieved through a process of informal consultations in 1975, for which there are no records.<sup>272</sup> Nonetheless, the Tribunal was of the opinion that certain general conclusions can be extracted from the negotiating history of Article 121(3). These included:

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<sup>266</sup> Ibid.

<sup>267</sup> Ibid para 519.

<sup>268</sup> Ibid.

<sup>269</sup> Ibid.

<sup>270</sup> Ibid para 520.

<sup>271</sup> Ibid para 534.

<sup>272</sup> Ibid.

First, the Tribunal identified Article 121(3) as a provision of limitation in that it imposes the criteria that disallow high-tide features from generating large maritime zones.<sup>273</sup> These two conditions were introduced for the purpose of impeding coastal States' jurisdiction over the international seabed which is reserved for the common heritage of mankind and the unequal division of maritime spaces.<sup>274</sup>

Second, The Tribunal recognised that the elements of Article 121(3) were not considered in isolation, but rather were frequently considered in light of the context of other aspects of the LOSC.<sup>275</sup> These aspects included: (a) the institution of the international seabed area for the common heritage of mankind<sup>276</sup>, (b) the institution of the exclusive economic zone<sup>277</sup>, (c) the object of the exclusive economic zone as a way to conserve marine resources for the benefit of the population of the coastal State<sup>278</sup>, (d) safeguarding the interests of archipelagic States<sup>279</sup>, (e) the issue of islands which fall under foreign domination/colonial dependence<sup>280</sup>, (f) growing concerns

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<sup>273</sup> Ibid at para 535.

<sup>274</sup> Ibid

<sup>275</sup> Ibid para 536.

<sup>276</sup> See "Summary Records of Meetings of the Second Committee, 39th Meeting," UN Doc. A/CONF.62/C.2/SR.39, p. 279 at p. 284, paras. 62-63 (14 August 1974) (Statement of the Representative of Turkey), *Official Records of the Third United Nations Conference on the Law of the Sea, Volume II (Summary Records of Meetings of the First, Second and Third Committees, Second Session)*.

<sup>277</sup> An "essential link" between Article 121(3) of the LOSC and the institution of the exclusive economic zone was identified by the International Court of Justice in *Nicaragua v. Colombia: Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Judgment, *ICJ Reports 2012*, p. 624 at p. 674, para. 139.

<sup>278</sup> "Summary Records of Meetings of the Second Committee, 39th Meeting," UN Doc. A/CONF.62/C.2/SR.39, p. 279 at p. 285, para. 72 (14 August 1974) (Statement of the Representative of Singapore), *Official Records of the Third United Nations Conference on the Law of the Sea, Volume II (Summary Records of Meetings of the First, Second and Third Committees, Second Session)*; "189th Plenary Meeting," UN Doc. A/CONF.62/SR.189, p. 66 at p. 83, para. 251 (8 December 1982) (Statement of the Representative of Colombia), *Official Records of the Third United Nations Conference on the Law of the Sea, Volume XVI (Summary Records, Plenary, First and Second Committees, as well as Documents of the Conference, Eleventh Session)*.

<sup>279</sup> See "Summary Records of Meetings of the Second Committee, 39th Meeting," UN Doc. A/CONF.62/C.2/SR.39, p. 279 at pp. 285-286, paras. 79-80 (14 August 1974) (Statement of the Representative of Greece), *Official Records of the Third United Nations Conference on the Law of the Sea, Volume II (Summary Records of Meetings of the First, Second and Third Committees, Second Session)*; "Summary Records of Meetings of the Second Committee," 37th Meeting, UN Doc. A/CONF.62/C.2/SR.37, p. 266 at p. 272, paras. 73-75 (12 August 1974) (Statement of the Representative of Tunisia), *Official Records of the Third United Nations Conference on the Law of the Sea, Volume II (Summary Records of Meetings of the First, Second and Third Committees, Second Session)*.

<sup>280</sup> See Fiji, New Zealand, Tonga and Western Samoa, "Draft Articles on Islands and on Territories under Foreign Domination or Control," UN Doc. A/CONF.62/C.2/L.30 (30 July 1974); Argentina, Bolivia, Brazil, Colombia, Costa Rica, Cuba, Dominican Republic, Ecuador, El Salvador, Guatemala, Honduras, Libyan Arab Republic, Mexico, Morocco, Nicaragua, Panama, Paraguay, Peru, Uruguay, "Draft Article on Islands and Other Territories under Colonial Domination or Foreign Occupation," UN Doc. A/CONF.62/C.2/L.58 (13 August 1974); "Summary records of meetings of the Second Committee, 38th Meeting," UN Doc. A/CONF.62/C.2/SR.38, p. 273 at p. 278, para. 69 (13 August 1974) (Statement of the Representative of New Zealand), *Official Records of the Third United Nations Conference on the Law of the Sea, Volume II (Summary Records of Meetings of the First, Second and Third Committees, Second Session)*;

over the potential use of artificial installations to generate maritime jurisdiction<sup>281</sup>, and (g) the role that islands play in maritime delimitation.<sup>282</sup>

Third, the Tribunal recognised that the drafters of the LOSC accepted that high-tide features differ greatly in their size, composition, population, vegetation etc.<sup>283</sup> In the past many States have identified criteria such as population size, surface area, and proximity to other land as useful in determining whether an insular feature should be endowed with fully-fledged island status. However, the Tribunal identified that the negotiating history of the LOSC illustrates the inherent difficulties of setting bright-line rules for all scenarios.<sup>284</sup> The negotiating history clearly shows that proposals to institute such specific criteria were continuously rejected.<sup>285</sup> The Tribunal

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“Summary Records of Meetings of the Second Committee, 24th Meeting,” UN Doc. A/CONF.62/C.2/SR.24, p. 187 at p. 190, para. 46 (1 August 1974) (Statement of the Representative of Tonga), *Official Records of the Third United Nations Conference on the Law of the Sea, Volume II (Summary Records of Meetings of the First, Second and Third Committees, Second Session)*; “Summary Records of Meetings of the Second Committee, 39th Meeting,” UN Doc. A/CONF.62/C.2/SR.39, p. 279 at pp. 284-285, paras. 64-71 (14 August 1974) (Statement of the Representative of Argentina), *Official Records of the Third United Nations Conference on the Law of the Sea, Volume II (Summary Records of Meetings of the First, Second and Third Committees, Second Session)*.

<sup>281</sup> See “Summary Records of Meetings of the Second Committee, 39th Meeting,” UN Doc. A/CONF.62/C.2/SR.39, p. 279 at p. 284, para. 63 (14 August 1974) (Statement of the Representative of Turkey), *Official Records of the Third United Nations Conference on the Law of the Sea, Volume II (Summary Records of Meetings of the First, Second and Third Committees, Second Session)*.

<sup>282</sup> See “Summary Records of Meetings of the Second Committee, 39th Meeting,” UN Doc. A/CONF.62/C.2/SR.39, p. 279 at p. 285, para. 76 (14 August 1974) (Statement of the Representative of Greece), *Official Records of the Third United Nations Conference on the Law of the Sea, Volume II (Summary Records of Meetings of the First, Second and Third Committees, Second Session)*; Summary records of meetings of the Second Committee, 40th meeting, UN Doc. A/CONF.62/C.2/SR.40, p. 286 at p. 288, paras. 26-27 (14 August 1974) (Statement of the Representative of Tunisia), *Official Records of the Third United Nations Conference on the Law of the Sea, Volume II (Summary Records of Meetings of the First, Second and Third Committees, Second Session)*; “140th Plenary Meeting,” UN Doc. A/CONF.62/SR.140, p. 75 at p. 79, para. 55 (27 August 1980) (Statement of the Representative of Turkey), *Official Records of the Third United Nations Conference on the Law of the Sea, Volume XIV (Summary Records, Plenary, General Committee, First and Third Committees, as well as Documents of the Conference, Resumed Ninth Session)*; “Summary Records of Meetings of the Second Committee, 40th Meeting,” UN Doc. A/CONF.62/C.2/SR.40, at pp. 286-287, para. 9 (14 August 1974) (Statement of the Representative of France), *Official Records of the Third United Nations Conference on the Law of the Sea, Volume II (Summary Records of Meetings of the First, Second and Third Committees, Second Session)*; see also Algeria, Dahomey, Guinea, Ivory Coast, Liberia, Madagascar, Mali, Mauritania, Morocco, Sierra Leone, Sudan, Tunisia, Upper Volta and Zambia, “Draft Articles on the Regime of Islands, Draft Art. 3,” UN Doc. A/CONF.62/C.2/L.62/Rev.1 (27 August 1974).

<sup>283</sup> *Ibid* para 537.

<sup>284</sup> *Ibid*.

<sup>285</sup> Attempts to include “geological configuration” or “geomorphological structure” as relevant factors in Article 121 all failed, confirming the Tribunal’s interpretation of that portion of the text. See, e.g., Romania, “Draft Articles on Definition of and Régime Applicable to Islets and Islands Similar to Islets,” UN Doc. A/CONF.62/C.2/L.53 (12 August 1974); Algeria, Dahomey, Guinea, Ivory Coast, Liberia, Madagascar, Mali, Mauritania, Morocco, Sierra Leone, Sudan, Tunisia, Upper Volta and Zambia, “Draft Articles on the Regime of Islands,” UN Doc. A/CONF.62/C.2/L.62/Rev. 1 (27 August 1974); “103rd Plenary Meeting,” UN Doc. A/CONF.62/SR.103 p. 61 at p. 64, para. 39 (18 May 1978) (Statement of the Representative of Madagascar), *Official Records of the Third United Nations Conference on the*

found that in rejecting these attempts at precision, the drafters must clearly have preferred the dialect of compromise which is presented in Article 121(3).<sup>286</sup>

The Tribunal also identified that attempts to categorise rocks and islands in relation to their size were all rejected during the negotiating history of Article 121.<sup>287</sup> Accordingly, the Tribunal found that although the negotiating history evidences that there may be a correlation between size and the availability of food, water, living area, and resources to sustain an economic life; the size of an insular feature is not determinative of its status as a fully entitled island or rock.<sup>288</sup> In the view of the Tribunal, size, on its own, is not a relevant factor in this regard.<sup>289</sup> In reaching this conclusion, the Tribunal reiterated the findings of the International Court of Justice in *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, that found that “international law does not prescribe any minimum size which a feature must possess in order to be considered an island.”<sup>290</sup>

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*Law of the Sea, Volume IX (Summary Records, Plenary, General Committee, First, Second and Third Committees, as well as Documents of the Conference, Seventh and Resumed Seventh Session).*

<sup>286</sup> Ibid.

<sup>287</sup> Ibid para 538.

<sup>288</sup> Ibid.

<sup>289</sup> Ibid.

<sup>290</sup> *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Judgment, ICJ Reports 2012, p. 624 at p. 645, para 37.

## **Chapter 6**

### **Clarity at Last?**

#### **6.1 Conclusions Drawn from State Practice and Rulings from International Courts and Tribunals**

From the above it is evident that drawing a distinction between islands and rocks in the context of Article 121(3) is an intricate task, fraught with hazards. It is impossible to objectively draw such a distinction on the basis of the text of Article 121 and its drafting history alone. In actuality, the drafting history of Article 121 does more to reveal the depth and scope of the differing views during the negotiations surrounding the regime of islands at UNCLOS III, rather than providing a useful guide for clearly interpreting the Article. It was apparent that States adopted vastly different views surrounding the issue of islands, undoubtedly based on their own national interests. As a result, States proposed substantively divergent and directly conflicting proposals, which reflected these often opposing and particular interests. These divergent views were, ultimately, accommodated in the compromise provision that was accepted as Article 121 of the LOSC.

The key interpretational questions, especially relating to the distinction between islands within the context of Article 121(1) and rocks within the meaning of Article 121(3), remained unanswered and differing opinions lingered even though the textual elements of Article 121 and the associated drafting history was analysed. Indeed, it seems impossible to arrive at a definitive interpretation of Article 121 solely on the basis of textual analysis, even with reference to the relevant drafting history. However, this comes as no surprise as the regime of islands, as encapsulated in Article 121, was undoubtedly drafted in an intentionally ambiguous and vague manner.<sup>291</sup>

Certain limited guidance on the interpretation on the regime of islands can be gleaned from the history of international jurisprudence on the issue. However, it has been evidenced that that this experience is often unsatisfactory, to say the least. Indeed, past jurisprudence of international courts and tribunals has, unfortunately, done little to offer an authoritative interpretation of Article 121. Such an interpretation remained lacking as international courts and tribunals have proven adept at effectively side-stepping the complex interpretational issues which riddle the regime of islands. Consequently, coastal States were still frequently confronted with challenging issues regarding islands.

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<sup>291</sup> See chapter 3.

However, the recent *South China Sea Arbitration* has marked a monumental shift in the trend of side-stepping the important interpretational issues that vex the regime of islands. The Tribunal employed a three-pronged approach in interpreting Article 121, relying on an analysis of the textual elements of the Article; a consideration of the context, object and purpose of the Article; and an exploration of the drafting history of Article 121(3). The *South China Sea Arbitration*, thus, eradicates much of the lingering interpretational uncertainty that existed within the regime of islands. Accordingly, it is possible draw the following conclusions in relation to the interpretation of Article 121:

First, the drafters' use of the word "rock" in Article 121(3) is not intended to confine the provision to insular features made up of solid rock.<sup>292</sup> As a result, the geomorphological and geological nature of a high-tide feature holds no relevance in relation to its classification in terms of Article 121(3).

Second, the status of an insular feature must be established solely on the basis of its natural capacity.<sup>293</sup> External modifications or additions that are intended to increase an insular features ability to sustain human habitation or economic life of its own should not be considered when determining the status of the status of the feature in terms of Article 121.<sup>294</sup>

Third, in regard to "human habitation", the fundamental factor is the non-transient nature of the inhabitation.<sup>295</sup> The inhabitants of the insular feature need to constitute the natural population of the feature, for whose advantage the resources within the exclusive economic zone need to be conserved and protected.<sup>296</sup> Furthermore, the term "human habitation" must be interpreted as involving the inhabitation of the insular feature by a stable community of individuals for whom the insular feature is a home and on which they can remain for an extended period of time.<sup>297</sup> A community of this sort does not necessarily have to be large, and a few family groups or individuals could well be sufficient to meet this requirement in remote atolls.<sup>298</sup> Additionally, habitual or periodic residence on an insular feature by a nomadic group of people could suffice to constitute habitation.<sup>299</sup> Indeed, the records of UNCLOS III exhibit a great deal of understanding

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<sup>292</sup> *The South China Sea Arbitration* supra note 16 at para 540.

<sup>293</sup> Ibid para 541.

<sup>294</sup> Ibid.

<sup>295</sup> Ibid para 542.

<sup>296</sup> Ibid.

<sup>297</sup> Ibid.

<sup>298</sup> Ibid.

<sup>299</sup> Ibid.

for the livelihoods of the people small island nations.<sup>300</sup> In this regard, an indigenous population would certainly suffice, but it is also possible that a non-indigenous inhabitation could satisfy this criterion if the population truly has the intention to reside on the insular feature in question and make their lives there.

Fourth, the term “economic life of their own” is inextricably connected to the criterion of human habitation.<sup>301</sup> Ultimately, in most scenarios the two will go hand in hand. Article 121(3) does not make reference to a feature having economic value, but rather to its capacity to sustain “economic life”. This will ordinarily imply that the “economic life” intended by the drafters be the livelihoods of the human population which inhabits and makes their home on the insular feature.<sup>302</sup> Furthermore, Article 121(3) makes it abundantly clear that the economic life in question must relate to the insular feature as “of its own”. Accordingly, the economic life referred to must be revolve around the feature itself.<sup>303</sup> Economic activity that focusses entirely on the seabed or waters of the surrounding territorial sea will not suffice.<sup>304</sup> Similarly, economic activity that depends entirely on external resources or economic activity that utilises the feature for extractive activities and fails to involve the local population will also fall short of evidencing a necessary link to the insular feature itself.<sup>305</sup> Extractive economic activity that gathers the resources of an insular feature in order to benefit a population elsewhere would undoubtedly constitute the exploitation of resources for the purposes of economic gain, however, it cannot logically be considered to represent the features own economic life.<sup>306</sup>

Fifth, the text of Article 121(3) must be viewed as disjunctive.<sup>307</sup> As such, the ability to sustain either human habitation or an economic life of its own will be sufficient to endow an insular feature with an exclusive economic zone and continental shelf.<sup>308</sup> In reality however, an insular feature will generally only possess an economic life of its own if there is a stable community that inhabits it.<sup>309</sup> However, exceptions can be made for populations that utilize a network of related maritime feature in order to sustain themselves.<sup>310</sup> In this context, insular features must be viewed in an

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<sup>300</sup> Ibid.

<sup>301</sup> Ibid para 543.

<sup>302</sup> Ibid.

<sup>303</sup> Ibid.

<sup>304</sup> Ibid.

<sup>305</sup> Ibid.

<sup>306</sup> Ibid.

<sup>307</sup> Ibid para 544.

<sup>308</sup> Ibid.

<sup>309</sup> Ibid.

<sup>310</sup> Ibid.

atomised manner. If a population is capable of inhabiting an area through the using multiple insular features it cannot be said that the population fails to inhabit a certain feature on the basis that this habitation is not sustained by one particular feature.<sup>311</sup> Similarly, if a population's economic life and livelihood spans a constellation of insular features, a certain feature in the constellation cannot be said to not possess and economic life of its own simply because it is not directly inhabited.<sup>312</sup>

Sixth, Article 121(3) is only concerned with an insular feature's capacity to sustain human habitation or an economic life of its own.<sup>313</sup> The capacity of an insular feature is an objective criterion and does not depend on whether the feature is inhabited or home to economic life presently or has been in the past.<sup>314</sup>

Seventh, an insular feature's capacity to sustain human habitation or an economic life of its own is an assessment that needs to take place on a case-by-case basis.<sup>315</sup> The drafters of the LOSC had the opportunity to institute any number of specific tests in this regard, but rejected precision in favour of the general formula seen in Article 121(3).<sup>316</sup> However, certain key factors that are fundamental to the natural capacity of an insular feature can be identified. These factors include the presence of food, water and shelter in necessary quantities that would allow a population to live on an insular feature for an extended period of time.<sup>317</sup> These factors will also need to be considered in conjunction with other conditions for developing an economic life on the insular feature in question, such as the proximity of the insular feature to other inhabited areas, the prevailing climate and the ability of the feature to sustain livelihoods.<sup>318</sup> However, the weight afforded to these factors will vary on a case-by-case basis. For this reason it would not be wise to formulate an abstract test of the objective requirements needed to sustain habitation and economic life.<sup>319</sup> This sentiment is bolstered in light of the fact the human habitation requires more than the basic survival of human on an insular feature and that economic life means more than just the mere presence of necessary resources.<sup>320</sup>

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<sup>311</sup> Ibid.

<sup>312</sup> Ibid.

<sup>313</sup> Ibid para 545.

<sup>314</sup> Ibid.

<sup>315</sup> Ibid para 546.

<sup>316</sup> Ibid.

<sup>317</sup> Ibid.

<sup>318</sup> Ibid.

<sup>319</sup> Ibid.

<sup>320</sup> Ibid.

Eighth, the capacity of an insular feature must be analysed in light of the potential for a small cluster on insular features to sustain human habitation and economic life collectively.<sup>321</sup> On one end of the spectrum, Article 121(3) requires that an insular feature itself sustains human habitation and economic life.<sup>322</sup> This clearly excludes any dependence on an external supply and as such, if a feature is only capable of sustaining human habitation by way of the continuous delivery of resources from the outside it cannot be said to satisfy the requirements of Article 121(3).<sup>323</sup> Similarly, economic activity that hinges entirely on the provision of external resources or that constitutes extractive activity and fails to involve the local population of the feature cannot be considered the feature's own economic life.<sup>324</sup> However, on the opposite end of the spectrum, it must be borne in mind that remote island populations often utilise a group of islands, occasionally ranging over a significant distance, in order to sustain their livelihoods.<sup>325</sup> In this context, any interpretation of Article 121(3) that seeks to analyse the capacity of each feature individually would not be aligned with the realities of remote island life or with sufficient regard for the lifestyles of small island populations that was emphasized at UNCLOS III.<sup>326</sup> Consequently, if an insular feature forms part of a web of features that collectively sustain human habitation and in a way that keeps the traditional lifestyle of the population in question, the role of multiple islands in this context will not be equated to an external supply.<sup>327</sup> In the same vein, local use of proximate resources to sustain the livelihood of the population will not be equated to the arrival of distant economic interests targeted at the extraction of natural resources.<sup>328</sup>

Ninth, evidence of objective, physical conditions on a certain insular feature will only be sufficient to help classify that feature if the feature clearly falls within one category or another.<sup>329</sup> For example, if an insular feature lacks vegetation, drinkable water and foodstuffs required for basic survival; it will be clear that the insular feature also does not have the capacity to sustain human habitation. On the other hand, an opposite conclusion can be drawn in cases where the physical characteristics of a large insular feature make it absolutely habitable.<sup>330</sup> However, if the insular feature falls close to the line, evidence of such physical characteristics will be insufficient in

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<sup>321</sup> Ibid para 547.

<sup>322</sup> Ibid.

<sup>323</sup> Ibid.

<sup>324</sup> Ibid.

<sup>325</sup> Ibid.

<sup>326</sup> Ibid.

<sup>327</sup> Ibid.

<sup>328</sup> Ibid.

<sup>329</sup> Ibid para 548.

<sup>330</sup> Ibid.

classifying the feature.<sup>331</sup> In these circumstances, it will be extremely difficult, if not impossible, to gauge purely from the physical conditions of the feature where the capacity to sustain human survival ends and the capacity to sustain the required form of settled habitation by a human population begins.<sup>332</sup> As the relevant threshold often differs from one insular feature to another, the issues related to relying on objective, physical conditions for the classification of insular features is exacerbated.<sup>333</sup>

In circumstances where an insular feature is close to the line, the most reliable evidence of a feature's capacity will generally be the use to which it has historically been put.<sup>334</sup> Human beings have exhibited extraordinary ingenuity in forming communities in extremely harsh conditions. If an insular feature has never been home to a stable community, a logical conclusion would be that the natural conditions on of the feature are not suited to the establishment of such a community and is incapable of sustaining human habitation in the context of Article 121(3).<sup>335</sup> In these scenarios it must be borne in mind that human habitation can be ended or prevented by forces which are separate from the feature's intrinsic capacity.<sup>336</sup> Pollution, war and environmental damage are all forces that may lead to the depopulation of a feature that in its natural state has the capacity to sustain human habitation.<sup>337</sup> However, in the absence of such forces, historical evidence that an insular feature has never sustained a stable community points towards the reasonable conclusion that the feature lacks the capacity to sustain human habitation.<sup>338</sup>

On the other hand, if a feature is inhabited presently or has been inhabited in the past, it is necessary to consider whether there is any evidence that indicates that this habitation was only made possible through outside support.<sup>339</sup> Links and trade with the outside world should not disqualify an insular feature in this regard, as long as they directly improve the quality of life of the feature's inhabitants.<sup>340</sup> However, if the outside support is so substantial that it forms a necessary requirement for the habitation of the feature, it cannot be said that the feature itself is capable of sustaining human habitation.<sup>341</sup> In this context, an official or military population, which is serviced

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<sup>331</sup> Ibid.

<sup>332</sup> Ibid.

<sup>333</sup> Ibid.

<sup>334</sup> Ibid para 549.

<sup>335</sup> Ibid.

<sup>336</sup> Ibid.

<sup>337</sup> Ibid.

<sup>338</sup> Ibid.

<sup>339</sup> Ibid para 550.

<sup>340</sup> Ibid.

<sup>341</sup> Ibid.

from the provision of outside resources, will not provide evidence that a feature has the capacity to sustain human habitation.<sup>342</sup> It must be borne in mind that the object of Article 121(3) is to limit unfair and excessive claims by States and this purpose would be thwarted if a population was planted on an insular feature that, in its natural state, is incapable of sustaining human habitation for the sole purpose of claiming jurisdiction over the feature's maritime zones.<sup>343</sup> Accordingly, evidence of human habitation predating the institution of the exclusive economic zone may carry more significance than more recent evidence, if the latter is fogged by a noticeable attempt to stake a maritime jurisdictional claim.<sup>344</sup>

The exact same mode of analysis must be employed when examining the current or past existence of economic life on an insular feature.<sup>345</sup> It must first be considered whether an insular feature has historically sustained an economic life of its own before considering whether evidence suggests that the feature's historical record does not fairly reflect the potential economic life that the feature is capable of sustaining in its natural condition.<sup>346</sup>

However, the value of such a precedent is questionable.<sup>347</sup> In a strict sense, arbitral or judicial decisions are only bind the parties to the specific case.<sup>348</sup> However, there can be no doubt that a decision of an ad hoc international arbitration tribunal of this kind is very influential as the written and oral pleadings which build up to the decision are saturated with past case references and judgements on the topic. In the context of the regime of islands, such rulings "carry special weight in international maritime boundary law" because of the "relative scarcity of authoritative pronouncements."<sup>349</sup>

The particular importance of decisions such as the *South China Sea Arbitration* can be attributed to two factors: first, the regime of islands constitutes "a unique line of jurisprudence" which stems from a continuous series of decisions and second, "the absence of clearer guidance from codification efforts, *opinio juris* and State practice."<sup>350</sup> Although there exists no doctrine of *stare decisis* in the context of international adjudication, it would not be inaccurate to view decisions of

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<sup>342</sup> Ibid.

<sup>343</sup> Ibid.

<sup>344</sup> Ibid.

<sup>345</sup> Ibid para 551.

<sup>346</sup> Ibid.

<sup>347</sup> C.H. Schofield op cit note 4 at 197.

<sup>348</sup> Ibid.

<sup>349</sup> J.J. Charney, "Progress in International Maritime Boundary Delimitation Law", *American Journal of International Law*, Vol. 88 (1994): 227-256, at 227.

<sup>350</sup> Ibid at 227-228.

this kind as developing a common law in the classic sense.<sup>351</sup> Accordingly, decisions from international courts and tribunals, such as the decision in the *South China Sea Arbitration*, are important for the purposes of comparison and will likely be attributed greater value as potential precedents.<sup>352</sup> As a result, it can be said that the international community is certainly moving towards clarity regarding Article 121 with particular reference to the distinction between rocks and islands. However, in light of the aforementioned concerns of the validity of the *South China Sea Arbitration* on the interpretation of Article 121, perhaps further potential sources of clarification in this regard should be explored.

## 6.2 Potential Avenues for Further Clarification of Article 121

As Article 121 of the LOSC has a direct impact of the maritime jurisdictional zones States can claim around insular features, it will also impact directly on the infringement of coastal State's claims on the high seas and the Area.<sup>353</sup> Consequently, it has been suggested that the International Seabed Authority (ISA), which acts as a representative of the international community's interests in the Area, should play a role in the interpretation of Article 121 of the LOSC.<sup>354</sup> This may seem like a very attractive option however, it is unlikely that all States will accept clarification of this sort.<sup>355</sup> During the negotiations at UNCLOS III broad margin States, in particular, made constant objections to increased international control in regards to defining the limits of their continental shelves.<sup>356</sup> In order to strike a compromise, the procedure involving the CLCS was formulated in Article 76 of the LOSC.<sup>357</sup> It is highly unlikely that this compromise in the LOSC would be overhauled.<sup>358</sup> Furthermore, opponents of bestowing a significant role to ISA in relation to the interpretation of Article 121 of the LOSC may argue that interest of the international community is already safeguarded by the CLCS procedure.<sup>359</sup>

A further option would be hosting a diplomatic conference in order to clarify Article 121 through the elaboration of a more precise text.<sup>360</sup> However, past experience illustrates that attempts at

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<sup>351</sup> Ibid at 228.

<sup>352</sup> C.H. Schofield op cit note 4 at 198.

<sup>353</sup> A.G.O. Elferink op cit note 6 at 64.

<sup>354</sup> W.M. Reisman and G.S. Westerman, *Straight Baselines in International Maritime Boundary Delimitation* (1992), at 209-211.

<sup>355</sup> A.G.O. Elferink op cit note 6 at 64.

<sup>356</sup> Ibid.

<sup>357</sup> Ibid.

<sup>358</sup> Ibid.

<sup>359</sup> Ibid.

<sup>360</sup> See Articles 312 and 313 of the LOSC for the rules applicable to its amendment.

precisely structuring the text of Article 121 were all rejected.<sup>361</sup> Consequently, past experience with Article 121 at UNCLOS III points towards the futility of this approach.<sup>362</sup>

Perhaps, a less ambitious approach may prove to be more realistic. The convening of a meeting of experts under the auspices of the Division of Ocean Affairs and the Law of the Sea (DOALOS) of the United Nations Secretariat could culminate in the adoption of a report which contains a fundamental guide to interpreting Article 121 of the LOSC.<sup>363</sup> However, it seems that States are only really concerned with obtaining clarity regarding the interpretation of Article 121 when they themselves are involved in a dispute which calls for clarification of this sort. Most coastal States seem content to maintain the ambiguous *status quo* as this best suits their interests as it favors the possibility of claiming expansive maritime jurisdictional zones from insular features under their possession.

In conclusion, although the *South China Sea Arbitration* has done much to clarify Article 121 of the LOSC with particular reference to the distinction between rocks and islands, the authoritative weight of the Award is questionable. It appears that State practice and international courts and tribunals will continue to be the key source for the establishment of a precise meaning of Article 121 of the LOSC. It remains to be seen whether State practice will follow the interpretation offered in the *South China Sea Arbitration* or whether international courts and tribunals will affirm and build on it. This implies that although some clarity regarding the interpretation of Article 121, with particular reference to the distinction between rocks and islands, has been obtained; in all likelihood some uncertainties will persist. However, it can be expected that both State practice and international courts and tribunals will engage with this issue more meaningfully and more often than seen in the past.

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<sup>361</sup> See chapter 3.

<sup>362</sup> A.G.O. Elferink op cit note 6 at 64.

<sup>363</sup> Ibid.

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