PART VIII
REGIME OF ISLANDS

Article 121
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.

Bibliography: *Derek W. Bowett*, Islands, Rocks, Reefs and Low-Tide Elevations in Maritime Boundary Delimitations, in: Jonathan I. Charney/Lewis M. Alexander (eds.), International Maritime Boundaries, vol. I (1991), 131–151; *Derek W. Bowett*, The Legal Regime of Islands in International Law (1979); *Jonathan I. Charney*, Rocks that Cannot Sustain Human Habitation, AJIL 93 (1999), 863–877; *Alex G. Oude 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 (Summer 1998), 58–68; *Erik Franckx*, The Regime of Islands and Rocks, in: Malgosia Fitzmaurice/Norman A. Martínez Gutiérrez (eds.), The IMLI Manual on International Maritime Law, vol. I (2014), 99–124; *Gilbert Gidel*, Le droit international public de la mer, tome III: La mer territoriale et la zone contiguë (1934); *Mahon Hayes*, The Law of the Sea: The Role of the Irish Delegation at the Third UN Conference (2011); *Robert Jennings* and *Arthur Watts* (eds.), Oppenheim's International Law, vol. I: Peace (9th edn. 1992); *Philip C. Jessup*, The Law of Territorial Waters and Maritime Jurisdiction (1927); *Robert Kolb*, L'interprétation de l'article 121, paragraphe 3, de la convention de Montego Bay sur le droit de la mer: les 'rochers qui ne se prêtent pas à l'habitation humaine ou à une vie économique propre…', AFDI 40 (1994), 876–909; *Sophia Kopela*, Dependent Archipelagos in the Law of the Sea (2013); *Barbara Kwiatkowska/Alfred H. A. Soons*, Entitlement to Maritime Areas of Rocks Which Cannot Sustain Human Habitation or Economic Life of Their Own, Netherlands YIL 21 (1990), 139–181; *Fritz Münch*, Die technischen Fragen des Küstenmeers (1934); *Myron H. Nordquist*, Textual Interpretation of Article 121 in the UN Convention on the Law of the Sea, in: Holger Hestermeyer/Doris König/Nele Matz-Lück/Volker Röben/Anja Seibert-Fohr/Peter-Tobias Stoll/Silja Vöneky (eds.), Coexistence, Cooperation and Solidarity: Liber Amicorum Rüdiger Wolfrum (2012), 991–1035; Myron N. Nordquist/Sataya N. Nandan/Shabtai Rosenne (eds.), United Nations Convention on the Law of the Sea 1982: A Commentary, vol. III (1995); *Daniel P. O'Connell*, The International Law of the Sea, vol. I (1982); *Donat Pharand*, The Legal Status of the Arctic Regions, RdC 163 (1979-II), 49–116; *W. Michael Reisman/Gayl S. Westerman*, Straight Baselines in International Maritime Boundary Delimitation (1992); *Joshua L. Root*, Castles in the Sand: Engineering Insular Formations to Gain Legal Rights over the Oceans, Chinese (Taiwan) Yearbook of International Law and Affairs 32 (2014), 58–85; *Aaron L. Shalowitz*, Shore and Sea Boundaries: With Special Reference to the Interpretation and Use of Coast and Geodetic Survey Data, vol. I (1962); *C. K. Shum* et al., Accuracy Assessment of Recent Ocean Tide Models, Journal of Geophysical Research 102 (1997), 25, 173-25, 194; *Gordon W. Smith*, Ice Islands in Arctic Waters, in: Adam Lajeunesse (ed.), Ice Islands in Canadian Policy, 1954–1971, Documents on Canadian Arctic Sovereignty and Security, vol. 5 (2015), 1–94; *Clive R. Symmons*, Some Problems Relating to the Definition of 'Insular Formations' in International Law: Islands and Low-Tide Elevations, in: Clive Schofield/Peter Hocknell (eds.), Maritime Briefing, vol. I (1995); *Yoshifumi Tanaka*, The International Law of the Sea (2nd edn. 2015); *Jon M. Van Dyke/Robert A. Brooks*, Uninhabited Islands: Their Impact on the Ownerships of the Ocean's Resources, ODIL 12 (1983), 265–300

Documents: GA, Law of the Sea: Report of the Secretary-General: Progress Made in the Implementation of the Comprehensive Regime Embodied in the United Nations Convention on the Law of the Sea, UN Doc. A/47/512 (1992); Harvard Law School, Research in International Law, Draft Convention on Territorial Waters and Comments, AJIL Special Supplement, 23 (1929), 241–380; Memorandum No. BA 1271/2, dated 7 October 1959, from the Foreign Office to the Political Resident, Bahrain, reproduced in: Richard Schofield (ed.), Islands and Maritime Boundaries of the Gulf, vol. 18 (1958–1960) (1990), 305–307; UN DOALOS, The Law of the Sea: Régime of Islands – Legislative History of Part VIII (Article 121) of the United Nations Convention on the Law of the Sea (1988)

Cases: Conciliation Commission on the Continental Shelf Area between Iceland and Jan Mayen, Report and Recommendations to the Governments of Iceland and Norway, May 1981, ILM 20 (1981), 797; *Ex parte Marincovich*, Judgment of 10 July 1920, 192 P. 156 (Cal.App. 2 Dist. 1920) (USA); ICJ, *International Status of South West Africa*, Advisory Opinion, ICJ Reports (1950), 128; ICJ, *Maritime Delimitation and Territorial Questions between Qatar and Bahrain* (Qatar v Bahrain), Merits, Judgment, ICJ Reports (2001), 40; ICJ, *Maritime Delimitation in the Area between Greenland and Jan Mayen* (Denmark v. Norway), Judgment, ICJ Reports (1993), 38; ICJ, *Maritime Delimitation in the Black Sea* (Romania v. Ukraine), Judgment, ICJ Reports (2009), 61; ICJ, *Territorial and Maritime Dispute* (Nicaragua v. Colombia), Judgment, ICJ Reports (2012), 624; ITLOS, *The 'Monte Confurco' Case* (Seychelles *v.* France), Prompt Release, Judgment of 18 December 2000, ITLOS Reports (2000), 86; ITLOS, *The 'Volga' Case* (Russian Federation *v.* Australia), Prompt Release, Judgment of 23 December 2002, ITLOS Reports (2002), 10; *Middleton v. United States*, Judgment of 23 April 1929, 32 F.2 d 239, 240 (C.C.A. 5th, 1929) (USA); PCA, *South China Sea Arbitration* (Republic of the Philippines *v.* People's Republic of China), Award of 12 July 2016, available at: https://www.pcacases.com/web/view/7; PCA, *South China Sea Arbitration* (Republic of the Philippines *v.* People's Republic of China), Award on Jurisdiction and Admissibility of 29 October 2015, available at: https://www.pcacases.com/web/view/7; *Public Prosecutor v. Haraldsson and Others*, Judgment of 7 May 1996, 140 ILR 559 (Norway); *The Anna*, High Court of Admiralty of England (6, 15 and 20 November 1805), Reports of Cases argued and determined in the High Court of Admiralty commencing with the Judgments of the Right Hon. Sir William Scott, Michaelmas Term, 1798, ed. by Christopher Robinson, 1799–1808, Vol. V (1806), 373, 385c; *United States v. Marshalls*, Decision of 8 May 2008, 2008 U.S. Dist. LEXIS 38627 (USA); *United States v. Alaska*, Judgment of 19 June 1997, 521 U.S. 1 (1997) (USA)

Contents

I. Purpose and Function

Consisting of its own Part VIII of the Convention, the 'Regime of Islands' in Art. 121 contains the legal definition of the term 'island', the general rule that islands are to be treated as any other land territory for the purpose of determining their maritime entitlements, and an exception to that rule with regard to 'rocks which cannot sustain human habitation or economic life of their own'. Art. 121 is only concerned with individual islands and not with groups of islands or archipelagos.[1] The provision deals only with the entitlement of islands to maritime zones; it does not deal with the question of delimiting the zones generated by islands in case of overlapping entitlements.[2] The regime of islands also has nothing to say about the acquisition of sovereignty over insular land territory, a question that is governed by general international law. **1**

With literally hundreds of thousands of islands, the practical importance of the provision can hardly be exaggerated. Islands can give States sovereignty, sovereign rights and jurisdiction over millions of square kilometres of ocean space. According to Art. 121, even the smallest of **2**

[1] For archipelagos, see *Markus* on Art. 46 MN 31 *et seq*.
[2] This question is dealt with in Arts. 15, 74 and 83.

islands is entitled to a territorial sea of up to 12 NM (22.22 km). A rock of the size of a few square centimetres can thus generate 1.551 km^2 of territorial sea. That is the same area of territorial sea as is generated by some 69.8 km of straight coastline. A small proper island, on the other hand, is entitled not just to a territorial sea but also to an exclusive economic zone (EEZ) and a continental shelf of at least some 431,000 km^2. The sea area that can be claimed on the basis of a proper island is thus 278 times bigger than the area that can be claimed on the basis of a rock. For example, Nauru, the smallest island State in the world with a land territory of 21 km^2 (and thus the 194th country in terms of land area) generates EEZ and continental shelf entitlements consistent with the Convention of 431,000 km^2. Nauru's sea area thus almost equals the land area of Finland, the world's 65th largest State.

3 At UNCLOS III the recognition of extensive EEZ and continental shelf entitlements met the long-established principles that islands, regardless of their size, enjoy the same status, and that islands generate the same maritime rights as other land territory. If all islands had given their owners the right to claim an 200 NM EEZ and continental shelf this would have led to an unprecedented encroachment of coastal State jurisdiction over areas of ocean space formerly open to all. This would have severely impacted on the new principle of the Area and its resources being the common heritage of mankind. In addition, EEZ and continental shelf claims based on islands would have led to countless new maritime delimitation disputes. The purpose of Art. 121 (3), restricting the maritime entitlements of certain rock islands, was to mitigate some of these effects and to contribute to a more equitable distribution of the resources of the sea.

II. Historical Background

4 The definition of the term 'island' has changed considerably over time. For example, up to the 1950s several States defined an island as a 'naturally formed part of the earth's surface, projecting above the level of the sea at low tide', thus including low-tide elevations in the term 'island'.[3] Others required the area of land to be 'capable of effective occupation and use'.[4] Some even treated 'artificial islands' as 'islands'.[5] The present definition of the term 'island' which is now contained in of Art. 121 (1) was arrived at only at UNCLOS I in 1958.[6]

5 The genesis of Art. 121 (2) and (3) is inextricably linked with the expansion of coastal State jurisdiction through the EEZ and the continental shelf. The question of the maritime entitlements of islands was first discussed in the Committee on the Peaceful Uses of the Sea-Bed and the Ocean Floor beyond the Limits of National Jurisdiction ('Sea-Bed Committee') which was working on a draft declaration of legal principles governing the sea-bed and the ocean floor, and the subsoil thereof, beyond the limits of national jurisdiction. On 18 March 1969, Malta submitted a draft declaration which recommended that 'rocks and islands without a permanent settled population' should be disregarded when determining the coastal States' right to exercise sovereign rights over the resources adjacent to their coasts.[7] Several States immediately objected.[8] The battle lines for the coming years were drawn. Matters were further complicated when at UNCLOS III questions of delimitation of the

[3] See e. g. League of Nations, Conference for the Codification of International Law, Bases of Discussion, Volume II – Territorial Waters, C.74.M.39.1929.V [C.74.M.68.1929.V.2], Geneva, 15 May 1929, 52–53.

[4] *Ibid.*, 53.

[5] *Ibid.*, 52.

[6] Art. 10 (1) Convention on the Territorial Sea and the Contiguous Zone.

[7] Sea-Bed Committee, Representative of Malta: Statement in the Legal Sub-Committee, UN Doc. A/AC.138/11 (1969, mimeo.), 2. See also Seabed Committee, Legal Sub-Committee 7th Meeting, UN Doc. A/AC.138/SC.1/SR.1-11 (1969), 66 (Malta).

[8] See Sea-Bed Committee, Legal Sub-Committee 8th Meeting, UN Doc. A/AC.138/SC.1/SR.1-11 (1969), 78 (Norway); Sea-Bed Committee, Legal Sub-Committee 10th Meeting, UN Doc. A/AC.138/SC.1/SR.1-11 (1969), 110 (United Kingdom); *ibid.*, 112 (Japan).

maritime zones of islands close to the coast of another State entered the picture. The various provisions taken by States are well documented.[9] However, the text of Art. 121 (2) and (3) emerged from informal consultations during the Third Session of UNCLOS III in 1975 for which there are no official records and only few informal documents.[10] The present text of the provision appeared first on the 9th of May 1975 as Art. 132 of the Informal Single Negotiating Text (ISNT).[11] During the Fourth Session of UNCLOS III in 1976 several amendments were suggested which commanded strong, but not majority, support. The provision was therefore retained without change in Art. 128 of the Revised Single Negotiating Text.[12] During the remainder of the conference several attempts were made, on the one hand, to limit the maritime entitlements of islands even further and, on the other, to remove any restriction of islands by deleting paragraph 3 altogether. None was successful and the provision became Art. 121 of the final text of the Convention.

Art. 121 was regarded as including 'a certain progressive development' of the rules of the 1958 Geneva Conventions on the Law of the Sea.[13] In 1992, the UN Secretary-General wrote in a Report that **6**

> 'Article 121(3), regarding rocks, has not had a great impact upon the practice of States. Existing claims to 200-mile zones made before the adoption of the Convention have, in the main, not been withdrawn. New claims since 1982 to 200-mile zones measured from small features, which may be described as rocks, have generated protests in some cases. As the result, the practice of States displays unevenness.'[14]

This has not prevented international courts and tribunals from declaring all three paragraphs of Art. 121 and not just the well-established definition of the term 'island' in paragraph 1[15] to be reflective of customary international law.[16] In light of the ambiguity of the language of Art. 121 (3) and conflicting State practice the customary international law nature of paragraph 3 has been rightly called into question.[17] Even if Art. 121 (3) were reflective of customary international law, a good case could be made that several non-parties to the Convention, such as Turkey and Venezuela, may be considered persistent objectors to that provision.

---

[9] See UN DOALOS, The Law of the Sea: Régime of Islands – Legislative History of Part VIII (Article 121) of the United Nations Convention on the Law of the Sea (1988). See also Myron N. Nordquist/Sataya N. Nandan/Shabtai Rosenne (eds.), United Nations Convention on the Law of the Sea 1982: A Commentary, vol. III (1995), 324–339.

[10] The latter can be found in Renate Platzöder (ed.), Third United Nations Conference on the Law of the Sea: Documents, vol. IV (1983), 221–222.

[11] UNCLOS III, Informal Single Negotiating Text, Part II, UN Doc. A/CONF.62/WP.8/PART II (1975), OR IV, 152, 170–171.

[12] UNCLOS III, Revised Single Negotiating Text, Part II, UN Doc. A/CONF.62/WP.8/REV.1/PART II (1976), OR V, 151, 172.

[13] See German Bundestag, Memorandum on the UN Convention on the Law of the Sea and the Implementation Agreement, BT-Drucksache 12/7829, 10 June 1994, 249.

[14] GA, Law of the Sea: Report of the Secretary-General: Progress Made in the Implementation of the Comprehensive Regime Embodied in the United Nations Convention on the Law of the Sea, UN Doc. A/47/512 (1992), 12 (para. 46).

[15] On the customary international law status of the definition of 'island' in Art. 121 (1), see e. g. ICJ, *Territorial and Maritime Dispute* (Nicaragua v. Colombia), Judgment, ICJ Reports (2012), 624, 645 (para. 37).

[16] ICJ, *Maritime Delimitation and Territorial Questions between Qatar and Bahrain* (Qatar v Bahrain), Merits, Judgment, ICJ Reports (2001), 40, 97 (para. 185: on Art. 121 (2)); *Territorial and Maritime Dispute* (note 15), 673 (para. 138), and 674 (para. 139): 'Article 121 forms an indivisible régime, all of which […] has the status of customary international law'. See also Conciliation Commission on the Continental Shelf Area between Iceland and Jan Mayen, Report and Recommendations to the Governments of Iceland and Norway, May 1981, ILM 20 (1981), 797, 803.

[17] See *Yoshifumi Tanaka*, The International Law of the Sea (2nd edn. 2015), 68–69.

III. Elements

1. 'island'

7 Art. 121 has not been the subject of in-depth consideration and analysis by international courts and tribunals. Its provisions have been accorded a wide range of different interpretations in scholarly writings.[18] The Award of 12 July 2016 of the Arbitral Tribunal constituted under Annex VII UNCLOS in the *South China Sea Arbitration* ('*SCS Arbitration*') has thus automatically become the leading (because only) case on the interpretation of Art. 121.[19] The Award, however, is not without controversy and some caution must be exercised when applying its findings.

8 Art. 121 distinguishes between 'island' (used in paragraphs 1 and 2) and 'rocks' (used in paragraph 3). Art. 121 (1) defines the term 'island' as a 'naturally formed area of land, surrounded by water, which is above water at high tide.' The name of a feature has no bearing on whether it qualifies as an 'island' or a 'rock' for purposes of Art. 121.[20] Rocks and islands, but not low-tide elevations, qualify as 'insular land territory' in terms of Art. 298 (1)(a)(i). The latter constitute land territory but do not meet the requirement of islands of being above water at high tide.

9 Rocks or 'rock islands' are a subset of the category 'island' and as such must also satisfy the geographical criteria set out in Art. 121(1). The term 'rock island' ('*Felseninsel*') was introduced in the Norwegian Law of 14 July 1822 which extended Norway's customs boundary to 10 NM measured from 'islands and rock islands' ('*øer og holmer*') which are not constantly submerged.[21] Whenever UNCLOS uses the term 'island' this includes 'rocks'. For example, where there is a fringe of 'rocks' along the coast in its immediate vicinity, the method of straight baselines may be employed (Art. 7 (1)).[22]

2. 'area of land'

10 An island is defined as an 'area of land', irrespective of its geological or geomorphological composition.[23] Islands may be formed by rock, sand, mud, gravel, sediment, madrepore or

[18] See e. g. *Jon M. Van Dyke/Robert A. Brooks*, Uninhabited Islands: Their Impact on the Ownerships of the Ocean's Resources, ODIL 12 (1983), 265–300; *Barbara Kwiatkowska/Alfred H. A. Soons*, Entitlement to Maritime Areas of Rocks which Cannot Sustain Human Habitation or Economic Life of Their Own, Netherlands YIL, 21 (1990), 139–181; *Robert Kolb*, L'interprétation de l'article 121, paragraphe 3, de la convention de Montego Bay sur le droit de la mer: les 'rochers qui ne se prêtent pas à l'habitation humaine ou à une vie économique propre…', AFDI 40 (1994), 876–909; *Alex G. Oude 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 (Summer 1998), 58–68; *Jonathan I. Charney*, Rocks that Cannot Sustain Human Habitation, AJIL 93 (1999), 863–877; *Myron H. Nordquist*, Textual Interpretation of Article 121 in the UN Convention on the Law of the Sea, in: Holger Hestermeyer et al. (eds.), Coexistence, Cooperation and Solidarity: Liber Amicorum Rüdiger Wolfrum (2012), 991–1035; *Erik Franckx*, The Regime of Islands and Rocks, in: Malgosia Fitzmaurice and Norman A. Martínez Gutiérrez (eds.), The IMLI Manual on International Maritime Law, vol. I (2014), 99–124.

[19] PCA, *South China Sea Arbitration* (Republic of the Philippines *v.* People's Republic of China) Award of 12 July 2016, available at: https://www.pcacases.com/web/view/7.

[20] *Ibid.*, para. 482.

[21] League of Nations, Committee of Experts for the Progressive Codification of International Law, Report to the Council of the League of Nations on the Questions which Appear Ripe for International Regulation (Questionnaires Nos. 1 to 7), C.196.M.70.1927.V.1, 20 April 1927, 41.

[22] See e. g. *Sophia Kopela*, Dependent Archipelagos in the Law of the Sea (2013), 57–60. Contra *W. Michael Reisman/Gayl S. Westerman*, Straight Baselines in International Maritime Boundary Delimitation (1992), 84–86, who require that the islands that constitute the fringe must be able to sustain human habitation or economic life of their own.

[23] *The Anna*, England, High Court of Admiralty of England, 6, 15 and 20 November 1805), Reports of Cases argued and determined in the High Court of Admiralty commencing with the Judgments of the Right Hon. Sir William Scott, Michaelmas Term, 1798, ed. by Christopher Robinson, 1799–1808, Vol. V (1806), 373, 385 c, 385 d; *Territorial and Maritime Dispute* (note 15), 645 (para. 37); *SCS Arbitration Award* (note 19), para. 481.

coral. A feature composed of coral debris qualifies as an island, provided it is composed of solid material, attached to the substrate, and not of loose debris.[24] The questions concerning the texture of the soil and vegetation are equally irrelevant for the island status of an area of land. These questions may, however, be relevant for the question of whether a land feature is capable of sustaining human habitation.[25]

So-called 'ice islands', i. e. 'large floating masses of distinctive kind of ice, which drift slowly with the wind and water currents' of the Arctic or Southern Ocean,[26] cannot be assimilated to land area, although they may be naturally formed and due to their size and thickness they may be capable of occupation by research expeditions. Depending on whether the ice island is used in a fixed position as a drilling platform or installation, or whether it is used as a floating research station it may legally be treated either as an artificial island or as a ship.[27] 11

International law does not prescribe a minimum size for a land area to qualify as an island.[28] There is no such legal category as an 'islet' in international law. Even the tiniest fragments of emerged land are legally islands. In practice, even 'pin-point rocks' of only several square centimetres have been treated as islands.[29] But the size of an island may be relevant for the question of whether it is capable of sustaining human habitation or economic life of its own.[30] The size of an island may also be relevant for purposes of delimitation.[31] 12

The geographic location of an area of land and, in particular, that it is located in 'a remote area of the world' such as the Arctic or Southern Ocean, is irrelevant for its status as an island.[32] Similarly, the question of habitation does not play any role in the status of a land area.[33] 13

3. 'naturally formed'

The term island initially included both natural and artificial islands. At the Conference for the Codification of International Law, held at The Hague in 1930, Subcommittee II of the Committee on Territorial Waters defined an 'island' as 'an area of land, surrounded by water, which is permanently above high-water mark.' In the Subcommittee's accompanying observations it was stated that the 'definition of the term "island" does not exclude artificial islands, provided these are true portions of the territory and not merely floating works, anchored buoys, etc.'[34] During the deliberations of the International Law Commission (ILC) 14

[24] *Cf. Territorial and Maritime Dispute* (note 15), 645 (para. 37). See also *Derek W. Bowett*, The Legal Regime of Islands in International Law (1979), 4–5.

[25] See *infra*, MN 38.

[26] *Gordon W. Smith*, Ice Islands in Arctic Waters, in: Adam Lajeunesse (ed.), Ice Islands in Canadian Policy, 1954–1971, Documents on Canadian Arctic Sovereignty and Security, vol. 5 (2015), 1.

[27] See *Donat Pharand*, The Legal Status of the Arctic Regions, RdC 163 (1979-II), 49, 94–100.

[28] *Maritime Delimitation between Qatar and Bahrain* (note 16), 97 (para. 185); *SCS Arbitration Award* (note 19), 538. This view had already been expressed by *Gilbert Gidel*, Le droit international public de la mer, tome III: La mer territoriale et la zone contiguë (1934), 668.

[29] See e. g. *Maritime Delimitation between Qatar and Bahrain* (note 16), 97 (para. 187); *Territorial and Maritime Dispute* (note 15), 645 (para. 37), and 699 (para. 202).

[30] See *infra*, MN 36.

[31] See e. g. *Territorial and Maritime Dispute* (note 15), 699 (para. 202); *Maritime Delimitation between Qatar and Bahrain* (note 16), 104 (para. 219). See, generally, *Derek W. Bowett*, Islands, Rocks, Reefs and Low-Tide Elevations in Maritime Boundary Delimitations, in: Jonathan I. Charney/Lewis M. Alexander (eds.), International Maritime Boundaries, vol. I (1991), 131–151.

[32] *Cf.* ITLOS, *The 'Volga' Case* (Russian Federation v. Australia), Prompt Release, Judgment, ITLOS Reports 2002, 10, 51 (para. 9, sep. op. Cot), and 57 (para. 2, n. 3, diss. op. Anderson); *ibid.*, Verbatim Records, ITLOS/PV.02/02 (2002), 5, line 45 (Australia); ITLOS, *The 'Monte Confurco' Case* (Seychelles v. France), Prompt Release, Statement in Response of the French Government, 5 December 2000, 14, available at: https://www.itlos.org/cases/list-of-cases/case-no-6/.

[33] *Middleton v. United States*, Circuit Court of Appeals, 5th Circuit, 23 April 1929, 32 F.2 d 239, 240 (C.C.A. 5th, 1929).

[34] Report Adopted by the [Second] Committee on April 10th, 1930, Appendix II: Report of the Second Sub-Committee, League of Nations, Acts of the Conference for the Codification of International Law, Volume III – Minutes of the Second Committee: Territorial Waters, C.351(b).M.145(b).1930.V.16, 19 August 1930, 209, 219. See also *Gidel* (note 28), 684.

on 'The Regime of the Territorial Sea', HERSCH LAUTERPACHT suggested in 1954 that the adjective 'natural' be inserted before the words 'area of land' in the definition of the term 'island' in order to exclude artificial islands from having a territorial sea, but his proposal was rejected by five votes to four, with two abstentions.[35] The United States, which already in 1929 had suggested limiting the term 'island' to 'any naturally formed part of the earth's surface',[36] in 1958 made another attempt to exclude 'artificially placed land' from the definition of island because its inclusion 'permits an undesirable means of extension of the territorial sea and consequent encroachment on the freedom of the high seas.'[37] The US proposal that 'an area is a *naturally-formed* area of land' found its way into Art. 10 (1) of the Convention on the Territorial Sea and the Contiguous Zone.[38]

15 'Man-made islands', i. e. islands 'created by man from natural materials, dredged or otherwise transported, to form an area of land surrounded by water which is above water at high tide',[39] do not qualify as 'islands' in terms of Art. 121 (1) but are governed by the provisions on 'artificial islands'.[40] The distinction between man-made and natural islands is, however, not always straightforward. While an area of land created by the deposition of sediment through storm or tidal action will usually qualify as a natural island,[41] the question is more difficult to answer if the reason or basis for any natural accretion of sand or rubble is an artificial structure such as a beacon, i. e. if the natural process of land-creation has been triggered, caused or accelerated by artificial means.[42] Any human interference with natural processes should automatically result in the newly emerging area of land being considered an artificial island.[43]

16 There has been a long history of human effort to preserve and protect existing natural islands against erosion and abrasion by building sea defences. States have also raised existing islands to protect them from storm surges and higher tides.[44] The preservation of existing naturally formed islands by artificial means or by human induced natural accretion does not deprive these land areas of their 'island' status.[45] Natural islands may grow naturally as a result of the accumulation of coral debris, the deposit of sediment or accretion, but they may also be extended artificially by building up the sea bed with dredged or other aggregate material. The extension of a naturally formed island by artificial means does not affect its legal status. States may extend existing islands just as they may extend mainland territory by way of reclamation or the building of harbour works.[46] When a natural island is extended its maritime zones may, depending on the circumstances, extend with it.[47] Natural islands which are totally or partially washed away by huge waves, tsunami, hurricane, cyclone or floods may be rebuilt by artificial means without affecting their legal status as islands.

---

[35] ILC Yearbook (1954), vol. I, 92, 94.

[36] League of Nations, Conference for the Codification of International Law, Bases of Discussion, Volume II – Territorial Waters, C.74.M.39.1929.V [C.74.M.68.1929.V.2], Geneva, 15 May 1929, 53.

[37] UNCLOS I, United States of America: Proposal, UN Doc. A/CONF.13/C.1/L.112 (1958), OR III, 242.

[38] Art. 10 (1) Convention on the Territorial Sea and the Contiguous Zone.

[39] See Sea-Bed Committee, Malta: Preliminary Draft Articles on the Delimitation of Coastal State Jurisdiction in Ocean Space and on the Rights and Obligations of Coastal States in the Area under their Jurisdiction, UN Doc. A/AC.138/SC.II/L.28 (1973), GAOR 26th Sess. Suppl. 21 (A/9021-III), 69.

[40] See Arts. 11, 56 (1)(b)(i), 60, 79 (4), 80, 87 (1)(d), 147 (2), 208 (1), 214, and 246 (5)(c).

[41] See *The Anna* (note 23), 385 c.

[42] *Gidel* (note 28), 682, 684, wanted to assimilate such artificial elevations with natural islands.

[43] *Cf.* Memorandum No. BA 1271/2, dated 7 October 1959, from the Foreign Office to the Political Resident, Bahrain, reproduced in Richard Schofield (ed.), Islands and Maritime Boundaries of the Gulf, vol. 18 (1958–1960) (1990), 305, 307.

[44] For examples, see *Clive R. Symmons*, Some Problems Relating to the Definition of 'Insular Formations' in International Law: Islands and Low-Tide Elevations, in: Clive Schofield/Peter Hocknell (eds.), Maritime Briefing, vol. I, no. 5 (1995), 2–3.

[45] *Ibid.*, 3.

[46] See *Philip C. Jessup*, The Law of Territorial Waters and Maritime Jurisdiction (1927), 456; *Fritz Münch*, Die technischen Fragen des Küstenmeers (1934), 76–77.

[47] *Joshua L. Root*, Castles in the Sand: Engineering Insular Formations to Gain Legal Rights over the Oceans, Chinese (Taiwan) Yearbook of International Law and Affairs 32 (2014), 58, 75.

A man-made island built within the territorial sea of an existing naturally formed island cannot automatically adopt the status of the natural island if the latter disappears due to sea-level rise or other events. However, in the course of time the artificial island may become assimilated to a natural island and the fact that it was once artificial forgotten.[48] 17

4. 'surrounded by water'

For an area of land to be an island it must be surrounded by water at low tide. Otherwise, it would be connected to other land territory and would thus come within, or form part of, the low-water line of that other land territory. In other words, an island can only have its own maritime zones where the low-water line of the island is completely detached from the low-water line of any other (main)land territory.[49] An artificial channel between the mainland and a land area is not sufficient as the island must have been 'naturally formed'. Thus the Kiel Canal does not make the seaward part of Germany and Denmark an island. 18

5. 'above water at high tide'

In a Memorandum Regarding a Common Policy for the British Empire on the Question of the Limits of Territorial Waters prepared for the Imperial Conference in London in October 1923, the word 'island' was defined in part as 'all portions of territory permanently above high water'.[50] However, the requirement that land territory had to be 'above high water' in order to qualify as an island was not generally accepted at the time.[51] The Committee of Experts in their Report for the Conference for the Codification of International Law, held at The Hague in 1930, considered any land territory 'not continuously submerged' to be an island.[52] In response to a questionnaire in preparation of the Conference the United States of America stated that 'any naturally formed part of the earth's surface, projecting above the level of the sea *at low tide* and surrounded by water at low tide, should be considered an island.'[53] This view was shared by Denmark, Estonia, Finland, Germany, Japan, Norway, the Netherlands, Rumania, and Sweden. The replies of South Africa, Australia, Great Britain, India, and New Zealand took the opposite position. The Preparatory Committee of the Conference observed the split and the fact that a 'compromise may be contemplated', and then stated as its Basis of Discussion No. 14: 19

> 'In order that an island may have its own territorial waters, it is necessary that it should be permanently above the level of high tide. In order that an island lying within the territorial waters or another island or of the mainland may be taken into account in determining the belt of such territorial waters, it is sufficient for the island to be above water at low tide.'[54]

[48] See United Kingdom, Records of the Admiralty, Hydrographer's Minute (H.W.0162/51), 6 January 1951, International Law Territorial Waters (51-1): Artificial islands: territorial waters and law of the sea, British National Archives, ADM 1/21890/50.

[49] *Aaron L. Shalowitz*, Shore and Sea Boundaries: With Special Reference to the Interpretation and Use of Coast and Geodetic Survey Data, vol. I (1962), 226. See League of Nations, Conference for the Codification of International Law, Bases of Discussion, Volume II – Territorial Waters, C.74.M.39.1929.V [C.74.M.68.1929.V.2], Geneva, 15 May 1929, 53.

[50] Imperial Conference 1923. Report of Inter-Departmental Committee on the Limits of Territorial Waters, E/64. Revised, Imperial Conference 1923, Territorial Waters as a common Empire Policy, British National Archives IOR/L/7/1290, File 3667(i).

[51] See e. g. Harvard Law School, Research in International Law, Draft Convention on Territorial Waters and Comments, AJIL Special Supplement 23 (1929), 241, 243.

[52] League of Nations, Committee of Experts for the Progressive Codification of International Law, Report to the Council of the League of Nations on the Questions which Appear Ripe for International Regulation (Questionnaires Nos. 1 to 7), C.196.M.70.1927.V.1, 20 April 1927, 41–42. See also the text of Art 5 of the Draft Convention, ibid., 59. See further identical the text of Art 5(1) of the Draft Convention Amended by M. Schücking in Consequence of the Discussion in the Committee of Experts, ibid., 72.

[53] See League of Nations, Conference for the Codification of International Law, Bases of Discussion, Volume II – Territorial Waters, C.74.M.39.1929.V [C.74.M.68.1929.V.2], Geneva, 15 May 1929, 53.

[54] *Ibid.*, 54.

A distinction was made not between islands and low-tide elevations but between islands permanently above water at high tide and islands above water only at low tide. While the first category had a territorial sea of its own, the second category could only extend an existing territorial sea of the mainland or another high tide island. Both, however, were called 'islands'.[55] It was only the ILC that reserved the term 'island' for land area that 'in normal circumstances is permanently above high-water mark.'[56] The distinction between 'islands' and 'low-tide elevations' then found its way into the Geneva Convention on the Territorial Sea and Contiguous Zone which in Art. 10 (1) defined the term 'island' as an area of land 'which is above water at high tide.'[57]

20 Islands are also referred to as 'high-tide elevations' or 'high-tide features'. The question of whether an area of land is above water at high tide is a question of hydrography. The Convention is silent on the question of which tide is relevant for the determination of island status: highest astronomical tide, mean high-water spring tide, mean high-water neap tide, or mean sea level?[58] Although many States define the term 'island' in their national legislations by reference to the 'mean high-water spring tides',[59] there is no clear rule of customary international law that would mandate that the status of islands be determined against any particular high-water datum.[60] Accordingly, the Tribunal in the *SCS Arbitration* considered

> 'that States are free under the Convention to claim a high-tide feature or island on the basis of any high-water datum that reasonably corresponds to the ordinary meaning of the term "high tide" in Articles 13 and 121. Ordinarily, this would also be the height datum for nautical charts published by that State, above which rocks would be depicted as not covering at high tide.'[61]

21 When determining whether an area of land is above water at high tide, tidal patterns and ranges have to be considered.[62] Tidal levels in a sea may vary both spatially and temporarily. A tidal model or method is required to convert bathymetric measurements made at different stages of the tide to a standard level. There are more than 20 global ocean tide models.[63] The International Court of Justice (ICJ) considered calculations based on global tidal models like the (disputed) Grenoble Tidal Model as not sufficient in shallow waters 'to prove that tiny maritime features are a few centimetres above water at high tide'.[64] If the parties to a dispute rely on different tidal models in their arguments, a court or tribunal should only treat such features as islands which are above water at high tide no matter which model is used. This is consistent with the fact that international law does not specify a particular tidal model for that purpose, as well as the bilateral character of the establishment of a maritime boundary.[65] In the *SCS Arbitration*, the Tribunal considered that the existence of potentially overlapping entitlements may have practical considerations for the selection of the vertical datum and tidal model against which the status of a land feature as an island is to be assessed. This – according to the Tribunal – may be particularly true if the parties' respective data and models

---

[55] See *Münch* (note 46), 79.

[56] ILC Yearbook (1956), vol. II, 270.

[57] See *supra*, MN 4.

[58] For the various tidal levels, see *Daniel P. O'Connell*, The International Law of the Sea, vol. I (1982), 173–175.

[59] See e. g. Solomon Islands, The Delimitation of Marine Waters Act, 1978, Act No. 32 of 21 December 1978, section 2(1); Tonga, The Territorial Sea and Exclusive Economic Zone Act, Act No. 30 of 23 October 1978, as amended by Act No. 19 of 1989, S. 2 (1); New Zealand, Territorial Sea and Exclusive Economic Zone Act 1977, Act No. 28 of 26 September 1977 as amended by Act No. 146 of 1980, S. 2 (1), Falkland Islands (Territorial Sea) Order 1989 [SI 1989, No. 1993], Art. 4 (a); St. Helena and Dependencies (Territorial Sea) Order 1989 [SI 1989, No. 1994], Art. 5 (a).

[60] *Cf.* US Supreme Court, *United States v. Alaska*, 521 U.S. 1, 23 (1997), where Alaska and the United States agreed that 'high-tide' under Art. 10 (1) of the Convention on the Territorial Sea and the Contiguous Zone should be defined as 'mean high water,' an average measure of high water over a 19-year period.

[61] *SCS Arbitration Award* (note 19), para. 311.

[62] *Cf. ibid.*, paras. 314–319.

[63] See *C. K. Shum et al.*, Accuracy Assessment of Recent Ocean Tide Models, Journal of Geophysical Research 102 (1997), 25,173.

[64] *Territorial and Maritime Dispute* (note 15), 645 (para. 38).

[65] *Cf. ibid.*, 645 (para. 37).

indicate differing results.[66] The Tribunals thus seems to have assumed that the relevant vertical datum or tidal model is the one of the State in whose EEZ or on whose continental shelf a feature is located.[67]

The Convention does not specify how frequently a feature must be above water at high tide to qualify as an island. The Tribunal in the *SCS Arbitration* held that **22**

> 'it is possible that a sand cay may be dispersed by storm action and reform in the same location after a short while. The absence of a sand cay at a particular point in time is thus not conclusive evidence of the absence of a high-tide feature. […] the Tribunal considers that the strong historical evidence of a sand cay on the reefs […] is to be preferred, even if the presence of [the feature] over time is intermittent.'[68]

While the ILC in its Draft Articles on the Law of the Sea defined an island as an area of land 'which in normal circumstances is permanently above high-water mark',[69] this part of the definition was later dropped from Art. 10 (1) of the Convention on the Territorial Sea and the Contiguous Zone at the suggestion of the United States which argued that the requirements 'in normal circumstances' and 'permanently' are conflicting and that 'there is no established state practice regarding the effect of subnormal or abnormal or seasonal tidal action on the status of islands.'[70] But this change did not signal an intent to cover features that are only sometimes or occasionally above water at high tide. On the contrary, to qualify as an island, a feature must be above water at high tide except in abnormal circumstances.[71] In particular, a land area cannot be deemed an island when above water at high tide and a low-tide elevation when below water at high tide. A feature that oscillates above and below high tide is not an island;[72] there are no 'ambulatory' islands. But, there is nothing in the Convention which prescribes that to be an island a feature must have been above water at high tide for any particular length of time.

There is no specific altitude requirement. A feature that is only millimetres or centimetres above water at high tide can qualify as an island.[73] **23**

A low-tide elevation can become an island as a result of natural accretion (alluvium). For example, a coral boulder may be pushed onto the reef platform and above high water by storm action,[74] or a sand cay or sandbar may be formed by storm action on a drying reef making the drying reef a rock island.[75] Artificially increasing the height of a feature by land reclamation, on the other hand, will not satisfy the requirement that an island is above water at high tide. This is the logical corollary of the requirement that an island is a 'naturally formed' area of land.[76] Human modification of features that, in their natural condition, are submerged at high tide will not change their legal status and cannot generate their own maritime entitlements. The raising of the height of an existing natural island or its rebuilding after storm action, on the other hand, does not deprive it of its island status. If a feature is above water at high tide because of reclamation works, it is an 'artificial island'. In case of land reclamation or construction activities, the status of a feature must be ascertained on the basis of its earlier, natural condition, prior to the onset of these activities.[77] **24**

---

[66] PCA, *South China Sea Arbitration* (Republic of the Philippines v. People's Republic of China), Award on Jurisdiction and Admissibility of 29 October 2015, paras. 401, 403, available at: https://www.pcacases.com/web/view/7; *SCS Arbitration Award* (note 19), para. 283.

[67] See *SCS Arbitration Award* (note 19), para. 312.

[68] *Ibid.*, para. 373.

[69] ILC Yearbook (1956), vol. II, 257.

[70] USA Proposal (note 37).

[71] See *United States v. Alaska* (note 60), 22–27.

[72] See *ibid.*, 31–32.

[73] See *Maritime Delimitation between Qatar and Bahrain* (note 16), 99 (para. 197); and *ibid.*, Reply Submitted by the State of Bahrain (Merits), vol. 1, 30 May 1999, para. 329; *Territorial and Maritime Dispute* (note 15), 644 (para. 36), and 645 (para. 37).

[74] *SCS Arbitration Award* (note 19), paras. 354, 382 (with regard to McKennan Reef in the South China Sea).

[75] See *ibid.*, paras. 373, 384 (with regard to Sandy Cay in the South China Sea).

[76] See *Root* (note 47), 75.

[77] See *SCS Arbitration Award* (note 19), paras. 305, 306, 508.

25 Nature may not only operate to raise the height of a feature but may also diminish it. Just as through accretion an island may come into existence, so it may disappear through erosion or volcanic action. Thus, if a feature falls below the water level at high tide it loses its status as an island.[78] If, on the other hand, the part of the feature which is exposed at high tide is removed against the will of the territorial sovereign by artificial means, the feature will not lose its islands status.[79]

26 Above water at high tide must be understood as referring to the 'naturally occurring tide'. Creating the appearance of a feature being above water at high tide by manipulating or keeping out the tide by artificial means, for example by building walls of other structures around a low-tide elevation, cannot transform that feature into an island.[80]

6. 'Rocks'

27 'Rocks' must be distinguished from so-called 'drying rocks' which are rocks that are only visible at low tide and as such are properly characterised as 'low-tide elevations'. 'Rocks', as used in Art. 121(3), are a subcategory of the category 'island', as defined in Art. 121(1).[81]

28 The term 'rocks' is not defined in the Convention. The Tribunal in the *SCS Arbitration* held that the term does not establish 'any geological or geomorphological criteria'. In other words, Art. 121 (3) does not apply only to 'features that are composed of solid rock or that are otherwise rock-like in nature',[82] but also to features consisting of sand, clay, coral or other material. The Tribunal thus gave up the distinction between rocks and islands. If rocks are a subcategory of islands but are not distinguishable from the latter on geological or geomorphological grounds, Art. 121 (3) in fact read: 'islands which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf.'[83] The Tribunal here adopted a legislative role rewriting the text of Art. 121 (1).

29 There are several reasons that militate against the Tribunal's wide interpretation of the term 'rocks'. First, it is contrary to the ordinary meaning of the term to treat any area of land irrespective of its composition as a 'rock'. Second, the term 'rocks' in Art. 121 (3) would be devoid of a distinct meaning and one might wonder why the drafters did not employ the term island, if that is what they intended. Third, and most importantly, the interpretation is not in accordance with the drafting history of the provision. During the deliberations of the topic 'regime of islands' in the Second Committee of UNCLOS III States clearly distinguished between 'islands', 'islets', 'rocks' and 'low-tide elevations'. In a draft article on the regime of islands proposed by 15 African States in August 1974, a 'rock' was defined as 'a naturally formed rocky elevation of ground', while an island or an islet was defined as a vast or smaller 'naturally formed area of land'.[84] Similarly, an informal proposal submitted by Algeria, Ireland, Madagascar, Morocco, Romania, Senegal, Thailand, Tunisia and Turkey (the 'Nine State Proposal') defined a 'rock' as 'a naturally formed rocky elevation normally unfit for human habitation'.[85] This proposal was submitted in April 1975 to the Second Committee's informal

[78] *Cf.* Robert Jennings/Arthur Watts (eds.), Oppenheim's International Law, vol. I: Peace (9th edn. 1992), 717 (MN. 276).

[79] *Cf. Maritime Delimitation between Qatar and Bahrain* (note 16), 99 (para. 192); and *ibid.*, Memorial submitted by the State of Bahrain (Merits), vol. 1, 30 September 1996, 269 (para. 623).

[80] See *Root* (note 47), 76.

[81] *SCS Arbitration Award* (note 19), para. 481. See also United States Department of State, Limits in the Sea No. 143: China: Maritime Claims in the South China Sea (5 December 2014), 13. See further *supra*, MN 9.

[82] *SCS Arbitration Award* (note 19), paras. 479–480, 504(a), 540.

[83] See *Kwiatkowska/Soons* (note 18), 153, para. 3.5.

[84] See UNCLOS III, Algeria *et al.*: Draft Articles on the Regime of Islands, UN Doc. A/CONF.62/C.2/L.62/REV. 1 (1974), OR III, 232–233. See also the proposed revision of Art. 132 (ISNT II) by Tunisa, submitted in April 1976: 'Un rocher est une élévation rocheuse naturelle de terrain', reproduced in: Platzöder (note 10), 347.

[85] Reproduced in: Platzöder (note 10), 221–222. For the history of this proposal, see *Mahon Hayes*, The Law of the Sea: The role of the Irish Delegation at the Third UN conference (2011), 61–63. See also Romania's argument in ICJ, *Maritime Delimitation in the Black Sea* (Romania *v.* Ukraine), Judgment, ICJ Reports (2009), 61, 120 (para. 180), that 'Serpents' Island qualifies as a "rock" because: it is a rocky formation in the geomorphologic sense'.

consultative subgroup on the regime of islands whose discussions gave rise one month later to the article in the ISNT that became Art. 121. Art. IV of this widely overlooked[86] proposal provided:

> '1. Islets of islands without economic life and unable to sustain a permanent population shall have no marine space of their own.
> 2. Rocks and low-tide elevations shall have no marine space of their own.'[87]

The proposal was opposed by States with offshore islands, in particular the Pacific Ocean small island States and New Zealand. Because of the extreme economic dependence of the Pacific small island States on resources of the sea they had tabled a proposal which provided, *inter alia*:

> '1. An island is a naturally formed area of land, surrounded by water, which is above water at high tide.
> 2. Subject to paragraph 5 of this article, the territorial sea of an island is measured in accordance with the provisions of the Convention applicable to other land territory.
> 3. The economic zone of an island and its continental shelf are determined in accordance with the provisions of this Convention applicable to other land territory.
> 4. The foregoing provisions have application to all islands, including those comprised in an island State.'
> 5. In the case of atolls or of islands having fringing reefs, the baseline for measuring the breadth of the territorial sea shall be the seaward edge of the reef, as shown on official charts.'[88]

The Pacific Ocean small island States and New Zealand argued that there was no logical reason to distinguish between sovereign rights appertaining to islands and sovereign rights appertaining to other land territory. In addition, all islands comprising the State must be treated alike and should have the same ocean space as other territories.[89] Any restriction on the ocean space of certain categories of islands should not affect mid-ocean island States.[90] They felt that the restrictions on ocean space spelled out in the Nine State Proposal were not adequate to cover their concerns. The provision on 'Regime of Islands' that appeared in the ISNT (Art. 132) excluded low-tide elevations from the definition of islands, and provided that rocks which could not sustain human habitation or economic life of their own should not have an EEZ or continental shelf. Other islands would have both. This provision obviously derived in part from the Nine State Proposal,[91] but did not go nearly so far in the restriction of ocean space to certain categories of islands. It benefited Ireland by depriving Rockall, a rock in the North Atlantic Ocean from which the United Kingdom claimed maritime zones to the detriment of Ireland, of an EEZ and continental shelf, but was not adequate for some of the other nine States who attempted to amend Art. 132 (3) so as to reduce further the capacity of islands to generate zones of maritime jurisdiction.[92] In contrast, Art. 132, as it stood, would have been acceptable to New Zealand and the Pacific Ocean small island States, which offered their support on questions of delimitation, in return for acceptance of Art. 132 by the proponents of the Nine State Proposal.[93] As some

[86] While Nordquist *et al.* meticulously list all formal and informal documents that form part of the travaux préparatoires of Art 121, they omits the Nine State Proposal from its list of informal documents and states that at 'the third session (1975) […] no new proposals were submitted'; see Nordquist/Nandan/Rosenne (note 9), 326 and 335 (MN. 121.6).

[87] Reproduced in: Platzöder (note 10), 222.

[88] UNCLOS III, Fiji *et al.*: Draft Articles on Islands and on Territories under Foreign Domination or Control, UN Doc. A/CONF.62/C.2/L.30 (1974), OR III, 210–211. Another informal proposal submitted to the informal consultative subgroup on 28 April 1975 also emphasized that the rules on maritime zones 'have application to all islands, including those comprised in an island State'; see Platzöder (note 10), 221.

[89] Second Committee UNCLOS III, 39th Meeting, UN Doc. A/CONF.62/C.2/SR.39 (1974), OR II, 282 (para. 37, Tonga).

[90] Second Committee UNCLOS III, 38th Meeting, UN Doc. A/CONF.62/C.2/SR.38 (1974), OR II, 278–279 (New Zealand).

[91] *Cf.* ISNT (note 11).

[92] See *Hayes* (note 85), 62, 83.

[93] *Ibid.*, 83.

proponents of the Nine State Proposal, however, continued to press for the inclusion of islets and small islands in Art. 132 (3),[94] the Pacific island States joined a group of 22 States which in April 1976 advocated the deletion of paragraph 3 altogether, giving all islands the same maritime entitlements as continental land territory. The deletion of the provision was opposed, inter alia, by the USSR, Liberia, Algeria, Turkey, Poland the German Democratic Republic, Sri Lanka, and Libya.[95] As a consequence of these conflicting positions, the text of the provision on the regime of islands survived UNCLOS III in the compromise formula adopted in the ISNT in 1975.

30 In this connection it is of interest to note that Art. 132 of the ISNT was drafted by Ambassador SATAYA N. NANDAN, who served as Rapporteur of the Second Committee.[96] Ambassador NANDAN was, at the same time, head of the Fiji delegation to UNCLOS III which together with the delegations of other Pacific Ocean small island States strongly advocated full maritime zones for all islands.[97] At the 39th meeting of the Second Committee on 14th August 1974, he had argued that the

> 'attempt to exclude uninhabited islands from the concept of the economic zone ran counter to article 10 of the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone. To adopt any such proposals would be to impose an unjustifiable penalty on island States, particularly the small island territories of the South Pacific'.[98]

It is difficult to comprehend that Ambassador NANDAN was drafting a provision that would have deprived all 'islands' which cannot sustain human habitation or economic life of their own of an EEZ and continental shelf – an outcome that would have been contrary to the interests of his own country.[99] If the interpretation of Art. 121 (3) by the Tribunal in the *SCS Arbitration* were applied to some of the small remote islands in the South Pacific Ocean, several of the Pacific island States, including Fiji, would have their EEZ and (outer) continental shelf claims considerably reduced.[100]

31 States understood Art. 132(3) of the ISNT to mean that islands and islets, irrespective of whether they could sustain human habitation or economic life of their own, were to enjoy the same EEZ and continental shelf rights as other land territory. This is shown by the fact that during the informal meetings of Committee II in April 1976 several States proposed to revise the article in order to broaden the restrictions on maritime zones of islands. For example, Libya suggested that paragraph 3 be revised to read as follows: '*Small islands and rocks*, wherever they may be, which cannot sustain human habitation or economic life of their own shall have no territorial sea, nor contiguous zone, nor economic zone, nor continental shelf.'[101] The Libyan proposal was supported by Iran and Yemen. Tunisia suggested that a 'State cannot claim jurisdiction over maritime areas on the basis of the sovereignty or control which it exercises over *islets, rocks or low-tide elevations*'.[102] Romania proposed to insert after

---

[94] See *infra*, MN 31.

[95] See US Mission to United Nations New York, Cable 1976USUNN01886, LOS Committee II Meetings, April 27, 1976, 30 April 1976.

[96] See Nordquist/Nandan/Rosenne (note 9), xvii. See also *Nordquist* (note 18), 1014.

[97] See *supra*, nn. 71, 72. See also UNCLOS III, Statement by the Chairman of the Joint Committee of the Congress of Micronesia submitted on behalf of the Congress by the United States of America, UN Doc. A/CONF.62/L.6 (1974), OR III, 84.

[98] Second Committee 39th Meeting (note 89), 283 (para. 50).

[99] Ambassador Nandan expressly stated that Fiji claimed an EEZ and continental shelf also for an uninhabited island situated more than 200 miles from the main archipelago and separated from the submarine platforms underlying it; see *ibid.*, 50, para. 48.

[100] For example, Fiji claims a 200 NM EEZ and an outer continental shelf from its outlying 'island' of Ceva-i-Ra, also known as Conway Reef, which measures only about 100 metres by 325 metres; see United States Department of State, Bureau of Intelligence and Research, Limits in the Sea, No. 101: Fiji's Maritime Claims (30 November 1984), 4.

[101] UNCLOS III, Libyan Arab Republic: Article 132 (ISNT II), reproduced in: Platzöder (note 10), 347 (italics added).

[102] UNCLOS III, Tunisia: Article 1232 (ISNT II), reproduced in: Platzöder (note 10), 347 (translation from French provided; italics added).

'rocks', the word 'islets'.[103] In April 1978, a group of 10 States again suggested to revise the text of the provision to read 'Rocks and islets', rather than just 'Rocks'.[104] At the 169th meeting of the Plenary on 15 April 1982 Romania proposed a new paragraph 4 to what by then had become Art. 121 which read as follows: 'Uninhabited islets should not have any effects on the maritime spaces belonging to the main coasts of the States concerned.'[105] Romania considered the amendment necessary because 'Paragraph 3 of that article referred only to rocks'.[106] This shows that States considered the term 'rocks' not to include islets, let alone proper islands.

32 The distinction in Art. 121 (3) is thus not between islands that can sustain human habitation or economic life of their own and those that cannot, as held by the Tribunal in the *SCS Arbitration*, but between rocks that cannot sustain human habitation or economic life of their own and all other islands, irrespective of their capacity for human habitation or economic life of their own. This means that there are three categories of islands: (1) rocks that cannot sustain human habitation or economic life of their own; (2) rocks that can sustain human habitation or economic life of their own; and (3) all other islands. Only the first category of islands does not have an EEZ or continental shelf.

33 This restrictive interpretation of Art. 121 (3) is in line with the jurisprudence of both domestic and international courts and tribunals which have treated 'islands' (other than rocks) which cannot sustain human habitation or economic life of their own, as interpreted by the Tribunal in the *SCS Arbitration*,[107] as generating entitlements to an EEZ and continental shelf. For example, the Norwegian Supreme Court ruled that with 13.2 km^2 the size of Abeløya (Abel Island) 'alone is sufficient to rule out that it is a "rock" according to the exemption in Article 121 paragraph 3' and that 'State practice seems to support this reading'.[108] The International Tribunal for the Law of the Sea (ITLOS) considered the uninhabited, 368 km^2 large Australian Heard Island in the Southern Ocean to be an island despite the fact that much of its surface is covered with snow and ice.[109] Both the Conciliation Commission on the Continental Shelf Area between Iceland and Jan Mayen and the ICJ treated Jan Mayen, which has an area of about 373 km^2, as an island generating EEZ and continental shelf rights, despite noting that 'Jan Mayen has no settled population, as only 25 persons temporarily inhabit the island for purposes of their employment' at meteorological or defence-related stations and that 'Norwegian fishing interests in the waters surrounding Jan Mayen are however the interests of mainland Norway, not of Jan Mayen as such, where there are no fishermen.'[110] The Conciliation Commission expressly stated that 'Jan Mayen must be considered as an island. Paragraphs 1 and 2 of Article 121 are thus applicable to it.'[111] This jurisprudence indicates that besides geological and geomorphological conditions the size of a land feature will also be taken into account when deciding whether a feature constitutes a 'rock' or rock-like feature. Against this background, it is not surprising that the ICJ treated QS32, 'a minuscule feature, barely 1 square m in dimension',[112] situated on the Bank of Quitasueño in the Caribbean Sea as a

[103] See US Mission to United Nations New York, Cable 1976USUNN01886 (note 95).

[104] UNCLOS III, Algeria *et al.*: Informal Suggestion, UN Doc.C. 2/Informal Meeting/21 (1978), reproduced in: Renate Platzöder (ed.), Third United Nations Conference on the Law of the Sea: Documents, vol. V (1984), 30.

[105] UNCLOS III, Romania: Amendment to Article 121, UN Doc. A/CONF.62/L.118 (1982), OR XVI, 225.

[106] UNCLOS III, 169th Plenary Meeting, UN Doc. A/CONF.62/SR.169 (1982), OR XVI, 97 (para. 53).

[107] See *infra*, MN 35 *et seq.*

[108] Norway, Supreme Court, *Public Prosecutor v. Haraldsson and Others*, Judgment of 7 May 1996, 140 ILR 559, 564.

[109] See ITLOS, '*Volga*' (Russian Federation *v.* Australia), Prompt Release, Judgment, ITLOS Reports (2002), 10, 44 (para. 6, decl. Vukas).

[110] ICJ, *Maritime Delimitation in the Area between Greenland and Jan Mayen* (Denmark *v.* Norway), Judgment, ICJ Reports 1993, 38, 73, para. 79. See also Conciliation Commission: Iceland and Jan Mayen (note 16), 801–803.

[111] Conciliation Commission: Iceland and Jan Mayen (note 16), 803–804.

[112] *Territorial and Maritime Dispute* (note 15), 699 (para. 202).

'rock'.[113] The Court defined a 'bank' as 'a rocky or sandy submerged elevation of the sea floor'.[114]

34 A restrictive interpretation of Art. 121 (3) is also confirmed by State practice. Numerous States have made relatively small, uninhabited barren islands in remote locations the subject of claims to an EEZ and an (outer) continental shelf which have received no opposition from other States. For example, France has established EEZ's around islands in French Polynesia, French Southern Ocean islands (Kerguelen Islands, Crozet Islands), Clipperton Island, Amsterdam Island; Australia claims an EEZ and outer continental shelf around Heard Island and McDonald islands;[115] Fiji has established an EEZ around Ceva-i-Ra; Kiribati has claimed an EEZ measured in part from McKean Island; Mexico has established an EEZ around Clarion and Roca Portida islets in the Pacific; Venezuela has established an EEZ around Aves Island; Norway claims an EEZ and outer continental shelf from Bouvet Island;[116] Portugal claims an EEZ from Ilhas Selvagens; the United States has established an EEZ around Maro Reef in the Northwest Hawaiian Islands, Palmyra Atoll, Kingman Reef and around Howland and Baker Islands.[117]

7. 'cannot'

35 The use of the word 'cannot' implies a concept of objective capacity or capability.[118] Actual habitation or economic activity at any particular moment in time is not required or relevant, except to the extent that past habitation or economic life may indicate the capacity of a rock to sustain such activity.[119] The capacity of a rock to sustain human habitation or economic life of its own must be assessed on a case-by-case basis.[120] Where indigenous island populations traditionally make use of groups of islands to support their livelihood, the focus should not be on the capacity of the individual rock but on the capacity of the group to collectively sustain human habitation and economic life.[121]

36 The Tribunal in the *SCS Arbitration* held that a feature must have the capacity to sustain human habitation or economic life 'in its natural form' or in its 'natural capacity'.[122] Drawing on the context of Art. 121 (3) and, in particular, the requirement in Arts. 13 and 121 (1) that an area of land must be 'naturally formed' in order to qualify as an island or low-tide elevation, the Tribunal imported the requirement that the status of a feature must be assessed on the basis of its natural condition into Art. 121 (3). The feature was to be capable of sustaining human habitation or economic life without 'external additions', 'human modifications', 'technological enhancements' or 'extraneous materials'.[123] Accordingly, the Tribunal under-

[113] *Ibid.*, 693 (para. 183), and 713 (para. 238). For the fact that Quitasueño is a 'bank', see *ibid.*, 640 (para. 24).

[114] *Ibid.*, 638 (para. 20). The Tribunal in the *SCS Arbitration* (note 19), para. 480, relied on the ICJ's judgment in *Territorial and Maritime Dispute* for its finding that Art. 121 (3) did not impose a geological or geomorphological criterion for the term 'rock'. The statement of the ICJ referred to by the Tribunal, according to which international law did not define the status of a feature 'by reference to its geological composition' related to the definition of 'island', not 'rock'; see *Territorial and Maritime Dispute* (note 15), 645, para. 37.

[115] The CLCS recognised the legal entitlement of Australia to establish a continental shelf beyond 200 NM in the region of the Kerguelen Plateau based on the volcanic Heard and McDonald Islands; see Recommendations of the Commission on the Limits of the Continental Shelf (CLCS) in Regard to the Submission Made by Australia on 15 November 2004, adopted by the Commission on 9 April 2009 (2009), paras. 64, 76.

[116] See Continental Shelf Submission of Norway in respect of Bouvetøya [Bouvet Island], Revised Executive Summary (2015).

[117] On the US claim to an EEZ around Howland Island (4.5 km^2 in size) and Baker Island (2.1 km^2 in size), see Digest of United States Practice in International Law 2008 (2008), 642–644. The claim was confirmed by the United States District Court for the District of Guam in *United States v. Marshalls*, Decision of 8 May 2008, 2008 U.S. Dist. LEXIS 38627, 11, where the Court held that 'are in fact islands as defined under the [Law of the Sea] Convention'.

[118] See *SCS Arbitration Award* (note 19), para 483.

[119] See *ibid.*, paras. 484, 504(b), 545.

[120] See *ibid.*, para. 546.

[121] *Cf. ibid.*, paras. 547, 572.

[122] See *i*bid., paras. 483, 541.

[123] See *ibid.*, paras 507–509, 541, 559.

stood the phrase 'cannot sustain' to mean 'cannot, without artificial addition, sustain.'[124] But, there is nothing in the text of Art. 121 (3) which requires a rock to be capable of sustaining human habitation or an economic life of its own 'in its natural condition', 'in its natural state', or 'in its naturally formed state'. During UNCLOS III Iran and Venezuela expressly pointed out that the insular territory of a State like its continental territory could be 'developed' and, as a consequence, could generate an EEZ and continental shelf.[125] There is a difference between the question of the status of a feature as an 'area of land' and the question of whether an area of land is capable of sustaining human habitation or an economic life of its own. While the status of a feature can and must be assessed on the basis of its natural condition,[126] human habitation and economic life always depend on human activity or involve technological enhancements and extraneous materials.[127] No man is an island, and neither is an island. Modern day human habitation will require building and other materials that usually have to be imported. An island economy based, for example, on software development or financial services will necessarily depend on the import of computers and other materials. What Art. 121 (3) requires is the 'basic capacity' of a feature to sustain human habitation or economic life of its own. Such basic capacity may be developed further by human activity. As is often the case, the question of human development is one of degree. Given sufficient resources, any place (on earth or in outer space) can be made habitable.[128] If the term 'cannot' is interpreted too formalistically, excluding any outside assistance (food, water, technology) or human engineering, most, if not all currently uninhabited islands will have to be considered uninhabitable. If, on the other hand, the term is interpreted too loosely, excluding only near-complete sustainment from outside, all islands will be able to be habitable. It has been suggested that the 'best interpretation is one based on reasonableness: a reasonable amount of engineering and outside assistance is acceptable to prove capability of sustaining the required showings'.[129]

8. 'sustain'

The term 'sustain' in its ordinary meaning suggests that what is required is capacity over time. The Tribunal in the *SCS Arbitration*, however, took the view that the term was not limited to a temporal concept but also included 'the concept of the support and provision of essentials' as well as 'a qualitative concept, entailing at least a minimal "proper standard"'.[130] Apart from references to the Oxford English Dictionary, the Tribunal did not provide any support for reading a 'qualitative element' into Art. 121 (3), let alone did it provide any criteria for what is meant by a 'proper standard'. 37

The Tribunal in the *SCS Arbitration* also ruled that 'in connection with sustaining human habitation, to "sustain" means to provide that which is necessary to keep humans alive and healthy over a continuous period of time, according to a proper standard.'[131] At a minimum, sustained human habitation would require that a feature be able to support, maintain, and provide potable fresh water, food and shelter to a group of persons to enable them to reside there permanently or habitually over an indefinite period of time.[132] A feature that was only capable of sustaining human habitation through the continued delivery of supplies from outside or the establishment of desalination facilities or the introduction of tillable soil did 38

[124] *Ibid.*, para. 510.

[125] See UNCLOS III, 191st Plenary Meeting, UN Doc. A/CONF.62/SR.191 (1982), OR XVII, 106 (para. 73, Iran); UNCLOS III, 135th Plenary Meeting, UN Doc. A/CONF.62/SR.135 (1980), OR XIV, 21 (para. 18, Venezuela).

[126] See *supra*, MN 14 *et seq.*

[127] See *Charney* (note 18), 867.

[128] *Cf. Maritime Delimitation in the Black Sea* (note 85), Memorial of Romania, 19 August 2005, para. 10.79.

[129] *Root* (note 47), 81.

[130] *SCS Arbitration Award* (note 19), para. 487.

[131] *Ibid.*

[132] *Ibid.*, paras. 490, 492, 546, 548.

not meet the requirements of Art. 121 (3).[133] An exception, again, was made for the traditional lifestyle of small island populations. Where a network of islands sustained human habitation on some of the islands, the role of the other islands was not equated with external supply.[134] Other factors to determine whether a feature is capable to sustain human habitation included the prevailing climate, the proximity of the feature to other inhabited areas and populations, and the potential for livelihoods on and around the feature.[135]

39 In the context of 'economic life of their own' the Tribunal found that the term 'sustain' meant 'to provide that which is necessary not just to commence, but also to continue, an activity over a period of time in a way that remains viable on an ongoing basis.'[136] Thus, a 'one-off transaction or short lived venture would not suffice.[137]

9. 'human habitation'

40 The capacity to sustain human habitation does not refer to actual habitation but to habitability.[138] The fact that a feature is currently not inhabited does not automatically prove that it is uninhabitable. That an uninhabited island in the past supported a human population establishes at least a strong presumption that it is able to sustain human habitation.[139]

41 Habitability of land territory as a criterion for the determination the maritime entitlements was first identified by the commissioner for the Norwegian district of Romsdal who stated on 11 August 1888 'that for the determination of the line of the territorial waters, account must undoubtedly be taken only of the outermost land *inhabited or habitable* and not of the rocks and islets located in the open sea.'[140]

42 The criterion of 'habitability' was also employed in the second revised draft of a confidential 'Memorandum Regarding a Common Policy for the British Empire on the Question of Territorial Waters', dated 13 April 1923. In the Memorandum four draft resolutions were put forward that embodied the views of the British Government. Resolution 4 provided:

> 'The coast-line from the low-water mark of which the 3-miles limit of territorial waters should be measured, is that of the mainland and also that of all habitable islands. Uninhabitable islands, rocks and banks should not be admitted as a basis for the 3-mile limit.'[141]

It was explained that the criterion of 'habitability' was adopted because it limited the extent of territorial waters that could be claimed by a State; it was intimately associated with the idea of sovereignty on which claims to territorial rights must be based; and it was thought that it gave fewer opportunities for dispute than any other criterion that would adequately restrict territorial waters.[142] The Hydrographer of the British Navy, Rear Admiral Frederick C. Learmonth replied to a question on the meaning of habitability: 'Generally speaking, it means that without artificial means it is not possible for human beings to live on a piece of territory, whatever the shape, form or height and it is never, on account of storms or tides, rendered uninhabitable.'[143] Rocks

---

[133] *Ibid.*, paras. 511, 547. See also, *ibid.*, para 550.
[134] *Ibid.*, para. 547.
[135] *Ibid.*, para. 546.
[136] *Ibid.*, para. 487.
[137] *Ibid.*, para. 499.
[138] See the statement by France of 28 July 1983 in response to written statements submitted by other States at the time of signing the Convention: UNCLOS III, Note by the Secretariat, UN Doc. A/CONF.62/WS/37 and ADD.l and ADD.2 (1983), OR XVII, 241 ('Uninhabited rocks which can sustain human habitation and an economic life of their own are entitled to an economic zone and a continent shelf').
[139] *Cf. SCS Arbitration Award* (note 19), para. 484.
[140] Kommission om sjøgrense i Finmarken, Rapport du 29 février 1912 de la Commission de la frontière des eaux territoriales, I: Partie générale (1912), 28.
[141] Imperial Conference 1923 Regarding Territorial Waters, Minutes of Meetings of Inter-Departmental Committee, IOR/L/E/7/1290, File 3667B.
[142] *Ibid.*
[143] Minutes of the Sixth Meeting of the Inter-Departmental Committee on Territorial Waters, held at the Admiralty, 16 April 1923, IOR/L/E/7/1290, File 3667B.

such as Eddystone Rock off the British coast, that were made habitable by erection of a lighthouse would not generate territorial waters because they 'have been made habitable' by artificial means.[144] In its final version, as submitted to the British Imperial Conference in October 1923, Resolution 4 read:

> 'The coast-line from the low-water mark of which the 3-miles limit of territorial waters should be measured, is that of the mainland and also that of all islands. The word "island" covers all portions of territory permanently above high water in normal circumstances and capable of use or habitation.'[145]

An explanatory note explained:

> '22. The phrase "capable of use or habitation" has been adopted as a compromise. It is intended that the words "capable of use" should mean capable, without artificial addition, of being used throughout all seasons for some definite commercial or defence purpose, and that "capable of habitation" should mean capable, without artificial addition, of permanent human habitation.
>
> 23. It is recognized that these criteria will in many cases admit of argument, but nothing more definite could be arrived at in view of the many divergent considerations involved.'[146]

The four resolutions on the Question of Territorial Waters were recommended for acceptance by the Governments of the British Empire.[147] The British Government continued to apply the definition of an 'island' as 'an area of land above high water capable of human use and habitation' until the adoption of the Convention on the Territorial Sea and Contiguous Zone in 1958.[148]

The 'habitation' of islands became an issue in the late 1960s/early 1970s, when the 43
Committee on the Peaceful Uses of the Sea-Bed and the Ocean Floor beyond the Limits of National Jurisdiction ('Seabed Committee') worked on the elaboration of legal principles and norms for the exploration and exploitation of the seabed beyond national jurisdiction. During the 56th meeting of the Committee on 23 March 1971, the delegate from Malta, Ambassador Arvid Pardo, pointed to 'the crucial role of islands' in the context of the 'encroachment of coastal State jurisdiction over areas of ocean space formerly open to all'. He pointed out that '[v]irtually uninhabited Arctic and sub-Antarctic islands could give their respective possessors the right to claim jurisdiction over millions of square miles of ocean space',[149] and that '[i]f a 200 mile limit of jurisdiction could be founded on the possession of uninhabited, remote or very small islands, the effectiveness of international administration of ocean space beyond national jurisdiction would be gravely impaired.'[150] Several States raised the question of whether uninhabited islets or islands should have a territorial sea, continental shelf or 200 NM fishery zone.[151] Cameroon, Kenya, Madagascar, Tunisia and Turkey proposed that the maritime spaces of islands should be determined according to equitable principles, including, *inter alia*, 'the population or the absence thereof'.[152] Romania suggested in the context of delimitation of the marine space between neighbouring States that 'Islets and small islands,

---

[144] *Ibid.*

[145] Imperial Conference 1923. Report of Inter-Departmental Committee on the Limits of Territorial Waters, E/64. Revised, 27 September 1923, Imperial Conference 1923, Territorial Waters as a common Empire Policy, IOR/L/7/1290, File 3667(i).

[146] *Ibid.*

[147] The British Imperial Conference in October 1923 only recommended them for acceptance by the Governments of the British Empire; see The position of the Dominions and India in relation to the signature of Treaties and the question of Territorial Waters, CAB 32/22.

[148] See Memorandum on Katah ad Jaradeh and Fasht ad Dibal, dated 25 August 1959, from the Hydrographic Department, Admiralty, to the Foreign Office, reproduced in Richard Schofield (ed.), Islands and Maritime Boundaries of the Gulf, vol. 18 (1958–1960) (1990), 303, 306.

[149] Sea-Bed Committee, 56th Meeting, UN Doc. A/AC.138/SR.45-60 (1971), 159 (Malta).

[150] Sea-Bed Committee, 57th Meeting, UN Doc. A/AC.138/SR.45-60 (1971), 167 (Malta).

[151] See e. g. Sea-Bed Committee, Sub-Committee II, 51st Meeting, UN Doc. A/AC.138/SC.II/SR.48-62 (1973), 46 (Peru); Sea-Bed Committee, Sub-Committee II, 58th Meeting, UN Doc. A/AC.138/SC.II/SR.48-62 (1973), 140–141 (Madagascar).

[152] Sea-Bed Committee, Sub-Committee II, Cameroon *et al.*: Draft Article under Article 19, Régime of Islands, UN Doc. A/AC.l38/SC.II/L.43 (1973).

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.'[153] However, such distinction between islands on the basis of habitation was strongly objected to by other States.[154] In the end, by way of compromise, the requirement of habitation was employed only with regard to rocks, not to islands generally.[155]

44 The Convention does not define 'human habitation' and the question has received little attention in State practice and jurisprudence.[156] In a case concerning the question of whether Howland and Baker Islands are 'rocks' or 'islands' that can generate an EEZ, the United States District Court for the District of Guam in 2008 rejected the argument that in order to meet the requirement of 'human habitation' in Art. 121 (3) the habitation must 'exist for its own sake, as part of an ongoing community that sustains itself and continues through generations'. The Court held that the United States had provided sufficient evidence that 'both Islands can sustain human habitation'.[157] In its pleadings, the United States had stated that the 'islands were inhabited between 1935 and 1942 by Hawaiian students',[158] and that the 'U.S. Coast Guard used the islands during the [Second World] War.' Since then the islands had been uninhabited and used as a wildlife refuge.[159]

45 The Tribunal in the *SCS Arbitration* was the first international tribunal to address the criterion of 'human habitation' in detail.[160] The Tribunal did not expressly apply the qualifier 'of their own' to human habitation,[161] but, in practice, reached the same result by requiring that a feature sustain human habitation 'in its natural form' or in its 'natural capacity'.[162] In the Tribunal's view, the use of the term 'human habitation' in Art. 121 (3)included a 'qualitative element'. Human habitation entailed more than the mere survival of humans on a feature.[163] The Tribunal held:

> 'The mere presence of a small number of persons on a feature does not constitute permanent or habitual residence there and does not equate to habitation. Rather, the term habitation implies a non-transient presence of persons who have chosen to stay and reside on the feature in a settled manner.'[164]

The temporary inhabitation of islands by fishermen, even for extended periods,[165] the temporary residence of workers engaged in extracting the economic resources of an island,[166]

---

[153] Sea-Bed Committee, Sub-Committee II, Romania: Working Paper on Certain Specific Aspects of the Regime of Islands in the Context of Delimitation of the Marine Space between Neighbouring States, UN Doc. A/AC.138/SC.II/L.53 (1973).

[154] See e. g. Sea-Bed Committee, Sub-Committee II, 75th Meeting, UN Doc. A/AC.l38/SC.II/SR.75 (1973), 2, 4 (Greece). See also UNCLOS III, Statement by the Chairman of the Joint Committee of the Congress of Micronesia Submitted on Behalf of the Congress by the United States of America, UN Doc. A/CONF.62/L.6 (1974), OR III, 84 ('We do not believe that the criteria of inhabitation or size are practical or equitable').

[155] See *supra*, MN 29.

[156] But see the statement of the representative of Indonesia during the 15th Session of the ISBA on 2 June 2009: ISA, Fifteenth Session, Council, Press Release SB/15/10 (2009), 3. See also the Statement by the Chairman of the Commission on the Limits of the Continental Shelf on the progress of work in the Commission, Twenty-second session, CLCS/607, 26 September 2008, 7, para 30, that Ascension Island qualifies under Art. 121 for an EEZ and continental shelf 'in view of its long and continuous history of individuals working and living on the island carrying out economic activity.'

[157] *United States v. Marshalls* (note 117), 11.

[158] The islands were continually occupied in three-month shifts of four men per island, in an attempt to help the United States assert territorial sovereignty over the islands.

[159] See United States, District Court for the District of Guam, *United States v. Marshalls*, Opposition of the United States to Defendant's Motion to Dismiss for Lack of Subject Matter and In Rem Jurisdiction, December 2007, 1.

[160] See *SCS Arbitration Award* (note 19), paras. 488–492, 512–520, 541–550.

[161] For the view favouring the application of the qualifier to both elements, see *Root* (note 47), 78.

[162] See *supra*, MN 36.

[163] *SCS Arbitration Award* (note 19), para. 546. On the qualitative aspect of human habitation, see also *ibid.*, paras. 492, 505.

[164] *Ibid.*, para. 489.

[165] *Ibid.*, para. 618.

[166] *Ibid.*, para. 619.

or the stationing of military and other governmental personnel on an island thus does not meet the qualitative requirement of human habitation.[167] There is no support for such a 'qualitative element' in the ordinary meaning of the term 'human habitation' and one may ask why in terms of 'habitability' there should be applied a stricter standard to islands than that is applied to the Sahara desert or other inhospitable coastal areas.

46 The Tribunal also identified a 'quantitative element' in human habitation. The term 'human habitation' implied the habitation of a feature by 'a settled group or community for whom the feature is home'.[168] The Tribunal did not specify a precise number of persons but held that 'a sole individual' would not suffice.[169] In remote atolls, however, the relevant community did not necessarily need to be large and a few individuals or family groups could suffice. Periodic or habitual residence on a feature by a nomadic people could also constitute habitation.[170] In practice, the Tribunal's 'quantitative element' will raise more questions than it answers.

10. 'economic life of their own'

47 A feature does not actually have to sustain economic life. The fact that it currently has no economic life does not prove that it cannot sustain economic life. Evidence of economic activity in the past may be relevant to establish a feature's capacity to sustain economic life.[171] Economic life does not need to be of a certain value but the requirement that it be sustained over a certain period of time presupposes a certain level of viability.[172] The Convention does not provide any definition of the term 'economic life of their own'.

48 The Norwegian Supreme Court considered the possibility 'to carry out significant hunting for polar bears' on an uninhabited island to be sufficient to show the capacity to sustain economic life.[173] The Tribunal in the *SCS Arbitration* adopted a much more stringent definition of the term 'economic life of their own'. The Tribunal distinguished between 'economic life' and mere 'economic activity' but admitted that the plain text of the words offered limited guidance as to the character or scale of the activity that would be required to meet the requirement of 'economic life' in Art. 121 (3).[174] According to the Tribunal, the ordinary meaning of the term 'life' suggested that 'the mere presence of resources will be insufficient and that some level of local human activity to exploit, develop, and distribute those resources would be required.'[175]

49 Rocks must be capable of sustaining not simply 'economic life' but an economic life 'of their own'. The Tribunal in the *SCS Arbitration* interpreted this qualifier to mean that a

> 'feature itself (or [a] group of related features) must have the ability to support an independent economic life, without relying predominantly on the infusion of outside resources or serving purely as an object for extractive activities, without the involvement of a local population.'

The resources around which the economic activity revolved had to be local, not imported, as had to be the benefit of such activity.[176] This means that fishing and other purely extractive activities (such as guano or phosphates mining, oil and gas exploration, or the collection of shells) which accrue no benefit to the feature or its population do not amount to economic life of the feature as its own.[177] In particular, fishing or other extractive activities for the benefit of the mainland population or a population elsewhere generally does not meet

[167] *Ibid.*, para. 620.
[168] *Ibid.*, para. 520.
[169] *Ibid.*, para. 491.
[170] *Ibid.*, para. 542.
[171] *Ibid.*, paras. 483, 484.
[172] See *ibid.*, para. 499. See also *ibid.*, para 543.
[173] *Public Prosecutor v. Haraldsson and Others* (note 108), 565.
[174] *SCS Arbitration Award* (note 19), paras. 505, 512.
[175] *Ibid.*, para. 499. See also *ibid.*, para 546 ('economic life entails more than the presence of resources').
[176] *Ibid.*, para. 500.
[177] *Ibid.*, para. 557.

the requirements of Art. 121 (3).[178] An exception may be made in case of small island populations which make use of the economic resources of a number of islands for sustenance and livelihoods.[179] In case of extractive economic activities there can therefore, as a rule, be no economic life of its own without human habitation.[180]

50 The Tribunal also held that economic activity derived from a possible EEZ or continental shelf of a feature was not sufficient to endow it with 'economic life of its own' because Art. 121 (3) was concerned with determining the conditions under which a feature would be accorded an EEZ and continental shelf. It would be circular if the mere presence of economic activity in those zones were sufficient to endow a feature with those very zones.[181] The Tribunal, however, overlooks that prior to the establishment of the concepts of the EEZ and the continental shelf the relevant sea areas were part of the High Seas. Fishermen from a feature may have been fishing or extracting resources in these areas adjacent to the feature for centuries and may thereby have contributed to the economic life of the feature. There is thus not necessarily any circularity of argument here. The better view therefore seems to be to treat fishing and other activities by a feature's population in the EEZ and continental shelf area as pertaining to the feature as 'of its own'.

51 According to the Tribunal in the *SCS Arbitration* a 'link' is required between the economic life and the feature itself. Consequently, fishing and other economic activity in the territorial sea is only to form part of the economic life of the feature, if they are linked to the feature through a local population or otherwise. Fishermen from the mainland or other islands 'exploiting the territorial sea surrounding a small rock and making no use of the feature itself' would not suffice to give the feature an economic life of its own.[182] Again, the Tribunal's 'link' requirement raises more questions than it answers. For example, would the building of dwellings for the fishermen or the establishment of a fish processing plant constitute sufficient 'use of the feature itself' to establish the required link? The territorial sea is, like dry land, part of the sovereign territory of the State. The better view seems to be that fishing in a feature's territorial sea forms part of the feature's own economic life. Any 'link' between fishing in the territorial sea and a stable local population amounts to a rewriting of Art. 121(3). Rather than having the capacity to 'sustain human habitation *or* economic life of their own' the 'link' requirement means that rocks must have the capacity to 'sustain human habitation *and* economic life of their own' in order to generate entitlements to an EEZ and continental shelf.[183] It is, however, an acknowledged rule of interpretation that treaty provisions must be interpreted as to avoid as much as possible depriving one of them of practical effect for the benefit of others.[184]

11. 'or'

52 The formulation of Art. 121 (3) gives rise to the question of whether the term 'or' is used disjunctively or conjunctively. As a matter of logic, the combination of a negative verb form (i. e. 'cannot') with the disjunctive 'or' creates a cumulative requirement. Applied to the text

[178] *Ibid.*, para. 543. See also Denmark's argument in the Jan Mayen case that the Norwegian fishing vessels in the area operated from the Norwegian mainland and for that reason the 'Norwegian fishing in the area does not serve to sustain economic life on Jan Mayen' (*Maritime Delimitation in the Area between Greenland and Jan Mayen* (Denmark v. Norway), Memorial Submitted by the Government of the Kingdom of Denmark, Vol. I, July 1989, para 302).

[179] See *SCS Arbitration Award* (note 19), para. 547.

[180] *Cf. ibid.*, para. 623.

[181] *Ibid.*, para. 502.

[182] *Ibid.*, paras. 503, 556.

[183] See *ibid.*, para. 543 ('the two will in most instances go hand in hand'). The possibility of the two requirements being met independently, mentioned by the Tribunal at para. 497, is limited to populations sustaining themselves through a network of related maritime features.

[184] See ICJ, *International Status of South West Africa*, Advisory Opinion, ICJ Reports (1950), 128, 187 (diss. op. De Visscher).

of Art. 121 (3) this means that the phrase 'rocks which cannot sustain human habitation *or* economic life of their own' corresponds to 'rocks which cannot sustain human habitation *and* which cannot sustain economic life of their own'. The negative overall structure of the sentence ('have no') means that a rock must fail both requirements before it can be denied an EEZ and continental shelf. Thus, if a rock is capable of sustaining either human habitation or economic life of its own, it will be entitled to an EEZ and continental shelf.[185] There is no hierarchy between the two.

12. '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 according to other land territory'

53 In 1920, the California District Court of Appeal held that there 'is just as much reason for the extension of state sovereignty over a 3-mile belt around Catalina Island as there is for the extension of sovereignty over a 3-mile zone along and off the shore of the mainland.'[186] The rule in Art. 121 (2) that the maritime zones of an island are determined in accordance with the provision of the Convention applicable to other land territory is an expression of the general principles of the indivisibility of territorial sovereignty and the sovereign equality of States. During the deliberations in the Seabed Committee and later at UNCLOS III, several States emphasized

> 'that the principle for determining the territorial sea of islands and their continental shelf and zones of national jurisdiction should be the same as the principle for determining the territorial sea, continental shelf and zones of national jurisdiction of the continental or other part of the State of which the islands formed an integral part.'[187]

54 Although not expressly mentioned in Art. 121 (2), islands can also have internal waters and may give rise to continental shelf entitlements beyond 200 NM. One of the Sub-commissions of the Commission on the Limits of the Continental Shelf stated that the phrase that maritime zones of an island 'are determined in accordance with the provisions of this Convention applicable to other land territory […] implies that for the purposes of delineating the outer limits of the continental shelf all island States have a continental margin in the sense of article 76, paragraph 3.'[188]

55 In practice, the principle of equal treatment of islands with other land territory means that the standard baseline rules apply. The normal baseline around an island follows the low-water line along the coast of the island as marked on large-scale charts officially recognized by the coastal State.[189] In case of islands situated on atolls or of islands having fringing reefs,

[185] See *SCS Arbitration Award* (note 19), paras. 494, 496, 504(d), 544. See also ICJ, *Territorial and Maritime Dispute* (Nicaragua v. Colombia), CR 2012/9, 24 April 2012, 40, para. 10 (Oude Elferink for Nicaragua), available at: http://www.icj-cij.org/docket/index.php?p1=3&p2=3&case=124&code=nicol&p3=2. But, see also UNCLOS III, 140th Plenary Meeting, UN Doc. A/CONF.62/SR.140 (1980), OR XIV, 77, para. 29 (Dominica).

[186] *Ex parte Marincovich*, California District Court of Appeal, Second District, Division 2, Judgment of 10 July 1920, 192 P. 156 at 158 (Cal.App. 2 Dist. 1920).

[187] Report of the Committee on the Peaceful Uses of the Sea-Bed and the Ocean Floor Beyond the Limits of National Jurisdiction, vol. I, UN Doc. A/9021 (1973), 56 (para. 85). See also Report of the Committee on the Peaceful Uses of the Sea-Bed and the Ocean Floor Beyond the Limits of National Jurisdiction, UN Doc. A/8721 (1972), 46 (para. 186); and Second Committee 39th Meeting (note 89), 282, para. 37 (Tonga); Second Committee UNCLOS III, 40th Meeting, UN Doc. A/CONF.62/C.2/SR.40 (1974), OR II, 289 (para. 56, Spain); UNCLOS III, 158th Plenary Meeting, UN Doc. A/CONF.62/SR.158 (1982), OR XVI, 15 (para. 14, Venezuela).

[188] Commission on the Limits of the Continental Shelf, Summary of Recommendations of the Commission on the Limits of the Continental Shelf in Regard to the Submission Made by the United Kingdom of Great Britain and Northern Ireland in Respect of Ascension Island on 9 May 2008, adopted by the Commission, with amendments, on 15 April 2010 (2010), 6 (para. 22). See also e. g. Submission by the Federated State of Micronesia to the Commission on the Limits of the Continental Shelf Concerning the Eauripik Rise, Executive Summary, September 2011, 1 (paras. 1–5).

[189] Art. 5 UNCLOS. See also Secretary of State Rusk to Attorney General Kennedy, letter, May 21, 1964, reproduced in Marjorie M. Whiteman (ed.), Digest of International Law, IV (1965), 281.

the baseline for measuring the breadth of the territorial sea is the low-water line of the reef.[190] In case a low-tide elevation is situated wholly or partly at a distance not exceeding the breadth of the territorial sea from an island, the low-water line on that elevation may be used as the (normal) baseline for measuring the territorial sea of the island.[191] In case of a fringe of islands along the coast of a (large main) island in its immediate vicinity, the method of straight baselines joining appropriate points may be employed in drawing the baseline from which the breadth of the territorial sea of the main island is measured.[192] In case of islands forming part of an archipelagic State, straight archipelagic baselines joining the outermost points of the outermost islands of the archipelago may be drawn.[193]

13. 'Except as provided for in paragraph 3'

56 The general rule set out in Art. 121 (2) that the maritime zones of an island are determined in accordance with the provision of the Convention applicable to other land territory is subject to the exception in paragraph 3 that rocks which cannot sustain human habitation or economic life of their own have no EEZ and continental shelf. Or, expressed in positive terms, such rocks only have internal waters, territorial sea and contiguous zone. As an exception to the general rule, Art. 121 (3) is to be construed narrowly.[194] The exception set out in Art. 121 (3) differs from the legal situation under the Geneva Convention on the Continental Shelf which defined the 'continental shelf', *inter alia*, as 'the seabed and subsoil of the submarine areas adjacent to the coasts of islands' without any distinction between islands.[195]

[190] Art. 6.
[191] Art. 11(1).
[192] *Cf. Maritime Delimitation between Qatar and Bahrain* (note 16), 103 (paras. 210–214).
[193] Art. 47(1).
[194] See *Nordquist* (note 18), 1015.
[195] Art. 1 (b).