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List of abbreviations

ASEAN	Association of Southeast Asian Nations
CCAMLR	Convention on the Conservation of Antarctic Marine Living Resources
ECJ	European Court of Justice
EEZ	Exclusive Economic Zone
FAO	Food and Agriculture Organization of the United Nations
GATT	General Agreement on Tariffs and Trade
GDP	Gross Domestic Product
ICJ	International Court of Justice
IHO	International Hydrographic Organization
ILC	International Law Commission
ITLOS	International Tribunal for the Law of the Sea
MPA	Marine Protected Area
MSY	Maximum Sustainable Yield
nm	nautical miles
OECD	Organization for Economic Co-operation and Development
SIDS	Small Island Developing States
TED	Turtle Excluder Device
UNCLOS	United Nations Convention on the Law of the Sea
VCLT	Vienna Convention on the Law of Treaties
WTO	World Trade Organization

Introduction

Biospheres and living conditions on islands are incredibly manifold, which makes it difficult to fit islands into a single category. Islands range from twin-bed-sized Okinotorishima to Greenland; they may be covered in ice and snow or consist of nothing but sand. On some islands, people live in dense communities – in Malé, the capital and largest island of the Maldives, there are 23,002 people per square kilometer.[1] On other islands, residential areas are view and far between: only 3.4 people per square kilometer live in Iceland.[2] Over 730 million people live on islands – or 11% of the world population – and they all live in vastly different cultures and communities. Counting the world's islands seems a near-impossible task: because so many of its islands are unnamed and uninhabited, Indonesia can for example only estimate that it has upward of 18,000 islands.[3] Still, this number is dwarfed by Sweden's total score of 267,570 islands,[4] making it the world's island capital. In international law, Article 121 of the United Nations Convention on the Law of the Sea (UNCLOS),[5] the so-called *Regime of islands*, defines islands as "naturally formed area[s] of land, surrounded by water, which [are] above water at high tide"[6]. This umbrella term is further subdivided into "rocks", a category of islands that "cannot sustain human habitation or economic life of their own"[7] and what we will call "islands in the narrow sense" or islands that *can* sustain human habitation or economic life. This subdivision is of significance because rocks do not generate entitlement to an Exclusive Economic Zone (EEZ) or continental shelf, whereas islands in the narrow sense do. An EEZ confers the exclusive right to fish or otherwise exploit the ocean's waters within a 200 nm range from the coast's territorial sea baselines. The continental shelf allows for the utilization of the riches of the seabed and its subsoil within the same geographical range as the EEZ. Depending on geologic properties, the outer continental shelf may extend even farther into the ocean.[8] Rocks, by contrast, may only be surrounded by a territorial sea and a contiguous zone. While a coastal state exercises sovereignty over the entirety of the territorial sea, including the air space

[1] National Bureau of Statistics, Statistics Yearbook of Maldives 2018, available at <http://statisticsmaldives.gov.mv/yearbook/2018/population/>.
[2] Statistics Iceland, Iceland in Figures 2018, Vol. 23, 31, available at < https://www.statice.is/publications/iceland-in-figures/>.
[3] Smithsonian.com, Indonesia's Trying to Figure Out How Many Islands It Contains, June 9, 2017 <https://www.smithsonianmag.com/smart-news/indonesias-trying-figure-out-how-many-islands-it-contains-180963606/>.
[4] Statistics Sweden, Islands in Sweden 2013, available at < http://www.scb.se/en_/Finding-statistics/Publishing-calendar/Show-detailed-information/?publobjid=22177>.
[5] United Nations Convention on the Law of the Sea, December 10, 1982, 1833 UNTS 397 [hereinafter UNCLOS].
[6] Art 121 (1) UNCLOS.
[7] Art 121 (3) UNCLOS.
[8] Art 76 (4) UNCLOS.

above, the seabed and its subsoil,[9] the territorial sea remains a zone severely limited in its dimensions: it is 12 nm wide.[10] The contiguous zone is a maritime zone seawards of the territorial sea which may extend up to 24 nm from the territorial sea baseline.[11] It is a zone that is of no relevance to the exploitation of marine resources, as it confers only rights related to the prevention and punishment of violations of customs, fiscal, immigration and sanitary laws.[12] The designation of an island as a "rock" or an "island in the narrow sense" has the capacity to greatly enlarge or shrink the EEZ and continental shelf of the owning state. The example of France allows us to visualize the significance of islands to EEZ rights: while France is only the 44th largest country, it has the world's second largest EEZ: the French EEZ covers 11 million square kilometers and owes its enormity to the French islands in its Overseas Territories and Departements.[13] The EEZ of these islands accounts for 97% of the French EEZ.[14] It should be noted that the comparative advantage of France lies not only in its ownership of numerous islands, but in the fact that these islands are dispersed, preventing their respective EEZs from overlapping. The criteria used to distinguish between "rocks" and "islands in the narrow sense", "human habitation" and "economic life", have elicited criticism for their perceived vagueness.[15] UNCLOS has been accused of having "left behind grey zones in the scenario of resources rights on the sea. These deliberate vacua impede the establishment of an efficient management order on the sea, and, further, have exacerbated sovereignty and territorial disputes"[16]. And indeed, Article 121[17] employs general terms that are not further specified and may convey various meanings. It is in this way doubtful whether "human habitation" and "economic life" represent the "clear criteria"[18] and the end to the "enigmatic definitions"[19] of the 1958 Conventions that states were planning to adopt. UNCLOS' *Regime of islands'* leaves important questions

[9] Art 2 UNCLOS.
[10] Art 3 and Art 5 UNCLOS.
[11] Art 33 (2) UNCLOS.
[12] For further information on the contiguous zone and its importance vis-à-vis the *Regime of islands*, see Part 1 Section 1 VII.
[13] Ministère des Outre-mer de la République Française, La dimension maritime et stratégique des Outre-mer, November 17, 2016 <outre-mer.gouv.fr/la-dimension-maritime-et-strategique-des-outre-mer>; Central Intelligence Agency of the United States of America, The World Factbook, Country Comparison by Area <https://www.cia.gov/library/publications/the-world-factbook/rankorder/2147rank.html>.
[14] Ministère des Outre-mer de la République Française, La dimension maritime et stratégique des Outre-mer, November 17, 2016 <outre-mer.gouv.fr/la-dimension-maritime-et-strategique-des-outre-mer>.
[15] *Beckman/Bernard,* The Significance of Offshore Geographic Features to Maritime Claims in *Wu/Zou* (eds.), Arbitration Concerning the South China Sea - Philippines versus China (2016) 190.
[16] *Tseng, Hui-Yi Katherine,* Lessons from the Disturbed Waters – The Diaoyu/Diaoyutai/Senkaku Islands Disputes (2015) 109.
[17] For the purpose of this paper, all cited articles not followed by the legal act from which they were taken refer to UNCLOS.
[18] See also United Nations Office for Ocean Affairs and the Law of the Sea, The Law of the Sea: Régime of Islands, UN Sales No. E.87.V.11 (1988) 59 (Nicaragua).
[19] *Ibid,* 44 (Turkey).

unanswered. What does it mean for an island to be capable of sustaining human habitation or economic life? How large, diverse or self-sufficient should this theoretical population be? Do meteorological stations, mining facilities or military outposts qualify as "economic life"? Does the provision imply that maritime entitlements change with demographic developments? How does the *Regime of islands* impact the delimitation between islands with opposite or adjacent coasts? Which maritime zones may be claimed by states that own island territories but have not ratified UNCLOS? Against the backdrop of the serious economic and political implications following an island's categorization as a rock or island in the narrow sense, this thesis aims to add clarity to the distinction of the two by offering a comprehensive look into the *Regime of islands'* history, its interpretation, its relevance to customary law and its possibilities for amendment.

Remarks on the Terminology Employed

As explained, the focal point of this thesis will be the distinction between islands generating entitlement only to the territorial sea and the contiguous zone on the one hand, and islands engendering entitlement to the territorial sea, the contiguous zone, the EEZ and the continental shelf on the other.[20] While UNCLOS calls the former "rocks", it does not explicitly designate the latter category of islands. Scholars, governments and international tribunals have thus adopted varying labels to describe these features, meaning that the terminology employed is far from uniform. This section briefly explains the terminology choices of this thesis.

Article 121 (1), which sets forth the general definition of islands, proclaims: "An island is a naturally formed area of land, surrounded by water, which is above water at high tide."[21] These very same qualities, namely being made up of naturally formed territory, enclosure by water and protuberance at high tide, are likewise required in rocks. For if a feature lacks any of these criteria, it is neither rock nor island, the feature would on the contrary fall in the category of an artificial island,[22] continental territory or a low-tide elevation.[23] This indicates that "rocks" are a subcategory of "islands".[24] Features fully entitled to both EEZ and continental shelf must not only meet the general characteristics of "islands" as mentioned above, but are also required to meet the condition of being capable of sustaining human habitation or economic life. These "fully entitled" islands are referred to as "islands in the narrow sense" in this thesis.

Naturally, it is possible to adopt a terminology different from the one chosen here. For those interested in the terminological habits within this particular niche of the law of the sea, the following paragraph offers a brief excursion into the terms employed to describe the features referred to in this thesis as "islands" and "islands in the narrow sense" respectively.

Scholars and governments involved in litigation sometimes refer to "islands in the narrow sense" plainly as "islands".[25] Some scholars even describe the distinction between "rocks" and "islands in the narrow sense" as one between "rocks" and "islands", despite having recognized

[20] For further information on the contiguous zone and its importance vis-à-vis the *Regime of islands*, see Part 1 Section 1 VII.
[21] Art 121 (1) UNCLOS.
[22] Art 60 UNCLOS.
[23] Art 13 UNCLOS.
[24] This is a common position. See for example *Black Sea Case,* Memorial submitted by Romania on August 19, 2005, para 10.3, *supra* note 310; *Charney,* Rocks that Cannot Sustain Human Habitation, The American Journal of International Law 93 (1999) 863 (864); *Talmon,* Article 121 - Regime of Islands in Proelss (ed.), The United Nations Convention on the Law of the Sea - A Commentary (2017) 858 (862).
[25] See for example *Diaz/Dubner/Parent,* When is a "Rock" an "Island"? - Another Unilateral Declaration Defies "Norms" of International Law, Michigan State Journal of International Law 15 (2007) 519 (519); *Black Sea Case,* Counter-Memorial submitted by Ukraine on May 19, 2006, Vol. 1, para 7.35, *supra* note 310; *Hafetz,* Fostering Protection of the Marine Environment and Economic Development: Article 121(3) of the Third Law of the Sea Convention, AM. U. INT'L L. REV 15 (2000) 583 (589, 590).

that "rocks" are a subcategory of "islands".[26] This approach ostensibly simplifies matters and perhaps renders newspaper articles on maritime standoffs and disputes comprehensible to a broader audience by referring to the issue of the legal status of islands plainly as a distinction between "islands and rocks".[27] However, this terminology both robs us of an appropriate umbrella term by which to refer to both "rocks" and "islands in the narrow sense" and is indicative of a flawed understanding of Article 121. Article 121 after all bears the title *Regime of islands*, which clearly refers to both "islands in the narrow sense" *and* "rocks", meaning that a "rock" is a type of "island". An approach more in line with the regulatory content of the *Regime of islands* is chosen by the arbitral tribunal in *The South China Sea Arbitration.* Here, the umbrella term of "islands" is replaced by "naturally formed high-tide features" and "islands in the narrow sense" are referred to as "fully entitled islands".[28] In the course of the same litigation, the claimant adopted the term "true islands"[29] to describe "islands in the narrow sense". During negotiations leading up to the adoption of the *Regime of islands*, Romania chose the term "islands proper"[30] when referring to "islands in the narrow sense". *Talmon*, on the other hand, has identified three categories of islands, namely "(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"[31]. He further uses the term "proper island"[32] to describe all high tide elevations entitled to an EEZ and continental shelf. The term "rock island"[33] denotes both rocks that *can* sustain human habitation or economic life and rocks that *cannot* sustain human habitation or economic life. Some sources simply resort to lengthy paraphrases such as "islands which have the same maritime entitlements as any other land territory, including an entitlement to a territorial sea of 12 nautical miles, an exclusive economic

[26] *Song,* The Application of Article 121 of the Law of the Sea Convention to the Selected Geographical Features Situated in the Pacific Ocean, Chinese Journal of International Law 9 (2010) 663 (694, 697); *Gjetnes,* The Spratlys: Are They Rocks or Islands?, Ocean Development & International Law 32 (2001) 191 (193).
[27] See for example Why Is China Giving the Philippines the Cold Shoulder?, Foreign Policy, November 13, 2013 <foreignpolicy.com/2013/11/13/why-is-china-giving-the-philippines-the-cold-shoulder/>.
[28] *The South China Sea Arbitration (The Philippines/The People's Republic of China),* Award, July 12, 2016, Permanent Court of Arbitration Case Nº 2013-19, para 390. The members of the Arbitral Tribunal were Judge Thomas A. Mensah, Judge Jean-Pierre Cot, Judge Stanislaw Pawlak, Professor Alfred Soons, and Judge Rüdiger Wolfrum. For all case-related documents see <https://pca-cpa.org/en/cases/7/> [hereinafter *South China Sea Arbitration*].
[29] *South China Sea Arbitration,* Memorial of the Philippines, March 30, 2014, Vol. I, para 5.25, *supra* note 28.
[30] United Nations Office for Ocean Affairs and the Law of the Sea, The Law of the Sea: Régime of Islands, UN Sales No. E.87.V.11 (1988) 42 (Romania).
[31] *Talmon,* Article 121 - Regime of Islands in Proelss (ed.), The United Nations Convention on the Law of the Sea - A Commentary (2017) 858 (871).
[32] *Ibid,* 860.
[33] *Ibid.*

zone and a continental shelf"[34] when referring to islands in the narrow sense. These differences in style may come as an unpleasant distraction to readers hoping for a consistent terminology throughout the literature relevant to the *Regime of islands*. The disparities in terminology are, it would seem, a consequence of UNCLOS' allusion to three categories of islands in Article 121, of which only two come with a formal designation. In the end, the categorization into "islands", "islands in the narrow sense" and "rocks" is both expedient and informative as this terminology avoids lengthy paraphrases and acknowledges the reality that "rocks" and "islands in the narrow sense" are a subcategory of "islands".

It should perhaps also be noted that the measurement employed throughout UNCLOS is nautical miles (nm) and that distances in this thesis will usually be displayed in nautical miles to ensure consistency. At the beginning of the 19th century, it was common practice to measure maritime zones in miles,[35] which is why the distances in the historical cases *Soult v. l'Africaine* and *Anna* will be specified in both nautical miles and miles in order to ensure consistency.

[34] International Court of Justice, *Territorial and Maritime Dispute (Nicaragua/Colombia),* Judgment, ICJ Reports 2012, para 689 [hereinafter *Colombian Islands Case*].

[35] 1 nautical mile = 1.15 miles = 1.85 km.

PART 1 HISTORICAL EVOLUTION OF THE REGIME OF ISLANDS

For those who wish to gain a comprehensive understanding of the legal categorization of islands it is important to study its gradual evolution over the last centuries. Historical codifications, case law and state practice all broaden our understanding of the present-day *Regime of islands*.

Section 1 Codifications

Tracing codifications of the law of the sea from its hegemonic beginnings at the Imperial Conference 1923, which was under the patronage of the British Empire, to the inclusive and comprehensive treaty that is today's UNCLOS, we may notice that some legal complexities have given rise to concern for centuries. We will also be able to observe how closely UNCLOS mirrors the conventions preceding it,[36] and crucially, where it deviates from them. While we will still start with the treatment of islands at the abovementioned Imperial Conference, it is of course acknowledged that individual scholars have addressed such matters even prior to this event. *Welwod*, for example, wrote in 1613, in his work *An Abridgement of all Sea-Lawes*, that not all types of islands share the same legal significance. According to *Welwod*, islands to be used in maritime delimitation had to be "rocks, or other eminent and visible marks above water"[37]. It remains unclear whether this statement was meant to refer to inundation at high or at low tide. As *Welwod*'s observations on the subject of rocks did not go any further, we can only guess whether he would have considered that islands irrespective of size and tidal datum should equally affect maritime zones and boundaries, a main point of contention at international conferences to come.

I. The Imperial Conference 1923

The Imperial Conference under the auspices of the British Empire in 1923 introduced a description of islands that evinced striking similarities to today's *Regime of islands*, not least because it was a definition based on inhabitability and profitability.

The relevant report stated:

> "The word 'island' covers all portions of territory permanently above high water in normal circumstances and capable of use or habitation."[38]

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[36] The definition of an "island" has for instance remained virtually unchanged since the International Law Commission adopted the *Articles concerning the Law of the Sea* in 1956. International Law Commission, Articles Concerning the Law of the Sea with Commentaries, July 4, 1956, Yearbook of the International Law Commission 2 (1956), Art 10 [hereinafter 1956 LOS Articles].

[37] *Welwod,* An Abridgement of all Sea-Lawes (1613) 68.

[38] Imperial Conference 1923, Report of Inter-Departmental Committee on the Limits of Territorial Waters, Document T.118/118/380, Public Record Office Ref. F. O. 372/2108 (1924) 5, cited in *Brown,* Rockall and the Limits of National Jurisdiction of the UK, Marine Policy, July (1978) 181 (206).

The explanatory memorandum went on to specify:

> "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. It is thought that no criteria could be selected that would not be open to some form of criticism."[39]

These documents show that the topic of an island's human habitation, economic activity and artificial structures were just as controversial at the 1923 Imperial Conference as they are today. This is in particular manifest from the official report of the Imperial Conference, where it is remarked that the "criteria [of habitation and use] will in many cases admit of argument"[40]. Documentation from the Imperial Conference is only reflective of the views of the British Empire and its dominions and colonies, as there were no other states participating.

II. The Conference for the Codification of International Law 1930

Over time, international conferences became representative of a broader spectrum of states. The Conference for the Codification of International Law (or 1930 Codification Conference) convened in the Hague under the auspices of the League of Nations and was a more inclusive effort to codify the existing - largely customary - law of the sea. Perhaps the most important objective of this conference was to lay down by law the breadth of the territorial sea, an effort that failed due to insufficient agreement among its participants.[41] The subjects covered were varied, and the observations and discussion points resulting from the 1930 Codification Conference provide valuable insight into the role of islands in international law at this point in time. Documentation from the 1930 Codification Conference shows that states contemplated two alternative definitions of the term "island": either "island" should designate an elevation above water at high tide or an elevation that was at the very least exposed at low tide. It was furthermore suggested to differentiate between islands located at a great distance from the

[39] *Ibid.*
[40] *Ibid.*
[41] While numerous States regarded the territorial sea as a belt 3 nm wide, others were in favor of a breadth of 4, 6 or 18 nm or a discretionary rather than a fixed number of nautical miles. See *Churchill/Lowe,* The law of the sea[3] (1999) 14 et seq; Preparatory Committee for the Codification Conference, First Report submitted to the Council by the Preparatory Committee for the Codification Conference, C. 73. M. 38. 1929. V., March 13, 1930, 27 et seq [hereinafter 1930 Codification Conference Report].

mainland or other islands (isolated islands) and islands within the territorial sea of the mainland or other islands (coastal islands).[42] Isolated islands should only be accorded a territorial sea if they were exposed at high tide, whereas coastal islands should generate entitlement to the territorial sea even if they were exposed only at low tide. This rule is to a certain extent still in effect today.[43] While Australia, the United Kingdom and South Africa submitted a proposal distinguishing between different kinds of high-tide elevations based on their occupation and use,[44] this proposal was ultimately rejected as inconsequential and off-topic.[45] The delegation from the United States found that the main focus should be on establishing the correct method of delimitation, not the definition of "land" as such.[46] In conclusion, the main distinctions drawn at the 1930 Codification Conference were between high and low-tide elevations and between isolated and coastal islands. The concept of different legal consequences depending on an island's occupation and use remained an afterthought.

III. Developments Linked to the Truman Proclamation 1945

The years following the Truman Proclamation in 1945 brought radical change to the law of the sea. Faced with a steady increase in raw material and energy consumption, the United States looked to the untapped riches of the seabed, resources that had only become exploitable beyond the territorial sea within the last few years.[47] Citing "the urgency of conserving and prudently utilizing [the United States'] natural resources" then President of the United States *Truman* famously proclaimed that he regarded the "natural resources of the subsoil and sea bed of the continental shelf beneath the high seas but contiguous to the coasts of the United States as appertaining to the United States, subject to its jurisdiction and control".[48] While conceding that it was not the first such proclamation,[49] the ICJ has found that the Truman Proclamation holds

[42] 1930 Codification Conference Report 35, *supra* note 41.
[43] Art 13 UNCLOS.
[44] The proposal was submitted by Australia, the United Kingdom and South Africa. League of Nations Conference for the Codification of International Law, Cases of Discussion 2, League of Nations Doc. No. C.74.M.39.1929.V. 52-53, cited in *Kwiatkowska/Soons,* Entitlement to Maritime Areas of Rocks Which Cannot Sustain Human Habitation or Economic Life of Their Own, Netherlands Yearbook of International Law 21 (1990) 139 (154).
[45] *Boggs,* Delimitation of the Territorial Sea: The Method of Delimination Proposed by the Delegation of the United States at the Hague Conference for the Codification of International Law, The American Journal of International 24:3 (1930) 541 (548).
[46] *Ibid.*
[47] *Rüster,* Verträge und Deklarationen über den Festlandsockel (Continental Shelf) (1975) 8.
[48] Truman, Harry S., Proclamation 2667 - Policy of the United States with Respect to the Natural Resources of the Subsoil and Sea Bed of the Continental Shelf, September 28, 1945, reprinted in the American Journal of International Law 40 (1946), Supplement 45.
[49] Argentina for instance acted ahead of the Truman Proclamation in issuing an anticipatory Decree in 1944, United Nations Legislative Series, Laws and Regulations on the Regime of the High Seas, Vol. I, UN Sales No. 1951.V.2 (1951), ST/LEG/SER.B/1, 3.

a "special status" as the "starting point of the positive law on the subject".[50] *Rüster* has described the impact of the Truman Proclamation on the law of the sea as "revolutionär[…]"[51]. Proclamations laying claim to the continental shelf issued in the wake of the Truman Proclamation would often explicitly cite the Truman Proclamation as an inspiration.[52] A mere month after the Truman Proclamation, Mexico asserted its claim to the "whole of the continental shelf platform"[53] and its resources via Presidential Declaration. In quick succession, a multitude of states followed suit. Within five years of the Truman Proclamation, Argentina, the Bahamas, British Honduras, Chile, Costa Rica, Jamaica, Panama, Peru, Saudi Arabia, the United Kingdom, Venezuela, as well as the Persian Gulf States under British protection and influence, namely Abu Dhabi, Ajman, Bahrain, Dubai, Kuwait, Qatar, Ras al Khaimah, Sharjah and Umm al Qaiwan, had all laid claim to the continental shelf adjacent to their coasts.[54] This was however no uniform movement. Rather, states differed on subjects ranging from the nature to the extent of this nascent legal regime. As *Jewett* has pointed out, "while the Mexican and Peruvian claims were phrased in terms of new acquisitions, only the Chilean and Costa Rican claims implied that they confirmed existing rights".[55] While some pronouncements mirrored the Truman Proclamation, others went far beyond this model, claiming not only the subsoil and sea bed of the continental shelf but its superjacent "epicontinental" sea as well.[56] As the ICJ has however concluded, the legal position that ultimately prevailed was the one endorsed in the Truman Proclamation, which postulated that coastal states held an "original, natural, and exclusive (in short a vested) right"[57] to the subsoil and sea bed of their continental shelf. By 1950, most members of the International Law Commission regarded continental shelf rights as "embryonic customary law"[58], while only a minority viewpoint ascribed customary law status

[50] International Court of Justice, *North Sea Continental Shelf Cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)*, Judgment, ICJ Reports 1969, para 47 [hereinafter *North Sea Continental Shelf Cases*].
[51] "revolutionary" *ger*. see *Rüster,* Verträge und Deklarationen über den Festlandsockel (Continental Shelf) (1975) 11.
[52] Chile, Peru and Saudi Arabia referenced the Truman Proclamation in their respective Declarations. See United Nations Legislative Series, Laws and Regulations on the Regime of the High Seas, Vol. I, UN Sales No. 1951.V.2 (1951), ST/LEG/SER.B/1, 6 (Chile), 16 (Peru), 22 (Saudi Arabia).
[53] Presidential Declaration with Respect to the Continental Shelf, October 29, 1945, United Nations Legislative Series, Laws and Regulations on the Regime of the High Seas, Vol. I, UN Sales No. 1951.V.2 (1951), ST/LEG/SER.B/1, 13.
[54] For a detailed analysis of the wording and chronology of the original continental shelf claims see *Jewett*, The Evolution of the Legal Regime of the Continental Shelf, The Canadian Yearbook of International Law 22 (1984) 153 (158-164).
[55] *Ibid,* 161.
[56] *Ibid.* While Argentina, Chile and Peru had claimed the "epicontinental sea" as part of their continental shelf, the United States and the United Kingdom were in favor of continental shelf rights that included only the seabed and subsoil thereof.
[57] *North Sea Continental Shelf Cases*, para 47, *supra* note 50.
[58] 67th Meeting, Yearbook of the International Law Commission I (1950), A/CN.4/SER.A/1950, 216 (217).

to the continental shelf regime. The emergence of the continental shelf regime expanded the geopolitical importance of islands, as even minor features were considered entitled to this new maritime zone.

IV. The Articles Concerning the Law of the Sea 1956

In 1953, the General Assembly of the United Nations resolved that it would address the legal issues relating to the high seas, the territorial waters, the contiguous zone as well as the continental shelf and its superjacent waters only after a comprehensive study thereof by the International Law Commission (ILC).[59] In execution of this request, the ILC submitted its Final Report to the General Assembly in 1956, a report that contained the Articles Concerning the Law of the Sea (1956 LOS Articles). The 1956 LOS Articles laid out that "[t]he coastal State exercises over the continental shelf sovereign rights for the purpose of exploring and exploiting its natural resources"[60]. It is evident from the ILC's commentary that this provision did not intend to codify existing customary law.[61] The 1956 LOS Articles further defined the continental shelf as the "seabed and subsoil of the submarine areas adjacent to the coast […] to a depth of 200 metres […], or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas"[62]. Continental shelf rights depended on the technical capabilities of the time, a vague criterion. Despite the heightened significance of maritime zones, the 1956 LOS Articles upheld the rule that all islands should be surrounded by the same maritime zones, irrespective of an island's size or significance. Article 10 of the 1956 LOS Articles defined islands as elevations exposed at high tide under "normal circumstances"[63]. The same provision stipulated that every island has a territorial sea.[64] Furthermore, the ILC commentary explicitly expounded that the "term 'continental shelf' does not imply that it refers exclusively to continents in the current connotation of that word. It also covers the submarine areas contiguous to islands."[65] The 1956 LOS Articles also made reference to a zone with a 12 nm limit where the coastal states where authorized to enforce their fiscal, sanitary and customs laws: the contiguous zone.[66] Whereas some of the LOS Articles

[59] General Assembly Resolution 798 (VIII) of December 7, 1953.
[60] Art 68 of the 1956 LOS Articles, *supra* note 36.
[61] *Ibid,* Art 68 (Commentary). See also *Jewett*, The Evolution of the Legal Regime of the Continental Shelf, The Canadian Yearbook of International Law 22 (1984) 153 (167).
[62] Art 67 of the 1956 LOS Articles, *supra* note 36.
[63] *Ibid,* Art 10.
[64] *Ibid,* Art 3. The ILC recommended that a separate international conference should ultimately decide on the breadth of the territorial sea. It was considered that "international law does not permit an extension of the territorial sea beyond twelve miles."
[65] *Ibid,* Art 67 (Commentary).
[66] *Ibid*, Art 66.

were quite novel, other concepts remained untouched. The distinction between high and low-tide elevations suggested at the 1930 Codification Conference was upheld. As before, isolated low-tide elevations should not be entitled to any maritime zones,[67] whereas low-tide elevations situated within the territorial sea of the mainland or an island created a "bulge" in the territorial sea.[68] The 1956 LOS Articles referred to low-tide elevations as "drying rocks and shoals". The 1956 LOS Articles further stipulated that certain features did not classify as "islands" and therefore created no entitlement to the corresponding maritime zones. Such was the case of low-tide elevations whose altitude had been artificially increased through installations such as lighthouses and technical installations on the seabed.[69] The 1956 LOS Articles acknowledged a new range and variety of maritime zones, but, significantly, failed to reach consensus on the question of sovereign rights to catch areas and other economic uses of the water column beyond the range of the territorial waters. On the topic of exclusive fishing rights, the ILC in fact considered that it had to remain silent as it "lack[ed] competence in the fields of biological science and economics adequately to study these exceptional situations"[70].

V. The First United Nations Conference on the Law of the Sea 1958

Having obtained the 1956 LOS Articles it had commissioned as a draft from the ILC, the General Assembly expressed its appreciation of the ILC's valuable work and convened an international conference in order to "examine the law of the sea, taking account not only of the legal but also of the technical, biological, economic and political aspects of the problem, and to embody the results of its work in one or more international conventions […]"[71]. The First United Nations Conference on the Law of the Sea produced four new codifications: the Convention on the Territorial Sea and the Contiguous Zone, the Convention on the Continental Shelf, the Convention on the High Seas and the Convention on Fishing and Conservation of Living Resources of the High Seas.[72] The preparatory works to these conventions show that there was some concern over the potentiality that "accidents of topography"[73], that is to say

[67] *Ibid,* Art 11.
[68] *Ibid.*
[69] *Ibid,* Art 10 (Commentary). States are entitled to draw limited "safety zones" around such installations.
[70] *Ibid*, 293.
[71] General Assembly Resolution 1105 (XI) of February 21, 1957.
[72] Convention on the Territorial Sea and the Contiguous Zone, April 29, 1958, 516 UNTS 205 [hereinafter Convention on the Territorial Sea and the Contiguous Zone]; Convention on the Continental Shelf of April 29, 1958, 499 UNTS 311 [hereinafter Convention on the Continental Shelf]; Convention on Fishing and Conservation of Living Resources of the High Seas, April 29, 1958, 559 UNTS 285 [hereinafter Convention on Fishing and Conservation of Living Resources of the High Seas].
[73] See Memorandum by the Secretariat of the United Nations Educational, Scientific and Cultural Organization of December 20, 1957 in Official Records of the First United Nations Conference on the Law of the Sea, Volume I – Preparatory Documents, A/CONF.13/37, 45.

small and isolated islands, could generate entitlement to the continental shelf. This question was in particular raised in the context of Rockall, an elevation whose capacity to generate a continental shelf was doubted despite the fact that Rockall met the legal qualifications of an "island" within the meaning of both the Convention on the Territorial Sea and the Contiguous Zone and its corresponding draft article.[74] These doubts can be attributed to the properties of Rockall, which was described as "almost unapproachable, and […] only suitable for a lighthouse-type building (which has never been built)"[75]. While these concerns were not addressed in the resulting convention itself, the summary records of the drafting committee reveal that there was disagreement on the maritime zones of islands situated within the territorial sea of a foreign state. The Burmese representative submitted a - ultimately unsuccessful - proposal to the effect that such islands should be deprived of their territorial sea.[76] The legal regime of islands reflected in the four 1958 conventions naturally closely resembled their drafts, the 1956 LOS Articles. The Convention on the Territorial Sea and the Contiguous Zone defined an island as "a naturally formed area of land, surrounded by water, which is above water at high tide"[77]. Islands were accorded a territorial sea, a contiguous zone and a continental shelf.[78] The limits of the contiguous zone and the continental shelf remained identical to those laid out in the 1956 LOS Articles. States were authorized to claim a contiguous zone of up to twelve miles from the territorial sea baseline.[79] The continental shelf referred to "the seabed and subsoil of the submarine areas adjacent to the coast but outside the area of the territorial sea, to a depth of 200 metres or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas; (*b*) to the seabed and subsoil of similar submarine areas adjacent to the coasts of islands."[80] It seems of note that it was considered necessary to specifically highlight that islands, too, could generate

[74] Art 10 Convention on the Territorial Sea and the Contiguous Zone, *supra* note 72; Art 10 of the 1956 LOS Articles, *supra* note 36.
[75] See Memorandum by the Secretariat of the United Nations Educational, Scientific and Cultural Organization of December 20, 1957 in Official Records of the First United Nations Conference on the Law of the Sea, Volume I – Preparatory Documents, A/CONF.13/37, 45.
[76] The Burmese proposal was notably opposed by Thailand and Greece. The United Kingdom expressed the opinion that this was a problem that could be resolved by invocation of the boundary provisions relating to states with opposite or adjacent coasts, in particular those regulating use of the median line. See Official Records of the United Nations Conference on the Law of the Sea, Volume III: First Committee: Territorial Sea and Contiguous Zone (1958) Proposal of March 10, 1958 (Burma), A/CONF.13/C.1/L.3, 212; Official Records of the United Nations Conference on the Law of the Sea, Volume III: First Committee: Territorial Sea and Contiguous Zone (1958) 161 – 162.
[77] Art 10 Convention on the Territorial Sea and the Contiguous Zone, *supra* note 72.
[78] *Ibid.*
[79] *Ibid,* Art 24.
[80] Art 1 Convention on the Continental Shelf, *supra* note 72.

entitlement to the continental shelf,[81] a sign of the potentially contentious nature of the maritime zones of islands. Artificial structures intended to aid in the exploration of the continental shelf were not accorded the status of islands,[82] which was in keeping with the 1956 LOS Articles.[83] At the suggestion of the United States, the terms used to describe low-tide elevations in the 1956 LOS Articles, "drying rocks and shoals"[84], were abandoned in view of being "irrelevant and vague terms in this context, since texture of land is immaterial for delimitation purposes"[85]. The Convention of the Territorial Sea and the Contiguous Zone describes elevations exposed at low-tide but submerged at high tide as "low-tide elevations". One of the rare departures from the 1956 LOS Articles concerned the legal status of artificially altered low-tide elevations: by virtue of Article 4 (3) of the Convention on the Territorial Sea and the Contiguous Zone, states were authorized to draw their territorial sea baselines around isolated low-tide elevations, provided that "lighthouses or similar installations which are permanently above sea level have been built on them"[86]. The ILC on the other hand, had determined that low-tide elevations upon which lighthouses had been built did not even require a "safety zone" of approximately 500 meters.[87] Furthermore, the Convention on Fishing and Conservation of Living Resources of the High Seas Far refrained from creating exclusive fishing zones for coastal states, stipulating instead that nationals of all states were entitled to fish on the high seas but had to cooperate in their ventures.[88] It was however recognized that the coastal state whose territorial sea abutted against a certain fishing area had a "special interest"[89] to be respected.

To the disappointment of states including Indonesia, Czechoslovakia and Ukraine, the 1958 Conference could not resolve the question of the legal nature of the waters in between elevations forming a mid-ocean archipelago.[90] Indeed, the failure to reach agreement on this issue had already been deplored by the ILC in its comments to the 1956 LOS Articles.[91] Finally, just as

[81] UNESCO criticized this accentuation of the equality of islands to other high-tide landmasses as "unnecessary" in the preliminary stages of the First United Nations Conference on the Law of the Sea. See Memorandum by the Secretariat of the United Nations Educational, Scientific and Cultural Organization of December 20, 1957 in Official Records of the First United Nations Conference on the Law of the Sea, Volume I – Preparatory Documents, A/CONF.13/37, 40.
[82] Art 5 (4) Convention on the Continental Shelf, *supra* note 72.
[83] Art 10 (Commentary) of the 1956 LOS Articles, *supra* note 36.
[84] *Ibid,* Art 11.
[85] Official Records of the United Nations Conference on the Law of the Sea, Volume III: First Committee: Territorial Sea and Contiguous Zone (1958) Proposal of April 1, 1958 (United States), A/CONF.13/C.1/L.115, 243.
[86] Art 4 (3) Convention on the Territorial Sea and the Contiguous Zone, *supra* note 72.
[87] Art 10 (Commentary), Art 71 (Commentary) of the 1956 LOS Articles, *supra* note 36.
[88] Art 1, 4 Convention on Fishing and Conservation of Living Resources of the High Seas, *supra* note 72.
[89] *Ibid*, Art 6.
[90] Official Records of the United Nations Conference on the Law of the Sea, Volume III: First Committee: Territorial Sea and Contiguous Zone (1958) 15, 43, 61, 67.
[91] Art 10 (Commentary) of the 1956 LOS Articles, *supra* note 36.

its predecessor, the 1930 Codification Conference, the First United Nations Conference on the Law of the Sea failed to reach its goal of defining the breadth of the territorial sea.

VI. The Second United Nations Conference on the Law of the Sea 1960

During the closing days of the First United Nations Conference on the Law of the Sea, the participants requested that certain issues that had not been resolved be taken up at a second conference.[92] This in turn prompted a General Assembly Resolution convening the Second United Nations Conference on the Law of the Sea, which would take place in 1960.[93] Eighty-eight states partook in this second conference, the scope of which comprised only the issues of the breadth of the territorial sea and the existence and range of fishery zones.[94] Despite such a comparatively limited frame, there was ultimately no agreement on either subject. This failure to come to an arrangement is attributed to concerns relating to national security, fears of disproportionate economic expenditure and dissent over the optimal approach to legislating fishery zones.[95] States were alarmed by the possibility that expanding the territorial sea of their maritime neighbors might limit the maneuverability of their own naval fleet or necessitate the adjustment of their fishing routes at great cost.[96] The United States additionally deplored that according coastal islands a territorial sea six miles wide would not merely double the current range of three miles, but increase the territorial sea "in geometrical proportion"[97]. The debate over coastal fishery zones, on the other hand, seems to have collapsed over the question of whether it was best to expand the territorial sea or whether it was more sensible to define a new type of exclusive fishery zone that existed independently from and beyond the confines of the territorial sea.[98] As is not surprising in view of the limited scope of the conference, its official records show that representatives did not address the definition or subsets of islands and mostly touched upon the impact of islands on maritime zones in a peripheral manner. Islands were however central to the focus of the Philippines. The Philippines deplored that, because the 1958 Conventions did not address the unique geographical circumstances of archipelagoes, there was

[92] Official Records of the United Nations Conference on the Law of the Sea, Volume II: Plenary Meetings (1958) 73.
[93] General Assembly Resolution 1307 (XIII) of December 10, 1958.
[94] *Ibid.*
[95] *Bowett,* The Second United Nations Conference on the Law of the Sea, The International and Comparative Law Quarterly 9:3 (1960) 415 (416 et seq).
[96] *Ibid,* 416 - 418.
[97] Official Records of the Second United Nations Conference on the Law of the Sea, Committee of the Whole: Verbatim Records of the General Debate (1960) 409-410.
[98] *Bowett,* The Second United Nations Conference on the Law of the Sea, The International and Comparative Law Quarterly 9:3 (1960) 415 (420).

"no existing rule of international law on the matter of archipelagoes"[99]. The Philippines explained that the over 7,000 islands within the Philippine archipelago were "considered as a single unit [from time immemorial]"[100]. Therefore, according to the Philippines, waters separating the individual islands were "inland waters".[101] To the disappointment of the Philippines, the special geographical constellation of archipelagoes remained unaddressed.

VII. The Third United Nations Conference on the Law of the Sea 1973 - 1982

In a historic moment, the Third United Nations Conference on the Law of the Sea finally settled several outstanding issues, ranging from the archipelago question over the breadth of the territorial sea to fishery zones. All of these concerns were addressed in a single legal document: the United Nations Convention on the Law of the Sea. UNCLOS stipulates that the territorial sea is 12 nm wide and is measured from the baseline.[102] The fisheries question was resolved by enshrining the EEZ in international law and defining it as a maritime zone authorizing the coastal state not only to fish but to exclusively explore and exploit all resources recoverable from the water column, the seabed and its subsoil as well as gains from energy production from the water currents and winds within a distance of 200 nm from the baseline.[103] States participating in the Third United Nations Conference on the Law of the Sea reacted to the associated discussions by claiming variations of today's EEZ even prior to the conclusion of treaty negotiations.[104] UNCLOS lays out that the continental shelf comprises the seabed and subsoil of submarine areas up to a distance of 200 nm from the baseline.[105] Beyond this general rule, UNCLOS authorizes coastal states to claim as their legal continental shelf the seabed and subsoil beyond 200 nm, up to the outer edge of the continental margin. The part of the continental shelf that can be claimed beyond the 200 nm-line is referred to as the outer continental shelf. The practical implementation of the rules on the outer continental shelf was to be guided by the recommendations of a newly founded body, the Commission on the Limits of the Continental Shelf (CLCS).[106] As opposed to the outer continental shelf, the continental shelf within 200 nm can be claimed irrespective of actual geological circumstances. The extent of the outer continental shelf "either shall not exceed 350 nautical miles from the baselines from

[99] Official Records of the Second United Nations Conference on the Law of the Sea, Committee of the Whole: Verbatim Records of the General Debate (1960) 76.
[100] Official Records of the Second United Nations Conference on the Law of the Sea, Committee of the Whole: Verbatim Records of the General Debate (1960) 76.
[101] *Ibid,* 77.
[102] Art 3 UNCLOS.
[103] Art 55, 56 UNCLOS.
[104] For the effect these early EEZ claims had on international law, see Part 3 Section 3.
[105] Art 76 (1) UNCLOS.
[106] See below Part 1 Section 4.

which the breadth of the territorial sea is measured or shall not exceed 100 nautical miles from the 2,500 metre isobath, which is a line connecting the depth of 2,500 metres"[107]. These precise geological demarcation criteria stand in sharp contrast to the method embraced at the First United Nations Conference on the Law of the Sea, which, as described earlier,[108] demarcated the continental shelf by relying on the comparatively vague criterion of scientifically possible resource extraction. Under UNCLOS, archipelagic states may decide to apply straight archipelagic baselines, a method that entails drawing baselines using "the outermost points of the outermost islands and drying reefs of the archipelago provided that within such baselines are included the main islands and an area in which the ratio of the area of the water to the area of the land, including atolls, is between 1 to 1 and 9 to 1"[109]. Such baselines may even be drawn from low-tide elevations, provided that the low-tide elevation in question supports a lighthouse or similar installation or is within the territorial sea of the nearest island.[110] UNCLOS' most noteworthy innovation for the purposes of this thesis concerns the introduction of a new subcategory of islands: rocks. Using the same phrase as the Convention on the Territorial Sea and the Contiguous Zone,[111] UNCLOS defines an island as "a naturally formed area of land, surrounded by water, which is above water at high tide"[112] and stipulates that "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".[113] There is however a caveat: this rule does not apply to "rocks", which are defined as unable to "sustain human habitation or economic life of their own"[114]. This subcategory of islands can be surrounded by a territorial sea and a contiguous zone, but not by its own EEZ or continental shelf.[115] Whereas the territorial sea is part of the sovereign territory of the coastal state in much the same way as dry land,[116] the same does not hold true for the contiguous zone. The contiguous zone is positioned seawards of the territorial sea and may extend up to 24 nm, as measured from the territorial sea baseline.[117] It is a zone wherein the coastal state is authorized to exercise control functions with respect to national fiscal, immigration, sanitary

[107] Art 76 UNCLOS.
[108] Part 1 Section 1 V.
[109] Art 47 (1) UNCLOS.
[110] Art 47 (4) UNCLOS.
[111] Art 10 Convention on the Territorial Sea and the Contiguous Zone, *supra* note 72.
[112] Art 121 (1) UNCLOS.
[113] Art 121 (1) UNCLOS.
[114] Art 121 (3) UNCLOS.
[115] Art 121 (3) UNCLOS.
[116] See Part 2 Section 2 VI D 1.
[117] Art 33 (2) UNCLOS.

and customs laws.[118] Specifically, the coastal state may punish individuals having violated these laws within the territory of the coastal state, which includes the territorial sea. Within the contiguous zone, the coastal state is furthermore authorized to take actions preventing such infringements in the first place. At least 85 states have enacted legislation relating to their respective contiguous zones, legislation that, while in conformity with the maximum breadth dictated by the UNCLOS, at times exceeds the competencies the UNCLOS grants the coastal state with respect to the contiguous zone.[119] Some states appear to view the contiguous zone as entailing jurisdiction over security issues, even though this is not explicitly provided for in the UNCLOS.[120] In contrast to other maritime zones, such as the territorial sea, the EEZ and the continental shelf, the UNCLOS does not regulate how to delimit the contiguous zone in case there is an overlap with the contiguous zone of a neighboring state. Explanations for this omission vary: it may have been an oversight, or it may have been envisioned that neighboring states would cooperate in the exercise of the control functions of the contiguous zone.[121] It is also possible that this matter was left unregulated because it was assumed that the EEZ would at any rate incorporate the contiguous zone and that there was consequently no need for separate delimitation provisions.[122] Not all scholars are convinced of the usefulness of the contiguous zone, with *Soons* for example having suggested deleting it from the convention text in its entirety.[123] Scholars overwhelmingly agree that islands within the meaning of Article 121 (1) – including "rocks" – generate entitlement to the contiguous zone.[124] The wording of Article 121 (2) stipulates that the contiguous zone, the territorial sea, EEZ and the continental shelf of islands are all to be measured in the same way as the zones of any other land territory. From the fact that Article 121 (3) contains exceptions to this rule with respect to the EEZ and

[118] Art 33 (1) UNCLOS.
[119] See *Caminos,* Contiguous Zone in Wolfrum (ed.), The Max Planck Encyclopedia of Public international law (2015) para 13.
[120] *Ibid.*
[121] *Ibid,* para 16.
[122] *Ibid.*
[123] *Kwiatkowska/Soons,* Entitlement to Maritime Areas of Rocks Which Cannot Sustain Human Habitation or Economic Life of Their Own, Netherlands Yearbook of International Law 21 (1990) 139 (171, fn 89).
[124] See *Symmons,* Some Problems Relating to the Definition of 'Insular Formations' in International Law: Islands and Low-Tide Elevations, IBRU Maritime Briefing 1:5 (1995) 1 (8); *Charney,* Rocks that Cannot Sustain Human Habitation, The American Journal of International Law 93 (1999) 863 (864); *Diaz/Dubner/Parent,* When is a "Rock" an "Island"? - Another Unilateral Declaration Defies "Norms" of International Law, Michigan State Journal of International Law 15 (2007) 519 (540, fn 142); *Song,* The Application of Article 121 of the Law of the Sea Convention to the Selected Geographical Features Situated in the Pacific Ocean, Chinese Journal of International Law 9 (2010) 663 (694).

continental shelf but not for the contiguous zone, it can be concluded that all islands – including rocks – are entitled to a contiguous zone.[125]

It is important to stress that the *Regime of islands'* subcategorization into rocks and islands in the narrow sense was not the only solution on the table. Putting all high-tide elevations - irrespective of their demographics - on an equal legal level was an option supported by many,[126] but one that did not ultimately prevail. The differentiation between islands based on population and use was the result of a compromise between factions of states aiming to preserve opposing interests. As we have seen, the maritime zones of UNCLOS dwarfed those of the 1958 conventions. At the time of the adoption of the 1958 conventions, there was no internationally recognized limit, yet the territorial sea would often measure three miles, the continental shelf was specified to extend up to a depth of 200 metres,[127] and there was no agreement on coastal fishery zones beyond the territorial sea. The territorial sea and the continental shelf could be claimed on the basis of sovereignty over islands and the mainland alike. This aspect led to concerns among some states participating in negotiations at the Third United Nations Conference on the Law of the Sea, that an extension of maritime zones in general would lead to an inequitable reduction of the common heritage of mankind were islands were involved.[128] As the representative from Turkey explained, "[i]f all islands were to be treated alike or on an equal footing with the continental territories, the application of the various new norms which were envisaged to islands isolated in the vast ocean spaces would diminish the area destined to make up the common heritage of mankind"[129]. Tunisia agreed that "if the relevant provisions of the 1958 Geneva Convention were retained, islands, reefs and atolls would be accorded the same maritime space as the continental masses of States. If the 200-mile exclusive economic zone were accepted and if an island was, as defined by the Geneva Convention on the Territorial Sea and the Contiguous Zone, a natural stretch of land surrounded by water which was exposed at high tide, vast maritime spaces and the resources they contained would automatically be assigned to islands, reefs and atolls, thus diminishing the content of the international zone"[130]. Turkey's proposed solution to this problem included the submission of draft articles prescribing that, depending on their economic life and proximity to foreign territory, not all islands should

[125] *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... », Annuaire français de droit international 40 (1994) 876 (908).
[126] See also Part 2 Section 1 II.
[127] Art 1 Convention on the Continental Shelf, *supra* note 72.
[128] United Nations Office for Ocean Affairs and the Law of the Sea, The Law of the Sea: Régime of Islands, UN Sales No. E.87.V.11 (1988) 27 (Turkey); 61 (Singapore); 55 (Denmark).
[129] *Ibid,* 27 (Turkey).
[130] *Ibid,* 25 (Tunisia).

be entitled to the same maritime zones.[131] Similarly, Tunisia, conjointly with thirteen other states, handed in draft articles specifying that islands were to be treated differently depending on their proximity to the coast, their size, their population and their geomorphology.[132] It seems as though, judging by their statements, Turkey and Tunisia found that the enlargement of maritime zones brought about by UNCLOS made it necessary to limit the range of geographical features entitled to these zones. They specifically spoke out against according the elevations having enjoyed equal status as "islands" under the 1958 conventions the same range of maritime zones, and pointed to the concomitant reduction of the high seas. This position put them at odds with the faction of states having advocated for the equal treatment of all high tide elevations irrespective of demographics.[133] The Second Committee ultimately settled for a provision embodying a distinction between those islands entitled to the full spectrum of maritime zones and those only entitled to certain, individually listed, zones.[134] The legislative history of the *Regime of islands* is explored in further detail below.[135]

Section 2 International Judicature

Be it a dispute relating to state-sanctioned piracy during the early years of the nineteenth century or a present-day standoff over fishing rights, coastal states have often seen benefit in bringing their island-related grievances before an impartial arbiter. The plentiful case law resulting therefrom informs us of the meaning attributed to the *Regime of islands* and its predecessor provisions by some of the most esteemed jurists of their respective times. There is a substantial time lapse between the two early cases to be discussed, *Soult v. L'Africaine* and *Anna*, and modern cases, which will be discussed beginning with the *Fisheries Case*. The society and regulatory framework these proceedings existed in have changed greatly over time. It is for this reason that the subsequent chapter is divided in two parts, one covering historical cases stemming from the 19th century and one covering case law from the 20th and 21st century.

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[131] *Ibid,* 43 (Turkey).
[132] *Ibid,* 48 et seq (Algeria, Dahomey, Guinea, Ivory Coast, Liberia, Madagascar, Mali, Mauritania, Morocco, Sierra Leone, Sudan, Tunisia, Upper Volta, Zambia).
[133] For the statements by the participating states in favor of an equal legal status for all high tide elevations see United Nations Office for Ocean Affairs and the Law of the Sea, The Law of the Sea: Régime of Islands, UN Sales No. E.87.V.11 (1988) 27 (Cyprus); 31, 33, 53 (Greece); 34 (Fiji); 34, 51 (New Zealand); 34, 53 (Western Samoa); 34, 56 (Tonga); 51 (Uruguay); 60 (Canada); 62 (France); 62 (Venezuela); 63 (Jamaica); 66 (United Kingdom); 89, 105 (Japan); 103 (Iran); 107 (Brazil); 107 (Portugal); 108 (Australia); 108 (Ecuador).
[134] The Second Committee of the Third United Nations Conference on the Law of the Sea, which was under the Chairmanship of Mr. Aguilar of Venezuela, was a body tasked with addressing the issues that had been covered by Sub-Committee II of the Sea-Bed Committee, which had taken a preparatory function ahead of the conference itself. Among the subjects covered by the Second Committee was that of the *Regime of islands*. See also *Nandan/Rosenne,* United Nations Convention on the Law of the Sea – A Commentary III (1995) 22.
[135] See Part 2 Section 1 II.

I. Rocks and Islands in the Early 19th Century

The early 19th century was a time when piracy was a business licensed by the government via a *letter of marque and reprisal*. The historical cases *Soult v. l'Africaine* and *Anna* both date back to this period and stand out because they address the issue of whether or not insignificant islands generate maritime zones. The proceedings reveal discussions over the qualities an island had to evince in order to generate maritime zones: potential requirements included a military presence, vegetation, and the solid composition of the ground. Whether or not these are necessary prerequisites of islands in the narrow sense is a question that remains relevant to the present-day *Regime of islands*. Having occurred nearly 200 years ago, these cases require a brief exposition of historical context. From the 16th to the 19th century, European colonial powers enforced a process of occupation, displacement of indigenous peoples and colonization across the Americas and its offshore islands, claiming these territories as colonies. The competition for conquered territory among the colonial powers often ended in military confrontations on the high seas, which in turn would lead to a rise in significance of the law of the sea. During the Napoleonic Wars (1803-1815), it was still common practice among belligerent nations to authorize private individuals known as privateers to board and capture enemy ships, a permission granted via the *letter of marque and reprisal*. While privateers could thus lawfully attack vessels on the high seas, such conduct was illicit within the territorial jurisdiction of a neutral state. In the Napoleonic Wars (1803-1815), which were fought between France and varying coalitions led by Great Britain, the United States initially held the position of such a neutral state. Nevertheless, some vessels operated by privateers conducted raids within the neutral waters of the United States, usually prompting the United States navy to confiscate any such vessel.[136] The flag state of the privateer vessel could object to such a confiscation and pursue legal remedies, which is what happened in the cases *Soult v. l'Africaine* and *Anna.*

A. Soult v. l'Africaine

In 1804, the Court of Admiralty in Charleston, South Carolina, delivered its judgement in the case *Soult v. l'Africaine*. A French corvette had been captured by a British privateer off the coast of the United States, while it lay anchored on the outside of Rattlesnake shoal, only six miles [5.2 nm] from Sullivan's Island in the state of South Carolina. The French government argued that the capture of the *Africaine* had been illegal due to having been carried out within the territorial jurisdiction of a neutral state, which made it necessary to precisely establish the

[136] See Jefferson, Thomas, letter to the British minister June 13, 1793 <oll.libertyfund.org/titles/804>.

neutral states' borders. At the beginning of the 19th century, territorial jurisdiction was generally recognized as extending three miles [2.6 nm] from the coast.[137] Sovereignty was conditional upon the coastal state being able to defend its territory, which is why territorial jurisdiction over ocean space supposedly should not extend beyond the reach of weapons fired from the shore.[138] In *Soult v. l'Africaine*, the District Judge applied the Act of Congress 1794 which stated that only the ocean space within one "marine league" [3 nm] from the mainland was within the United States' jurisdiction.[139] He proceeded to enquire whether the *Africaine* was within this distance at the time of the capture. The incident occurred at a distance of six miles [5.2 nm] from the mainland, while the vessel lay anchored on Rattlesnake shoal. This rendered it difficult for the representative of France, *John Francis Soult*, to argue that the territorial bounds of a neutral state had been breached. Spotting a way out, *Soult* called on the court to draw the zone of territorial jurisdiction – what we may today call the territorial waters – from Rattlesnake Shoal, arguing that it had a "coast" too and should be treated equally as the mainland. *Soult* considered shoals to be the "sunken continuation"[140] of the mainland and claimed that both geographers and surveyors supported his opinion as they, too, viewed shoals as forming part of the coast. *Soult* effectively argued in favor of measuring the zone of territorial jurisdiction from low-tide elevations, regardless of their distance from the mainland. It is of interest that the idea that the validity of maritime zones may stem from the nature of geological formations as the "sunken continuation" of the mainland is still relevant today and notably reflected in Article 76 (1) UNCLOS. *Soult* justified his position on the range of maritime jurisdiction by relying on deliberations of public order and security: he argued that to deny the specific low-tide elevation a security zone would culminate in a threat to national security as, without a national security zone around the contested shoals in place, belligerent nations would be entitled to anchor their warships along these shoals. The court did not endorse this view. Rather, it emphasized that the Act of Congress 1794 postulated that a zone of protection and territorial jurisdiction one "marine league" wide [3 nm] could be claimed, but had to be measured from the mainland, not

[137] Although not uniformly applied, the notion that the territorial jurisdiction of a State over the oceans should in general extend to a distance of three miles from the coast had gained recognition in the courts. In this manner, the British High Court of Admiralty decided in 1800 that this rule formed a part of the law of nations. See High Court of Admiralty, *Twee Gebroeders*, Judgment, July 29, 1800 in *Robinson,* Reports of Cases Argued and Determined in the High Court of Admiralty, Vol. 3 (1802) 162 et seq.

[138] *Fulton*, The Sovereignty of the Sea: an historical account of the claims of England to the dominion of the British seas, and of the evolution of the territorial waters (1911) 576.

[139] District Judge *Bee* invokes the sixth section of the Act of Congress 1794 which lays out that the territorial jurisdiction of the United States measures "a marine league from the coasts or shores of the United States". District Court of South Carolina, *Soult v. l'Africaine*, Case No. 13/179, Judgment, May 28, 1804, 807 [hereinafter *Soult v. l'Africaine*].

[140] *Robinson,* Reports of Cases Argued and Determined in the High Court of Admiralty, Vol. 5 (1806) 378.

from nearby shoals. Such a reading, it was added, was necessary in the interest of the predictability of legal decisions, described as the imperative to forestall the "glorious uncertainty of the law"[141]. The court found that requiring that the maritime frontier be adjusted to take account of every single shoal would have the effect that "perplexed"[142] district courts would habitually contradict each other on their estimation of the course of the maritime frontier. Valuing legal certainty above the supposed threat to national security, the court ruled that no zone of national jurisdiction was to be drawn around Rattlesnake Shoal.[143]

B. Anna

Only one year later, in 1805, a very similar case was submitted to a British court. It was set off by the capture of the *Anna*, an American vessel, by a British privateer off US coasts. To the eyes of the United States' ambassador, this constituted a most unpleasant event, a view the responsible British judge shared. As in *Soult v. l'Africaine*, the British privateer argued that his actions had been in conformity with the law due to having taken place beyond the jurisdiction of the neutral United States. The capture took place within a distance of three miles [2.61 nm] from a group of very small islands in the estuary of the Mississippi in Louisiana. The surface area of these islands was negligible, yet it can be presumed that they were high-tide elevations.[144] Their vegetation consisted of a few weeds and "small shrubs"[145], with people only venturing there in order to "shoot wild fowl and procure eggs"[146]. The privateer stated that while the American ambassador may view these elevations as islands, they were in actuality nothing more than "temporary deposits of log and drift"[147] and as such hardly fit to serve as a basis for a territorial claim. Invoking the principle of legal certainty, he argued that territorial boundaries should be "fixed and permanent"[148] so as to permit vessels to easily recognize them. He warned that drawing the three miles [2.61 nm] wide zone of territorial jurisdiction from accumulations of sand and driftwood that the currents could easily sweep away would produce a vaguely defined maritime border. According to the privateer, the elevation in question met none of the conditions that would authorize the state to draw a three miles [2.61 nm] zone of national jurisdiction around it: the privateer in this way listed human habitation, location above water at

[141] *Soult v. l'Africaine* 806, *supra* note 139.
[142] *Ibid.*
[143] *Ibid,* 807.
[144] *Robinson*'s account describes them as "always dry" at one point and as "not at all times distinguishable" elsewhere. High Court of Admiralty, *Anna*, Judgment, November 1805 in *Robinson,* Reports of Cases Argued and Determined in the High Court of Admiralty, Vol. 5 (1806) 374, 378 [hereinafter *Anna*].
[145] *Ibid*, 374.
[146] *Ibid.*
[147] *Ibid,* 376.
[148] *Ibid,* 377.

high tide,[149] military presence within firing range and solid texture as necessary requirements. With the exception of the precondition of nearby military installments, these criteria are still relevant to today's legal system: according to UNCLOS, protuberance at high tide is a constitutive element of islands,[150] and the capacity to sustain human habitation is what differentiates rocks from islands in the narrow sense.[151] It is furthermore regularly discussed whether geomorphology is important to the definition of rocks.[152] Unlike the ruling in *Soult v. l'Africaine*, the court found that these low-tide elevations could lawfully be surrounded by a three miles [2.61 nm] zone of national jurisdiction given that they were the "natural appendage of the coast on which they border"[153]. Additionally, the court explained that the small islands in question were "a kind of portico to the mainland", meaning that they were so closely linked to the mainland that the waters in between the islands and the mainland coast could be considered part of the sovereign territory of the coastal state.[154] The court thereby contributed to the propagation of the "Portico Doctrine". Initially understood as postulating that small coastal islands should be awarded a territorial sea, the Portico Doctrine eventually "came to possess independent integrity as a means of attributing sovereignty over off-shore features which fell within the attraction of the mainland"[155]. The court did not agree with the privateer that sovereignty depended on the texture of the soil. The capture of the *Anna* was found to have been unlawful.[156] In an explanatory statement diametrically opposed to the reasoning of the ruling in *Soult v. l'Africaine*, the court laid out that drawing a maritime zone around the small islands at the mouth of the Mississippi was justified on the basis of security concerns. After all, if such islands were to be regarded as part of the high seas, European powers might seize such an opportunity to use the islands for military purposes and erect embankments or other fortifications.[157] The wrongfulness of the privateer's conduct was found to have consisted primarily in the act of lurking in the estuary of the Mississippi with the intention of exercising the rights of war from and within a neutral river. Had the privateer instead caught sight of the *Anna* outside the Mississippi estuary on the high seas and pursued the vessel all the way to the islands in question, his conduct would have been lawful.[158]

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[149] Described as the attribute of being "at all times distinguishable". *Ibid,* 378.
[150] Art 121 (1) UNCLOS.
[151] Art 121 (3) UNCLOS.
[152] Part 2 Section 2 I A.
[153] *Anna* 374, 385c, *supra* note 144.
[154] *O'Connell/Shearer*, The International Law of the Sea, Vol. 1 (1982) 186.
[155] *O'Connell/Shearer*, The International Law of the Sea, Vol. 1 (1982) 185.
[156] *Anna* 385h, *supra* note 144.
[157] "What a thorn would this be in the side of America!" *ibid*, 385d.
[158] *Ibid,* 385e.

Despite similar starting points there are key differences between the cases *Soult v. l'Africaine* and *Anna* which explain the vastly different rulings. In *Soult v. l'Africaine*, the islands in question were mere 'shoals', and as such below the surface of the oceans at high tide.[159] Whereas in *Anna*, the relevant islands were in all likelihood high-tide elevations, and probably more important in size. The disparity in sea levels in the two cases might provide a justification for the different outcomes. Even today, low-tide elevations can only generate entitlement to maritime zones under limited circumstances.[160] The fact that the distance between the mainland and the islands in question was much greater in *Soult v. l'Africaine* than in *Anna* may also explain why a zone of national jurisdiction was considered appropriate for the elevations in question in the latter, but not in the former case.

II. Rocks and Islands in the 20th and 21st Century

Modern international courts and tribunals applying UNCLOS have traditionally shown restraint when pronouncing themselves on the subject of the *Regime of islands* in general or the definition of rocks more particularly. This is a practice that, as noted by the Philippines in the *South China Sea Arbitration*, has led to "an unhelpful lack of judicial authority"[161] in this area. Nevertheless, numerous cases illustrate the role islands potentially falling under the category of "rocks" have played in a variety of scenarios. We will see how judgments and awards preceding the adoption of UNCLOS in 1982 have handled the maritime zones of islands and focus in particular on those international decisions that have not merely mentioned the *Regime of islands* in passing, but have dealt with its interpretation and scope. It is important to recognize that the *Regime of islands* can be considered from two different points of view: as a provision conveying the coastal state title to the EEZ and continental shelf, or as a provision that, additionally, has an impact on the maritime boundary between states with opposite or adjacent coasts. This chapter will be divided in two: Part A will address cases where the *Regime of islands* acts as an "entitlement" provision determining whether an island can legally be surrounded by an EEZ and continental shelf or not. These cases only address the coastal state's title to the EEZ and continental shelf in question, but do not cover any questions relating to the delimitation of maritime boundaries between states with opposite or adjacent coasts. Cases that

[159] Even in view of *Soult*'s description, the shoals in question appear to have been low-tide elevations. His assertion that they constitute the "sunken continuation" of the coast indicates that they were at least submerged at high tide. See *Robinson,* Reports of Cases Argued and Determined in the High Court of Admiralty, Vol. 5 (1806) 378.
[160] See Part 2 Section 1 III B.
[161] *The South China Sea Arbitration,* Hearing on the Merits and Remaining Issues of Jurisdiction and Admissibility, Day 2: November 25, 2015, 58, *supra* note 28; see also *Gewirtz,* Limits of Law in the South China Sea, East Asia Policy Paper 8 (2016) 9.

only concern themselves with Article 121 (3) in so far as the provision conveys a title to the EEZ and continental shelf often focus on islands on the high seas with potential maritime zones that do not overlap with the maritime zones of a neighboring state. "Entitlement" cases also cover cases where one or more parties to a dispute has opted out of UNCLOS' compulsory dispute settlement mechanism as far as Articles 15, 74 and 83, which govern "sea boundary delimitations", are concerned.[162] In such a situation, the court must avoid pronouncing itself on delimitation matters and may thus only take account of the *Regime of islands* as an entitlement provision.[163] Part B will cover cases where islands and their legal classification potentially affect the maritime boundary between states with opposite or adjacent coasts. These cases are referred to as "delimitation cases". The reason for this partitioning is that, in entitlement cases, maritime zones are strongly influenced by the classification of an island under Article 121 (3), whereas in delimitation cases, there are several other variables additionally influencing the breadth of maritime zones.[164] This means that entitlement cases generally allow for direct conclusions as to a tribunal's understanding of the meaning of Article 121 (3), while delimitation rulings are often more vague when clarifying whether and to what extent the *Regime of islands* influenced the course of the newly established maritime boundary. As we have seen, UNCLOS introduced its member states to substantial changes in the legal classification of islands, which is why, when examining case law, it is important to remember certain time-related aspects: UNCLOS was adopted in 1982, but it only became binding following the submission of the 60th ratification document in 1994. Some cases, such as the *Fisheries Case*, are deeply relevant to the evolution of the *Regime of islands*, despite stemming from a time well before the adoption of UNCLOS. In the interim period, before UNCLOS' entry into force, but after its signing, international courts would often rely on principles of international law in a way that produced legal consequences that were in line with the stipulations of Article 121 (3), all while refraining from invoking the *Regime of islands* directly.

A. Entitlement

This section will address cases involving islands whose maritime zones do not affect a maritime border shared with another state. These cases include the *Fisheries Case*, the *Volga Case*, the *Confurco Case* and the *South China Sea Arbitration*. The *South China Sea Arbitration* is

[162] See Art 298 (1) (a) (i) UNCLOS.
[163] A prime example is the *South China Sea Arbitration*. See Part 1 Section 2 II A 3.
[164] In the case of islands close to the border separating adjacent or opposite states, the course of the maritime boundary may be influenced by an island's coastline length, its ability to "cut off" mainland territories from their access to the high seas or its proximity to other islands or the mainland. See Part 3 Section 3 II.

included in this list because its tribunal lacked the competence to draw maritime boundaries between the territories of the litigants on the basis of Article 298 (1) (a) (i) UNCLOS.

1. The Fisheries Case

In the *Fisheries Case* of 1951,[165] the ICJ had to decide whether Norway had violated international law in claiming straight baselines for the coast of northern Norway, an area marked by deep coastal indentations and several extremely small islands. Treating these islands as suitable base points would have pushed the baseline for the territorial sea farther seawards and consequently enlarged Norway's zone of internal waters, a situation deemed inequitable by the United Kingdom. The United Kingdom in particular opposed the Norwegian position that the use of the outermost low-tide elevations as base points for the drawing of straight baselines was permissible.[166] The question of the validity of drawing straight baselines is in principle independent from an island's status as a rock or island in the narrow sense. Whether or not it is lawful to draw straight baselines does not depend on an elevation's habitability or adequacy for economic use. Rather, it depends on whether a feature is exposed at high tide or merely at low tide.[167] The United Kingdom nonetheless framed its argument in terms very similar to those to be employed in the – yet to be adopted – *Regime of islands*. In particular, the United Kingdom pointed out that certain features in dispute did not exhibit the essential characteristics of islands and should therefore be omitted from consideration in the straight baseline. The position of the United Kingdom was largely based on the general findings of the 1930 Codification Conference,[168] but also included a repetition of the viewpoints the United Kingdom had unsuccessfully advocated for at this conference. These viewpoints included the position that "for an elevation to rank as an island and have its own territorial waters, it must be capable of occupation and use"[169]. Said capacity for "occupation and use" is – under the designation "human habitation or economic life" – still central to today's laws on islands and their spheres of influence. However, in the current legal system, these criteria are only relevant within the application area of the *Regime of islands*, not in the context of straight baselines. In an effort to prevent Norway from claiming the waters enclosed between its mainland territory and the

[165] International Court of Justice, *Fisheries Case (United Kingdom/Norway)*, Judgment, December 18, 1951, ICJ Reports 1951, 116 [hereinafter *Fisheries Case*].
[166] *Ibid,* 135.
[167] Art 5 (Commentary) of the 1956 LOS Articles, *supra* note 36; Art 4 (3) Convention on the Territorial Sea and the Contiguous Zone, *supra* note 72; Art 7 (4) UNCLOS; for additional information see also Part 2 Section 1 III E.
[168] *Fisheries Case*, Memorial submitted by the government of the United Kingdom of Great Britain and Northern Ireland, January 27, 1950, Vol. 1, paras 96, 104, *supra* note 165.
[169] *Ibid.*

numerous offshore islands belonging to Norway as part of its fishing zone, the United Kingdom further asserted that straight baselines could not be drawn to and from low-tide elevations.[170] The United Kingdom's restrictive legal parameters for features to be used in a system of straight baselines failed to convince the ICJ, which chose to widely recognize Norway's exclusive fishing rights in the disputed regions. The ICJ explained that its decision had been made possible by the flexibility of the rules governing the measurement of the territorial sea. It further noted that the situation had necessitated an approach tailored to the circumstances of the case and a solution that was above all equitable.[171]

2. The Volga and Monte Confurco Cases

The *Volga* and *Monte Confurco* cases only broached the topic of the legal classification of islands in a peripheral manner.[172] It is for this reason that judge *Vukas* addressed questions relating to the interpretation of the *Regime of islands* in declarations separate from the corresponding judgments. It is a marker of the importance he attached to the *Regime of islands* that he chose to make his position on the topic known in such a way despite the fact that the two cases dealt with the *prompt release* of captured foreign vessels, rather than with maritime boundaries or entitlements. In both cases the nature of the proceedings did not permit the adjudication on the validity of maritime zones. In statements delivered in connection with the *Volga* and *Monte Confurco* cases, *Vukas* dissociated himself from those aspects of the judgments indicating that the EEZ established in the areas of detention were in conformity with UNCLOS. These areas were the Kerguelen Islands in the *Monte Confurco Case* and the Heard and MacDonald Islands in the *Volga Case*. The Kerguelen Islands constitute one of the most remote places on earth and are devoid of indigenous inhabitants. In his declaration relating to the *Monte Confurco Case*, *Vukas* describes the establishment of an EEZ off the shores of the Kerguelen Islands as "highly questionable"[173]. The declaration submitted on the occasion of the *Volga Case* elaborates in more detail on the reasons why *Vukas* found that according islands such as the Heard and MacDonald Islands an EEZ to be contrary to international law. *Vukas* in particular explained that the absence of local fishing communities as well as harsh climatic

[170] A rule that is, with certain exceptions, in effect today. See Art 7 (4) UNCLOS.
[171] *Johnson,* The Anglo-Norwegian Fisheries Case, International and Comparative Law Quarterly 1:2 (1952) 145 (155).
[172] International Tribunal for the Law of the Sea, *The "Volga" Case (Russian Federation/Australia),* Judgment, December 23, 2002, 126 ILR 433 [hereinafter *Volga Case*]; International Tribunal for the Law of the Sea, *The "Monte Confurco" Case (Seychelles/France),* Judgment, December 18, 2000, 125 ILR 220 [hereinafter *Monte Confurco Case*].
[173] *Monte Confurco Case,* Declaration by *Budislav Vukas*, December 18, 2000, *supra* note 172.

conditions qualified Heard and MacDonald Island as rocks within the meaning of UNCLOS.[174] He took the view that geological characteristics were irrelevant to the definition of rocks and elaborated on what he had found to be the primary motives for the introduction of the EEZ in the first place.[175] This last topic as well as *Vukas*' views will be revisited below in the context of the *Regime of islands'* interpretation.[176]

3. The South China Sea Arbitration

After Japan had renounced the territorial claims to the islands it had occupied during the Second World War, China officially declared its sovereignty over the islands in the South China Sea in 1958.[177] The claim included the Spratly Islands (Nansha), the Pratas Islands (Dongsha), the Paracels (Xisha) and Macclesfield Bank (Zhongsha).[178] These claims have not gone uncontested. Taiwan, the Philippines, Vietnam, Brunei and Malaysia all claim sovereignty over some of the - often tiny - islands scattered across the South China Sea.[179] Malaysia and Vietnam have made a joint submission to the CLCS that does not contain any continental shelf claims emanating from the Spratly islands themselves, which would seem to imply that they view these features as "rocks".[180] Brunei has published claims to the continental shelf adjacent to Louisa Reef, a feature made up of a few rocks supporting nothing more than a light beacon.[181] In 2013, the Philippines instituted proceedings against China challenging its historic rights in the South China Sea.[182] In total, the Philippines listed 15 points of contention to be resolved by the arbitral tribunal.[183] In particular, the Philippines submitted that, despite the fact that the area in question was encompassed by the so-called nine-dash line, a demarcation line China relies on to corroborate its historical rights,[184] China was not permitted to exercise historic rights beyond

[174] *Volga Case*, Declaration by *Budislav Vukas*, December 23, 2002, para 6, *supra* note 172.
[175] *Ibid.*
[176] See Part 2 Section 2 IV B.
[177] *Dupuy/Dupuy,* A Legal Analysis of China's Historic Rights Claim in the South China Sea, The American Journal of International Law 107:1 (2013) 124 (126).
[178] *Ibid.*
[179] *Gewirtz,* Limits of Law in the South China Sea, East Asia Policy Paper 8 (2016) 2.
[180] Malaysia and the Socialist Republic of Vietnam, Joint Submission to the Commission on the Limits of the Continental Shelf in Respect of the Southern Part of the South China Sea (6 May 2009) <un.org/depts/los/clcs_new/submissions_files/mysvnm33_09/mys_vnm2009excutivesummary.pdf>.
[181] *Smith,* Maritime Delimitation in the South China Sea: Potentiality and Challenges, Ocean Development & International Law 41 (2010) 214 (215).
[182] *South China Sea Arbitration, supra* note 28; see also Why the South China Sea ruling matters, The Washington Post, July 12, 2016 <https://www.washingtonpost.com/news/monkey-cage/wp/2016/07/12/why-the-south-china-sea-ruling-matters/>.
[183] *South China Sea Arbitration,* Memorial of the Philippines, March 30, 2014, Vol. I, 271, *supra* note 28.
[184] For a discussion of the history of the nine-dash line see *Miyoshi,* China's "U-Shaped Line" Claim in the South China Sea: Any Validity Under International Law?, Ocean Development and International Law 43:1 (2012) 1 (3); *Gao/Jia,* The Nine-Dash Line in the South China Sea: History, Status, and Implications, The American Journal of International Law 107 (2013) 98 (100 et seq).

the limits prescribed by UNCLOS. Furthermore, the Philippines alleged that various maritime features upon which Chinese maritime claims were based were mere rocks or low-tide elevations. Finally, in hindering the activity of Philippine fishermen and endangering Philippine vessels, China had interfered with the Philippines' exercise of sovereign rights and freedoms under UNCLOS. Indonesia has released a Note Verbale in connection with the *South China Sea Arbitration*, which emphasized that "[a]llowing the use of uninhabited rocks, reefs and atolls isolated from the mainland and in the middle of the high sea as a basepoint to generate maritime space concerns the fundamental principles of the [UNCLOS] and encroaches the legitimate interest of the global community"[185]. Indonesia seems to adopt an interpretation of Article 121 (3) where islands in the narrow sense must not merely be habitable, but inhabited.
In a Note Verbale released shortly after the Philippines initiated proceedings, China voiced its opposition to the move and urged the Philippines to return to bilateral negotiations.[186] While China did not participate in or accept the proceedings, it submitted a Position Paper in 2014, in which it laid out its position that the arbitral tribunal lacked jurisdiction over the case.[187] Specifically, China disputed the Philippine's view that the case concerned merely the interpretation and application of UNCLOS. China submitted that the arbitration would in fact affect matters of territorial sovereignty, which were outside of the scope of UNCLOS. China emphasized that it had opted out of UNCLOS' compulsory dispute settlement mechanism in all matters relating to maritime delimitation in accordance with Article 298 (1) (a) (i). In its Award on Jurisdiction and Admissibility, the tribunal nevertheless affirmed its jurisdiction over seven of the Philippines' fifteen claims, and ruled that the question of jurisdiction over the remaining points would be decided conjointly with the merits.[188] In 2016, the arbitral tribunal delivered its final award, wherein it proclaimed that China's claims to historic rights over the maritime areas encompassed by the nine-dash line were unlawful in so far as they exceeded the limits of maritime entitlements laid out in UNCLOS.[189] UNCLOS had "superseded any historic rights or other sovereign rights or jurisdiction in excess of the limits imposed [by it]"[190]. The arbitral tribunal interpreted the *Regime of islands* and, in "perhaps the boldest part of its decision"[191],

[185] Note verbale from the Republic of Indonesia to the Secretary-General of the United Nations, 480/POL-703/VII/10, July 8, 2010, unofficial translation <un.org/depts/los/clcs_new/submissions_files/mysvnm33_09/idn_2010re_mys_vnm_e.pdf>.
[186] Note Verbale of the People's Republic of China, February 19, 2013, No. (13) PG-039.
[187] Position Paper of the Government of the People's Republic of China on the Matter of Jurisdiction in the South China Sea Arbitration Initiated by the Republic of the Philippines, December 7, 2014.
[188] *South China Sea Arbitration (The Philippines/The People's Republic of China),* PCA Case Nº 2013-19, Award on Jurisdiction and Admissibility, October 29, 2015, para 413.
[189] *South China Sea Arbitration,* para 278, *supra* note 28.
[190] *Ibid.*
[191] *Beckman,* The Tribunal Award: What It Means, AseanFocus 5 (2016) 6.

classified all relevant elevations appertaining to the Spratly Islands group as either low-tide elevations or rocks. This part of the award will be explored in more detail below. Having found that Mischief Reef, Second Thomas Shoal and Reed Bank were low-tide elevations within the Philippine EEZ, the tribunal concluded that in interfering with Philippine fisheries and petroleum exploration in the waters surrounding these elevations, China had violated the sovereign rights of the Philippines.[192] It was also found that both China and the Philippines had traditional fishing rights in the waters surrounding Scarborough Shoal, that neither party had the right to prevent the other's access to these fishing grounds, and that China had acted unlawfully in doing so.[193] The tribunal asserted that China had, by virtue of the conduct of Chinese law enforcement vessels, violated its obligations relating to safe navigation. The tribunal observed that Chinese vessels had approached Philippine vessels at high speed, and had thereby risked collision.[194] The tribunal remarked that the Philippines and China seemed to agree that they were bound both by UNCLOS and general obligations of good faith. The discord among the parties was considered to stem not from a desire to violate UNCLOS to the detriment of the other, but from fundamentally different understandings of the rights the convention conveyed.[195] *Beckman* has opined that the dispute is a reflection of China's neglect to recognize the universality of UNCLOS, instead choosing to interpret its provisions "in the light of [China's] own historical and cultural traditions"[196]. The significance of the *South China Sea Arbitration* to this thesis is difficult to overstate. It is not only the most recent decision implicating the *Regime of islands*, it contains a discussion of the meaning and impact of Article 121 (3) that is unprecedented in international judicature. As *Elferink* has remarked, the award "provides the first detailed review of the interpretation and application of article 121 and in particular its paragraph 3 by the international judiciary"[197]. The award has interpreted "human habitation" and "economic life" in a way that is more restrictive than the interpretation favored among coastal states. *Hafner* has commented that "the particular criteria in Article 121(3) of UNCLOS as interpreted by the Tribunal do not match the practice of States"[198]. *Tanaka* has

[192] *South China Sea Arbitration,* para 716, *supra* note 28.
[193] The tribunal did not rule on which state had sovereignty over Scarborough Shoal. *Ibid,* paras 812-814.
[194] *Ibid,* para 1109.
[195] *Ibid,* para 1198.
[196] *Beckman,* The Tribunal Award: What It Means, AseanFocus 5 (2016) 5.
[197] *Elferink,* The South China Sea Arbitration's Interpretation of Article 121(3) of the LOSC: A Disquieting First, The Blog of the K.G. Jebsen Centre for the Law of the Sea, September 7, 2016 <site.uit.no/jclos/2016/09/07/the-south-china-sea-arbitrations-interpretation-of-article-1213-of-the-losc-a-disquieting-first/>.
[198] *Hafner,* Some Remarks on the South China Sea Award: Itu Aba versus Clipperton, Chinese (Taiwan) Yearbook of International Law and Affairs 34 (2016) 1 (10); see also *Tanaka,* Reflections on the Interpretation and Application of Article 121(3) in the South China Sea Arbitration (Merits), Ocean Development and International Law 48:3-4 (2017) 365 (373 et seq).

lauded the tribunal's interpretation of Article 121 (3) for its emphasis on the protection of the common heritage of mankind, noting that the interpretation may "serve for the development of the law of the sea toward universalism. Indeed, the Tribunal's view can be thought to be the antithesis of unilateralism demonstrated by China's claim in the South China Sea"[199]. On the other hand, *Tanaka* has raised doubts as to whether states will recognize the tribunal's interpretation of Article 121 (3) in practice,[200] especially in light of the possibility that their own territories would have to be reclassified as "rocks". While the *South China Sea Arbitration* contains several pronouncements that are both momentous and politically controversial, this thesis shall focus on the part of the award addressing the interpretation of the *Regime of islands*.

a. Philippine View on the Interpretation of Article 121 (3)

In general, the Philippines favored a narrow interpretation of Article 121 (3). The Philippines submitted that, while geomorphology was irrelevant to the question of whether an island is a "rock" within the meaning of Article 121 (3),[201] size may be a pertinent factor, especially a surface area measuring below one square kilometer.[202] Furthermore, the Philippines argued that the criterion of "human habitation" refers to a situation where an island is presently and under natural conditions capable of sustaining a stable group of human beings for a period potentially stretching over several years.[203] The Philippines endorsed the approach of relying on the existence of certain "habitability indicators"[204] including "fresh water, the food, the shelter and the living space that are necessary to keep human beings alive for an extended period of time."[205] The Philippines understood "economic life" as an activity sustained by local resources, with the consequence that any infusion of outside support was considered detrimental to the finding that an island could sustain "economic life".[206] Additionally, the Philippines submitted that, according to the laws of grammar, the conjunction "or" in Article 121 (3) carried a cumulative meaning, which would imply that "human habitation" and "economic life" represent a single concept, as opposed to two separate criteria.[207] Finally, the Philippines took the stance

[199] *Tanaka,* Reflections on the Interpretation and Application of Article 121(3) in the South China Sea Arbitration (Merits), Ocean Development and International Law 48:3-4 (2017) 365 (378).
[200] *Ibid.*
[201] *South China Sea Arbitration*, Hearing on the Merits and Remaining Issues of Jurisdiction and Admissibility, Day 2: November 25, 2015, 67 et seq, *supra* note 28.
[202] *South China Sea Arbitration,* Memorial of the Philippines, March 30, 2014, Vol. I, para 5.26, *supra* note 28.
[203] *South China Sea Arbitration,* Hearing on the Merits and Remaining Issues of Jurisdiction and Admissibility, Day 2: November 25, 2015, 69 et seq, *supra* note 28.
[204] See Part 2 Section 2 V F 1.
[205] *South China Sea Arbitration,* Hearing on the Merits and Remaining Issues of Jurisdiction and Admissibility, Day 2: November 25, 2015, 72, *supra* note 28.
[206] *Ibid,* 78.
[207] *Ibid,* 85.

that the term "human habitation" describes an "indigenous population", which would rule out government officials or military personnel as potential forms of human habitation.[208]

b. Chinese View on the Interpretation of Article 121 (3)

Due to China's refusal to submit any oral or written statements clarifying its view on the legal status of the disputed islands, the arbitral tribunal set out to discern the Chinese position "from its own laws, diplomatic exchanges, and public statements"[209]. According to the arbitral tribunal, these materials show that China has "repeatedly alluded to the risks to 'the common heritage of mankind' and 'overall interests of the international community' if Article 121(3) is not properly applied to small features that on their 'natural conditions' obviously cannot sustain human habitation or economic life of their own."[210] It consequently seems as if China, while having embraced a relatively restrictive reading of Article 121 (3) itself in connection with the dispute surrounding the Japanese island Okinotorishima,[211] was reluctant to concede that some or any of the features it claims in the South China Sea fail to meet the legal standard of an island in the narrow sense.[212] Inconsistencies in state practice relating to Article 121 (3) are not altogether uncommon. The position taken by the United States is plagued by similar contradictions.[213]

c. Interpretation of Article 121 (3) by the Arbitral Tribunal

The arbitral tribunal started out by deconstructing the text of Article 121 (3) into its individual components, namely into "rocks", "cannot", "sustain", "human habitation", "or" and "economic life of their own". The terminology adopted by the arbitral tribunal is notably different from the one used in this thesis: the tribunal frequently referred to "islands" in the sense of Article 121 (1) as "high-tide features" and to islands capable of sustaining human habitation or economic life as "fully entitled islands".[214] The arbitral tribunal dismissed both geomorphological conditions and an island's official designation as irrelevant to the question of whether or not an island is a "rock".[215] The arbitral tribunal initially explained that the mere capacity to sustain "human habitation" or "economic life" is theoretically sufficient in an island

[208] *South China Sea Arbitration,* Hearing on the Merits and Remaining Issues of Jurisdiction and Admissibility, Day 4: November 30, 2015, 48, *supra* note 28.
[209] *South China Sea Arbitration,* para 450, *supra* note 28.
[210] *Ibid,* para 458.
[211] See Part 1 Section 3 II E.
[212] *South China Sea Arbitration,* paras 459 – 472, *supra* note 28.
[213] *Van Dyke/Morgan/Gurish*, The Exclusive Economic Zone of the Northwestern Hawaiian Islands: When Do Uninhabited Islands Generate an EEZ?, San Diego Law Review 25 (1988) 425 (430).
[214] *South China Sea Arbitration,* para 390, *supra* note 28.
[215] *Ibid,* paras 481, 482.

in the narrow sense, which means that actual inhabitation is not required.[216] The arbitral tribunal later cut back on this pronouncement, stating that if "nothing resembling a stable community has ever developed there, the most reasonable conclusion would be that the natural conditions are simply too difficult for such a community to form and that the feature is not capable of sustaining such habitation"[217]. According to the tribunal, only in case colonization has been prevented by "[w]ar, pollution, [or] environmental harm", can an island that has never been inhabited be entitled to an EEZ and continental shelf.[218] The arbitral tribunal further elaborated that, in the context of the *Regime of islands*, "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. In connection with an economic life, to 'sustain' means 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."[219] "Human habitation" was considered as designating "a non-transient presence of persons who have chosen to stay and reside on the feature in a settled manner"[220]. The arbitral tribunal stated that the natural availability of "food, drink, and shelter" on an island was indicative of the island's capacity to sustain human habitation.[221] These conditions were required to persist naturally.[222] In the event of human interference with nature, the assessment of an island's legal status should therefore focus on the environmental conditions predating such interference.[223] The arbitral tribunal in particular drew a distinction between islands merely enabling human "survival"[224] or "presence"[225] and those allowing for the stay of a "settled human habitation"[226]. It was further noted that, from a perspective of "formal logic", the word "or" in "rocks that cannot sustain human habitation *or* economic life" is meant to convey a disjunctive meaning.[227] At the same time, the arbitral tribunal considered that "human habitation" and "economic life" were inseparable as they will usually not exist in isolation from each other.[228] Mining activities could not constitute an "economic life" if there was no local population, an assessment which may be interpreted as the arbitral tribunal actually interpreting "or" to mean "and" in spite of its declarations to the

[216] *Ibid,* para 483.
[217] *Ibid,* para 549.
[218] *Ibid.*
[219] *Ibid,* para 487.
[220] *Ibid,* para 489.
[221] *Ibid,* para 490.
[222] *Ibid,* para 508.
[223] *Ibid,* para 578.
[224] *Ibid,* para 546.
[225] *Ibid,* para 492.
[226] *Ibid.*
[227] *Ibid,* para 494.
[228] *Ibid,* para 497.

contrary.[229] The arbitral tribunal defined "economic life of [its] own" as "a process or system by which goods and services are produced, sold and bought, or exchanged"[230]. This process had to involve some degree of human activity, endure for an extended period, in some way benefit the island itself and/or its local population and meet a "basic level of viability".[231] Certain uses were found to fail this definition, including the deployment of military or official personnel and the extraction of resources.[232] Additionally, economic activity "relying predominantly on the infusion of outside resources"[233] did, in the opinion of the arbitral tribunal, not meet the threshold of an "economic life" because it was not deemed sustainable "of [its] own".

Finally, the arbitral tribunal assessed whether the Spratly Islands were to be legally classified as rocks in a two-step approach: first, the arbitral tribunal ascertained whether any historical activity having taken place on a given island in the past met the definition of "human habitation" or "economic life". In a second step, the arbitral tribunal proceeded to determine whether there was reason to believe that the historical record was insufficient proof of an island's present-day capabilities.[234] In order to understand the tribunal's focus on the historical record it is important to remember its position that human habitation and economic life have to be possible under natural conditions, which makes it necessary to find out what an island looked like under pristine conditions, and base one's assessment of an island's legal status on these historical circumstances.

d. Application of Article 121 (3) to Individual Islands

Since China had opted out of UNCLOS' compulsory dispute settlement mechanism as far as Articles 15, 74 and 83, which govern "sea boundary delimitations"[235], were concerned, the tribunal could not issue direct pronouncements on the correct method for delimiting maritime boundaries in the South China Sea.[236] In order to avoid exceeding its competency, the arbitral tribunal chose to focus on the legal classification of the islands in dispute in accordance with Article 121 (3), which is an approach capable of revealing the legality of maritime claims in an implicit fashion. The legal status as a "rock" or "island in the narrow sense" has no bearing on the island's sovereignty, which made it possible for the arbitral tribunal to pronounce itself on the status of Scarborough Shoal, Johnson Reef, Cuarteron Reef, Fiery Cross Reef, North Gaven

[229] *Ibid,* para 500.
[230] *Ibid,* para 499.
[231] *Ibid,* paras 499, 500.
[232] *Ibid,* paras 500, 550.
[233] *Ibid,* para 500.
[234] *Ibid,* para 617.
[235] Art 298 UNCLOS.
[236] *South China Sea Arbitration,* paras 161 et seq, *supra* note 28.

Reef, and McKennan Reef. It evaluated the entirety of the Spratly Islands by drawing inferences from its assessment of the group's most prominent islands: Itu Aba, Thitu, West York, Spratly Island, South-West Cay, and North-East Cay.

All of these features were found to be "rocks" within the meaning of Article 121 (3). The arbitral found that, although certain islands bore evidence of human presence or activity, they ultimately failed the requirements of being capable of sustaining human habitation or economic life. In the absence of a harbour or settlement on Scarborough Shoal's high-tide elevations themselves, fishing taking place only in the surrounding territorial sea was considered insufficiently linked to the area of dry land.[237] Thus, these fisheries were found to fall short of the definition of "economic life". The official personnel China had stationed on Johnson Reef was not recognized as a form of "human habitation", as its presence had only become possible in the wake of construction works in the reef's submerged area and due to its heavy reliance on outside support.[238] The focus on natural conditions and self-sufficiency led to the classification of Cuarteron Reef,[239] Fiery Cross Reef,[240] and North Gaven Reef as "rocks".[241] All three islands had been artificially altered, inter alia through land reclamation projects intended to enable them to accommodate Chinese personnel. McKennan Reef was considered "obviously incapable"[242] of sustaining human habitation or economic life due to its extremely limited size.

Subsequently, the arbitral tribunal examined the characteristics of the most prominent features of the Spratly Islands. The arbitral tribunal observed that many of the Spratly Islands' high-tide elevations have been "significantly modified from their natural condition"[243], which has enabled the construction of various installations and prolong the stay of – mainly military and governmental – personnel. In view of this widespread interference with nature and the arbitral tribunal's emphasis on "natural conditions", its conclusions were often based on historical records.[244] The arbitral tribunal considered "historical evidence of conditions on the features−prior to the advent of the exclusive economic zone as a concept or the beginning of significant human modification−to represent a more reliable guide to the capacity of the features to sustain human habitation or economic life"[245]. The arbitral tribunal proceeded to review various forms

[237] *Ibid,* para 556.
[238] *Ibid,* para 559.
[239] *Ibid,* paras 561 et seq.
[240] *Ibid,* paras 564 et seq.
[241] *Ibid,* paras 566 et seq.
[242] *Ibid,* para 570.
[243] *Ibid,* para 578.
[244] These include materials from the United Kingdom Hydrographic Office and France's *Bibliothèque Nationale de France* and *Archives Nationales d'Outre-Mer. Ibid,* para 577.
[245] *Ibid,* para 578.

of erstwhile human presence and activity for their compliance with the requirements of Article 121 (3). It identified four criteria relevant to the assessment of the legal status of rocks: the presence of fresh water, the state of vegetation, an island's agricultural potential and whether or not there were fishermen or other ongoing commercial operations. While potable water was available on some of the Spratly Islands due to the existence of small wells and the possibility for rain water collection, it was often brakish.[246] Itu Aba was found to have historically featured vegetation conducive to human habitation, such as banana, pineapple and papaya trees, sugar cane and palm trees.[247] The arbitral tribunal did not specify whether it was of relevance that some of these fruit trees were imported as opposed to native to the environment.[248] In the case of Itu Aba, agricultural potential could be inferred from the presence of the abovementioned fruit trees.[249] And yet, it was found that "agriculture on Itu Aba would not suffice, on its own, to support a sizable population"[250]. The arbitral tribunal found that small groups of fishermen had traditionally been active in the region, with sporadic evidence pointing to their living on the Spratly Islands, in some cases for several years.[251] And yet, the number of fishermen was ultimately considered "significantly constrained"[252]. Historical evidence showed that the Spratly Islands were used for guano mining and commercial fishing.[253] The small Malaysian resort and scuba diving enterprise on Swallow Reef was found to have no impact on the island's legal status, as such commercial use had only become possible following a process of land reclamation. Having conducted a detailed evaluation of present environmental conditions on the Spratly Islands, the arbitral tribunal found that the characteristics examined did not allow for a definite conclusion. The relevant islands could neither be "dismissed as uninhabitable" nor were they "obviously habitable".[254] Having established that the chosen habitability indicators failed to produce a conclusive result, the tribunal turned to an assessment of the historic record, in particular looking into whether there had once been "human habitation" or "economic life" on the Spratly Islands.[255] The rare instances of fishermen actually having lived on the islands, which have already been highlighted above, were found to fail the threshold of "human habitation". This was due to the transitory nature of the fishermen's stay and to the fact

[246] *Ibid,* paras 580 et seq.
[247] *Ibid,* para 586.
[248] *Ibid,* para 593.
[249] *Ibid,* para 596.
[250] *Ibid,* para 596.
[251] *Ibid,* para 597.
[252] *Ibid,* para 601.
[253] *Ibid,* paras 603, 610.
[254] *Ibid,* para 616.
[255] *Ibid,* para 616.

that the arbitral tribunal did not consider them to be the "natural population" of the islands, as the fishermen eventually returned to their homelands and did not live on the islands conjointly with their families.[256] According to the arbitral tribunal, the presence of military and official personnel in the Spratly Islands likewise did not constitute "human habitation" due to being heavily dependent on the provision of outside supplies.[257] Seeing that the arbitral tribunal regarded "human habitation" and "economic life" as virtually inseparable, it is not surprising that it found no evidence of "economic life" in the Spratly Islands. Having proclaimed that "extractive economic activity, without the presence of a stable local community, necessarily falls short of constituting the economic life of the feature"[258], the arbitral tribunal naturally found that activities such as guano mining, fishing or even petroleum exploration, could play no role in the assessment of an island's legal status. It concluded that even Itu Aba, Thitu, West York, Spratly Island, South-West Cay, and North-East Cay, the largest and most prominent of the Spratly Islands, were mere "rocks". In the case of Itu Aba, this classification has been criticized among scholars.[259]

After having found that Itu Aba, the largest and most prominent feature in the Spratly Islands, was a rock, the arbitral tribunal drew the conclusion that – *a maiore ad minus* – the remaining unoccupied and unused features of the Spratly Islands were even less likely to meet the criterion of being able to sustain human habitation or economic life. These smaller features were consequently categorized as rocks, but not given individual consideration.[260] The arbitral tribunal qualified two minor protrusions, Mischief Reef and Second Thomas Shoal, as low-tide elevations.[261]

e. Conclusion

The arbitral tribunal's conclusions – as far as they affect the subject matter of this thesis – can be summed up as follows: none of the features in the Spratly Islands generates an EEZ or continental shelf, as they are all either rocks or low-tide elevations. The Chinese claim that

[256] *Ibid,* para 618.
[257] *Ibid,* para 620.
[258] *Ibid,* para 623.
[259] *Gewirtz,* Limits of Law in the South China Sea, East Asia Policy Paper 8 (2016) 8; *Elferink,* The South China Sea Arbitration's Interpretation of Article 121(3) of the LOSC: A Disquieting First, The Blog of the K.G. Jebsen Centre for the Law of the Sea, September 7, 2016 <site.uit.no/jclos/2016/09/07/the-south-china-sea-arbitrations-interpretation-of-article-1213-of-the-losc-a-disquieting-first/>; *Song,* The South China Sea Arbitration Case Filed by the Philippines against China: Arguments Concerning Submerged Features, Low Tide Elevations and Islands in *Wu/Zou* (eds.), Arbitration Concerning the South China Sea - Philippines versus China (2016) 174; *Hafner,* Some Remarks on the South China Sea Award: Itu Aba versus Clipperton, Chinese (Taiwan) Yearbook of International Law and Affairs 34 (2016) 1 (10).
[260] *South China Sea Arbitration,* paras 622, 625, *supra* note 28.
[261] *Ibid,* para 632.

some of these rocks and low-tide elevations limit the Philippines' EEZ because their zones overlap with the Philippines' EEZ originating from the coast of the island of Palawan, was thus rejected by the arbitral tribunal. While China may have perceived the award as a setback to its marine policy, the award's underlying rationale may still prove beneficial to China's interests if it were to be applied in an eventual future dispute surrounding Okinotorishima, where positions are reversed and it is China advocating for a restrictive interpretation of islands in the narrow sense.[262] These findings of the arbitral tribunal lines are analyzed at different points throughout this thesis whenever they add perspective to the discussion at hand.

B. Delimitation

This chapter will examine, in chronological order, international delimitation cases having contributed to the discussion surrounding the *Regime of islands*. The analysis will highlight relevant developments in international jurisprudence and cite from the decisions of the ICJ, the International Tribunal for the Law of the Sea (ITLOS) and from arbitral awards.

This chapter is more extensive than the previous one, which has addressed only cases having dealt with the *Regime of islands* outside of the context of delimitation. The simple reason for this is that, where islands potentially affect a maritime border shared by two or more states, this constitutes a situation that is more contentious than a constellation where the only issue in question is an island's entitlement vis-à-vis the high seas. The former situation is thereby far more likely to end in litigation. While the *Regime of islands*' authority in delimitation questions has been challenged,[263] its influence and relevance in the cases to be discussed are hard to deny. In delimitation cases, the *Regime of islands* interplays with a number of other rules of statutory and customary international law, including UNCLOS' delimitation provisions, most prominently among them Articles 15, 74 and 83,[264] but also obligations such as those arising from the doctrine of minor geographical features.[265] In delimitation cases, we have to be careful to distil the effect attributable to the *Regime of islands* from the more general pronouncements on delimitation rules.

[262] See Part 1 Section 3 II E.
[263] See Part 2 Section 1 IV B 1.
[264] For the relation between the *Regime of islands* and Articles 15, 74 and 83 see Part 2 Section 1 IV B 2.
[265] For more on the doctrine of minor geographical features, see Part 3 Section 4 II.

1. The English Channel Case

In 1977, an ad hoc tribunal laid out the boundary separating the respective continental shelf areas between the opposite coasts of the United Kingdom and France in the English Channel.[266] While it was clear from the provisions of the Convention on the Continental Shelf that islands in principle generated entitlement to their adjacent continental shelf area,[267] the parties disagreed on the effect islands had on overlapping claims. The features concerned were the Scilly Isles, the Channel Islands and Eddystone Rock. France spoke out against attributing undue legal weight to minor insular features that were not only within the range of another state's continental shelf, but also disconnected from the mainland coastline, such as the Channel Islands. France argued that an equidistant line ignoring the presence of the English Channel Islands should be drawn. Located at the center of a bay, these islands are within very close range of mainland France, with some of them as near as 6.9 nm to the coast of Normandy.[268] As per the French delegation, the regional geology as well as equity considerations called for the creation of an enclave around the Channel Islands, a solution that would preclude their impact on the equidistance line. The United Kingdom on the other hand contested the classification of the Channel Islands as "very small islands"[269] on the basis of their size and population: the Channel Islands feature a total land area of 194 km^2 and 130 000 inhabitants,[270] which, according to the United Kingdom entitled them to their own continental shelf area. The arbitral tribunal recognized the population and economy of these islands as relevant aspects, but found that the situation called for a "method of delimitation that in some measure redresses the inequity"[271]. The feared inequity was a potential outcome where the Channel Islands were given full effect in the delimitation of the continental shelf and would thereby deprive France of nearly the entire continental shelf it claimed in the English Channel. The court consequently ignored the Channel Islands in the process of drawing the equidistance line and opted for an enclave-solution.[272] The status of islands was also relevant to the question of whether or not the Scilly Islands, a British territory at the western end of the English Channel, merited recognition as base points. The United Kingdom sought to corroborate their importance to delimitation by emphasizing that they were islands within the meaning of Article 1 (b) of the Convention on

[266] *Delimitation of the Continental Shelf (United Kingdom/France)*, Decision, June 30, 1977, 18 RIAA 3, para 251 [hereinafter *English Channel Case*].
[267] Art 1 (b) Convention on the Continental Shelf, *supra* note 72.
[268] This island group is called Les Écréhous.
[269] *English Channel Case*, para 171, *supra* note 266.
[270] *Ibid.*
[271] *Ibid,* para 196.
[272] To the north and west, the enclave was 12 miles in breadth. The court's jurisdiction did not allow for a decision on the limits of the enclave to the east and south, where the Channel Islands faced the French coast. *Ibid,* para 202.

the Continental Shelf,[273] and were "islands of considerable size" which "under no circumstances could either be classed as an islet or rock and on that basis ignored".[274] It is interesting to observe that the United Kingdom feared the Scilly Islands may forfeit their importance to the delimitation of the continental shelf due to being perceived as a "rock", even though Article 121 (3) had not yet been adopted at this point in time. The tribunal ultimately found the Scilly Islands to bear the potential to inequitably distort the boundary line and resolved the issue by according these islands "half-effect"[275]. The boundary was thus drawn midway between the line not accounting for the presence of the Scilly Islands and the line giving full effect to the Scilly Islands as base points for the delimitation of the continental shelf.[276]
Lastly, proceedings focused on the status of Eddystone Rock. The parties to the dispute could not agree on this matter due to the feature's special situation of being a naturally formed, yet artificially altered elevation. Whereas the lighthouse on Eddystone Rock was above water at all times, the underlying rock was not. This added weight to the French argument that it was a mere low-tide elevation and as such unsuitable as a location for a base point. In the end, the tribunal held that the subject matter did not call for a decision on the legal status of Eddystone Rock. It found France to have formerly acknowledged its importance to delimitation and to have in this manner assented to its use as a base point for the continental shelf boundary.[277]

2. The Maltese Islands Case

South of Malta, 2.7 nm from the coast, lies a barren and uninhabited limestone plateau, the Maltese island Filfla. Due to its location within close proximity of the main territory of Malta and its status as a high-tide elevation, the use of Filfla in the Maltese baseline system would normally be permissible irrespective of its remaining characteristics.[278] However, the island's potential to push the continental shelf boundary between Malta and Libya southwards complicated matters and consequently became an issue to be evaluated by the ICJ.[279] As UNCLOS had already been signed, but had not entered into force, the court could not apply UNCLOS by directly referring to Article 121 (3). The court chose to ignore Filfla as a potential base point during the first phase of the three-stage delimitation process.[280] The ICJ argued that

[273] *Ibid*.
[274] *Ibid,* para 227.
[275] *Ibid*, para 251.
[276] *Ibid.*
[277] *Ibid,* paras 139 et seq.
[278] Art 11 (1) Convention on the Territorial Sea and the Contiguous Zone.
[279] International Court of Justice, *Case Concerning the Continental Shelf (Libya/Malta),* Judgment, June 3, 1985, ICJ Reports 1985 [hereinafter *Maltese Islands Case*].
[280] See Part 2 Section 1 IV B 2 for a brief description of the three-stage approach to delimitation.

this step was necessary in view of equity considerations and in order to eliminate "the disproportionate effect of certain 'islets, rocks and minor coastal projections'"[281] on the delimitation line. Had UNCLOS been in force, the court could have cited Article 121 (3) as indicative of an emerging rule in international law stating that rocks within the meaning of UNCLOS cannot affect continental shelf limits. The ICJ withheld any pronouncement on the legitimacy of including Filfla into the Maltese baselines for the measurement of the territorial sea, but found that, due to equity considerations, Filfla could not determine the extent of the continental shelf.[282] According to the ICJ, different rules may apply depending on whether the court is asked to establish the baseline for the territorial sea or the baseline determining the course of the continental shelf boundary between two states with opposite coasts.[283] The ICJ pronounced its opinion only with regard to the continental shelf within 200 nm, not beyond.

3. The St. Pierre and Miquelon Arbitration

The 1992 *St. Pierre and Miquelon Arbitration* opposing Canada and France revolved *inter alia* around the legal status of the French islands St. Pierre and Miquelon off the coast of Newfoundland, Canada.[284] Canada took the position that the French islands were incapable of generating entitlement to an EEZ, declaring that the only tenable solution would consist in creating a territorial sea enclave surrounding them. St. Pierre and Miquelon comprise a total of eight islands, two of which are inhabited and support a community of roughly 6000 people. In view of their substantial population, these islands would seem to satisfy the conditions for entitlement to the EEZ and continental shelf that are set forth by UNCLOS.[285] If UNCLOS had been applicable to this case, the French Islands' capacity for human habitation and economic life would have been difficult to deny. Certain statements that have been made by France seem to indicate that France was of the opinion that UNCLOS was capable of producing legal effects in spite of the fact that it had yet to enter into force: France namely objected to what it claimed was an attempt undertaken by Canada to put the St. Pierre and Miquelon islands on the same level as "rocks" within the meaning of Article 121 (3).[286] The arbitral tribunal agreed with the French position in so far as it found that continental landmasses and islands alike are entitled to maritime zones.[287] It however clarified that its findings did not imply that the maritime zones

[281] *Maltese Islands Case*, para 64, *supra* note 279.
[282] *Ibid.*
[283] *Ibid.*
[284] *Case Concerning the Delimitation of Maritime Areas between Canada and France (Canada/France*), Decision, June 10, 1992, 21 RIAA 265, para 43 [hereinafter *St. Pierre and Miquelon Arbitration*].
[285] See Art 121 (3) UNCLOS.
[286] *St. Pierre and Miquelon Arbitration*, para 43, *supra* note 284.
[287] *Ibid*, para 45.

of islands and the mainland should be of equal size.[288] The *St. Pierre and Miquelon Arbitration* being a delimitation case, the arbitral tribunal had to take into account factors such as the proximity of the islands to the Canadian coastline and the great disparity in coastline lengths, which ultimately produced the outcome that France was only accorded a small percentage of the area it had originally claimed as its EEZ.[289]

4. The Jan Mayen Case (Denmark/Norway)

Article 121 (3) played a vital role in the litigation opposing Denmark and Norway over the boundary delimiting the fishing zones and the continental shelf between Jan Mayen and Greenland.[290] Denmark contended that - contrary to Greenland - Jan Mayen was not entitled to a full 200 nm fishery zone. Using the terms of Article 121 (3), Denmark remarked upon Jan Mayen's incapacity to sustain human habitation or economic life of its own. Denmark argued that the 25 persons temporarily residing on Jan Mayen for employment purposes did not amount to a "settled population"[291] and that Norwegian fishing vessels operating in the waters surrounding Jan Mayen were likewise immaterial. Despite the fact that there was evidence of fisheries in the waters surrounding Jan Mayen, Denmark maintained that this activity did not amount to an "economic life", because the fishing vessels operated from Norway, as Jan Mayen lacked a harbor or a residing community of fishermen. This, in the opinion of Denmark, rendered the fishing vessels an integral part of the Norwegian mainland fishery which had to be considered separately from Jan Mayen's fishing industry.[292] Denmark's invocation of Article 121 (3) seemed at odds with its declared intention not to "enter into the question of what is the status and what are the rights of Jan Mayen under international law"[293]. And yet, Denmark cited Jan Mayen's population and socio-economic properties as a justification for attributing less maritime space to an island, which is arguably the quintessence of Article 121 (3). The court rejected the view that Article 121 (3) may justify according an island partial effect, stating that Article 121 (3) only permitted two possible outcomes: either an island was entitled to an EEZ or not, with no room for a middle ground.[294] The court therefore found that, in demanding partial effect for Jan Mayen on the basis of Article 121 (3), Denmark had misapplied Article

[288] *Ibid.*
[289] *Ibid*, paras 66 et seq.
[290] International Court of Justice, *Case Concerning Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark/Norway)*, Judgment, June 14, 1993, ICJ Reports 1993, para 70 [hereinafter *Jan Mayen Case (Denmark/Norway)*].
[291] *Jan Mayen Case (Denmark/Norway)*, Memorial submitted by the government of the Kingdom of Denmark on July 31, 1989, Vol. 1, para 302, *supra* note 290.
[292] *Ibid.*
[293] *Ibid,* para 272.
[294] *Jan Mayen Case (Denmark/Norway)*, paras 70, 80, *supra* note 290.

121 (3). In the end, the ICJ concluded that there was "no reason to consider either the limited nature of the population of Jan Mayen or socio-economic factors as circumstances to be taken into account"[295], the relevant area was delimited using the median line,[296] and Jan Mayen was recognized as an island fully entitled to both EEZ and continental shelf.[297]

5. Sovereignty and Maritime Delimitation in the Red Sea

In *Sovereignty and Maritime Delimitation in the Red Sea* the role and interpretation of Article 121 (3) remains somewhat obscure. While Eritrea was not a party to UNCLOS, it had agreed to its application in the arbitration at hand.[298] Despite the litigation's focus on the effect of small islands on the maritime boundary between states with opposite coasts, the award does not mention Article 121 (3) at all, which could be interpreted as the tribunal's understanding that the provision was irrelevant to matters of delimitation.[299] On the other hand, the decision that the al-Tayr island and the al-Zubayr island group should have no effect on the boundary was *inter alia* justified by pointing towards their "barren and inhospitable nature"[300]. It is a statement that very clearly echoes Article 121 (3), which specifically limits the ability of such islands to generate entitlement to maritime zones. Despite not mentioning Article 121 (3) explicitly, the tribunal seemed to perceive al-Tayr island and the al-Zubayr island group as "rocks" within the meaning of Article 121 (3), and in consequence found that they could not generate entitlement to the EEZ or continental shelf and should have no effect on the course of the maritime boundary. This view was not shared by *Elferink*, who noted that while the tribunal "distinguishes between islands, islets and rocks"[301], "Jabal al-Tayr is consistently identified as an island"[302]. The award's use of the term "island" to describe Jabal al-Tayr is consequently the reason why *Elferink* has argued that the tribunal perceived Jabal al-Tayr as theoretically fully entitled to both EEZ and continental shelf. However, the tribunal never explains the potential differences between islands, islets and rocks and seems to use these terms with a considerable

[295] *Ibid,* para 80.
[296] *Ibid,* paras 80, 89.
[297] *Ibid,* para 70.
[298] Arbitral Tribunal, *Award of the Arbitral Tribunal in the First Stage of the Proceedings - Territorial Sovereignty and Scope of the Dispute (Eritrea/Yemen),* October 9, 1998, Reports of International Arbitral Awards, Vol. XXII pp. 209-332, para 7.
[299] For a discussion on the scope of application of Article 121 (3), see Part 2 Section 1 IV.
[300] Arbitral Tribunal, *Award of the Arbitral Tribunal in the Second Stage of the Proceedings – Maritime Delimitation (Eritrea/Yemen),* December 17, 1999, Reports of International Arbitral Awards, Vol. XXII pp. 335-410, paras 147-148.
[301] *Elferink,* The South China Sea Arbitration's Interpretation of Article 121(3) of the LOSC: A Disquieting First, The Blog of the K.G. Jebsen Centre for the Law of the Sea, September 7, 2016 <site.uit.no/jclos/2016/09/07/the-south-china-sea-arbitrations-interpretation-of-article-1213-of-the-losc-a-disquieting-first/>.
[302] *Ibid.*

degree of randomness, meaning that it is possible the tribunal does not designate al-Tayr as an island with the intent of legally distinguishing it from a rock, but merely in an effort to distinguish it from a low-tide elevation. Given the scope and wording of the award, it is evident that its arbitrators did not wish to delve into an in-depth analysis of the legal distinction between various types of islands, which makes the award's significance as a future point of reference difficult to assess.

6. The Persian Gulf Case

As in *Sovereignty and Maritime Delimitation in the Red Sea*, the judgement in the *Persian Gulf Case* deals with the role of very small and barren islands in the delimitation of maritime zones without ever directly referencing Article 121 (3).[303] In the process of delimiting the territorial sea, EEZ and continental shelf between Qatar and Bahrain the question arose how two very small high-tide elevations should affect the course of the equidistant boundary line. The ICJ found that Qit'at Jaradah, "a very small island, uninhabited and without any vegetation"[304], should be ignored in the delimitation process. After a provisional equidistance line had been drawn, Qit'at Jaradah was ignored, as using base points on its low-water line would have engendered the undesired result of according an "insignificant maritime feature"[305] a "disproportionate effect"[306]. The ICJ considered that, in the interest of equity, the equidistant line should be adjusted so as to lessen the impact of Fasht al Jarim, a small Bahraini island of which only a minuscule part is above water at high tide.[307] The ICJ's decisions relating to Qit'at Jaradah and Fasht al Jarim were informed by the principle of equity and the imperative to minimize disproportionate effects rather than by Article 121 (3). This approach was unavoidable given that the ICJ had to apply customary international law. While the ICJ found the first two paragraphs of Article 121 to form part of customary international law,[308] it did not reach any such conclusion with respect to the provision's third paragraph, which made it impossible for the court to base its decisions on Article 121 (3). The *de facto* consequences of this judgment have nonetheless led scholars to believe that Article 121 (3) played a role as an

[303] International Court of Justice, *Case Concerning Maritime Delimitation and territorial Questions between Qatar and Bahrain (Qatar/Bahrain),* Judgment, ICJ Reports 2001 [hereinafter *Persian Gulf Case*].
[304] *Ibid,* para 219.
[305] *Ibid.*
[306] *Ibid.*
[307] *Ibid*, para 248.
[308] *Ibid*, para 185.

"unarticulated premise in giving no effect […] to the tiny, uninhabited island of Qit'at Jaradah and to the maritime feature of Fasht al Jarim"[309].

7. The Black Sea Case

The *Black Sea Case* touches upon some of the most pertinent questions surrounding the *Regime of islands* today.[310] The relevance of this ruling to the interpretation of the *Regime of islands* is second only to that of the *South China Sea Arbitration*. It was Romania who instituted proceedings in 2004, aiming to resolve a dispute over the single maritime boundary delimiting the continental shelves and EEZs between Romania and Ukraine in the Black Sea. Central to this case were the questions whether Article 121 (3) was relevant to matters of delimitation and if it was, whether Article 121 (3) entailed that Serpents' Island could not be used as a base point in the establishment of the maritime boundary. Serpents' Island is under Ukrainian jurisdiction, approximately 0.17 km^2 in size and home to 100 inhabitants. Romania nevertheless argued that an assessment of Serpents' Island's properties on the basis of Article 121 (3) suggested that the feature constituted a rock which should not affect the course of the maritime boundary.[311] Ukraine believed otherwise and, citing the presence of fresh water, vegetation and infrastructure for human habitation, submitted that the geographical characteristics of Serpents' Island evidenced that it was an island in the narrow sense and not just a rock.[312] From the Ukrainian point of view, the base points for the construction of the provisional equidistance line lay on the baselines from which the breadth of their territorial sea was to be measured. And given that the Ukrainian territorial sea baseline surrounded Serpents' Island, the single maritime boundary had, according to Ukraine, to be drawn with due consideration of Serpents' Island. Both parties dedicated large parts of their written submissions to the accumulation of evidence aimed at corroborating or refuting the status of Serpents' Island as a rock.[313] They even cited aspects such as the name of the feature,[314] its praise by poets and its importance as a historical site.[315] The fact that both parties focused on the properties of Serpents' Island in this manner is

[309] *Kwiatkowska,* The Qatar v. Bahrain Maritime Delimitation and Territorial Questions Case, Ocean Development & International Law 33:3 (2002) 227 (246).
[310] International Court of Justice, *Maritime Delimitation in the Black Sea (Romania/Ukraine)*, Judgment, February 3, 2009, ICJ Reports 2009 [hereinafter *Black Sea Case*].
[311] *Ibid*, para 180.
[312] *Black Sea Case,* Counter-Memorial submitted by Ukraine on May 19, 2006, Vol. 1, para 7.37, *supra* note 310.
[313] *Black Sea Case,* Memorial submitted by Romania on August 19, 2005, paras 10.1 – 10.132; Counter-Memorial submitted by Ukraine on May 19, 2006, Vol. 1, paras 7.27 - 7.92; Reply submitted by Romania on December 22, 2006, paras 5.1 – 5.184; Rejoinder submitted by Ukraine on July 6, 2007, paras 4.35 – 4.50, 5.18 – 5.24, 6.57 – 6.72, *supra* note 310.
[314] *Black Sea Case,* Counter-Memorial submitted by Ukraine on May 19, 2006, Vol. 1, para 7.35, *supra* note 310.
[315] *Ibid,* paras 7.47, 7.50 – 7.71.

indicative of their understanding that Article 121 (3) was of significance for the drawing of the maritime boundary. In any event, they submitted no argument to the contrary until the commencement of oral proceedings. It appears that the ICJ was undecided as far as the scope of application of Article 121 (3) was concerned. During the public sitting on September 12, 2008, Judge *Oxman* asked both parties to clarify whether they viewed Article 121 (3) as relevant to elevations located within the 200 nm EEZ or the continental shelf of the same state. The responses submitted by the parties were diametrically opposed. Romania suggested that neither the wording of the provision nor its *travaux preparatoires* made any mention of Article 121 (3) only being applicable to a specific type of island, such as islands on the high seas.[316] Ukraine replied that Article 121 (3) was merely an "entitlement" provision and as such "not concerned with questions of delimitation"[317]. According to the Ukrainian position, Article 121 (3) should not have been applicable to the *Black Sea Case* because

> "when [rocks] already lie within a maritime area that is, in any event, within the 200-nautical-mile limits of the EEZ and continental shelf of a mainland coast, Article 121 (3) has no relevance to that area. It is only in situations where an Article 121 (3) rock is being used to extend the outer limit of a coastal State's EEZ or continental shelf beyond the 200-mile limit generated by other coasts of a State, as was the case with Rockall, that Article 121 (3) might have a role to play."[318]

While scholars mostly agree that Article 121 (3) is less relevant to features that lie within the territorial sea of another landmass,[319] there is no indication that Article 121(3) was intended as a provision only applicable to features outside of the EEZ or continental shelf of other landmasses. Islands in the narrow sense within the mainland EEZ may after all expand the EEZ by creating a "bulge" in the outer limit of the EEZ. The ICJ did unfortunately not pronounce itself on whether Article 121 (3) was merely applicable to rocks on the high seas or to rocks in general, irrespective of their location.[320] The ICJ found that it was necessary to discern between the act of "determining the baseline for the purpose of measuring the breadth of the continental shelf and the exclusive economic zone"[321] on the one hand and "identifying base points for drawing an equidistance/median line for the purpose of delimiting the continental shelf and the exclusive economic zone between adjacent/opposite States"[322], on the other. The ICJ drew a provisional equidistance line and subsequently verified whether this line merited adjustment

[316] *Black Sea Case,* Public Sitting on September 16, 2008, Verbatim Record CR 2008/31, 11, *supra* note 310.
[317] *Black Sea Case,* Public Sitting on September 19, 2008, Verbatim Record CR 2008/33, 22, *supra* note 310.
[318] *Black Sea Case,* Public Sitting on September 19, 2008, Verbatim Record CR 2008/33, 22, *supra* note 310.
[319] See Part 2 Section 1 IV A.
[320] *Ibid.*
[321] *Black Sea Case,* para 137, *supra* note 310.
[322] *Ibid.*

due to special circumstances. The aim was to establish a provisional equidistance line reflecting "the general direction of the coast"[323], a criterion only explicitly called for in UNCLOS in connection with straight baselines.[324] The ICJ ultimately decided that it would be inapposite to use Serpents' Island as a base point for this line as such a course of action would "amount to grafting an extraneous element onto Ukraine's coastline"[325]. This particular line of reasoning would go on to trigger a sequence of international judgements and awards that have been referred to as the doctrine of minor geographical features.[326] The ICJ disregarded Serpents' Island as a base point for the EEZ or continental shelf in the early stages of the delimitation process and chose not to factor the island in at a later stage as a "special circumstance". This unusual method of omitting Serpents' Island as a base point at an early stage made it possible for the court to conclude that assessing the scope of application of Article 121 (3) or the legal status of Serpents' Island was unnecessary.[327]

8. The Bay of Bengal Case (Bangladesh/Myanmar)

The *Bay of Bengal Case (Bangladesh/Myanmar)* in many ways took up a discussion that had commenced in the *Black Sea Case*.[328] Bangladesh and Myanmar had turned to the ITLOS to aid them in the delimitation of the shared maritime boundary separating their respective territorial seas, EEZs and continental shelves in the Bay of Bengal. At the heart of the dispute was the significance to delimitation of St. Martin's Island, a coastal island with a surface area of 8 km^2 close to the shared maritime boundary.[329] The island's population of 7,000 people mostly relied on fishing and tourism to support their livelihoods, which prompted Bangladesh to argue that the food supply was – at least in part – derived from local production.[330] Bangladesh claimed that the considerable population and economy of St. Martin's Island substantiated its status as an island in the narrow sense.[331] The ITLOS did not deny that the island was in principle entitled to the territorial sea, the EEZ and a continental shelf. However,

[323] *Ibid,* para 127.
[324] Art 17 (3) UNCLOS.
[325] *Black Sea Case,* para 149, *supra* note 310.
[326] See Part 3 Section 4 II.
[327] *Bederman* has remarked on the unusual nature of the early elimination of the feature in the *Black Sea Case*. *Bederman,* Maritime Delimitation in the Black Sea (Romania v. Ukraine), The American Journal of International Law 103 (2009) 543 (548).
[328] International Tribunal for the Law of the Sea, *Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar)*, Judgment, March 14, 2012, 51 ILM 840 [hereinafter *Bay of Bengal Case (Bangladesh/Myanmar)*].
[329] *Ibid.*
[330] *Bay of Bengal Case (Bangladesh/Myanmar),* Memorial of Bangladesh, July 1, 2010, para 2.18, *supra* note 328.
[331] *Bay of Bengal Case (Bangladesh/Myanmar)*, Reply of Bangladesh, March 15, 2011, paras 2.75 – 2.76, *supra* note 328.

the ITLOS found that the particular constellation of the coast, or more precisely the fact that St. Martin's Island was located in front of the coast of Myanmar, called for a restriction of its ability to generate entitlement to maritime areas. According to the tribunal, the effect of islands can vary depending on whether the delimitation of the territorial sea or a wider maritime zone, such as the EEZ or the continental shelf, is at stake.[332] The ITLOS consequently chose to draw a 12 nm territorial sea but not an EEZ or continental shelf around St. Martin's Island. The decision to treat islands differently depending on the zone to be delimited led to the recognition of St. Martin's Island as a relevant base point for the equidistance line delimiting the territorial sea. Simultaneously, the tribunal omitted St. Martin's Island as a base point for the delimitation of the EEZ. Both in the context of delimiting the territorial sea and the EEZ, the ITLOS ruled that St. Martin's Island was not a "special circumstance" meriting an adjustment of the boundary line. In connection with the establishment of the territorial sea boundary, this observation meant that St. Martin's Island was surrounded by a 12 nm territorial sea. In connection with the EEZ, it meant that after dismissing the island as a base point from the beginning, the island would not retrospectively influence the EEZ boundary as a "special circumstance". The tribunal observed that there was no general rule in international law regarding the treatment of islands in delimitation matters.[333] It further maintained that it had to find a solution bearing in mind the individual circumstances of the case at hand.[334] In particular, the tribunal had to account for the fact that St. Martin's Island was located immediately in front of the mainland on Myanmar's side of the land boundary terminus separating Bangladesh and Myanmar. This meant that selecting a base point on the Bangladeshi St. Martin's Island would result in a boundary line blocking the seaward projection from Myanmar's coast, a situation the tribunal described as an "unwarranted distortion of the delimitation line"[335]. The selection of a base point on St. Martin's Island, the ITLOS expounded, would have misrepresented the geographic realities in much the same way Serpents' Island would have distorted the boundary line had it been recognized as a valid location for an EEZ base point in the *Black Sea Case*.[336] The ITLOS also had to address the role of Oyster Island, a small feature supporting a lighthouse despite the fact that its high tide surface area measures only 0.02 km^2.[337] Bangladesh had called for this island to be ignored in the delimitation process because it was a "rock" within the meaning of UNCLOS,[338] and

[332] *Bay of Bengal Case (Bangladesh/Myanmar),* para 148, *supra* note 328.
[333] *Ibid,* para 147.
[334] *Ibid.*
[335] *Ibid,* para 265.
[336] *Ibid.*
[337] *Bay of Bengal Case (Bangladesh/Myanmar),* Memorial of Bangladesh, July 1, 2010, para 2.21, *supra* note 328.
[338] *Ibid*, fn 261.

Myanmar was not in principle opposed thereto. Myanmar was willing to omit Oyster Island from the delimitation process as long as St. Martin's Island was equally disregarded.[339] However, Myanmar's opinion in this matter did not prevail and Oyster Island was ultimately eliminated as a delimitation base point by the tribunal. In a separate opinion, Judge *Gao* criticized the decision of the tribunal to disregard St. Martin's Island for the purpose of the EEZ delimitation, and suggested to accord the feature half effect would have been the correct approach.[340] In the same way as giving full effect to St. Martin's Island would inequitably narrow the EEZ of Myanmar, he explained, the chosen solution of disregarding St. Martin's Island entirely inequitably curtailed the EEZ of Bangladesh. *Bateman* has criticized *Gao*'s opinion as biased towards the Chinese policy of recognizing the comparatively tiny islands in the South China Sea as capable of generating valid EEZ and continental shelf claims.[341] However, *Gao* was far from alone in his criticism of the ITLOS' decision. In a separate declaration, Judge *Wolfrum* commented on the tribunal's assertion that there was no general rule on the treatment of islands in maritime delimitation, suggesting that the tribunal should have stepped in to fill this gap and expounded the reasons for the omission of St. Martin's Island in the EEZ delimitation in greater detail.[342] The tribunal, according to *Wolfrum*, should have embraced its law-making function. Additionally, he criticized the tribunal for failing to deal with other aspects relating to the role of islands in maritime delimitation such as "the ratio of the size of the island to the size of the maritime area in question"[343] and "the freedom of access to the sea"[344]. By not touching upon these subjects, the ITLOS missed the opportunity "to progressively develop the rules on islands in the delimitation process"[345], which was particularly deplorable since "international jurisprudence, so far, seems to lack the necessary coherence on this issue."[346] International courts and tribunals were indeed historically reticent in pronouncing themselves on the subject of rocks and islands. This tendency towards judicial

[339] *Bay of Bengal Case (Bangladesh/Myanmar),* Counter-Memorial of Myanmar, December 1, 2010, para 5.79, *supra* note 328.
[340] *Bay of Bengal Case (Bangladesh/Myanmar),* Separate Opinion of Zhiguo Gao, March 14, 2012, 51 ILM 840, para 82, *supra* note 328.
[341] China has for example made this position known in the context of its general position on the Spratly Islands and in the context of the *South China Sea Arbitration*. See above Part 1 Section 2 II A 3 and Permanent Mission of China to the United Nations, Note Verbale to Secretary-General of the United Nations, No. CML/8/2011, April 14, 2011; *Bateman,* Solving Maritime Disputes: The Bangladesh-Myanmar Way, RSIS Commentaries 48 (March 20, 2012) 2.
[342] *Bay of Bengal Case (Bangladesh/Myanmar),* Declaration of Rüdiger Wolfrum, March 14, 2012, 51 ILM 840, 3, *supra* note 328.
[343] *Ibid,* 4.
[344] *Ibid.*
[345] *Ibid,* 4 et seq.
[346] *Ibid.*

discretion has been abandoned in the award issued in the *South China Sea Arbitration*, which includes a detailed interpretation of the *Regime of islands*.[347]

9. The Colombian Islands Case

In the *Colombian Islands Case* the ICJ addressed many issues relating to Article 121 (3) it had formerly avoided.[348] *Inter alia*, the court was tasked with establishing a boundary separating the respective EEZs and continentals shelves between the Nicaraguan mainland coast and a group of islands under the jurisdiction of Colombia. The Colombian islands are located beyond 200 nm from the Colombian mainland but within 200 nm of Nicaragua. With the exception of the main islands San Andrés, Providencia and Santa Catalina, the islands' surface area, economic impact and population are negligible, which led to disagreement over the smaller islands' classification as rocks or islands in the narrow sense. The ICJ did not elaborate on the status of the smaller islands within the group, as their potential EEZ and continental shelf entirely overlapped with that of the three larger islands of San Andrés, Providencia and Santa Catalina.[349] It was beyond controversy between the parties that these three islands generated entitlement to an EEZ and a continental shelf given that they harbored both a sizeable population and a prospering tourist industry. More contentious issues included the legal classification and entitlement to maritime zones of the smaller Colombian islands of Quitasueño and Serrana. The court's consideration that the legal classification of Quitasueño as a rock or island in the narrow sense could impact the course of the maritime boundary shows that Article 121 (3) is indeed relevant to delimitation as well as entitlement questions.[350] The court delimited the EEZ and continental shelf using the traditional three-stage approach to delimitation,[351] the first step of which consists in drawing a provisional equidistance line. Two Colombian features, Quitasueño and Serrana, were ignored in the establishment of the provisional equidistance line and found themselves on the Nicaraguan side of the line. Given that they were both above water at high tide, the court could not lawfully deny them their entitlement to the territorial sea. The court consequently surrounded Quitasueño and Serrana each with a territorial sea enclave measuring 12 nm from their respective coasts. Nicaragua opposed the notion that Quitasueño was entitled to a territorial sea on the ground that the diameter of the top of its highest elevation

[347] For further details on the positions adopted in the *South China Sea Arbitration* see Part 1 Section 2 II A 3.
[348] *Colombian Islands Case, supra* note 34.
[349] *Ibid,* para 180.
[350] *Ibid,* para 2; see also Part 2 Section 1 IV B 1.
[351] The three-stage approach is more comprehensively explained in *Zhang,* The ITLOS Judgment in the Bay of Bengal Case between Bangladesh and Myanmar, Chinese Journal of International Law 12 (2013) 255 (268 et seq). A brief summary of this delimitation method can also be found in Part 2 Section 1 IV B 2.

only measured 10-20 cm.[352] The court rejected this argument on the basis that there was no minimum size requirement for islands.[353] The ICJ furthermore explicitly pointed out that Quitasueño's incapability to support human habitation or economic life disentitled Colombia from claiming an EEZ or a continental shelf for the island.[354] Quitasueño Bank is a large coral reef made up of 54 individual elevations, only one of which the court found to be above water at high tide. Due to its virtually non-existent surface area, it is easy to see why Quitasueño is unfit for settlement. According to the Colombian account, Quitasueño is nevertheless frequently visited by industrial and artisanal fishers, and supports two operational lighthouses.[355] Unfortunately, the court did not address these uses or their relevancy as a potential form of "economic life" within the meaning of Article 121 (3), but limited itself to asserting Quitasueño's incapacity in this regard without further explanation.[356] While the court commented on the legal status of Quitasueño, it declined to provide an assessment of the remaining small features, such as the Alburquerque Cays. The Alburquerque Cays are the southernmost of the Colombian islands and are rather similar to Quitasueño. The reef measures seven kilometers in length and is mostly submerged. Some of its elevations rise up to two meters above the surface and provide conditions for mangrove trees and bushes to grow. There is a lighthouse on the Alburquerque Cays. While the ICJ clarified the grounds for eliminating Quitasueño and Serrana in the establishment of the provisional equidistance line, it did not sufficiently explain why the Alburquerque Cays, which exhibit characteristics not altogether dissimilar from Quitasueño were not excluded.[357] The ICJ's view that it was in the interest of "the public order of the oceans"[358] to perceive the Colombian islands as a collectivity of islands as opposed to creating separate enclaves for each feature might provide an explanation. Quitasueño is located at a greater distance from the three central islands of San Andrés, Providencia and Santa Catalina than the Alburquerque Cays. The distance between Quitasueño and Santa Catalina measures 38 nm,[359] while only 20 nm lie between the Alburquerque Cays and San Andrés.[360] The relative proximity of the Alburquerque Cays to the main islands explains why it was regarded as part of the collectivity of Colombian islands and therefore as a

[352] *Colombian Islands Case,* Public Sitting on April 24, 2012 at 10 a.m., Verbatim Record CR 2012/9, *supra* note 34.
[353] *Colombian Islands Case,* para 37, *supra* note 34.
[354] *Ibid,* para 238.
[355] *Colombian Islands Case*, Counter-Memorial submitted by Colombia on November 11, 2008, Vol. 1, paras 2.26, 2.27, 2.29, *supra* note 34.
[356] *Colombian Islands Case*, para 238, *supra* note 34.
[357] *Ibid,* paras 200-204.
[358] *Ibid,* para 244.
[359] *Ibid,* para 24.
[360] *Ibid.*

suitable location for a base point for the provisional equidistance line. Quitasueño, on the other hand was situated too far apart from the main islands to belong to the collectivity of Colombian islands. *Gao* suggests that by setting up a base point on the Alburquerque Cays, the court tacitly recognized that they held the position of islands entitled to an EEZ and continental shelf.[361] The fact that Colombia had not ratified UNCLOS necessitated an examination into whether the *Regime of islands* had developed a binding effect vis-à-vis non-party states. In this context, the court decided to expand on its pronouncement from the *Persian Gulf Case* to the effect that the first two paragraphs of Article 121 formed part of customary international law.[362] In the *Colombian Islands Case* the court thus went one step further and declared that Article 121 represented an indivisible régime, which had passed into customary international law in its entirety.[363] This is of relevance in light of the fact that international scholars prevalently attributed a purely conventional character to the third paragraph of Article 121 beforehand.[364]

10. The Bay of Bengal Case (Bangladesh/India)

The *Bay of Bengal Maritime Boundary Arbitration* is notable for its pronouncements on the legal impact of anticipated environmental changes to an island or low-tide elevation.[365] The arbitral tribunal also reiterated that an island's suitability as a basepoint depends on whether the tribunal is drawing a maritime boundary between adjacent or opposite states or measuring the maritime zones of a completely isolated island. It then applied this rationale to low-tide elevations.[366] One of the elevations India proposed to use as a base point for the delimitation of the maritime boundary, New Moore Island, was only just recognizable at low tide by the waves breaking on its edges.[367] Bangladesh submitted that such a feature did not even constitute a low-tide elevation. Additionally, the effects of climate change would – according to the Bangladeshi view - lead to the complete disappearance of New Moore Island and other base points chosen

[361] *Gao,* A Note on the Nicaragua v. Colombia Case, Ocean Development & International Law 44:3 (2013) 219 (226).
[362] *Persian Gulf Case,* para 185, *supra* note 303.
[363] *Colombian Islands Case,* para 139, *supra* note 34.
[364] *Dipla,* Le régime juridique des îles dans le droit international de la mer (1984) 42; *Kwiatkowska/Soons,* Entitlement to Maritime Areas of Rocks Which Cannot Sustain Human Habitation or Economic Life of Their Own, Netherlands Yearbook of International Law 21 (1990) 139 (175); *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... », Annuaire français de droit international 40 (1994) 876 (899); *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 (59).
[365] *The Bay of Bengal Maritime Boundary Arbitration (Bangladesh/India)*, Award, July 7, 2014, 51 ILM 840 [hereinafter *Bay of Bengal Case (Bangladesh/India)*].
[366] *Ibid,* paras 259 – 260.
[367] *Ibid,* para 263.

by India within a few years.[368] Bangladesh declared the features to be instable and inappropriate for the establishment of a provisional equidistance line. The arbitral tribunal did not share this view and enunciated that future developments, such as sea level rise, were not of relevance. The key element was the appropriateness of the boundary line "in the present case and at the present time"[369]. This consideration is also inherent in the decision in the *Black Sea Case*, which pointed out the importance of the "physical reality at the time of the delimitation"[370]. It is an important finding, and one that is of relevance to the distinction between rocks and islands in the narrow sense. If an island is threatened by erosion or in the process of being developed to allow for inhabitation, a coastal state may argue that these prospective changes will in all likelihood affect an island's legal status in future and should therefore be given consideration in the present. Why this is an erroneous assumption is discussed below in Part 2 Section 1 V B.

Section 3 State Practice

A fundamental step towards understanding the *Regime of islands'* impact and meaning consists in taking a look at how the provision has been received and implemented by the international community. The relevance of "subsequent practice in the application of the treaty" as a means of interpretation is confirmed by the VCLT.[371] If we look at how UNCLOS' member states have translated the *Regime of islands* into national law, we may be disappointed by the near-total absence of the provision from domestic legal systems: while the coastal states' right to an EEZ and continental shelf is often prominently featured in domestic codifications, there is usually no mention of the limitations to this right, that is to say, of Article 121. On the other hand, UNCLOS in no way obligates its members to transpose its legal content into domestic law and even if such a transposition has taken place, it remains immaterial to UNCLOS' validity. A by far richer insight into states' opinions on the content and applicability of the *Regime of islands* can be gained by looking at their statements and actions. While not all statements concerning the validity of maritime zones can end in litigation, which is the province of the previous chapter, they often inspire diverse reactions. These reactions range from acknowledging that one's own territory is a rock, to vehement denial of any such classification, a response that may be accompanied by the renaming of features, settlement initiatives or the intensive structural enhancement of tiny islands. The conduct of states in any of these circumstances allows us to draw conclusions as to how they individually interpret the *Regime*

[368] *Ibid,* para 213.
[369] *Ibid,* para 214.
[370] *Black Sea Case,* para 131, *supra* note 310.
[371] Art 31 (3) (b) Vienna Convention on the Law of Treaties, May 23, 1969.

of islands, even if their interpretations may in the end prove far too diverse to draw universally applicable conclusions from them.

I. Domestic Law

While an abundance of states have put forward statements and declarations reflecting their view on the applicability of Article 121 (3) to specific features, integration of this provision into national legislation is far less common. The range of domestic legal systems considered for the present purposes is limited to a selected few that nevertheless pertain to states having a special interest in islands and rocks. The majority of states have acted swiftly in incorporating the breadth of the territorial sea, the EEZ and the continental shelf as suggested by UNCLOS into their national laws. In so doing, they have selected UNCLOS' rules that are capable of bolstering their national claims to maritime zones, while leaving out Article 121 (3), the most prominent limitation to excessive claims. As an example, the national legislations of Brazil,[372] Canada,[373] China,[374] France,[375] Japan,[376] Morocco,[377] Romania,[378] and the United States[379] incorporate the coastal state's right to an EEZ 200 nm in width, mostly accompanied by similar legislation concerning the range of the continental shelf. The United States' proclamations relating to the EEZ and territorial sea stress that they are based on international law,[380] and at one point even mention UNCLOS.[381] The Japanese laws refer to Article 121 (1) for the

[372] Art 1, 6 and 11 of the Law No. 8617 on the Territorial Sea, the Contiguous Zone, the Exclusive Economic Zone and the Continental Shelf, Brazil, January 4, 1993.
[373] Art 5, 13 and 17 of the Oceans Act, Canada, December 18, 1996.
[374] China specifies that the areas surrounded by the territorial sea include the Diaoyu (or Senkaku) Islands, the Penghu Islands, the Dongsha Islands, the Xisha Islands, Nansha (or Spratly) Islands and all other islands belonging to China. See Art 2 of the Law on the Territorial Sea and the Contiguous Zone, China, February 25, 1992. See also Art 2 Exclusive Economic Zone and Continental Shelf Act, China, June 26, 1998.
[375] Art 1 of the Law No. 71-1060 regarding the Delimitation of French Territorial Waters, France, December 14, 1971; Art 1 Law No. 76-655 relating to the Economic Zone off the Coasts of the Territory of the Republic, France, July 16, 1976.
[376] Art 1 Law No. 30 on the Territorial Sea and the Contiguous Zone, as amended by Law No. 73 of 1996, Japan, May 2, 1977; Art 1 and 2 of the Law No. 74 on the Exclusive Economic Zone and the Continental Shelf, Japan, June 14, 1996.
[377] Art 1 of the Act No. 1.73.211 establishing the Limits of the Territorial Waters and the Exclusive Fishing Zone of Morocco, Morocco, March 2, 1973; Art 1 of the Act No. 1-81 establishing a 200-nautical-mile Exclusive Economic Zone off the Moroccan Coasts, Morocco, December 18, 1980.
[378] Art 1 of the Act concerning the Legal Regime of the Internal Waters, the Territorial Sea and the Contiguous Zone of Romania, Romania August 7, 1990; Art 2 of the Decree No. 142 of the Council of State concerning the establishment of the Exclusive Economic Zone of Romania in the Black Sea, Romania, April 25, 1986.
[379] Proclamation on the Territorial Sea of the United States of America by the President of the United States of America, United States, December 27, 1988; Proclamation 5030 by the President of the United States of America on the Exclusive Economic Zone of the United States of America, United States, March 10, 1983.
[380] *Ibid.*
[381] Proclamation on the Territorial Sea of the United States of America by the President of the United States of America, United States, December 27, 1988.

definition of an island, but entirely ignore the restrictions imposed by its third paragraph.[382] A reader in search of a definition of the areas creating entitlement to the EEZ and continental shelf in the national laws of these states is usually referred to the base line for the territorial sea. Neither UNCLOS nor national laws require that there be any restrictions on land areas entitled to a zone of territorial waters, beyond the condition that this line be drawn along the low-water line of permanently dry land. According to the national laws of the states listed above, the EEZ and continental shelf can thereby be claimed irrespective of the demographic or economic properties of an island. Even though UNCLOS does not require its member states to transpose its obligations into national law, their willingness to do so with respect to much of the remaining provisions governing the EEZ and continental shelf while omitting Article 121 (3), suggests a desire to distance themselves from the *Regime of islands* or at least retain a certain amount of flexibility. Qatar, another state with a heightened interest in the treatment of islands,[383] approaches the subject differently. Apart from the stipulation that all islands are entitled to the territorial sea, the laws of Qatar lay out which maritime zones can be claimed around different types of islands.[384] Qatari declarations lay out that the EEZ and the continental shelf of every feature shall be determined individually by boundary agreements, in the absence of which equidistance and the principles of international law shall be decisive.[385] The Qatari legislation thereby indirectly accounts for UNCLOS' rules, at least in so far as they represent "principles of international law". Similar legislation can be found in Libya, which provides that the EEZ extends as far beyond the territorial sea as permitted under international law.[386] The limits of this zone shall be drawn in cooperation with neighboring states and according to agreements concluded on the basis of international law.[387] The wording is even more straightforward than in the Qatari legislation and consequently provides for UNCLOS' application on a national level, especially in light of the absence of clear-cut national limits to the EEZ and continental shelf. Finally, Mexico takes the most progressive approach. Article 51 of its 1986 Federal Act relating to the Sea lends authority to UNCLOS' *Regime of islands* by reproducing the terms of Article 121 (3) in its national legislation, stating that "[i]slands shall have an exclusive

[382] Art 2 (2) (2) (5) of the Enforcement Order of the Law on the Territorial Sea and the Contiguous Zone (Cabinet Order No. 210 of 1977, as amended by Cabinet Order No. 383 of 1993, and Cabinet Order No. 206 of 1996), Japan.
[383] See above Part 1 Section 2 II B 6 for an account of the *Persian Gulf Case*.
[384] Art 1 of the Decree No. 40 of 1992 defining the Breadth of the Territorial Sea and Contiguous Zone of the State of Qatar, Qatar, April 16, 1992.
[385] Declaration by the Ministry of Foreign Affairs, Qatar, June 2, 1974.
[386] Art 1 of the General People's Committee Decision No. 260 of A.J. 1377 concerning the declaration of the exclusive economic zone of the Great Socialist People's Libyan Arab Jamahiriya, Libya, May 31, 2009.
[387] *Ibid.*

economic zone; however, rocks that cannot sustain human habitation or economic life of their own shall not"[388].

II. Claims and Declarations

States are most likely to take a position on the application and interpretation of the *Regime of islands* if they wish either to corroborate their own claims to maritime areas or to contest such claims in case they are made by neighboring states. We shall center our attention on those statements, claims and actions that serve to illustrate what legal content states ascribe to the *Regime of islands*. Island territories having sparked insightful legal commentary in official statements notably include Rockall, Clipperton Island, some of the United States' island territories in the Northern and Central Pacific, most importantly Maro Reef, Palmyra Atoll, Kingman Reef, Howland Island and Baker Island, Aves Island, Okinotorishima, the Senkaku Islands, the Spratly Islands, Scarborough Shoal and the Pratas Islands. The number of small island territories of course far exceeds this selection. However, no additional legal insights can be gained from the comprehensive enumeration and description of all islands potentially affected by Article 121 (3). On the one hand, this is due to the fact that, in most cases, official statements commenting on the perceived legal status of islands have not been released. On the other hand, smaller features within an island group are often included in a system of straight or archipelagic baselines, which means that they usually generate entitlement to an EEZ and continental shelf regardless of their capacity for habitation or economic life.[389] While a complete list of all islands surrounded by an EEZ and continental shelf is beyond the scope of this thesis,[390] *Bowett* has compiled an instructive overview in this regard.[391]

A. Rockall

The case of Rockall represents the only instance of a state having unilaterally withdrawn its claim to an EEZ and continental shelf as a consequence of UNCLOS and its *Regime of islands* entering into force. Rockall was considered to correspond to the description of rocks in Article 121 (3) to such an extent that it was even mentioned as an example for a rock in the drafting process.[392] A single, inhospitable granite rock 17.15 m high and 25 m wide, Rockall is mostly

[388] Federal Act relating to the Sea, Mexico, January 8, 1986.
[389] See Part 2 Section 1 IV A.
[390] For a complete picture of the relevant boundaries see *Charney/Alexander*, International Maritime Boundaries Vol. I + II (1993).
[391] *Bowett,* Islands, Rocks, Reefs, and Low-Tide Elevations in Charney/Alexander (eds.), International Maritime Boundaries Vol. I (1993).
[392] *Anderson,* British Accession to the UN Convention on the Law of the Sea, International and Comparative Law Quarterly 46 (1997) 761 (778).

known as a hazard to shipping. It is located far off the mainland territories of Ireland and the United Kingdom: a distance of 232 nm and 248 nm separates Rockall from the Irish coast and the coast of the United Kingdom, respectively. This isolated location meant that, historically, Rockall was used as a justification for the exclusive fishing zones of both Irleand and the United Kingdom, who both claimed sovereignty over the island. Additionally, Denmark, acting as an agent representing the Faroe Islands, and Iceland had made claims to the seabed in the Hatton-Rockall area. Denmark and Iceland both argued that the seabed in the area surrounding Rockall formed an integral part of their extended continental shelf. All four parties eventually made declarations regarding Rockall's status in light of Article 121 (3). Ireland felt that the United Kingdom's claim to an EEZ surrounding Rockall was invalid and submitted that the UK government was under the obligation to review its laws accordingly.[393] According to Ireland, the United Kingdom should have changed its laws in conformity with Article 121 (3) before acceding to UNCLOS in 1997, arguing that Article 121 (3) already reflected the legal view of the majority of states prior to 1997.[394] Denmark declared in 1985 that UNCLOS confirmed that an "uninhabited skerry [such as Rockall] cannot be granted the status of an island in the sense of international law"[395]. Iceland's parliamentary resolutions in support of its claim to the Rockall-Hatton seabed area as the natural prolongation of its territory also completely rejected the notion that Rockall could give rise to entitlement to any economic zones.[396] The United Kingdom finally reconsidered its EEZ claim for Rockall in view of its planned accession to UNCLOS in 1997. Accordingly, the British Foreign Secretary stated in a parliamentary discussion in 1997 that the United Kingdom's fishery limits would have to be redefined "since Rockall is not a valid base point for such limits under Article 121 (3) of the Convention"[397]. An amendment to the Fisheries Limits Order was thus adopted in the same year.[398] It excluded Rockall from use as an EEZ base point, which implied a loss of 155 399 km^2 to the United Kingdom's EEZ.[399] The British EEZ in this area is now measured departing from St Kilda,[400] a

[393] The territorial and maritime claim of the United Kingdom is evident from its Fishery Limits Act 1976.
[394] *Symmons,* Ireland and the Rockall Dispute: An Analysis of Recent Developments, IBRU Boundary and Security Bulletin (Spring 1998) 78 (83).
[395] *Symmons,* The Rockall Dispute Deepens: An Analysis of Recent Danish and Icelandic Actions, The International and Comparative Law Quarterly 35:2 (1986) 344 (348).
[396] Althing (Icelandic Parliament) resolution of December 22, 1978.
[397] *Symmons,* Ireland and the Rockall Dispute: An Analysis of Recent Developments, IBRU Boundary and Security Bulletin (Spring 1998) 78 (83).
[398] Statutory Order No. 1750 of 1997, United Kingdom, July 22, 1997.
[399] *Symmons,* Ireland and the Rockall Dispute: An Analysis of Recent Developments, IBRU Boundary and Security Bulletin (Spring 1998) 78 (83).
[400] Ireland has however contested the eligibility of St Kilda as a base point in light of Article 121 (3) in the past; *Symmons,* The Rockall Dispute Deepens: An Analysis of Recent Danish and Icelandic Actions, The International and Comparative Law Quarterly 35:2 (1986) 344 (366).

significantly larger British archipelago the main island of which has supported human settlement for hundreds of years, until the population was ultimately evacuated in 1930. The disputes between the states involved have in the meantime been to some extent resolved through negotiations and the adoption of appropriate legislation.[401]

B. Clipperton Island

Despite its smallness and remoteness, France has treated Clipperton Island as an island generating an EEZ since before the adoption of UNCLOS.[402] According to the French Ministry of Overseas Territory,[403] this coral atoll in the Eastern Pacific Ocean has a surface area that is exposed at high tide of merely 2 km^2. It lacks permanent human habitation and even though there has been a considerable political effort to establish an economic life of its own on the atoll,[404] the French authorities ultimately abandoned this project. According to the French Ministry of Overseas Territory, both the insufficient size and the remoteness of Clipperton Island were at the base of the decision to discontinue the process of equipping the island with a permanent fishing industry after an initial research and study phase.[405] In spite of these findings relating to the island's potential for habitation and use, France does not seem to perceive its claim to an EEZ and continental shelf off the coasts of Clipperton Island as a violation of Article 121 (3).[406] Unfortunately, it has so far remained unnecessary for the French government to remark on the status of Clipperton Island in light of Article 121 (3) as its claims have been met with little international protest except on the part of Mexico. Mexico objected to the establishment of the French EEZ around Clipperton Island and continued to fish in the area.[407] In 2005, at the height of the dispute, French authorities captured a Mexican fishing vessel,

[401] The United Kingdom and Ireland have in the meantime resolved their conflicting claims to the EEZ and proceeded to enshrine the respective limits within their national laws: See The Exclusive Economic Zone Order 2013, Statutory Instrument No. 3161 of 2013, United Kingdom, December 11, 2013; Maritime Jurisdiction (Boundaries of Exclusive Economic Zone) Order 2014, Statutory Instrument No. 86 of 2014, Ireland, February 11, 2014. The issues surrounding the delimitation of the continental shelf in the Rockall area involving the United Kingdom, Ireland, Denmark and Iceland however remain unsettled despite the efforts to resolve the dispute at various conferences held in Reykjavík (2007), Copenhagen (2007) and Dublin (2008).

[402] Decree No. 78-147 creating an Exclusive Economic Zone off the Coasts of Clipperton Island, France, February 3, 1978.

[403] See the description on the website of the French Ministry of Overseas Territory (Ministère des Outre-mer) <outre-mer.gouv.fr/?presentation-de-clipperton.html&decoupe_recherche=clipperton>.

[404] The French Ministry of Overseas Territory refers to an undertaking aimed at providing Clipperton Island with a "vie économique propre" (economic life of its own). *Ibid.*

[405] *Ibid.*

[406] See the French preliminary information on the outer limits of the continental shelf surrounding Clipperton Island submitted to the CLCS in 2009, <un.org/Depts/los/clcs_new/submissions_files/preliminary/fra2009infos_preliminaires_clipperton.pdf>; Decree No. 78-147 creating an Exclusive Economic Zone off the Coasts of Clipperton Island, France, February 3, 1978.

[407] See *Song,* The Application of Article 121 of the Law of the Sea Convention to the Selected Geographical Features Situated in the Pacific Ocean, Chinese Journal of International Law 9 (2010) 663 (667).

which led to increased efforts to resolve the conflict through negotiation. Finally, in 2007, France and Mexico concluded a treaty committing France to grant Mexican vessels fishing licenses free of charge every year, as long as these were registered with the Inter-American Tropical Tuna Commission.[408] Mexico in exchange acquiesced to the French EEZ around Clipperton Island. This understanding has not prevented individual Mexican politicians from objecting to the French EEZ. Sebastián Calderón, former senator in the Mexican Congress and member of the centre-right National Action Party has argued that the French EEZ surrounding Clipperton Island is unlawful due to being devoid of human habitation and stated that France is merely entitled to 12 nm of territorial waters.[409] His endeavors to further push for the revocation of the French EEZ have however not been met with sufficient support by the Mexican government. Even though the dispute has largely subsided, some potential for discord remains as the implementation of the treaty has not gone as smoothly as intended and France maintains an official presence in the waters surrounding Clipperton Island.[410]

C. The United States' Remote Island Territories in the Northern and Central Pacific

Among the United States' remote island territories in the Northern and Central Pacific, five features are of particular interest: Maro Reef in the Northwest Hawaiian Islands chain, Palmyra Atoll and Kingman Reef in the Northern Pacific and Howland and Baker Island in the Central Pacific. In spite of their smallness, these features have led to substantial EEZ claims. Apart from Palmyra Atoll, which is home to a research facility and accommodates scientific and other personnel on a temporary basis, they appear devoid of both economic activity and human habitation. This raises the question of whether, in claiming an EEZ and continental shelf for all of these islands, the United States is acting contrary to the principles enshrined in Article 121 (3). Even though the United States has not ratified UNCLOS, UNCLOS is referenced in its national jurisprudence and legislation, and the *Regime of islands* has been treated as customary international law by the US State Department.[411] While the United States' claim to an EEZ

[408] Arrangement entre le ministère des affaires étrangères de la République Française et le ministre de l'agriculture, de l'élevage, du développement rural de la pêche et de l'alimentation des États-Unis du Mexique relatif à l'élaboration d'un programme de recherches en matière de sciences de la mer et de pêche, March 29, 2007.

[409] L'Ile de Clipperton, ou comment un atoll de 6 km^2 est devenu l'un des dossiers sensibles des relations bilatérales entre la France et le Mexique, Infosmexique, July 18, 2009 <https://infosmexique.wordpress.com/2009/07/18/l%E2%80%99ile-de-clipperton-ou-comment-un-atoll-de-6-km2-est-devenu-l%E2%80%99un-des-dossiers-sensibles-des-relations-diplomatiques-entre-la-france-et-le-mexique/>.

[410] For the corresponding parliamentary discussion in the Senate of France see <senat.fr/questions/base/2014/qSEQ141013419.html>.

[411] For the particulars of the United States position vis-à-vis UNCLOS, see Part 3 Section 1 II E 5 b; for US national legislation referring to UNCLOS see Proclamation on the Territorial Sea of the United States of America by the President of the United States of America, United States, December 27, 1988.

measured from the shores of these features has gone largely uncontested,[412] it was still compelled to clarify its position on the compatibility with UNCLOS in one case: the legality of the Howland and Baker Island EEZ was called into question in *United States of America vs. Marshalls 201,* a case before a national court.[413] In 2006, the United States Coast Guard had apprehended a fishing vessel, the *Marshalls 201,* within the Howland and Baker Island EEZ. In the ensuing proceedings, the United States initially submitted that Article 121 (3) was not relevant to the case due to the United States not having ratified UNCLOS but pleaded alternatively that Howland and Baker Island did not fall within the category of rocks described by Article 121 (3).[414] According to the United States' position, the absence of a population on the islands did not have an adverse impact on its status, since Article 121 (3) requires that the rock "cannot" sustain settlement rather than "does not"[415]. Consequently, „[t]he question posed by Article 121 (3) is whether the feature at issue is habitable"[416]. The fact that the islands had been inhabited in the past was to be regarded as indicative of their suitability for habitation in general. In its decision to quash the defendant's motion to dismiss the case the District Court of Guam endorsed the United States position and added that a lack of economic activity in itself is not sufficient for the classification of a feature as a rock.[417] Furthermore, the court emphasized that a feature could not be considered a rock if it fulfilled either the criterion of human habitation or of economic life, since Article 121 (3) refers to these criteria alternatively.[418]

A. Aves Island

Aves Island, a remote sandbank in the Caribbean Sea, has long been the subject of a sovereignty dispute between Venezuela and the Dominican Republic. Its surface area – less than two square kilometers of sand and sparse vegetation - changes frequently owing to storms and erosion.

[412] See Exclusive Economic Zone and Maritime Boundaries - Notice of Limits, United States Federal Register 60:163 (1995) 43825, 43828, 43829.
[413] District Court of Guam, *United States of America vs. Marshalls 201*, Court Order, May 8, 2008, Civil Case No. 06-00030 [hereinafter *Howland Island Case*].
[414] Even though the United States have so far failed to ratify UNCLOS, its representative declared that UNCLOS' rules concerning "navigation and overflight and most other provisions (…) reflect prevailing international practice" at the closing session of the Third United Nations Conference on the Law of the Sea. The United States has spearheaded and declared to adhere to, but has not ratified UNCLOS and is not likely to ratify it in the near future due to particularities inherent to its legislative system. It could furthermore be argued that due to the United States' general compliance with the indivisible regime governing the EEZ and continental shelf, the United States' cannot refuse to be bound by an essential obligation within this regime and must accept the benefits as well as the detriments of its application. See Statement by the United States, 192nd meeting, Official Records of the Third United Nations Conference on the Law of the Sea 17 (1982) 116.
[415] *Howland Island Case*, Opposition of the United States to defendant's motion to dismiss for lack of subject matter and *in rem* jurisdiction, December 28, 2007, 12, *supra* note 413.
[416] *Ibid.*
[417] *Howland Island Case* 6, *supra* note 413.
[418] *Ibid.*

Human habitation as well as economic life consequently appears unfeasible under natural conditions. In 1978, Venezuela erected a naval base on stilts on the sandy beaches of Aves Island, thereby enabling scientific and military personnel to reside permanently on the island. The conclusion of the United States-Venezuelan Maritime Boundary Treaty and the Dominican Republic's recognition of Aves Island as a feature appertaining to Venezuela have largely resolved the issue of sovereignty.[419] Venezuela's neighbors are however not solely concerned with ownership, but with Aves Island's entitlement to an EEZ and continental shelf as well. As scholars have pointed out,[420] the fact that two states conclude a maritime boundary treaty employing Aves Island as a point of reference is not *eo ipso* contrary to Article 121 (3), since states can deviate from UNCLOS' provisions as long as the treaty does not encroach upon the rights of third states. Yet, several states perceived the use of Aves Island as a base point in the United States-Venezuelan Maritime Boundary Treaty as a recognition of the feature as more than a rock within the meaning of UNCLOS. Fearing that Venezuela may announce further EEZ or continental shelf claims on the basis of this treaty, Antigua and Barbuda, St. Kitts and Nevis and St. Vincent and the Grenadines objected to the treaty on the grounds that it would "appear to grant 'Isla Aves' full status of territorial sea, exclusive economic zone and continental shelf"[421]. Importantly, these statements directly referred to the requirements of human habitation and economic life. While aware that Venezuela was not a party to UNCLOS, the protesting states concluded that Venezuela was nevertheless bound to respect UNCLOS' status requirements for islands as a matter of customary international law. Even though protests have subsided following an increase in economic cooperation, the issue of the status of Aves Island seems to remain on the agenda of the Organization of Eastern Caribbean States.[422]

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[419] See the statement made by the Dominican Prime Minister at a press conference at the Caribbean Community Secretariat in Guyana on June 26, 2006. Dominica may cede Bird Island to Venezuela, Dominica News Online, August 27, 2011 <dominicanewsonline.com/news/homepage/news/general/dominica-may-cede-bird-island-to-venezuela/>; Maritime Boundary Treaty between the United States of America and the Republic of Venezuela, March 28, 1978.

[420] *Charney,* Rocks that Cannot Sustain Human Habitation, The American Journal of International Law 93 (1999) 863 (873).

[421] Saint Lucia also expressed "dissatisfaction" over the status granted to Aves Island in this way. See letter dated 19 June 1997 from the Government of Antigua and Barbuda with regard to maritime treaties and a protest with regard to the status granted to "Isla Aves", Antigua and Barbuda, Law of the Sea Bulletin 35 (1997) 97; Note dated 16 July 1997 addressed to the Secretary-General of the United Nations referring to the bilateral maritime boundary delimitation treaties, St. Kitts and Nevis, Law of the Sea Bulletin 35 (1997) 98; Note dated 8 August 1997 addressed to the Secretary-General of the United Nations referring to the bilateral maritime boundary delimitation treaties, Saint Vincent and the Grenadines, Law of the Sea Bulletin 35 (1997) 100; Note dated 23 July 1997 concerning its position with regard to Aves Island (Isla Aves), Saint Lucia, Law of the Sea Bulletin 35 (1997) 99.

[422] *Sanders,* Venezuela in the Caribbean: Expanding its Sphere of Influence, The Round Table: The Commonwealth Journal of International Affairs 96:391 (2007) 465 (473).

B. Okinotorishima and the Senkaku Islands

Okinotorishima in the Philippine Sea and the Senkaku Islands in the East China Sea are features central to an ongoing dispute between China and Japan. In the Okinotorishima case, both parties perceive their respective views to be in conformity with Article 121 (3). In its natural state, Okinotorishima was a coral reef featuring two high tide protrusions, Higashi-Kojima ("Eastern Islet") and Kita-Kojima ("Northern Islet"), which put together had a surface area of only 9.36 square meters. The islands' surface has been encased in concrete and construction works have allowed for the installation of a helicopter landing pad, a marine research facility on stilts and a meteorological station.[423] Additionally, the government encourages fishing in the area. Despite the limited surface area, Japan has submitted maps and charts to the Secretary-General of the UN and the CLCS indicating that the Japanese EEZ and continental shelf extends up to 200 nm from the shores of Okinotorishima.[424] China dismisses these claims and argues that "[a]vailable scientific data fully reveal that the rock of Oki-no-Tori, on its natural conditions, obviously cannot sustain human habitation or economic life of its own, and therefore shall have no exclusive economic zone or continental shelf."[425] The case of the Senkaku Islands is somewhat similar,[426] although one aspect significantly aggravates tensions: both Taiwan, whose position is backed by China, and Japan claim this cluster of uninhabited and minute islands as their sovereign territory. While Japan claims that the Senkaku Islands are fully entitled to an EEZ and continental shelf, Taiwan argues the reverse: according to Taiwan, the absence of human habitation and economic life qualify the Senkaku Islands as rocks, meaning that neither EEZ nor continental shelf can be claimed departing from their shores.[427]

Section 4 The Commission on the Limits of the Continental Shelf

The Commission on the Limits of the Continental Shelf (CLCS) is the technical body tasked with advising states in the establishment of the outer limits of their continental shelves where those limits extend beyond 200 nm, a zone sometimes referred to as the "outer continental shelf". The CLCS has so far issued recommendations in relation to 29 submissions, and has, in the majority of cases, confirmed the outer limits of the continental shelf as suggested by the

[423] *Ibid,* 693.
[424] These submissions are required by Articles 16 (2) and 76 (8) and are expounded in more detail in *Song,* The Application of Article 121 of the Law of the Sea Convention to the Selected Geographical Features Situated in the Pacific Ocean, Chinese Journal of International Law 9 (2010) 663 (668).
[425] Note verbale, China, CML/2/2009, February 6, 2009 <un.org/Depts/los/clcs_new/submissions_files/submission_jpn.htm>.
[426] Referred to as Diaoyu Islands in Chinese.
[427] *Guoxing,* The Diaoyudao (Senkaku) Disputes and Prospects for Settlement, The Korean Journal of Defense Analysis 6:2 (1994) 285 (306 et seq).

submitting states. The CLCS constitutes an integral part of UNCLOS' regime for the deep seabed and is composed of 21 members who are experts in the field of geology, geophysics and hydrography.[428] The CLCS was not conceived as a judicial body and is not part of UNCLOS' dispute settlement mechanism.[429] And yet, as a consequence of the influence the CLCS wields over national continental shelf limits in practice, states have, as we shall see, alerted the CLCS to their interpretation of the *Regime of islands.* It would indeed seem that in situations where a rock is used to determine the outer limit of the continental shelf, the CLCS is forced to interpret Article 121 (3) one way or the other, even if this occurs implicitly. This chapter explores the mandate of the CLCS, its competency to interpret the *Regime of islands*, and the approach the CLCS has chosen when confronted with divergent interpretations of the *Regime of islands* in execution of its functions.

I. Mandate

Where an UNCLOS member state lays claim to the outer continental shelf, it is obligated to submit the details of the outer limits to the CLCS, along with all technical and scientific data needed to evaluate these limits.[430] Only states that have become a party to UNCLOS are entitled to file submissions with the CLCS.[431] The CLCS considers the data and other materials that have been filed and subsequently informs the submitting state of its recommendations in the matter.[432] However, only the coastal state is vested with the authority to establish the limits of the continental shelf, the CLCS is not competent to review whether the coastal state has violated its recommendations and the CLCS "cannot impose its views on the coastal State"[433]. On the other hand, states are required to establish the limits of their outer continental shelves "on the basis of"[434] the recommendations of the CLCS. *Elferink* has remarked that "[t]he exact implications of that […] requirement are not clear"[435]. There thus appears to be some uncertainty regarding the extent to which the coastal state is bound by the CLCS' recommendations. The CLCS may provide scientific and technical advice to any coastal state

[428] Art 2 of Annex II UNCLOS.
[429] *Elferink,* Commission on the Limits of the Continental Shelf in Wolfrum (ed.), Max Planck Encyclopedia of Public international law (2015) para 6.
[430] Art 4 of Annex II UNCLOS.
[431] *Elferink,* Commission on the Limits of the Continental Shelf in Wolfrum (ed.), Max Planck Encyclopedia of Public international law (2015) para 10.
[432] Art 3 (1) (a) of Annex II UNCLOS.
[433] *Elferink,* Commission on the Limits of the Continental Shelf in Wolfrum (ed.), Max Planck Encyclopedia of Public international law (2015) para 4.
[434] Art 76 (8) UNCLOS.
[435] *Elferink,* Commission on the Limits of the Continental Shelf in Wolfrum (ed.), Max Planck Encyclopedia of Public international law (2015) para 4.

preparing a submission to the CLCS, if the coastal state so desires.[436] As has been noted, the CLCS has an obligation to advise and guide states in establishing the limits of their outer continental shelves and to issue recommendations in this matter. These functions are impossible to perform in the absence of basic familiarity with Article 76, which lays out the definition of the continental shelf as the "seabed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance"[437]. *Elferink* has noted that "it is difficult to determine the exact scope of the competence of the CLCS to address the interpretation of Art. 76 or Annex II"[438]. As the duties of the CLCS are in the first place technical and scientific,[439] UNCLOS does not require that the CLCS be staffed with lawyers.[440] According to *Elferink,* it would seem that "the drafters of the UN Convention on the Law of the Sea did not intend that the Commission should be the body deciding on legal questions related to the application of Art. 76"[441]. While this view is common among UNCLOS' member states, it clashes with the opinion expressed by the Chairman of the CLCS that the body is indeed competent to interpret Article 76 and Annex II where such interpretation is necessary to fulfill official duties.[442] *Hafner* has likewise remarked that the CLCS is tasked with the implementation of Article 76.[443] As *Elferink* has pointed out, denying the CLCS the authority to interpret the basic legal provisions it has to consider in the execution of its functions bears the risk of rendering the CLCS "largely ineffective"[444]. After all, the CLCS may have no other option but to violate its duty to issue recommendations by remaining idle in the face of submissions requiring an interpretation of UNCLOS. *Gau* has further argued that not only does the CLCS have "the power and the duty to apply Article 76"[445], but "a proper interpretation and application of Article 76 (1) by the CLCS […] may prevent encroachment [of the common heritage of mankind]"[446]. On the other hand, affirming the

[436] Art 3 (1) (b) of Annex II UNCLOS.
[437] Art 76 (1) UNCLOS.
[438] *Elferink,* Commission on the Limits of the Continental Shelf in Wolfrum (ed.), Max Planck Encyclopedia of Public international law (2015) para 9.
[439] *Ibid,* para 6.
[440] Art 2 of Annex II UNCLOS.
[441] *Elferink,* Commission on the Limits of the Continental Shelf in Wolfrum (ed.), Max Planck Encyclopedia of Public international law (2015) para 6.
[442] *Ibid,* para 9.
[443] *Hafner,* Die seerechtliche Verteilung von Nutzungsrechten (1987) 348.
[444] *Elferink,* Commission on the Limits of the Continental Shelf in Wolfrum (ed.), Max Planck Encyclopedia of Public international law (2015) para 9.
[445] *Gau,* The Commission on the Limits of the Continental Shelf as a Mechanism to Prevent Encroachment upon the Area, Chinese Journal of International Law 10 (2011) 3 (16).
[446] *Ibid.*

competence of the CLCS to interpret Article 76 may appear questionable in light of its lack of legal expertise.

II. Veto Power

According to Annex I of the Rules of Procedure of the CLCS, the CLCS may not consider and qualify a submission in the event of a land or maritime dispute.[447] This rule seemingly echoes Article 76 of UNCLOS, which stipulates that its provisions "are without prejudice to the question of delimitation of the continental shelf between States with opposite or adjacent coasts"[448]. Dispute settlement is, it would seem, beyond the mandate of the CLCS. As the Rules of Procedure of the CLCS clarify, only "with prior consent given by all States that are parties to [the land or maritime] dispute"[449] is it permissible for the CLCS to consider a submission concerning the disputed area. As a result of the prior consent-rule, submitting states engaged in disputes have for the most part cooperated in advance.[450] As *Elferink* has noted, this willingness to act jointly has often not extended to disputes over ownership of individual territories, with the result that the CLCS has in the past often refrained from considering submissions affecting such sovereignty disputes.[451] The fact that a "land or maritime dispute" can prevent the CLCS from taking a position raises the question which kind of conflicts fall under the definition of a "land or maritime dispute" and who can veto the CLCS' consideration of a particular area by alerting the body to the existence of such a dispute. Neither UNCLOS nor the Rules of Procedure of the CLCS provide a definition of the phrase "land or maritime dispute". *Elferink* has remarked that the CLCS "seems to have taken a restrictive approach to [the] definition [of 'land or maritime dispute']"[452], under which, for example, disagreements over the interpretation of Article 76 are not covered and would not hinder the CLCS from issuing recommendations. *Jensen* has argued that the veto right the Rules of Procedure of the CLCS confers on states is unduly expansive, noting that it appears to be both in violation of UNCLOS and seems to "undermine a fundamental purpose of the Convention, as expressed in its preamble: the strengthening of peace, security, cooperation and friendly relations among all nations"[453] by stirring up further dispute. *Jensen* has specifically opined that there is "a clear contradiction"

[447] Para 5 (a) of Annex I to the Rules of Procedure of the Commission on the Limits of the Continental Shelf, April 17, 2008, CLCS/40/Rev.1 [hereinafter Rules of Procedure of the CLCS].
[448] Art 76 (10) UNCLOS.
[449] Para 5 (a) of Annex I to the Rules of Procedure of the CLCS, *supra* note 447.
[450] *Elferink,* Commission on the Limits of the Continental Shelf in Wolfrum (ed.), Max Planck Encyclopedia of Public international law (2015) para 19.
[451] *Ibid.*
[452] *Ibid,* para 20.
[453] *Jensen,* The Commission on the Limits of the Continental Shelf: Law and Legitimacy (2014) 68.

between Article 76 (10), which stipulates that the activity of the CLCS is without prejudice to the UNLCOS' rules on the delimitation of continental shelf areas between states with opposite or adjacent coasts, and the Rules of Procedure of the CLCS, which state that any "land or maritime dispute" may prevent the CLCS from exercising its duties.[454] Arguably, the term "land or maritime dispute" covers an array of disputes that goes beyond disagreements over delimitation between neighboring states, for instance disputes over territorial sovereignty. *Jensen* has explained that the Rules of Procedure grant the parties to a land or maritime dispute a veto by barring the CLCS from considering a submission "without the consent of all parties to the dispute"[455]. According to *Jensen*, this veto power is in violation of UNCLOS, as the CLCS' obligation to exercise its duties is "not conditional upon the consent of other states"[456]. *Gau,* taking an entirely different approach, has argued that the right to veto the CLCS' consideration of a submission should be understood to be even more extensive than *Jensen* has suggested. According to *Gau*, not only a party to the dispute may veto the examination of a submission, but any state.[457] *Gau* has inferred this conclusion from the fact that the Rules of Procedure of the CLCS clarify that the CLCS may consider "any information regarding any disputes related to the submission"[458]. It should be noted that the CLCS does not seem to share the opinion that every state may easily halt proceedings by alerting the CLCS to a dispute. The CLCS in this way did not suspend its activities in the face of disagreement voiced by the United States following a submission made by Brazil, but explained that "the content of the letter from the United States should not be taken into consideration by the Commission"[459] because there was no land or maritime dispute. *Gau* is of the opinion that where a state finds that a submission by another state contains continental shelf limits encroaching upon the common heritage of mankind, this constitutes a "land or maritime" dispute capable of halting the CLCS' activity.[460] The two states need not share a maritime border, *Gau* has explained, because the Rules of Procedure of the CLCS explicitly exclude not only disputes between states with opposite or adjacent coasts from the CLCS' competency, but also exclude submissions "in other cases of

[454] *Ibid,* 67.
[455] *Ibid,* 66.
[456] *Ibid.*
[457] *Gau,* The Commission on the Limits of the Continental Shelf as a Mechanism to Prevent Encroachment upon the Area, Chinese Journal of International Law 10 (2011) 3 (11-13).
[458] Section II para 2 (b) of Annex III to the Rules of Procedure of the CLCS, *supra* note 447.
[459] Commission on the Limits of the Continental Shelf, Statement by the Chairman of the Commission on the Limits of the Continental Shelf on the progress of work in the Commission, September 14, 2004, CLCS/42, 3 et seq.
[460] *Gau,* The Commission on the Limits of the Continental Shelf as a Mechanism to Prevent Encroachment upon the Area, Chinese Journal of International Law 10 (2011) 3 (15 et seq).

unresolved land or maritime disputes"[461]. In a dispute over a submission describing continental shelf claims that seem to violate the maximum legal range and thereby encroach upon the common heritage of mankind, every state is a party. *Gau* has explained that this once more implies that "any State, be it neighbor or not, would be qualified to send third-party notification to the CLCS to boycott the Submissions encroaching upon the Area, as the Area is the concern of all the States in the world"[462]. From the legal perspective embraced by *Gau*, it appears that a state may prevent the CLCS from considering a submission on the basis that a continental shelf is claimed in violation of Article 121 (3) with the result that its limits unlawfully extend into what would otherwise be the Area.

III. Position on the Regime of islands

The primary task of the CLCS is to advise states seeking to definitely establish the limits of their outer continental shelves. Given this responsibility, it would be difficult for the CLCS to completely avoid discussing the legal provision stating which areas make up the continental shelf, which is Article 76. Indeed, the CLCS has affirmed that it understands itself to be competent to "deal with issues related to article 76 and Annex II to the Convention".[463] This raises the question whether the authority of the CLCS may extend to interpreting and applying legal provisions that concern indispensable preliminary questions, which, left unanswered, prevent any constructive application of Article 76. Article 76 notably determines that the continental shelf is "the natural prolongation of [the coastal state's] land territory"[464]. Importantly, "land territory" in this sense refers to islands in the narrow sense, but not to rocks. This means that, in a scenario involving island territories, it will often be impossible to determine the course of the outer limit of the continental shelf without having decided beforehand on what is and what isn't a "rock". *Gau* has explored the question of the CLCS' competency in deciding preliminary legal questions in some detail and has concluded that the *Regime of islands* provides context to Article 76 and that the CLCS is thus competent to interpret and apply Article 121.[465] The obstacle that legal interpretation of this kind would seem to require a body staffed with lawyers as opposed to geologists and hydrographists, can,

[461] Rule 46 (1) of the Rules of Procedure of the CLCS, *supra* note 447.
[462] *Gau,* The Commission on the Limits of the Continental Shelf as a Mechanism to Prevent Encroachment upon the Area, Chinese Journal of International Law 10 (2011) 3 (15-16).
[463] Annex II governs the composition and operating principles of the CLCS. See also *Elferink,* Commission on the Limits of the Continental Shelf in Wolfrum (ed.), Max Planck Encyclopedia of Public international law (2015) para 9.
[464] Art 76 (1) UNCLOS.
[465] *Gau,* The Commission on the Limits of the Continental Shelf as a Mechanism to Prevent Encroachment upon the Area, Chinese Journal of International Law 10 (2011) 3 (21).

according to *Gau*, be cleared by the CLCS consulting the Legal Counsel of the UN Office of Legal Affairs where need be.[466] However, while UNCLOS explicitly authorizes cooperation between the CLCS and other international bodies to the extent that this entails "exchanging scientific and technical information"[467], it is questionable whether the CLCS may seek external guidance in legal matters. The CLCS itself has found that while it is authorized to "deal with issues related to article 76 and Annex II to the Convention" this competency does not extend to delimitation matters or "other parts of the Convention or any other treaties".[468] This shows how, since the *Regime of islands* is undoubtedly in a different part of UNCLOS, namely Part VIII, the CLCS views itself as not authorized to interpret Article 121. South Korea and China have supported this stance in statements made in the context of the Japanese submission to the CLCS.[469] Both South Korea and China have criticized the submission of Japan on the basis that it included continental shelf areas measured from the island Okinotorishima, a minuscule Japanese territory that South Korea and China classify as a "rock".[470] South Korea also submitted that the interpretation of Article 121 (3) was "beyond the purview" [471] of the CLCS, whereas China noted that "[a]s a body consisting of experts in the fields of geology, geophysics and hydrography, the Commission should avoid the situation in which its work influences the interpretation and application of relevant provisions of the Convention, including Article 121"[472]. Both China and South Korea declared themselves to be in favor of the CLCS "set[ting] aside the portions relating to Oki-no-Tori Shima from its action on the submission made by Japan"[473]. While Japan agreed that the CLCS was not competent to interpret the *Regime of islands*, Japan objected to the solution suggested by China and South Korea: Japan submitted that the CLCS "not mak[ing] recommendations on the regions relating to Oki-no-Tori Shima Island has no legal basis"[474]. Observing that "no State other than Japan […] possesses any maritime area nearby which might overlap with the areas generated from the coastline of

[466] *Ibid.*
[467] Art 3 (2) of Annex II UNCLOS.
[468] The CLCS has regularly described this as a "general principle" in its recommendations to states. See for example CLCS, Recommendations of the Commission on the Limits of the Continental Shelf in Regard to the Submission made by New Zealand, August 22, 2008, 8; see also *Elferink,* Commission on the Limits of the Continental Shelf in Wolfrum (ed.), Max Planck Encyclopedia of Public international law (2015) para 9.
[469] Japan, Submission to the Commission on the Limits of the Continental Shelf pursuant to Article 76 (8) UNCLOS – Executive Summary, 2008.
[470] Note Verbale by the Republic of Korea, February 27, 2009, MUN 046/09; Note Verbale by the People's Republic of China, February 6, 2009, CML/2/2009.
[471] Note Verbale by the Republic of Korea, February 27, 2009, MUN 046/09.
[472] Note Verbale by the People's Republic of China, August 3, 2011, CML/59/2011.
[473] Note Verbale by the Republic of Korea, February 27, 2009, MUN 046/09; see also Note Verbale by the People's Republic of China, August 3, 2011, CML/59/2011.
[474] Note Verbale by Japan, April 9, 2012, PM/12/078.

[Okinotorishima]"[475], Japan concluded that there was no "land or maritime dispute"[476] justifying the abandonment of its duties by the CLCS. Excluding the continental shelf measured from Okinotorishima from consideration could, according to Japan, "be regarded as the matter of an interpretation of the Convention, which is not within the mandate of the Commission"[477]. Therefore, the CLCS should not "take into consideration the positions of China and the Republic of Korea"[478]. The solution suggested by Japan was in effect for the CLCS to issue recommendations in respect of all areas submitted without looking into Japan's interpretation of the *Regime of islands*, thereby accepting Japan's classification of Okinotorishima as an island in the narrow sense by implication. In the end, the CLCS acknowledged what had been uncontroversial among the states involved, namely that it had „no role on matters relating to the legal interpretation of article 121 of the Convention"[479]. The CLCS explained that it would omit the Southern Kyushu-Palau Ridge Region, which refers to the continental shelf measured from Okinotorishima, from its final recommendations as the CLCS was not „in a position to take action to make recommendations on the Southern Kyushu-Palau Ridge Region (KPR) until such time as the matters [relating to the interpretation of the *Regime of islands*] have been resolved"[480]. The CLCS' understanding of its own competency rules out that it will take a position on which islands can legally be classified as islands in the narrow sense and which are mere "rocks".

Section 5 Conclusion of Part One

The first Part of this thesis has addressed the role minor islands have played in international organizations, proceedings and practice throughout the 20th and 21st century. The history of codifications of the law of the sea reveals that two major developments shaped today's *Regime of islands*: first, following significant technological advancements in resource extraction methods, states started to lay claim to the continental shelf, especially in the wake of the Truman Proclamation in 1945.[481] Then, during the Third United Nations Conference on the Law of the Sea (1973 – 1982), the EEZ emerged as an institute of international law.[482] Prior to UNCLOS, the maritime zones of islands did not depend on their capacity to sustain settlements or enable

[475] Note Verbale by Japan, August 9, 2011, SC/11/233.
[476] Para 5 (a) of Annex I to the Rules of Procedure of the CLCS, *supra* note 447.
[477] Note Verbale by Japan, August 26, 2009, PM/09/735.
[478] Note Verbale by Japan, March 25, 2009, SC/09/108.
[479] Commission on the Limits of the Continental Shelf, Statement by the Chairman of the Commission on the Limits of the Continental Shelf on the progress of work in the Commission, April 20, 2009, CLCS/62, para 59.
[480] 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 Japan on 12 November 2008, April 19, 2012.
[481] Part 1 Section 1 III.
[482] Part 1 Section 1 VII.

economic exploitation, as islands were all awarded the same zones.[483] Islands where defined as natural high-tide elevations, which conceptually distinguished them from low-tide elevations.[484] Perhaps in an effort to prevent minor islands from generating exclusive access to the vast and relatively recently created EEZ and continental shelf, the adoption of UNCLOS in 1982 introduced the world to two new subcategories of islands: islands in the narrow sense and rocks.[485] The former category was to generate entitlement to the EEZ and continental shelf, while the latter category was not.[486] International case law reveals that the maritime zones of islands have been points of conflict as far back as the early 19th century.[487] In the 20th and 21st century, international courts and tribunals have often made only indirect or peripheral references to the *Regime of islands*, an approach that can be at least partially attributed to uncertainty surrounding the provision's scope of application.[488] This era of restraint has come to an end with the announcement of the award in the *South China Sea Arbitration*, which includes a detailed assessment of the meaning of the *Regime of islands* as well as an evaluation of the legal status of the Spratly Islands in light of Article 121 (3).[489] This decision has however been criticized for being out of step with contemporary state practice.[490] International judicature touching upon the subject of the *Regime of islands* shows that Article 121 is usually discussed in cases where the delimitation of maritime zones between states with opposite or adjacent coasts is at stake.[491] There are only three recorded cases where the *Regime of islands* was dealt with in isolation from the topic of delimitation.[492] While states have overall been less reticent in pronouncing their opinion on the *Regime of islands* than courts and tribunals, the positions of states are at times plagued by inconsistencies: despite the fact that there is a tendency to apply the label of the "island in the narrow sense" to even the tiniest of their own islands, "human habitation" and "economic life" can be interpreted in a comparatively narrow fashion when applied to the islands of maritime neighbors.[493] While the EEZ and continental shelf as general concepts are habitually incorporated into the domestic legal systems of the states parties

[483] Part 1 Section 1 I-VI.
[484] Part 1 Section 1 V.
[485] Part 1 Section 1 VII.
[486] See Art 121 UNCLOS.
[487] Part 1 Section 2 I.
[488] See Part 1 Section 2 II B 7 and Part 2 Section 1 IV B.
[489] Part 1 Section 2 II A 3.
[490] *Hafner,* Some Remarks on the South China Sea Award: Itu Aba versus Clipperton, Chinese (Taiwan) Yearbook of International Law and Affairs 34 (2016) 1 (10); see also *Tanaka,* Reflections on the Interpretation and Application of Article 121(3) in the South China Sea Arbitration (Merits), Ocean Development and International Law 48:3-4 (2017) 365 (373 et seq).
[491] Part 1 Section 2 II B.
[492] Part 1 Section 2 II A.
[493] Part 1 Section 2 II A 3 b.

to UNCLOS, the content of the *Regime of islands* is absent from domestic legislation in nearly all member states.[494]

As a body tasked with advising states in the process of delimiting their continental shelves, the CLCS may initially seem well-suited to determine whether or not an island generates entitlement to the continental shelf or not.[495] However, this task would involve taking a position on the interpretation of the *Regime of islands*, despite the fact that the CLCS was not conceived as a judicial body nor does it view itself as such.[496] Seeing that states having made submissions to the CLCS and the CLCS itself appear to be in agreement that a pronouncement on the correct interpretation or application of the *Regime of islands* is beyond its mandate,[497] the CLCS will in all likelihood continue to abstain from any involvement in the debate surrounding the correct interpretation of the *Regime of islands.*

[494] Part 1 Section 3 I.
[495] Part 1 Section 4 I.
[496] Part 1 Section 4 III.
[497] Part 1 Section 4 III.

PART 2 THE INTERPRETATION OF ARTICLE 121 (3)

The interpretation of the third paragraph of Article 121 constitutes the main part of this thesis. There will be a focus on the text parts that are simultaneously the most contentious and the most relevant to the provision's impact in practice, which are the definitions of "human habitation" and "economic life". To begin with, several preliminary questions will be addressed: these include the relevant methodology, the systematic context of the *Regime of islands* and its temporal elements. Lastly, this part will address the topic of structural modifications to an island's environment and the possibility that the concomitant maritime claims may amount to an "abuse of rights".

Section 1 Preliminary Questions

This Section will elaborate on the relevant international standards governing the interpretation of laws, the position the *Regime of islands* holds within the holistic system of norms that is UNCLOS and the temporal elements affecting the validity of any assessment under Article 121 (3).

I. On the Methodology of Treaty Interpretation

The methodology employed in this exposition of the meaning of Article 121 (3) is in essentials based on two sets of guidelines: on the one hand, the indisputably most relevant standards of interpretation can be found in the Vienna Convention on the Law of Treaties (VCLT), or more precisely in its Articles 31 and 32. On the other hand, we must not forget that the ICJ is an influential judicial body that has been forthcoming in explaining its approach to treaty interpretation and has thereby, through its pronouncements on the subject, contributed to the existing set of standards commonly used in the interpretation of international treaties.

A. The Vienna Convention on the Law of Treaties

This thesis analyses Article 121 (3) according to the fundamentals of treaty interpretation as they are embedded in Articles 31 and 32 VCLT.[498] Even though dissenting voices remain, there is a growing consensus that these guidelines to interpretation have entered into customary international law.[499] Both the ICJ's vociferous support of this position and the large number of

[498] Vienna Convention on the Law of Treaties, May 23, 1969, 1155 UNTS 331. [hereinafter VCLT].
[499] For a more detailed discussion on the role of Articles 31 and 32 VCLT in customary international law see *Villiger,* The Rules on Interpretation: Misgivings, Misunderstandings, Miscarriage? - The 'Crucible' lntended by the International Law Commission in Canizzario (ed.), The Law of Treaties Beyond the Vienna Convention (2011) 105 (118).

states having ratified the VCLT underline the role of Articles 31 and 32 VCLT as the primary point of reference when it comes to the interpretation of international treaties.[500] That these provisions are not formulated in an overly casuistic fashion ensures flexibility, which in turn permits their application to all kinds of international treaties, be their nature synallagmatic or – as is the case of UNCLOS - law-making. The "general rule" of interpretation states that "a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose"[501]. Article 31 (2) VCLT further clarifies which records shall appertain to the "context". Lastly, Article 32 permits the application of supplementary means of interpretation in the event that the general rule produces an absurd or ambiguous result. At first glance, the general rule appears to comprise a subset of interpretational rules seemingly in conflict with each other and thus in need of a hierarchical order. On closer observation it can however be seen that the individual aspects of the provision - such as the "ordinary meaning" of words or the significance of "object and purpose" - complement one another. They mutually serve to convey understanding of the underlying subject matter of the rule,[502] which is accessible through the intermediary of a certain phrasing. According to Article 31 VCLT, the "ordinary meaning" of words cannot be established in an isolated fashion. The VCLT emphasizes the meaning of words in the specific context of the treaty. This automatically implies that the meaning will in the end also be determined by the provision's purpose, given that use of the context mainly serves to elucidate the underlying aim of the provision. There is consequently no need for a specific hierarchy between the means of interpretation referred to in Article 31 VCLT.[503] Approaches to interpretation that single out one of the means of interpretation in Article 31 VCLT and ascribe a comparatively greater importance to it are not grounded to a satisfactory extent in state practice.[504] Next, the significance of the *travaux préparatoires* to this thesis requires a brief explanation.[505] Despite the view held by some that a "legal argument […] is not complete without a reference to the *travaux préparatoires*"[506], this thesis will not attribute a greater role

[500] 114 states are parties to the VCLT. *Ibid.*
[501] Art 31 (1) VCLT.
[502] *Köck,* Vertragsinterpretation und Vertragsrechtskonvention - Zur Bedeutung der Artikel 31 und 32 der Wiener Vertragsrechtskonvention 1969 (1976) 74.
[503] *Villiger,* The Rules on Interpretation: Misgivings, Misunderstandings, Miscarriage? - The 'Crucible' lntended by the International Law Commission in Canizzario (ed.), The Law of Treaties Beyond the Vienna Convention (2011) 105 (114).
[504] The textual approach is an example of an interpretation technique that is sometimes favored in international jurisprudence. *Ibid,* 115 et seq.
[505] The *travaux préparatoires* relevant to the understanding of Article 121 (3) are discussed in Part 2 Section 1 II.
[506] *Klabbers,* International Legal Histories: The Declining Importance Of *Travaux Préparatoires* In Treaty Interpretation?, Netherlands International Law Review (2003) 267 (281).

to the preparatory works than envisaged by the VCLT. As "supplementary means of interpretation", they are secondary in nature to the general rule embedded in Article 31 VCLT. It follows that they may be employed as a means of confirming the result obtained from the application of the general rule. Alternatively, their use is permitted in case said rule leaves the meaning of a term or provision "ambiguous or obscure"[507] or "manifestly absurd or unreasonable"[508]. *Hafner* has indeed found that, while the definition of rocks embedded in Article 121 (3) is "vague", it is not "ambiguous", "as the existence of a certain spectrum of meaning can be called neither obscure or ambiguous nor absurd or unreasonable, unless the full spectrum is of such nature"[509]. As a consequence, *Hafner* has reasoned, the *travaux préparatoires* should not inform the interpretation of Article 121 (3). And yet, the meaning of the *Regime of islands* has at times been described as "ambiguous"[510]. In light of the "elastic concept of ambiguity"[511], it is not surprising that the ambiguity or clarity of Article 121 (3), a norm which after all introduces the criteria of "human habitation" and "economic life" without offering further definitions of these terms, may be received differently by different scholars. Indeed, as *Dörr* explains "[i]t is regularly in the eye of the interpreter, *ie* subjective, whether, after applying the general rule of interpretation, the meaning of the treaty is clear or ambiguous"[512]. Beyond these considerations, some debate remains on the question whether the *travaux préparatoires* should really be limited to the narrow scope envisaged by the VCLT. According to *Klabbers*, resorting to the preparatory works is necessary, as the application of the general rule alone will often leave a provision's meaning ambiguous.[513] Such ambiguity could easily be obviated by a reference to the *travaux préparatoires*, for "one cannot quibble with history"[514]. *Klabbers* has thus proposed that the solution is to "not take the injunction of Article 32 too seriously"[515]. According to *Corten/Klein*, a compromise may "permit the interpreter to have recourse to [the *travaux préparatoires*] in cases where he or she would find

[507] Art 32 (a) VCLT.
[508] Art 32 (b) VCLT.
[509] *Hafner,* Some Remarks on the South China Sea Award: Itu Aba versus Clipperton, Chinese (Taiwan) Yearbook of International Law and Affairs 34 (2016) 1 (17-18).
[510] *Talmon* for example speaks of the "ambiguity of the language of Art. 121 (3)". See *Talmon,* Article 121 - Regime of Islands in Proelss (ed.), The United Nations Convention on the Law of the Sea - A Commentary (2017) 858 (861); see also *Beckman/Bernard,* The Significance of Offshore Geographic Features to Maritime Claims in *Wu/Zou* (eds.), Arbitration Concerning the South China Sea - Philippines versus China (2016) 199.
[511] *Dörr*, Article 32 – Supplementary means of interpretation in *Dörr/Schmalenbach* (eds.), Vienna Convention on the Law of Treaties – A Commentary[2] (2012) 617 (631).
[512] *Ibid,* 630.
[513] *Klabbers,* International Legal Histories: The Declining Importance Of *Travaux Préparatoires* In Treaty Interpretation?, Netherlands International Law Review (2003) 267 (284).
[514] *Ibid,* 286.
[515] *Ibid,* 285.

it useful"[516]. On the other hand, the notion that *travaux préparatoires* usually reflect the will of the drafters in a clear-cut fashion should be taken with a grain of salt. As the legislative history of Article 121 (3) shows,[517] the positions states take during the drafting stage of a treaty may differ from one another, as different states may attribute different objectives to the same provision.[518] *Elferink* has emphasized the supplementary nature of the *travaux préparatoires* and seemed to agree that they provide limited insight with regard to the meaning of Article 121 (3).[519] The importance of the *travaux préparatoires* to the interpretation of the *Regime of islands* should also not be overstated in view of the fact that some of the perhaps most relevant statements and points of discussion having shaped the provision as it exists today are not accessible.[520] The *Regime of islands* is founded on a compromise, which makes it difficult to assert with certainty which of the opposing opinions voiced during negotiations adequately reflect the final consensus. Or, as *Corten* and *Klein* have summed up the problem arising from the use of the *travaux préparatoires,* "the recourse to preparatory works, in particular to interpret a provision that was still controversial at the end of the negotiations, could simply confirm the ambiguity [concerning the provision's meaning], instead of dissipating it"[521]. While the *travaux préparatoires* shall remain a subsidiary means of interpretation, they shall not be omitted in their entirety. As per Article 32 VCLT, they will mainly be cited where they confirm the meaning arrived at by applying the general rule of interpretation. Lastly and in view of the fact that UNCLOS has been authenticated in Arabic, Chinese, English, French, Russian and Spanish, attention should be drawn to Article 33 VCLT.[522] Article 33 VCLT prescribes that all authenticated versions are "equally authoritative".[523] Where the reader nevertheless notices differences in meaning between the texts, he or she should look to "the meaning which best reconciles the texts"[524]. This thesis will consequently address such discrepancies where they are detected and relevant to the discussion. A comparison with other authentic versions of Article 121 (3) is particularly significant in the context of interpreting the phrase "of their own" and when evaluating whether in situations where communities rely on networks of islands, each

[516] *Corten/Klein*, The Vienna Convention on the Law of Treaties: a Commentary, Vol. 1 (2011) 848.
[517] See Part 2 Section 1 II.
[518] For an example of contradictory cues in the *travaux préparatoires,* see the discussion on the meaning of "or" in Article 121 (3) in Part 2 Section 2 III.
[519] *Elferink,* The South China Sea Arbitration's Interpretation of Article 121(3) of the LOSC: A Disquieting First, The Blog of the K.G. Jebsen Centre for the Law of the Sea, September 7, 2016 <site.uit.no/jclos/2016/09/07/the-south-china-sea-arbitrations-interpretation-of-article-1213-of-the-losc-a-disquieting-first/>.
[520] *Talmon,* Article 121 - Regime of Islands in Proelss (ed.), The United Nations Convention on the Law of the Sea - A Commentary (2017) 858 (861).
[521] *Corten/Klein*, The Vienna Convention on the Law of Treaties: a Commentary, Vol. 1 (2011) 857.
[522] Art 320 UNCLOS.
[523] Art 33 (1) VCLT.
[524] Art 33 (4) VCLT.

of these islands qualifies as an "island in the narrow sense" by virtue of contributing in some form to the livelihood of the population.[525]

B. Evolutionary Interpretation

Often, the formal amendment of treaties is not a viable solution as "[t]he standard process for amendment can quickly become an unachievable negotiation goal in view of the number of states parties to the major treaties"[526]. Obstacles to renegotiation may cause a treaty to become ill-suited to resolve contemporary legal problems. *Nolte* has pointed out that we have to decide whether the "treaty must be interpreted in light of the circumstances at the time of its conclusion ('contemporaneous interpretation'), or rather in the light of the circumstances at the time of its application ('evolutive interpretation')"[527]. While the VCLT's general rule of interpretation has little to say on the impact the passing of time may have on the meaning of the terms of a treaty,[528] the ICJ has found that the meaning of generic conventional terms may evolve over time. According to the ICJ, "[w]here the parties have used generic terms in a treaty (…) and where the treaty (…) is 'of continuing duration', the parties must be presumed, as a general rule, to have intended those terms to have an evolving meaning"[529]. The recognition of this "evolving meaning" has been labelled "evolutionary" or "dynamic" interpretation. *Dupuy* has labelled this concept "evolutionary interpretation supported by memory" and described it as "not a matter of giving a meaning to the text that was unintended by its authors; rather, it is the task of the judge to ensure that a new reading is undertaken in such a ways as to reflect the common desire of the parties as if they had renegotiated the same agreement taking into account the circumstances that have since evolved."[530] It represents the "loyal translation of the will of the parties, as opposed to deliberate betrayal of this will" [531]. *Hafner* has described the evolutive concept of treaty interpretation as "construct[ing] the term of a treaty in the light of the object and purpose of the treaty to be achieved under new factual circumstances"[532]. According to the

[525] See Part 2 Section 2 IV A 1 and Part 2 Section 2 V E 2.
[526] *McLachlan*, The Evolution of Treaty Obligations in International Law in Nolte (ed.), Treaties and Subsequent Practice (2013) 69 (71).
[527] *Nolte*, Jurisprudence of the International Court of Justice and Arbitral Tribunals of Ad Hoc Jurisdiction Relating to Subsequent Agreements and Subsequent Practice – Introductory Report for the ILC Study Group on Treaties over Time in Nolte (ed.), Treaties and Subsequent Practice (2013) 169 (184).
[528] *Dupuy,* Evolutionary Interpretation of Treaties: Between Memory and Prophecy in Canizzario (ed.), The Law of Treaties Beyond the Vienna Convention (2011) 127.
[529] International Court of Justice, *Case concerning the Dispute Regarding Navigational and Related Rights (Costa Rica/Nicaragua),* Judgment, ICJ Reports 2009, paras 66-67 [hereinafter *Navigational Rights Case*].
[530] *Dupuy,* Evolutionary Interpretation of Treaties: Between Memory and Prophecy in Canizzario (ed.), The Law of Treaties Beyond the Vienna Convention (2011) 126.
[531] *Ibid.*
[532] *Hafner*, Subsequent Agreements and Practice: Between Interpretation, Informal Modification, and Formal Amendment in Nolte (ed.), Treaties and Subsequent Practice (2013) 105 (108).

ILC, open or evolving concepts justify using rules of international law that have formed subsequent to the adoption of a specific treaty in the interpretation of this treaty.[533] This course of action, the ILC has explained, is in particular permissible where the concept "is one which implies taking into account subsequent technical, economic or legal developments" or „has a very general nature or is expressed in such general terms that it must take into account changing circumstances".[534] We may ask why the "dynamic" or "evolutionary" method of interpretation is of relevance to the interpretation of the *Regime of islands.* To that it may be responded that "human habitation" and "economic life" are what the ICJ has described as terms having an "evolving meaning"[535]. Technological innovation has made it possible to access resources in ways that were not possible at the time UNCLOS was drafted and were therefore not covered by the umbrella term of "economic life". Nonetheless, the drafters of UNCLOS, one can presume, would have understood these activities as "economic" in nature if they were asked today. It is highly probable that the ICJ would rule that "economic life" is a term carrying an "evolving meaning", as it has already found this to true with regard to the concept of "comercio"[536] which has a related connotation.[537] Conceptions of what it means for an island to sustain "human habitation" and "economic life" may change over time. This will be in particular shown in relation to small island communities, which have seen a shift from subsistence fishing and farming to tourism-based economies.[538] A fundamental principle of maritime delimitation, equity, has also seen significant changes to its meaning over the years.[539] According to UNCLOS' preamble, an "equitable international economic order"[540] means that the "special interests and needs of developing countries"[541] are respected. These special interests were almost certainly not covered by the concept of "equity" as it was understood in the early decades of the 20th century, at a time when developing states were routinely exploited as cheap suppliers of natural resources. This illustrates how the common conception of what is equitable in international law may evolve. In sum, evolutionary interpretation supported by memory is potentially relevant to this thesis, because the *Regime of islands* incorporates

[533] International Law Commission, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, Report of the Study Group of the International Law Commission, A/CN.4/L.702, July 18, 2006, 16-17.
[534] *Ibid*. See also *Dupuy,* Evolutionary Interpretation of Treaties: Between Memory and Prophecy in Canizzario (ed.), The Law of Treaties Beyond the Vienna Convention (2011) 129.
[535] *Navigational Rights Case*, paras 66-67, *supra* note 529.
[536] "commerce" *es*.
[537] *Navigational Rights Case*, paras 66-67, *supra* note 529.
[538] Part 2 Section 2 IV C 2.
[539] See also *Bowett,* Islands, Rocks, Reefs, and Low-Tide Elevations in Charney/Alexander (eds.), International Maritime Boundaries Vol. I (1993) 131 (132).
[540] Preamble of UNCLOS.
[541] *Ibid.*

concepts with an "evolving character open to political and social transformation" and is part of a treaty of "continuing duration" using "generic terms".[542]

II. The Adoption of the Regime of Islands: Legislative History

The legislative history of the *Regime of islands* showcases the competing interests behind its adoption, the rules that could have been adopted in its stead and the various readings attributable to it.[543] In order to achieve consensus, delegates had to settle on a provision worded in general terms, a process referred to in the *travaux préparatoires* as "amalgamat[ing] some of the alternative formulations"[544]. As will be shown, the result has been lamented as "intentionally ambiguous"[545] and was not universally well received. It is for this reason that some scholars have actually described the final wording of Article 121 (3) as the result of a failure to compromise instead of a compromise in itself.[546]

The Committee on the Peaceful Uses of the Sea-Bed and the Ocean Floor beyond the Limits of National Jurisdiction, or Sea-Bed Committee for short, was put in charge by the UN General Assembly to act as the preparatory body for the conference.[547] To understand its work, it is helpful to examine the relevant drafts and reports. The Sea-Bed Committee started its work on the maritime space attributed to islands in its 1973 session and by 1975 work on the *Regime of islands* was largely completed with only minor changes to the provision being made after this date.[548] The individual drafts and proposals recommended vastly different provisions, which show that the *Regime of islands* as it is known today was not necessarily the only or even the best solution to the issue of how much maritime space should be attributed to islands. The *Regime of islands'* basic definition of an "island" as "a naturally formed area of land, surrounded by water, which is above water at high tide" in Article 121 (1) was not new. As noted above, it had been adopted from former codifications, namely the outcome document of the 1930 Codification Conference and the 1956 LOS Articles, and was uncontroversial.[549] There was on the other hand strong disagreement on whether all islands – that is to say all high-

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[542] *Navigational Rights Case,* paras 66-67, *supra* note 529; *Dupuy,* Evolutionary Interpretation of Treaties: Between Memory and Prophecy in Canizzario (ed.), The Law of Treaties Beyond the Vienna Convention (2011) 129.

[543] For a comprehensive analysis of the *travaux préparatoires* see also *Nandan/Rosenne,* United Nations Convention on the Law of the Sea – A Commentary III (1995) 321 et seq.

[544] United Nations Office for Ocean Affairs and the Law of the Sea, The Law of the Sea: Régime of Islands, UN Sales No. E.87.V.11 (1988) 82.

[545] *Beckman/Bernard,* The Significance of Offshore Geographic Features to Maritime Claims in *Wu/Zou* (eds.), Arbitration Concerning the South China Sea - Philippines versus China (2016) 199.

[546] *Ibid,* 190.

[547] General Assembly Resolution 2750 C (XXV) of December 17, 1970.

[548] *Nandan/Rosenne,* United Nations Convention on the Law of the Sea – A Commentary III (1995) 335.

[549] See Part 1 Section 1 II and Part 1 Section 1 IV.

tide elevations – should be entitled to the same maritime zones or whether there should be a subcategory of islands entitled to no or less expansive maritime zones. We may refer to these opposing factions as delegations having favored "equality" among all islands on the one hand and delegations having preferred the "subdivision" of islands on the other hand. Of course, this is in itself only a rough classification: the provisions and criteria suggested were varied, and some delegations changed their positions as negotiations went on. Nevertheless, we can ascertain: out of 160 participating states, eighteen voiced vehement opposition to any subdivision of different types of islands and supported the equal treatment of islands and continental landmasses, without exception.[550] Therefore, when it became clear that Article 121 (3) was going to contain a category of islands, labelled "rocks", that was disentitled from certain maritime zones, eleven states called for the complete removal of the final version of Article 121 (3) from the draft convention.[551] On the other hand, thirty-five states either openly supported subdivision, spoke out against the effort to delete Article 121 (3) in its final version or expressed contentment with the final provision. Thirty-five states can thus be said to have supported subdivision in some form.[552] As we know, the *Regime of islands* today subdivides between rocks and other islands, which means that the variant openly backed by a larger number of delegations prevailed. In spite of this, the overall level of discontent with the *Regime of islands* at the end of the conference was significant. Sixteen states expressed dissatisfaction with the final version of Article 121 (3) or outright called for its deletion, versus sixteen states who remarked on their satisfaction with Article 121 (3) or at least objected to the prospect of its deletion.[553] The remaining 128 states did not comment on the last-minute proposal to delete

[550] United Nations Office for Ocean Affairs and the Law of the Sea, The Law of the Sea: Régime of Islands, UN Sales No. E.87.V.11 (1988) 27 (Cyprus); 31, 33, 53 (Greece); 34 (Fiji); 34, 51 (New Zealand); 34, 53 (Western Samoa); 34, 56 (Tonga); 51 (Uruguay); 60 (Canada); 62 (France); 62 (Venezuela); 63 (Jamaica); 66 (United Kingdom); 89, 105 (Japan); 103 (Iran); 107 (Brazil); 107 (Portugal); 108 (Australia); 108 (Ecuador).

[551] *Ibid,* 89, 105 (Japan); 91 (France); 103 (Venezuela); 105 (Greece); 105 (United Kingdom); 107 (Brazil); 107 (Portugal); 108 (Australia); 108 (Ecuador); 108 (Iran); 108 (Zambia).

[552] *Ibid,* 43 (Turkey); 52 (Madagaskar); 61 (Singapore); 25 (Tunisia); 40 (Romania); 48 (Algeria); 48 (Dahomey); 48 (Guinea); 48 (Ivory Coast); 48 (Liberia); 48 (Mali); 48 (Mauritania); 48 (Morocco); 48 (Sierra Leone); 48 (Sudan); 48 (Upper Volta); 48 (Zambia); 88 (Bangladesh); 88 (Cameroon); 88 (Iraq); 88 (Libya); 88 (Nicaragua); 88 (Somalia); 54, 55, 107 (Denmark); 98 (Dominican Republic); 98 (Ethiopia); 98,99 (Dominica); 106 (German Democratic Republic); 106 (USSR); 107 (Korea); 107 (Trinidad and Tobago); 109 (Colombia); 108 (Mongolia); 108 (Byelorussian Soviet Socialist Republic); 108 (Pakistan).

[553] For the group malcontent with Article 121 (3) see *ibid,* 89, 105 (Japan); 91 (France); 95 (Iraq); 95 (Ireland); 95 (Turkey); 96 (Algeria); 103 (Libya); 103 (Venezuela); 105 (Greece); 105 (United Kingdom); 107 (Brazil); 107 (Portugal); 108 (Australia); 108 (Ecuador); 108 (Iran); 108 (Zambia). For the group having expressed contentment with Article 121 (3) in its final version or having at least objected to the suggestion of deleting it, see *ibid,* 108 (Uruguay); 95, 98 (Cyprus); 98 (Fiji); 98 (Dominican Republic); 98 (Ethiopia); 98, 99 (Dominica); 106 (DDR/German Democratic Republic); 106 (USSR); 107 (Korea); 107 (Denmark); 107 (Trinidad and Tobago); 107 (Tunisia); 108 (Mongolia); 108 (Byelorussian Soviet socialist Republic); 108 (Pakistan); 109 (Colombia).

Article 121 (3) or their general contentment with the final outcome, but chose to vote in favor of the final version.

One reason for states' dissatisfaction with the final version of the *Regime of islands* can be attributed to the fact that neither faction saw their legislative goals achieved. Those states who had positioned themselves in favor of equality were dismayed: a rule limiting ocean space entitlement on the basis of such criteria as land area or population would "unfairly penalize island countries in the Pacific and would constitute a discriminatory act not envisaged in international law"[554]. On the other hand, those who were of the opinion that islands should not receive a legal status equal to that of continental territories were likewise disappointed. Some representatives noted that they "could not accept the wording of the article[in its final version]"[555]. *Beckman* and *Bernard* have similarly commented on the nature of Article 121 (3) as a widely unpopular provision.[556]

What follows is a look at the individual drafts and proposals submitted, starting with a look at those in favor of some form of subcategorization of islands:

> "2. An island situated in the economic zone or on the continental shelf of other States shall have no economic zone or continental shelf of its own if it does not contain at least one tenth of the land area and population of the State to which it belongs.
>
> 3. Islands without economic life and situated outside the territorial sea of a State shall have no marine space of their own."[557]

This proposal, submitted by Turkey, combines the criteria of proximity to neighboring territory and surface area, yet in a way that would seem to put states with large land areas at a disadvantage without legal cause for such discrimination. Madagascar suggested that a variety of factors should affect the categorization of islands, including "surface, population, contiguity to the principal territory and geological structure"[558]. Algeria, Dahomey, Guinea, Ivory Coast, Liberia, Madagascar, Mali, Mauritania, Morocco, Sierra Leone, Sudan, Tunisia, Upper Volta and Zambia submitted draft articles subdividing high-tide elevations into "vast naturally formed areas of land", "smaller naturally formed areas of land" and "naturally formed rocky elevations

[554] *Ibid,* 53 (Western Samoa).
[555] *Ibid,* 95 (Turkey).
[556] *Beckman/Bernard,* The Significance of Offshore Geographic Features to Maritime Claims in *Wu/Zou* (eds.), Arbitration Concerning the South China Sea - Philippines versus China (2016) 190.
[557] United Nations Office for Ocean Affairs and the Law of the Sea, The Law of the Sea: Régime of Islands, UN Sales No. E.87.V.11 (1988) 43 (Turkey).
[558] *Ibid,* 52 (Madagascar).

of ground", which they labelled islands, islets and rocks respectively.[559] These groups were additionally subdivided into "adjacent" and "non-adjacent" elevations, depending on the proximity to their home state. One of Romania's proposals referenced precise size thresholds. These draft articles introduced two new categories of elevations, both of which were not considered capable of generating their own EEZ and continental shelf, except in specified cases of close proximity to their home state's mainland coast. They were designated as "islets" and "islands similar to islets", with the former label applying to elevations less than one square kilometer in size and the latter to elevations of an as yet undetermined size:

> "Article 1
> 1. An islet is a naturally formed elevation of land (or simply an eminence of the sea-bed) less than one square kilometre in area, surrounded by water, which is above water at high tide.
> 2. An island similar to an islet is a naturally formed elevation of land (or simply an eminence of the sea-bed) surrounded by water, which is above water at high tide, which is more than one square kilometre but less than ... square kilometres in area, which is not or cannot be inhabited (permanently) or which does not or cannot have its own economic life.
>
> Article 2
> 1. In principle, a State may not invoke the existence, in one of its maritime zones, of islets or islands similar to islets, as defined in article 1, for the purpose of extending the marine spaces which belong to its coasts. (…)"[560]

The size threshold of one square kilometer also found its way into the Committee's single working document as one of three alternative versions of the article.[561] There were numerous suggestions on how to subdivide different types of islands. The drafts of the delegations pushing for the equal legal status of all high-tide elevations closely resembled each other. The wording used by Fiji, New Zealand, Tonga and Western Samoa in their draft articles was widely supported among the eighteen states having spoken out in favor of an equal legal status. These draft articles stipulated that the economic zone and the continental shelf of an island should be "determined in accordance with the provisions of this Convention applicable to other land territory", with a particular emphasis on the fact that these "provisions have application to all islands".[562] Uruguay submitted a draft article with a very similar wording which reiterated the

[559] *Ibid,* 48 (Algeria, Dahomey, Guinea, Ivory Coast, Liberia, Madagascar, Mali, Mauritania, Morocco, Sierra Leone, Sudan, Tunisia, Upper Volta, Zambia).
[560] *Platzöder,* Third United Nations Conference on the Law of the Sea - Documents of the Caracas Session 1974 (1975) 168.
[561] United Nations Office for Ocean Affairs and the Law of the Sea, The Law of the Sea: Régime of Islands, UN Sales No. E.87.V.11 (1988) 73.
[562] *Platzöder,* Third United Nations Conference on the Law of the Sea - Documents of the Caracas Session 1974 (1975) 134.

sentiment that the maritime zones of islands should be "determined and delimited in accordance with the provisions of this Convention applicable to its land territory"[563]. In the end, the Committee and the participating delegations settled for a variant of the *Regime of islands* echoing two criteria for subdivision that Romania had been strongly promoting: human habitation and economic life. Romania called for these determinants in two separate sets of draft proposals.[564]

The Romanian draft articles incorporated detailed directives relating to maritime boundary delimitation, an elevation's proximity to foreign and domestic coasts and additional criteria such as an elevation's concrete size, none of which made it into the final article, leaving the Romanian draft stripped of its specifics. With its reference to delimitation, the Romanian proposal hints at another controversy central to the origins of the *Regime of islands*: the question of whether and to what extent the *Regime of islands* impacts UNCLOS' rules on the delimitation of maritime boundaries between states with opposite or adjacent coasts. Having failed to come to an agreement in the matter, it was ultimately decided to completely omit this discussion point from UNCLOS' text.[565] In spite of this, states continued to suggest ways of incorporating the issue of delimitation into the *Regime of islands*. Even in the late stages of negotiation, Algeria, Bangladesh, Cameroon, Iraq, Libya, Madagascar, Morocco, Nicaragua, Somalia and Turkey submitted draft articles which, besides containing the by now familiar distinction based on human habitation and economic life, added this reference to delimitation to the *Regime of islands*: "Islands which because of their geographical location constitute a source of distortion or inequity in the drawing of a boundary line between two or more adjacent or opposite States shall have marine spaces only to the extent compatible with equitable principles and with all geographic and other relevant circumstances."[566] This is just one of many examples of states calling for an article that clarifies the interdependencies between boundary delimitation and the *Regime of islands*.[567] Indeed, the *Regime of islands'* shortcomings in this regard were deplored until the very end of negotiations.[568]

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[563] *Ibid,* 183.
[564] *Ibid,* 103, 168.
[565] United Nations Office for Ocean Affairs and the Law of the Sea, The Law of the Sea: Régime of Islands, UN Sales No. E.87.V.11 (1988) 3.
[566] *Ibid,* 88, 89 (Algeria, Bangladesh, Cameroon, Iraq, Libya, Madagascar, Morocco, Nicaragua, Somalia, Turkey).
[567] *Ibid,* 93 (Ireland), 43 (Turkey), 49 (Algeria, Dahomey, Guinea, Ivory Coast, Liberia, Madagascar, Mali, Mauritania, Morocco, Sierra Leone, Sudan, Tunisia, Upper Volta, Zambia).
[568] *Ibid,* 91 (Ireland), 95 (Turkey).

III. Systematic Context

Mentions of varying types of islands and their impact on the measurement of maritime zones abound throughout UNCLOS.[569] These references provide important context to the main focus of this thesis, which is the legal distinction between rocks and islands in the narrow sense as it is described in Article 121 (3).

A. The General Definition of Islands

The first paragraph of the *Regime of islands* contains the definition of "islands", an umbrella term which incorporates both "islands in the narrow sense" and "rocks": "An island is a naturally formed area of land, surrounded by water, which is above water at high tide". Islands within the meaning of Article 121 (1) may be composed of any naturally occurring material, be it rock, sand or coral, provided that it is "composed of solid material, attached to the substrate, and not of loose debris"[570]. Ice floes, although naturally formed and sometimes of gigantic proportions, do not qualify as islands, as they are not attached to the subsoil. Structures such as drilling rigs or man-made high-tide elevations constructed for touristic purposes do not meet the legal requirements for "islands" either and fall under the category of "artificial islands, installations and structures"[571]. Naturally formed islands may however be protected from erosion by artificial means, artificially enlarged or even entirely rebuilt in the wake of a natural catastrophe without this effecting a change in status.[572] Construction works do not immediately re-categorize an island as an "artificial island" within the meaning of Article 60 (8).[573] As long as a part of the cultivated or developed island was above water at high tide prior to human interference the feature remains an "island" by virtue of Article 121 (1). By contrast, "[a]rtificially increasing the height of a [low-tide elevation] by land reclamation […] 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'"[574]. It should be noted that the requirement that islands be "naturally formed" does not imply that "human habitation" and "economic life", conditions set out in Article 121 (3), must equally be possible prior to human

[569] For an enumeration of UNCLOS' provisions mentioning islands, see also *Nandan/Rosenne,* United Nations Convention on the Law of the Sea – A Commentary III (1995) 323.
[570] *Talmon,* Article 121 - Regime of Islands in Proelss (ed.), The United Nations Convention on the Law of the Sea - A Commentary (2017) 858 (863).
[571] Art 60 UNCLOS.
[572] *Talmon,* Article 121 - Regime of Islands in Proelss (ed.), The United Nations Convention on the Law of the Sea - A Commentary (2017) 858 (864).
[573] The impact of construction works and *mala fide* claims based thereupon is further explored in Part 2 Section 3.
[574] *Talmon,* Article 121 - Regime of Islands in Proelss (ed.), The United Nations Convention on the Law of the Sea - A Commentary (2017) 858 (867).

interference with nature.[575] Article 121 (1) further postulates that islands must be "above water at high tide", without specifying which of multiple tidal models should be applied: should states consider the highest astronomical tide, the mean high-water neap tide, the mean high-water spring tide or the mean sea level? When confronted with this question, the arbitral tribunal in the *South China Sea Arbitration* found that states are free to employ any model 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"[576]. There is no minimum altitude standard for islands. According to *Talmon*, an island can still be qualified as such even if it is "only millimetres or centimetres above water at high tide"[577].

B. Low-tide Elevations

Low-tide elevations are conceptually distinct from islands, which are by definition high-tide elevations. As Article 13 informs us, "[a] low-tide elevation is a naturally formed area of land which is surrounded by and above water at low tide but submerged at high tide." This description mirrors that of "islands" in Article 121 (1), with the notable exception of the tidal datum. It is contested whether or not low-tide elevations constitute "territory" in the sense that they can be appropriated.[578] In general, low-tide elevations do not have a territorial sea, a contiguous zone, an exclusive economic zone or a continental shelf. There are exceptions to this rule: low-tide elevations within the territorial sea of the mainland or an island may be used as base points for the territorial sea,[579] and low-tide elevations on which lighthouses or similar installations have been built on can be used in a system of straight or archipelagic baselines.[580] In this way, they are capable of expanding not only the coastal state's territorial sea, but also its EEZ and continental shelf by creating a "bulge" in these zones. After all, territorial sea baselines are simultaneously used as EEZ and continental shelf baselines.[581] *Symmons* has referred to a low-tide elevation that is situated within the territorial sea of the mainland or an island – and may therefore be used to determine the territorial sea baseline – as "intraterritorial"[582]. Such an intraterritorial low-tide elevation depends on its proximity to another landmass for its zone-

[575] See Part 2 Section 2 IV C 1.
[576] *South China Sea Arbitration,* para 311, *supra* note 28.
[577] *Talmon,* Article 121 - Regime of Islands in Proelss (ed.), The United Nations Convention on the Law of the Sea - A Commentary (2017) 858 (867).
[578] *Persian Gulf Case,* para 205, *supra* 303.
[579] Art 13 (1) UNCLOS.
[580] Art 7 (4), Art 47 (4) UNCLOS.
[581] Art 57, 76 UNCLOS.
[582] *Symmons*, Article 13 – Low-tide elevations in Proelss (ed.), The United Nations Convention on the Law of the Sea - A Commentary (2017) 131 (134).

generating capacity, a capacity that is thusly derivative or "parasitic"[583]. Due to "rocks" being a sub-category of "islands", low-tide elevations within the territorial sea of rocks are likewise capable of expanding the territorial sea. However, low-tide elevations within the territorial sea of rocks cannot extend the EEZ or continental shelf of a coastal state, because rocks do not generate these zones of themselves and the zone-generating capacity of low-tide elevations is merely derivative. The ICJ has clarified that low-tide elevations have no derivative zone-creating capacity where a low-tide elevation is merely within the territorial sea generated by another low-tide elevation in accordance with Article 13 (1).[584] The maritime claims stemming from any such "leap-frogging"[585] would be unlawful. The rule that intraterritorial low-tide elevations generate their own territorial sea even entails, according to *Symmons*,[586] that they may be used in a system of straight baselines despite the fact that Article 7 (4) expressly prohibits drawing straight baselines to and from low-tide elevations, except where lighthouses or similar installations have been constructed on them. The prohibition of Article 7 (4) is in this way interpreted as applying only to low-tide elevations outside the territorial sea. *Symmons* has further noted that Article 13 (1) could also be interpreted to mean that a low-tide elevation situated within 12 nm not of an island or the mainland, but of an already established straight baseline could be incorporated into this baseline, thereby stretching the limits of maritime zones even farther seawards.[587] Contrary to *Symmons'* position, it could be argued that straight baselines cannot be drawn to and from intraterritorial low-tide elevations in view of the express prohibition in Article 7 (4) and in view of Article 47, which lays out the rules on archipelagic baselines. Article 47 states that, just like straight baselines, archipelagic baselines cannot be drawn to and from low-tide elevations, except where lighthouses or similar installation have been constructed on them. There is one notable difference: Article 47 explicitly states that "where a low-tide elevation is situated wholly or partly at a distance not exceeding the breadth of the territorial sea from the nearest island"[588] its use in a system of archipelagic baselines is lawful. By embedding this phrase in Article 47, but omitting the phrase from Article 7, it would seem that the intention of the drafters was to allow the use of intraterritorial low-tide elevations devoid of lighthouses or similar installations in the drawing of archipelagic baselines, but not in the drawing of regular straight baselines.

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[583] *Ibid.* See also *Symmons,* Some Problems Relating to the Definition of 'Insular Formations' in International Law: Islands and Low-Tide Elevations, IBRU Maritime Briefing 1:5 (1995) 1 (7).
[584] *Persian Gulf Case,* para 207, *supra* note 303.
[585] *Ibid.*
[586] *Symmons*, Article 13 – Low-tide elevations in Proelss (ed.), The United Nations Convention on the Law of the Sea - A Commentary (2017) 131 (144).
[587] *Ibid.*
[588] Art 47 (4) UNCLOS.

C. Artificial Islands, Installations and Structures

Articles 60, 80 and 147 (2) (e) complement the *Regime of islands.* Article 60 formulates the rules applicable to artificial islands, installations and structures within the EEZ and Article 80 postulates that Article 60 shall be applied *mutatis mutandis* to artificial islands, installations and structures in and upon the continental shelf. Article 147 partly reiterates the postulations of Article 60 and applies them to installations used for carrying out activities in the Area. Most importantly, artificial islands, installations and structures are not "islands": they do not have baselines and they do not generate maritime zones, except for "safety zones", which must not exceed a breadth of 500 m.[589] They do not form part of the territory of a state, a state only exercises exclusive jurisdiction over them if they are within his EEZ or continental shelf.[590] The coastal state is competent to issue and enforce customs, fiscal, health, safety and immigration laws pertaining to the artificial structure.[591] Still, the coastal state's authority is not limitless. The coastal state is obligated to factor in certain shared interests of the international community. In particular, the coastal state must give due notice of the construction of artificial islands, installations and structures, warn of their presence, remove the structure upon abandonment and inform in the event of an incomplete removal.[592] That the coastal state is not completely free in its decision making but bound to respect the navigational freedoms of other states is also evident from the fact that it would be unlawful to erect an artificial island, installation or structure where "interference may be caused to the use of recognized sea lanes essential to international navigation"[593]. This potential conflict between the rights of a state exercising jurisdiction over an artificial installation and the general rights enjoyed by other states immediately beyond the installation's safety zone, was particularly apparent from the case of the *Arctic Sunrise*. In this case, environmental activists disrupted the operation of a drilling platform. The ensuing arrest of ship and crew lead to a dispute over the rights and obligations of the coastal state in such a situation.[594]

[589] Art 260 UNCLOS.
[590] *Proelss,* Article 60 – Artificial islands, installations and structures in the exclusive economic zone in Proelss (ed.), The United Nations Convention on the Law of the Sea - A Commentary (2017) 858 (479).
[591] Art 60 (2) UNCLOS.
[592] Art 60 (3) UNCLOS.
[593] Art 60 (7) UNCLOS.
[594] See *Rothwell/Stephens*, The International Law of the Sea[2] (2016) 95-96.

D. Seafloor Highs

UNCLOS describes the continental shelf as "the seabed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance"[595]. This entails that entitlement to the seabed and subsoil seawards of the 200 nm-line (or Outer Continental Shelf) depends on geomorphological and geological characteristics, while entitlement to the seabed and subsoil landwards of the 200 nm-line (or Legal Continental Shelf) does not. The question of the geomorphologic and geologic categorization of seafloor highs affects only the dimensions of the Outer Continental Shelf, which may extend all the way to the outer edge of the continental margin. The continental margin is composed of "the shelf, the slope and the rise"[596]. UNCLOS differentiates between different types of elevations on the ocean floor, some of which can be claimed as part of the continental shelf and some of which cannot. "Oceanic ridges"[597] are underwater mountain systems formed by plate tectonics and belong to the deep ocean floor. They cannot be claimed as a part of a coastal state's continental shelf. "Submarine ridges"[598] on the other hand can be claimed as part of the continental shelf. Whether a ridge is "oceanic" or "submarine" depends on whether it is a natural prolongation of the coastal state's land territory, which means we have to evaluate "not only the geological structure of the ridge, but also its morphology, its influence on evolution of the continental margin and continuity of the ridge"[599]. There are special restrictions in place for submarine ridges: where the continental shelf encompasses submarine ridges, "the outer limit of the continental shelf shall not exceed 350 nautical miles from the baselines from which the breadth of the territorial sea is measured"[600]. This is a restriction as the continental shelf can usually be claimed *either* up to nm from the baseline *or* up to a distance of 100 nm seawards of the "2,500 metre isobath, which is a line connecting the depth of 2,500 metres"[601], whichever one reaches farther. Lastly, there are "submarine elevations": the restrictions placed on submarine ridges do not apply to them. This entails that where the continental shelf is comprised of submarine elevations, it can extend either up to a distance of 350 nm from the baseline or up to a distance of 100 nm seawards of the 2,500 meter isobath.

[595] Art 76 (1) UNCLOS.
[596] Art 76 (3) UNCLOS.
[597] Art 76 (3) UNCLOS.
[598] Art 76 (6) UNCLOS.
[599] *Górski,* A Note on Submarine Ridges and Elevations with Special Reference to the Russian Federation and the Arctic Ridges, Ocean Development and International Law 40:1 (2009) 51 (53).
[600] Art 76 (6) UNCLOS.
[601] Art 76 (5) UNCLOS.

These submarine elevations are described as "natural components of the continental margin, such as its plateaux, rises, caps, banks and spurs"[602]. In what is reminiscent of the debate circling the *Regime of islands*, scholars have debated what separates a submarine ridge from the privileged submarine elevations. According to the CLCS' Scientific and Technical Guidelines, the classification of a seafloor high as a "submarine elevation" must take account of the natural growth process of a continent, which refers to the accretion of sediments and crustal material onto the continental margin. In this way, crustal fragments accreted to the continental margin are recognized as "submarine elevations". Seafloor highs that have formed as a result of magma erupting from a rift in the continental crust are also classified as "submarine elevations" as long as they "constitute an integral part of the prolongation of the land mass"[603]. It consequently appears that both geological and geomorphological aspects are relevant to the definition of "submarine elevations". While the distinction between "submarine ridges" and "submarine elevations" has been described as "not clear"[604], it is especially relevant in the context of claims to the arctic seafloor. As noted by *Jensen*, "[i]f the seafloor highs in the Arctic are legally classified as elevations, there may not be any areas of the seafloor in the Central Arctic Ocean beyond the Gakkel Ridge […] that are not under coastal state jurisdiction"[605]. In particular, the 2001 and 2015 Russian submissions to the CLCS reveal that the Russian continental shelf claim encompasses an area reaching beyond 350 nm from the baseline on the Russian coast, extending up to the North Pole.[606] This means that Russia has categorized at least some of the sea floor highs within the claimed area as submarine elevations.[607] A particular point of contention is the classification of the Lomonosov Ridge and the Alpha-Mendeleev Rise which, according Russia, form part of the Russian continental margin, whereas the United States has made the argument that they are more accurately described as an oceanic ridges.[608] In reaction to the Russian submission in 2001, the CLCS has found that neither the Lomonosov Ridge nor the Alpha-Mendeleev Rise constitute submarine elevations.[609] Russia has notably disputed the CLCS'

[602] Art 76 (6) UNCLOS.
[603] Commission on the Limits of the Continental Shelf, Scientific and Technical Guidelines of the Commission on the Limits of the Continental Shelf, CLCS/11 (May 13, 1999), para 7.3.
[604] *Jensen,* Russia's Revised Arctic Seabed Submission, Ocean Development and International Law 47:1 (2016) 72 (74).
[605] *Ibid,* 74-75.
[606] Russian Federation, Partial Revised Submission to the Commission on the Limits of the Continental Shelf in respect of the Continental Shelf of the Russian Federation in the Arctic Ocean (August 3, 2015) <un.org/depts/los/clcs_new/submissions_files/submission_rus_rev1.htm>.
[607] *Jensen,* Russia's Revised Arctic Seabed Submission, Ocean Development and International Law 47:1 (2016) 72 (75).
[608] *Górski,* A Note on Submarine Ridges and Elevations with Special Reference to the Russian Federation and the Arctic Ridges, Ocean Development and International Law 40:1 (2009) 51 (53-54).
[609] *Jensen,* Russia's Revised Arctic Seabed Submission, Ocean Development and International Law 47:1 (2016) 72 (80).

finding that the Mendeleev-Alpha Rise is an oceanic plateau on the oceanic crust of the Canada Basin resulting from volcanic activity. In its new submission from 2015, Russia has brought forward new bathymetric and seismic data, which it claims demonstrate more clearly that the Lomonosov Ridge and the Alpha-Mendeleev Rise are an uninterrupted morphological continuation of its land mass. As *Jensen* has noted "[w]hether the Commission is convinced by this explanation remains to be seen"[610].

E. Straight Baselines

The baseline from which the territorial sea, the contiguous zone, the EEZ and the continental shelf are measured usually corresponds to the "the low-water line along the coast as marked on large-scale charts officially recognized by the coastal State"[611]. Under certain conditions, UNCLOS allows for the drawing of straight baselines that connect the coast to adjoining offshore features that are thereby incorporated into a single continuous baseline. The legality of applying straight baselines was particularly contentious in the *Fisheries Case*.[612] In this momentous decision, the ICJ pronounced that straight baselines are permissible only if they do "not depart to any appreciable extent from the general direction of the coast"[613], a rule that was eventually included both in the 1958 Convention on the Territorial Sea and the Contiguous Zone and in UNCLOS.[614] UNCLOS further added the requirement that "the sea areas lying within [straight baselines] must be sufficiently closely linked to the land domain to be subject to the regime of internal waters"[615]. Straight baselines are credited with laying the groundwork for the eventual recognition of archipelagic baselines.[616] Low-tide elevations can be included in a system of straight baselines if lighthouses or similar installations have been built on them or where such baselines have been met with general international recognition.[617] The argument has been made that straight baselines can be drawn to and from low-tide elevations, where these low-tide elevations are within the range of the territorial sea.[618] Rocks and low-tide elevations can indirectly expand the EEZ and continental shelf by virtue of their inclusion in a system of straight baselines despite the fact that the *Regime of islands* postulates that rocks have no exclusive economic zone or continental shelf.[619] The use of straight baselines is permitted in

[610] *Ibid,* 82.
[611] Arts 5, 57, 33 (2), 76 (1) UNCLOS.
[612] See Part 1 Section 2 II A 1.
[613] *Fisheries Case* 133, *supra* note 165.
[614] Art 4 (2) Convention on the Territorial Sea and the Contiguous Zone, *supra* note 72; Art 7 (3) UNCLOS.
[615] Art 7 (3) UNCLOS.
[616] *Rothwell/Stephens*, The International Law of the Sea[2] (2016) 44.
[617] Art 7 (4) UNCLOS.
[618] See Part 2 Section 1 III B.
[619] Part 2 Section IV A.

case of highly unstable coastlines as well as "[i]n localities where the coastline is deeply indented and cut into, or if there is a fringe of islands along the coast in its immediate vicinity"[620]. *Rothwell* and *Stevens* have remarked that the straight baseline system gives coastal states "considerable latitude"[621] with respect to the interpretation of terms such as "a fringe of islands along the coast in its immediate vicinity"[622]. The wording of this provision seems to suggest that one island alone or even a small number of islands that are isolated from each other cannot constitute a "fringe".[623] *Rothwell* and *Stevens* have explained that straight baselines connecting offshore islands may measure up to 24 nm in length.[624]

F. Archipelagic Baselines

Where the 1958 and 1960 Conferences on the Law of the Sea had failed to recognize the unique situation of archipelagoes, UNCLOS achieved a breakthrough. Article 46 (b) defines an archipelago as "a group of islands, including parts of islands, interconnecting waters and other natural features which are so closely interrelated that such islands, waters and other natural features form an intrinsic geographical, economic and political entity, or which historically have been regarded as such"[625]. Most importantly, UNCLOS introduced a new system of straight archipelagic baselines, which would join "the outermost points of the outermost islands and drying reefs of the archipelago"[626]. Like regular straight baselines, archipelagic baselines must not "depart to any appreciable extent from the general configuration of the archipelago"[627] and they cannot be drawn to and from low-tide elevations, except in cases where these low-tide elevations support lighthouses. The inclusion of low-tide elevations is permitted where they are located – at least in part – within the territorial sea of the nearest island. The water to land ratio within archipelagic baselines is required to be between 1 to 1 and 9 to 1.[628] Additionally, archipelagic baselines can only be drawn around islands that include the archipelago's "main islands" – the definition of which is not clearly laid out, and may depend on factors such as population size, productivity and historical or cultural importance.[629] In principle, Article 47 (1) specifies that only archipelagic states – meaning states "constituted wholly by one or more

[620] Art 7 (1) UNCLOS.
[621] *Rothwell/Stephens*, The International Law of the Sea[2] (2016) 45.
[622] Art 7 (1) UNCLOS.
[623] *Rothwell/Stephens*, The International Law of the Sea[2] (2016) 46.
[624] *Ibid.*
[625] Art 46 (b) UNCLOS.
[626] Art 47 UNCLOS.
[627] Art 47 (3) UNCLOS.
[628] Art 47 (1) UNCLOS.
[629] Art 47 (1); *Davenport*, The Archipelagic Regime in Rothwell/Elferink/Scott/Stephens (eds.), The Oxford Handbook of the Law of the Sea (2015) 134 (145).

archipelagos and may include other islands"[630] – may make use of archipelagic baselines. Nevertheless, whether or not the mid-ocean archipelagos of continental states, or "dependent archipelagos", should equally be afforded this opportunity is a question that is still "mired in uncertainty"[631]. While some continental states advocated for a provision allowing the application of archipelagic baselines to dependent archipelagoes during the Third United Nations Convention on the Law of the Sea, this suggestion was rejected over concerns for the freedom of navigation and fears that it would lead to excessive maritime claims.[632] In spite of this setback, continental states such as Canada, Denmark, Ecuador, Portugal and Spain have since drawn straight baselines around mid-ocean island groups in seeming violation of Article 47 (1), often without clarifying whether the relevant baselines are simply "straight" or also "archipelagic".[633] In the *South China Sea Arbitration* such an approach was clearly opposed by the arbitral tribunal. In particular, it was declared that China could not draw archipelagic baselines surrounding the Spratly Islands as China "is constituted principally by territory on the mainland of Asia and cannot meet the definition of an archipelagic State"[634]. Nevertheless, the practice of applying archipelagic baselines to dependent archipelagoes may gradually assert itself as a rule of customary international law in future.[635]

IV. Area of Application

As *Kwiatkowska* and *Soons* have noted, there is „considerable and unresolved controversy as to the exact meaning and scope of the principle embodied in [Article 121 (3)]"[636]. There are two central issues surrounding the *Regime of islands*' area of application, which will be dealt with in consecutive order below. First, we may ask whether Article 121 (3) is at all applicable to rocks within the territorial sea of the mainland or another island, or is alternatively only relevant to islands outside the territorial sea of any other mainland or island. Secondly, we must assess whether Article 121 (3) exclusively applies to "entitlement questions", that is, to questions relating to the measurement of maritime zones, or whether the *Regime of islands* also affects the maritime boundary between states with opposite or adjacent coasts, which is a "delimitation" issue.

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[630] Art 46 (a) UNCLOS.
[631] *Davenport*, The Archipelagic Regime in Rothwell/Elferink/Scott/Stephens (eds.), The Oxford Handbook of the Law of the Sea (2015) 134 (156).
[632] *Ibid,*154.
[633] *Ibid,* 155.
[634] *South China Sea Arbitration,* para 573, *supra* note 28.
[635] *Davenport*, The Archipelagic Regime in Rothwell/Elferink/Scott/Stephens (eds.), The Oxford Handbook of the Law of the Sea (2015) 134 (156).
[636] *Kwiatkowska/Soons,* Entitlement to Maritime Areas of Rocks Which Cannot Sustain Human Habitation or Economic Life of Their Own, Netherlands Yearbook of International Law 21 (1990) 139 (180).

A. Applicability of the *Regime of islands* to Intraterritorial Islands

Any careful reader of the *Regime of islands* may wonder whether Article 121 (3) applies in equal measure to islands that lie within the territorial sea of another landmass – also referred to as "intraterritorial"[637] islands – and islands on the high seas. How have scholars responded to this particular question?

Kwiatkowska and *Soons*, have found that "once rocks are given effect for the determination of baselines, any maritime spaces, whether TS or EEZ/CS, can be measured from those baselines"[638]. This statement seems to suggest a special status for intraterritorial rocks which may involve an exemption from Article 121 (3), as an elevation's use as a basepoint for the baseline of another landmass hinges – amongst other criteria – on whether the elevation is within of beyond 12 nm from the coast of this landmass.[639] *Kwiatkowska* and *Soons* have further pointed out the abundancy of state practice confirming that rocks are employed in baselines for the territorial sea, the EEZ and the continental shelf.[640] On the other hand, *Kwiatkowska* and *Soons* have also argued that not all intraterritorial rocks may be employed as basepoints in the baseline from which the EEZ and continental shelf is measured, but only those rocks that are "situated in the vicinity of the coast"[641]. Rocks that are on the other hand "situated close to the outer limit of the [territorial sea] and within or beyond the EEZ/[continental shelf]"[642] can, according to *Kwiatkowska* and *Soons*, affect the baseline from which the territorial sea is measured but cannot be taken into account for EEZ or continental shelf measurement. This view is however not widely supported in legal doctrine. *Kolb* has argued that the use of rocks as base points in the delimitation of the territorial sea of another feature is not constrained by Article 121 (3). He has noted that Article 121 (3) concerns the maritime spaces of an elevation *proper*, which is to be distinguished from the use of an elevation to determine the maritime spaces of *another* landmass, usually the mainland.[643] Having found that these two questions are

[637] The descriptor "intraterritorial" is also used by *Symmons* in reference to low-tide elevations within territorial sea distance of the mainland or an island. See *Symmons*, Article 13 – Low-tide elevations in Proelss (ed.), The United Nations Convention on the Law of the Sea - A Commentary (2017) 131 (133); see also Part 2 Section 1 III B.

[638] *Kwiatkowska/Soons,* Entitlement to Maritime Areas of Rocks Which Cannot Sustain Human Habitation or Economic Life of Their Own, Netherlands Yearbook of International Law 21 (1990) 139 (147, 148).

[639] Art 13 UNCLOS.

[640] *Kwiatkowska/Soons,* Entitlement to Maritime Areas of Rocks Which Cannot Sustain Human Habitation or Economic Life of Their Own, Netherlands Yearbook of International Law 21 (1990) 139 (148).

[641] *Ibid,* 147.

[642] *Ibid,* 148.

[643] *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... », Annuaire français de droit international 40 (1994) 876 (899).

distinct from each other, he concluded that Article 121 (3) is generally not relevant to islands within the territorial sea. *Bowett* has expressed a somewhat similar opinion in noting that, where islands do not generate entitlement to maritime zones of their own, but are used as basepoints to ascertain the maritime zones of a different landmass, "islands have no special status, and they need to be considered together with rocks, reefs, and low-tide elevations"[644].

On the surface, the *Regime of islands* does not seem to make a distinction based on an island's location within or beyond the territorial sea of another landmass. And yet, an examination that takes the entirety of UNCLOS' baseline system into account reveals a more nuanced picture. The provisions that would appear to modify the *Regime of islands* with respect to intraterritorial rocks are in particular Article 13, 7 and 47. According to Article 13 (1), if low-tide elevations are within the territorial sea of another landmass, they can be used as basepoints in the territorial sea baseline – thereby expanding the territorial sea, but also the EEZ and continental shelf by creating a "bulge" in the outer limit of these zones.[645] After all, territorial sea baselines are simultaneously used as EEZ and continental shelf baselines.[646] If intraterritorial rocks were denied this capacity to expand the EEZ and continental shelf on the basis of Article 121 (3), this would produce the illogical result that a low-tide elevation can legally generate entitlement to the EEZ and continental shelf where a rock cannot, even if they are in equivalent geographic situations. In a similar fashion, the inclusion of rocks within a system of straight or archipelagic baselines would seem to grant these rocks the capacity to indirectly enlarge the EEZ and continental shelf of the coastal state, in apparent violation of Article 121 (3). The *Regime of islands* after all expressly stipulates that rocks "shall have no exclusive economic zone or continental shelf"[647] and makes no exception for rocks used in straight or archipelagic baselines. *Hafner* has referred to this apparent contradiction between Article 121 (3) and UNCLOS' provisions on baselines as the "problem of contextuality"[648]. There is however some consensus among scholars that Article 121 (3) is subsidiary to the rules on normal, straight and archipelagic baselines in Articles 7, 13 and 47, and does therefore not derogate this indirect entitlement to the EEZ and continental shelf.[649] Given the context, it would indeed be highly irregular to claim that the more general rule on the maritime entitlement of rocks, Article 121

[644] *Bowett,* Islands, Rocks, Reefs, and Low-Tide Elevations in Charney/Alexander (eds.), International Maritime Boundaries Vol. I (1993) 131 (151).
[645] See Part 2 Section 1 III B.
[646] Art 57, 76 UNCLOS.
[647] Art 121 (3) UNCLOS.
[648] *Hafner,* Some Remarks on the South China Sea Award: Itu Aba versus Clipperton, Chinese (Taiwan) Yearbook of International Law and Affairs 34 (2016) 1 (8).
[649] *Roach/Smith,* Straight Baselines: The Need for a Universally Applied Norm, Ocean Development & International Law 31 (2000) 47 (53).

(3), derogates the specific rules on normal, straight and archipelagic baselines – rules more acutely tailored to the subject of various island formations and their individual baseline. This would constitute not only a position unsupported by legal doctrine, but run counter to the principle of *lex specialis derogat legi generali*. In conclusion, it appears that intraterritorial rocks may be included in the territorial sea baseline of the mainland or an island in the narrow sense and may thereby indirectly enlarge the size of the EEZ and continental shelf.[650] This entails that the *Regime of islands* has very little impact on intraterritorial islands, which generate entitlement to maritime zones irrespective of habitation or economic usage. It should lastly be noted that the capacity of rocks to indirectly enlarge the EEZ or continental shelf of the coastal state – made possible by their inclusion in the territorial sea baseline of another landmass – is only derivative or "parasitic"[651]. It is dependent on a rock's proximity to another landmass. The derivative nature of a rock's capacity to enlarge the EEZ and continental shelf excludes rocks within territorial sea distance of each other from use as successive seaward basepoints. The ICJ has laid down this basic tenet in the context of low-tide elevations.[652] A rock within the territorial sea of a rock or low-tide elevation cannot expand the EEZ and continental shelf of the coastal state, as such an expansion would constitute what the ICJ has designated as "leap-frogging"[653]. The classification of an intraterritorial island as a rock or island in the narrow sense is therefore important only in a single scenario, which is whenever a coastal state appears to make an unlawful claim based on the practice of leap-frogging".

B. The *Regime of islands* and the Delimitation between States with Opposite or Adjacent Coasts

It has been questioned whether and to what extent the *Regime of islands* is relevant to cases concerning the drawing of maritime boundaries between states with opposite or adjacent coasts, also referred to as "delimitation" cases. If the *Regime of islands* does indeed have a role to play in these cases, we must further inquire after its relationship to UNCLOS' legal framework governing maritime delimitation. We shall approach these issues consecutively, dealing first with the applicability of the *Regime of islands* to delimitation cases before we look at the ways in which it interacts with UNCLOS' provisions on delimitation.

[650] See also *Talmon,* Article 121 - Regime of Islands in Proelss (ed.), The United Nations Convention on the Law of the Sea - A Commentary (2017) 858 (862).
[651] *Symmons*, Article 13 – Low-tide elevations in Proelss (ed.), The United Nations Convention on the Law of the Sea - A Commentary (2017) 131 (134).
[652] *Persian Gulf Case*, para 207, *supra* note 303.
[653] *Ibid,* para 207.

1. Applicability of the *Regime of islands* to Delimitation Cases

If we think of an island on the high seas that is isolated to such an extent that its potential maritime zones cannot overlap with those of any other state, we need concern us only with the question of the island's entitlement to maritime zones under Article 121. In determining the outer limit of the island's maritime zones, we consider whether it is a "rock" or an "island in the narrow sense". It is, in this scenario, unnecessary to account for UNCLOS' provisions relating to the delimitation of boundaries between opposite or adjacent coasts, because the island's zones border only the high seas. The scenario described affects only entitlement questions. If an island's potential maritime zones however overlap with the maritime zones of a foreign state, a border between these zones must be negotiated and entirely different considerations come into play. The case no longer deals exclusively with the question of an island's theoretical entitlement to maritime zones under Article 121, but is affected by the UNLCOS' provisions relating to the delimitation between states with opposite or adjacent coasts and thus concerns both matters relating to the title an island conveys and matters of "delimitation". The question that this chapter will answer is whether Article 121 (3) retains relevance in such "delimitation" cases or whether it should be ignored in scenarios where an island's potential maritime zones overlap with the zone of a neighboring state. We will examine indications in the *Regime of islands'* wording, context and purpose, and consider the relevant doctrine, UNCLOS' preparatory works, subsequent state practice and international judicature.

We shall start by examining what experts have to say on the possible role of the *Regime of islands* in the context of delimitation. *Talmon* has found that Article 121 (3) "does not deal with the question of delimiting the zones generated by islands in case of overlapping entitlements"[654]. *Elferink* has observed that "in the delimitation of maritime boundaries between states, in most cases it is either not necessary to resolve or possible to circumvent the question whether a particular island is a rock in the sense of article 121(3) of the LOS Convention"[655]. He remarked that "[a]lthough entitlement to and delimitation of maritime zones are closely related, in the case of article 121(3) both issues seem to have different implications"[656]. *Kolb* has expressly excluded the relation between Article 121 (3) and maritime delimitation from the scope of his analysis.[657] *Charney* has described the role of "rocks" in the resolution of

[654] *Talmon,* Article 121 - Regime of Islands in Proelss (ed.), The United Nations Convention on the Law of the Sea - A Commentary (2017) 858 (859).
[655] *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 (63).
[656] *Ibid.*
[657] *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... », Annuaire français de droit international 40 (1994) 876 (899).

conflicting maritime claims by states with a shared maritime border as "murky"[658]. *Bowett,* on the other hand, has found that factors such as an island's "size, population, political status, economic status, 'disputed' status […] and even timing of the boundary negotiations"[659] may influence the delimitation between states with opposite or adjacent coasts. This would seem to indicate that *Bowett* regards the pertinent criteria of Article 121 (3) – human habitation and economic life – as potentially relevant to maritime boundary delimitation. In sum, most legal scholars appear skeptical whether the *Regime of islands* holds any sway in delimitation cases. However, the wording of the *Regime of islands* does not bear out the theory that the *Regime of islands* should not affect delimitation. The subject matter of the *Regime of islands* is such that it seems near impossible to separate it from delimitation; if an island in the narrow sense is entitled to an EEZ, but a rock is not, how could this be construed as *not* affecting the EEZ boundary between two states? Additionally, given how severe a limitation to the *Regime of islands'* area of application the exclusion of delimitation cases would be, it would have been not only clarifying, but necessary to add a fourth paragraph, spelling out that "paragraph (3) shall not affect the course of maritime boundaries separating states with opposite or adjacent coasts" to the *Regime of islands*. No such clarification was included. While the *Regime of Islands* and the rules on delimitation were indeed embedded in different Parts of UNCLOS,[660] this is not enough to imply that there should be no interdependency between these provisions. For an insight into whether or not states intended the *Regime of islands* to cover delimitation cases, we shall look to the *travaux préparatoires.* There was some opposition to recognizing the *Regime of islands'* relevance to delimitation cases during UNCLOS' drafting process.[661] According to the compilation of preparatory documents published by the United Nations "[t]he question of the role of islands in the delimitation process was not expressly provided for [in UNCLOS], nor was any link made between provisions concerning the regime of islands and the delimitation provisions"[662]. While the subject of the relation between the *Regime of islands* and delimitation was omitted from the negotiating text, the *travaux préparatoires* welcomed

[658] *Charney,* Rocks that Cannot Sustain Human Habitation, The American Journal of International Law 93 (1999) 863 (866).
[659] *Bowett,* Islands, Rocks, Reefs, and Low-Tide Elevations in Charney/Alexander (eds.), International Maritime Boundaries Vol. I (1993), 131 (132).
[660] Whereas the delimitation of the territorial sea, the EEZ and the continental shelf between states with opposite or adjacent coasts are respectively dealt with in part II, part V and part VI of UNCLOS, Article 121 is the sole provision of and hence equates part VIII of the Convention.
[661] As such, the representative of New Zealand submitted a draft on the entitlement of island territories with the express reservation that it was not intended to impact on delimitation questions, but was meant to apply where "that kind of problem did not arise"; see United Nations Office for Ocean Affairs and the Law of the Sea, The Law of the Sea: Régime of Islands, UN Sales No. E.87.V.11 (1988) 35 (New Zealand).
[662] *Ibid,* 3.

and emphasized the law-making function of future state practice and jurisprudence in this respect.[663] The interrelation between the *Regime of islands* and delimitation was thus left intentionally unregulated, a gap that was supposed to be closed by state practice and jurisprudence to come. So how have states and international courts and tribunals approached this subject in the years since the *Regime of islands'* inception? As has been shown earlier,[664] both states and judicial bodies have frequently invoked Article 121 (3) in delimitation cases, seemingly confirming that Article 121 (3) impacts delimitation as well as entitlement questions.[665] As expounded above, Denmark,[666] Bangladesh,[667] Romania,[668] Nicaragua and Colombia all explicitly relied on Article 121 (3) in delimitation cases before international tribunals.[669] While the *Regime of islands* remains unmentioned in many judgments and awards revolving around small islands and their impact on the maritime boundary, this is due to the fact that the ICJ has often relied on the rationale underlying Article 121 (3), rather than citing the provision verbatim. One of these cases is the *Bay of Bengal Case (Myanmar/Bangladesh),* which led the ICJ to declare that St. Martin's Island was not comparable to "insignificant maritime features"[670] in light of its local population and economy. In so doing the ICJ echoed the rationale of Article 121 (3) in a context clearly relating to delimitation. In the *Colombian Islands Case,* a delimitation case, the ICJ explicitly invoked the *Regime of islands* and established the legal status of two Colombian islands pursuant to Article 121 (3).[671] The impact of Article 121 (3) on inter-state delimitation also manifests itself via its influence on the *doctrine of minor geographical features*, a delimitation practice common in international judicature.[672] In the *Black Sea Case*, the ICJ directed the question of the scope of Article 121 (3) to the parties. The court requested the parties submit their positions on whether or not Article 121 (3) should in general impact the maritime boundary between states.[673] Unfortunately but foreseeably,[674] the litigants - Romania and Ukraine - were not of one mind on the matter and

[663] *Ibid.*
[664] See Part 1 Section 2 II B.
[665] See also *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 (58).
[666] *Jan Mayen Case (Denmark/Norway)*, Memorial submitted by the government of the Kingdom of Denmark on July 31, 1989, Vol. 1, para 302, *supra* note 290.
[667] *Bay of Bengal Case (Bangladesh/Myanmar)*, Memorial of Bangladesh, July 1, 2010, fn 261, *supra* note 328.
[668] *Black Sea Case*, para 180, *supra* note 310.
[669] *Colombian Islands Case*, paras 171, 173, *supra* note 34.
[670] *Bay of Bengal Case (Bangladesh/Myanmar)*, para 151, *supra* note 310.
[671] *Colombian Islands Case*, para 238, *supra* note 34.
[672] See Part 3 Section 4 II.
[673] The written submissions relating the parties' views on the scope of application of Article 121 (3) have already been discussed above in Part 1 Section 2 II B 7.
[674] Given the circumstances of the case, it was in the interest of Romania to argue that Article 121 (3) applied to the delimitation case at hand, as this provision provided an opportunity to limit the maritime zone surrounding the small Ukrainian feature of Serpents' Island. From the Ukrainian perspective, a more desirable outcome was within

the decision remained with the ICJ's judges. The ICJ exercised judicial discretion and avoided a definite response, ruling that any assessment of the relevancy of Article 121 (3) to the delimitation case at hand was superfluous.[675]

In sum, text and context of the provision indicate that the scope of the *Regime of islands* covers delimitation cases. The *travaux préparatoires* indicate that the matter was left intentionally unregulated, in the hope that future state practice and judicature would fill this regulatory gap. And while state practice and especially judicial bodies have shown that there remains some division – or at the very least hesitation to take a position – on the subject, there is a clear trend towards the recognition that the *Regime of islands* is relevant to the delimitation of maritime boundaries between states with opposite or adjacent coasts.

2. The Interrelation between the *Regime of islands* and Articles 15, 74 and 83 in Practice

In a first step, we shall acquaint ourselves with the basic framework of maritime delimitation. Articles 15, 74 and 83 are UNCLOS' central provisions on matters of delimitation. Article 15 identifies equidistance as the defining element in every delimitation of the territorial sea between states with opposite or adjacent coasts. Article 74 and 83 call on states to conclude delimitation agreements for the EEZ and continental shelf which shall lead to equitable solutions on the basis of international law or, if agreement fails, to make use of UNCLOS' dispute settlement mechanism. Even though these provisions thus lay out rules on the delimitation of the territorial sea that are different from the rules on the delimitation of the EEZ and continental shelf, the techniques in use to delimit all of these zones are actually quite similar.[676] International tribunals have developed a three-stage approach to delimitation,[677] which shall be briefly summarized as follows: firstly, the judicial body selects base points off the adjacent or opposite coasts that serve to draw a provisional equidistance line. Secondly, the judicial body looks for special circumstances meriting the adjustment of this line. At this stage, islands relevant to the delimitation may be omitted by virtue of being "rocks" or distorting the

reach if Article 121 (3) was not relevant to delimitation issues at all. For a detailed study of the *Black Sea Case* see Part 1 Section 2 II B 7 above.

[675] *Black Sea Case,* para 187, *supra* note 310.

[676] According to the decision in the *Jan Mayen Case* the methods applied to draw the boundaries between neighboring continental shelves, fishery zones or all-purpose boundaries "produce much the same result", a finding that was reiterated in the *Persian Gulf Case. Jan Mayen Case (Denmark/Norway),* para 56, *supra* note 290; Persian Gulf Case, para 231, *supra* note 303.

[677] The three-stage process played a prominent rule in the *Black Sea Case*, *supra* note 310; the *Bay of Bengal Case (Bangladesh/Myanmar), supra* note 328; the *Bay of Bengal Case (Bangladesh/India), supra* note 365; the *Colombian Islands Case, supra* note 34; and in the *Persian Gulf Case, supra* note 303. The three-stage approach to delimitation is furthermore explored in detail in *Zhang,* The ITLOS Judgment in the Bay of Bengal Case between Bangladesh and Myanmar, Chinese Journal of International Law 12 (2013) 255 (268 et seq).

boundary. In the third and final step, also referred to as the "proportionality test", the ratio between coastline length and the size of the maritime area attributed to the coastal state is established for both parties to the boundary dispute. Then, the two ratios are compared in order to highlight eventual inequalities that may call for an adjustment of the line. While international courts and tribunals have in some cases deviated from this approach and eliminated base points on small features as early as the first stage,[678] this is not common practice.[679] Where an island is to be discounted, solid grounds for its distorting effect must be presented.[680] State practice overall seems to indicate that, if an island relevant to a contentious boundary falls into the category of an island in the narrow sense, this is an argument in favor of refraining from eliminating or unduly reducing its effect on the equidistant boundary line. If, on the other hand, its characteristics are closer to that of a rock within the sense of Article 121 (3), this would seem to speak for its omission or at least limited effect on the boundary. An island in the narrow sense whose territorial sea does not overlap with the territorial sea of a neighboring state should for example at least partially affect the EEZ boundary, even if it is situated off the shores of the neighboring state, as it is in principle entitled to an EEZ.[681] On the other hand, if the feature in question is a mere "rock", it can be discounted as a base point for the drawing of the EEZ or continental shelf and may – depending on the circumstances – be awarded a territorial sea enclave.

V. The Temporal Dimensions of Article 121 (3)

Under the heading of the "temporal dimensions" we shall, in essence, discuss two closely interrelated questions. First, we have to address the question of the permanency of the legal status of islands. If a court has found an elevation to be an island in the narrow sense, is this finding valid for perpetuity? What happens if rising sea levels lead to a complete submersion

[678] This applies for instance to the *Black Sea Case*. In this case, the ICJ asserted that the initial course of the provisional equidistance line was determined by "methods that are geometrically objective" and excluded the base point on Serpents' Island during the first stage. See *Black Sea Case,* para 116, *supra* note 310. In the *Bay of Bengal Case (Bangladesh/Myanmar)* St. Martin's Island was likewise eliminated at an early stage. This method has however been criticized as "problematic". See *Schofield/Telesetsky/Lee*, A Tribunal Navigating Complex Waters: Implications of the Bay of Bengal Case, Ocean Development & International Law 44:4 (2013) 363 (380).

[679] For a complete list of cases confirming the practice of employing all features in the initial construction of the provisional equidistance line, see *Bederman,* Maritime Delimitation in the Black Sea (Romania v. Ukraine), The American Journal of International Law 103 (2009) 543 (548).

[680] See Part 3 Section 3 II.

[681] An example of such a feature is St. Martin's Island, which was pivotal in the delimitation case between Bangladesh and Myanmar. It was accorded full effect in respect of the territorial sea boundary, but had no bearing on the EEZ or continental shelf boundary. *Bay of Bengal Case (Bangladesh/Myanmar),* paras 319, 152, *supra* note 328.

of the island? Secondly, we may inquire after the relevant evaluation moment and whether past and future developments should affect the assessment of an island's legal status in any way.

A. The Ambulatory Nature of The Status of Islands

The question of whether the legal status of an island is, once authoritatively established, permanent or dependent on consistent conditions is of some importance in a world experiencing the continuing effects of climate change. *Dipla*, who was among the first to comment on this issue, found the prospect of an ambulatory status for islands problematic in view of the swiftness with which a state's entitlement to maritime zones would change as soon as the state chose to render an island habitable.[682] *Dipla* suggested that recognizing that the status of an island may change over time would lead to a sudden surge in EEZ and continental shelf claims around insignificant territories.[683] While concerns that coastal states may try to set up settlements on islands only to gain access to the EEZ and continental shelf are indeed justified,[684] it is widely held that an island's legal status may change over time.[685] *Kwiatkowska* and *Soons* have regarded this as so evident that they did not even address the matter separately but implicitly assumed this to be the case.[686] *Tanaka* has noted that "the capacity of a maritime feature may change over time"[687] and has in this context criticized the "static" interpretation of Article 121 (3) in the *South China Sea Arbitration*. *Charney* has explained that whether human

[682] *Dipla,* Le régime juridique des îles dans le droit international de la mer (1984) 84.
[683] *Ibid.*
[684] This can be seen from recent efforts to expand the surface area of rocks and lay dry reefs. The land reclamation process and construction works on some features in particular have raised the suspicion of having been undertaken in order to elevate their status from low-tide elevations or rocks to islands in the narrow sense. These cases include Okinotorishima and the features pertaining to the so-called "Great Wall of Sand", notably Johnson South Reef, Fiery Cross Reef, Hughes Reef, Mischief Reef, Subi Reef, Cuarteron Reef and Gaven Reef. See U.S. Navy alarmed at Beijing's 'Great Wall of sand' in South China Sea, The Washington Post, April 1, 2015 <https://www.washingtonpost.com/world/us-navy-alarmed-at-beijings-great-wall-of-sand-in-south-china-sea/2015/04/01/dda11d76-70d7-4b69-bd87-292bd18f5918_story.html>; for further information on Okinotorishima see Part 1 Section 3 II E.
[685] *Charney,* Rocks that Cannot Sustain Human Habitation, The American Journal of International Law 93 (1999) 863 (867 et seq); *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... », Annuaire français de droit international 40 (1994) 876 (906); *Gjetnes,* The Spratlys: Are They Rocks or Islands?, Ocean Development & International Law 32 (2001) 191 (197); *Beckman/Bernard,* The Significance of Offshore Geographic Features to Maritime Claims in *Wu/Zou* (eds.), Arbitration Concerning the South China Sea - Philippines versus China (2016) 198 ; *Talmon,* Article 121 - Regime of Islands in Proelss (ed.), The United Nations Convention on the Law of the Sea - A Commentary (2017) 858 (867-868).
[686] *Kwiatkowska* and *Soons* for instance state that reefs that have become permanently dry land through the process of land reclamation may be considered islands in the narrow sense. The reason that is given in this context is that land reclamation is merely a way of assisting nature. This line of argument only makes sense if it proceeds from the premise that natural processes can change the legal status of islands. *Kwiatkowska/Soons,* Entitlement to Maritime Areas of Rocks Which Cannot Sustain Human Habitation or Economic Life of Their Own, Netherlands Yearbook of International Law 21 (1990) 139 (172).
[687] *Tanaka,* Reflections on the Interpretation and Application of Article 121(3) in the South China Sea Arbitration (Merits), Ocean Development and International Law 48:3-4 (2017) 365 (379).

habitation and economic life occur depends on "socioeconomic circumstances"[688]. Human habitation and economic life, he added, are "directly linked to human activities and development"[689], which evolve over time. *Charney* has pointed out that "changes in the value of resources and human capacity to inhabit or economically develop the area" may increase or diminish an island's capacity for economic life or human habitation.[690] In fact, *Charney* illustrated the will of the provision's authors to establish a flexible status for islands by drawing attention to their statements during the drafting process.[691] At least some of the negotiating states wanted to retain the possibility that the legal status of islands may change with the advancement of technology. *Charney*'s argument that "human habitation" and "economic life" seem to be designed as changeable characteristics appears convincing. Climatic events such as sea level rise, volcanic activity or alluvial deposits may impact the potential an island holds as a home to human settlements. Additionally, the size of settlements changes with migration flows, while some economic ventures, in particular those based on resource exploitation, are only intended to operate for a finite period. In much the same way, technological advancements may enable the exploitation of formerly inaccessible minerals, suddenly conferring an economic value to the island exhibiting the relevant deposits. There is no reason to believe that UNCLOS' drafters wished to exclude these changes from impacting on an island's legal status, given that their occurrence is foreseeable. It should not come as a surprise that the legal status of islands is ambulatory if the determinant of that status, i.e. the ability to "sustain human habitation or economic life", may itself be subject to change over time.[692] This does not entail that a judicial body may view the legal status of an island differently during different stages of the same trial. In the event of changes to an island's environment during a single trial, the court or tribunal would be bound to base its legal classification of the island on the time of the claim, as shall be explained more thoroughly in the next chapter.[693]

Viewing the status of an island as a constant unaffected by environmental changes, leaves us searching for the relevant point in time when the legal status of the island became immutable. Is this key date to be equated with the moment the island first formed or the date it made its first appearance on either the maps of seafarers or on official nautical charts? Or is an island's classification immutable following the submission of official charts to the CLCS? It appears

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[688] *Charney,* Rocks that Cannot Sustain Human Habitation, The American Journal of International Law 93 (1999) 863 (867 et seq).
[689] *Ibid.*
[690] *Ibid,* 867.
[691] *Ibid.*
[692] *Gjetnes,* The Spratlys: Are They Rocks or Islands?, Ocean Development & International Law 32 (2001) 191 (197).
[693] Part 2 Section 1 V B.

unlikely that the legal status of islands was envisioned as permanent and unperturbed by environmental changes, given that the baselines from which the territorial sea, the contiguous zone, the EEZ and the continental shelf are measured, and which serve similar functions, are widely regarded as ambulatory in nature.[694] And yet, baselines are dependent on less volatile criteria than the classification of islands. The ambulatory nature of baselines is inferred by negative implication from the fact that the Convention explicitly prescribes fixed delimitation points in two instances,[695] but refrains from doing so on other occasions. The first such example refers to straight baselines. Straight baselines can be maintained in spite of an altered coastline until the coastal state chooses to adjust them in accordance with UNCLOS.[696] Secondly, UNCLOS refers to "fixed points"[697] comprising the seaward limit of the outer continental shelf. No such definite language is used with respect to the measurement of any other maritime zone. While human settlement and economic activity may depend on the construction of desalinisation plants or a certain climate, baselines are affected by the construction of ports and the rise and fall of the sea level. The dependency of baselines on the tidal datum gives rise to devastating consequences: island nations threatened by global warming and the associated rise in sea levels face a steady reduction of their territory as well as harsher climatic conditions. With states' existence as sovereign nations at stake, efforts have been made to eliminate or mitigate the effects of climate change. *Talmon* has suggested that "[n]atural 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."[698] Among the proposed solutions is furthermore the global "freezing" of baselines or the outward limit of maritime zones at a point in time that has yet to be determined.[699] This naturally includes the introduction of a fixed status for islands and consequently the irrelevancy of newly formed islands or artificial alterations to existing islands. While not providing a solution to the problem of receding living space, the concept of the "deterritorialised state"[700] solidifies and affirms a

[694] *Schofield,* Against a rising tide: ambulatory baselines and shifting maritime limits in the face of sea level rise, Paper presented at the Proceedings of International Symposium on Islands and Oceans, Akasaka, Tokyo, January 22-23, 2009, 74. For further references, see also *Rayfuse,* International Law and Disappearing States: Utilising Maritime Entitlements to Overcome the Statehood Dilemma, University of New South Wales Faculty of Law Research Series 52 (2010) 3.
[695] *Schofield,* Against a rising tide: ambulatory baselines and shifting maritime limits in the face of sea level rise, Paper presented at the Proceedings of International Symposium on Islands and Oceans, Akasaka, Tokyo, January 22-23, 2009, 74, fn 16.
[696] Art 7 UNCLOS.
[697] Art 67 (5) UNCLOS.
[698] *Talmon,* Article 121 - Regime of Islands in Proelss (ed.), The United Nations Convention on the Law of the Sea - A Commentary (2017) 858 (864).
[699] *Rayfuse,* International Law and Disappearing States: Utilising Maritime Entitlements to Overcome the Statehood Dilemma, University of New South Wales Faculty of Law Research Series 52 (2010) 5.
[700] *Ibid,* 11.

nation's identity as a sovereign state. It aims to ensure the preservation of its culture, language and the exclusivity with which it is entitled to exploit and use the maritime area that was formerly dry land or part of the EEZ. Once the concept has thus been put to practical use and is met by sufficient support by the international community, the legal status of islands will thus become permanent and the evaluation of whether an island meets the requirements of Article 121 (3) will have to ignore all changes having taken place after a certain point in time. To date, states do not yet agree on the relevant date marking the beginning of the immutability of baselines.[701] Nor have they decided on a means to amend the current legal situation, even though suggestions exist aplenty: the required changes could be implemented by way of a formal amendment to UNCLOS, supplementary agreements or a UN General Assembly resolution.[702] Consequently, until the concept of permanent baselines has won sufficient international recognition, both the course of baselines and the status of islands hinge upon natural conditions as well as human activity.

B. Evaluation Moment

The ambulatory nature of the legal status of islands has the effect that an island may be either a rock or an island in the narrow sense depending on the date it is examined for evidence of human habitation or economic life. In case an international tribunal is thus seized in a matter relating to Article 121 (3), it is thus crucial that the tribunal identifies the correct evaluation moment. The following chapter will address the relevant evaluation moment and will discuss whether and to what extent past and future changes to an island's environment affect the assessment of the legal status. Given that the *South China Sea Arbitration* extensively covers these questions, this chapter shall also look at the arbitral tribunal's pronouncements to this end and provide commentary.

With respect to the appropriate evaluation moment, there is a well-established tradition in international judicature of relying on present circumstances in questions of maritime entitlement and delimitation.[703] It is thus indicated that the relevant evaluation moment is the time of the claim.[704] In the particular context of maritime delimitation, the *Black Sea Case* and

[701] *Ibid,* 6.
[702] For further suggestions see *ibid,* 7.
[703] *Black Sea Case,* para 131, *supra* note 310; see also the *Bay of Bengal Case (Bangladesh/India)*, para 214, *supra* note 365.
[704] *Gjetnes,* The Spratlys: Are They Rocks or Islands?, Ocean Development & International Law 32 (2001) 191 (200); *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... », Annuaire français de droit international 40 (1994) 876 (905).

the *Bay of Bengal Maritime Boundary Arbitration* have confirmed that past and future developments are irrelevant to the measurement of coastlines and their maritime zones, as base points depend upon the "physical reality at the time of the delimitation"[705]. And yet, the award rendered in the *South China Sea Arbitration* contains several pronouncements seemingly differing from this statement, which shall be highlighted and discussed in the following. In general, the legal evaluation of the arbitral tribunal in the *South China Sea Arbitration* was based on the circumstances of the case as they presented themselves at the initiation of proceedings. Occasionally, however, the arbitral tribunal seems to have strayed from this practice and favoured an earlier evaluation moment. The arbitral tribunal notably considered "historical evidence of conditions on the features—prior to the advent of the exclusive economic zone as a concept or the beginning of significant human modification—to represent a more reliable guide to the capacity of the features to sustain human habitation or economic life [than accounts of current conditions and inhabitation]"[706]. The tribunal further found that "the [water resources on Itu Aba and South-West Cay] have supported small numbers of people in the past […] and [the tribunal] concludes that they are therefore able to do so in their natural condition, *whether or not that remains the case today.* [emphasis added]"[707] The tribunal seemingly supported the notion that as soon as humans structurally alter an island so as to accommodate their needs, the conditions on the island are no longer a reliable basis of assessment. The arbitral tribunal's statements in this respect are a consequence of its position that human habitation or economic life must be sustainable on an island under "natural condition[s]"[708], a view that will be discussed in more detail below.[709] The focus on natural conditions entails that – in the case of islands with significant artificial alterations – it becomes necessary to search for a point in time when conditions were pristine. A – perhaps unintended – side effect of the tribunal's position is that islands that are presently fully submerged as a consequence of man-made climate change, but were able to sustain human habitation in their natural state, that is prior to the advent of the exclusive economic zone, or pre-1982, remain islands in the narrow sense, as the effects of human interference with nature have to be factored out. Rising CO_2 levels and the resulting climatic changes are after all not "natural" in the sense that they would have taken place in the absence of human interference.[710] On the whole, it

[705] *Black Sea Case*, para 131, *supra* note 310; see also the *Bay of Bengal Case (Bangladesh/India)*, para 214, *supra* note 365.
[706] *South China Sea Arbitration,* para 578, *supra* note 28.
[707] *Ibid,* para 584.
[708] *Ibid,* para 508.
[709] Part 2 Section 2 IV C.
[710] According to the Intergovernmental Panel on Climate Change, increasing anthropogenic greenhouse gas emissions are "extremely likely to have been the dominant cause of the observed warming since the mid-20th

appears questionable whether the position that it is best to rely on natural conditions, ideally from a pre-1982 period, is reconcilable with the express wording of Article 121 (3). When Article 121 (3) postulates that human habitation or economic life must be sustainable on an island in the narrow sense, the provision uses the present tense. There is indeed no reference to the pertinence of historical environmental data. Prospective changes to an island's environment – be they of a natural or artificial origin – can also be readily dismissed as irrelevant. It should perhaps be noted that the question of the relevancy of future environmental changes to an island is distinct from the question of whether an island is theoretically capable of sustaining human habitation or economic life.[711] Anticipated shifts in an island's economic usefulness or habitability may stem from impending erosion or a settlement program in the planning stage. Taking future changes to an island's environment in consideration when assessing its legal status would however be irreconcilable with the principle of legal certainty.[712] It would further create a possibility for states to argue with respect to virtually all high-tide elevations that they are entitled to both EEZ and continental shelf in view of planned developments. This would be at odds with the provision's objective, which is to specifically curtail the capacity of high-tide elevations to generate maritime zones.[713] While future changes to an island's environment can thus be discounted as immaterial, an island's former characteristics may retain an ancillary role as evidence pointing towards an islands' present-day capacity to sustain human habitation,[714] a role that is conditional upon the fact that environmental conditions on the island have remained essentially the same. The emigration of an island's population may after all have been caused by a change in the island's environment that threatened the survival of its inhabitants. An island may also have once been home to a flourishing economy that has since become

century". See Intergovernmental Panel on Climate Change, Climate Change 2014: Synthesis Report, Summary for Policymakers, 4.

[711] While the former issue concerns *future* developments, the latter relates to an island's condition and capabilities *at present*. It is crucial to recognize that it is irrelevant to the evaluation of an island's status whether the potential for settlement or economic use is actually realized. Thus, addressing an island's theoretical capacities and incorporating them into the status assessment does not contradict the proposition that the relevant evaluation moment is the present. See also Part 2 Section 2 II.

[712] In this way, *Kolb* claims that an interpretation failing to focus on the present would dispense with all limits. *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... », Annuaire français de droit international 40 (1994) 876 (905).

[713] Part 2 Section 2 IV B 2 A.

[714] See *Gjetnes*, who emphasizes that "the only practicable and equitable way of judging [the ability to sustain human habitation] is to look at past and present habitation". *Gjetnes,* The Spratlys: Are They Rocks or Islands?, Ocean Development & International Law 32 (2001) 191 (195); see also *Kwiatkowska/Soons,* Entitlement to Maritime Areas of Rocks Which Cannot Sustain Human Habitation or Economic Life of Their Own, Netherlands Yearbook of International Law 21 (1990) 139 (161).

unsustainable.[715] Such islands would not be considered presently capable of sustaining human habitation or economic life, despite their history. On the other hand, settlers may have moved for reasons entirely disconnected from the island's capacity to sustain them, such as a lack of satisfactory employment opportunities or simply the fact that more promising life circumstances were to be expected at a different location. Past inhabitation or economic activity may thus point in either direction and is hence a means of evidence to be handled with caution.[716] To what extent evidence of a former colonization accurately demonstrates that an island remains habitable today is also in dispute among legal scholars.[717]

In conclusion, the time of evaluation is the present. Whereas future developments are completely immaterial, past inhabitation or use, may, depending on whether environmental conditions have remained constant and depending on the reason for the termination of the habitation or use, provide us a glimpse of an island's potential. What truly matters are an island's present-day capabilities. We can only agree with this statement from the *travaux préparatoires*:

> "'Cannot sustain', I presume, must mean that we are dealing with the present. Whatever may have happened centuries ago would not be relevant to the notion of what a rock is not able to sustain today. So one has to look at what is happening today, the capability of that rock-like formation at the present time."[718]

Section 2 A Meticulous Look at the Wording of the "Regime of Rocks"

This Section will explore the many facets of Article 121 (3) by addressing its descriptive terms and requirements individually. In this way, we shall separately examine the legal effects of using the terms "rock", "cannot", "or", "of their own", "human habitation" and "economic life". Particular attention shall be given to the definition of "human habitation" and "economic life", which are indisputably the most contentious parts of the *Regime of islands*. In a final step, we will address the fact that any intentional circumvention of the legal restriction that Article 121 (3) imposes on the coastal states' right to claim maritime zones is unlawful by virtue of UNCLOS' prohibition of abusing the rights it confers and the obligation to interpret in good faith.

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[715] See also *Gjetnes,* The Spratlys: Are They Rocks or Islands?, Ocean Development & International Law 32 (2001) 191 (196).

[716] See also *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... », Annuaire français de droit international 40 (1994) 876 (905).

[717] *Van Dyke, Morgan* and *Gurish* argue in favour of the relevance of the historic use of the island. See *Van Dyke/Morgan/Gurish*, The Exclusive Economic Zone of the Northwestern Hawaiian Islands: When Do Uninhabited Islands Generate an EEZ?, San Diego Law Review 25 (1988) 425 (438).

[718] *Kwiatkowska/Soons,* Entitlement to Maritime Areas of Rocks Which Cannot Sustain Human Habitation or Economic Life of Their Own, Netherlands Yearbook of International Law 21 (1990) 139 (160).

I. The Relevance of Texture and the Element of Size – What Is a "Rock"?

The decision to designate islands that shall not have an EEZ or continental shelf of their own as "rocks" has spurred two lines of debate in international doctrine. On the one hand, experts have wondered whether the term was intended to apply only to islands evincing a certain geological composition, a composition that can be described as "rocky" or "solid" or whether an island's geological characteristics are irrelevant. Moreover, despite the fact that the option to include a precise size threshold for rocks was repeatedly rejected during the *Regime of islands'* drafting stage, some scholars have inquired whether the term "rock" represents an indirect reference to size.

A. Geological Properties

While remaining doubtful whether composition is "le critère pertinent et unique"[719], *Dipla* has suggested that "rocks" are by nature "rocheuse"[720] and necessarily incorporate a geological aspect.[721] *Charney* has opined that durability and hardness do matter in the definition of a rock, but that it remains unclear where exactly to draw the line between rocks and other small islands.[722] The majority of scholars have however taken the stance that the term "rock" is not to be understood as a reference to a particular geological condition.[723] This position is to some extent reflected in international judicature. At the beginning of the 19th century, in *Anna*, it was explained that sovereignty over island territories does not depend upon the texture of the soil.[724] In the *Colombian Islands Case* between Nicaragua and Colombia, the ICJ ruled that "[i]nternational law defines an island by reference to whether it is 'naturally formed' and whether it is above water at high tide, not by reference to its geological composition"[725]. Both of the above rulings however relate to islands in general and do not comment on the required

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[719] "the pertinent and unique criterion" *fr*. *Dipla,* Le régime juridique des îles dans le droit international de la mer (1984) 84.
[720] "rocky" *fr*.
[721] *Dipla,* Le régime juridique des îles dans le droit international de la mer (1984) 38.
[722] *Charney,* Rocks that Cannot Sustain Human Habitation, The American Journal of International Law 93 (1999) 863 (870).
[723] An opinion shared by *Van Dyke, Vukas, Gjetnes, Elferink, Kwiatkowska and Soons*. *Van Dyke,* Legal Issues Related to Sovereignty over Dokdo and Its Maritime Boundary, Ocean Development & International Law 38 (2007) 157 (196); *Volga Case,* Declaration of Budislav Vukas, December 23, 2002, para 6, *supra* note 172; *Gjetnes,* The Spratlys: Are They Rocks or Islands?, Ocean Development & International Law 32 (2001) 191 (193); *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 (59); *Kwiatkowska/Soons,* Entitlement to Maritime Areas of Rocks Which Cannot Sustain Human Habitation or Economic Life of Their Own, Netherlands Yearbook of International Law 21 (1990) 139 (153).
[724] See Part 1 Section 2 I B.
[725] *Colombian Islands Case*, para 37, *supra* note 34.

geological composition of rocks. In the *South China Sea Arbitration* it was finally proclaimed that "'rocks' for the purposes of Article 121(3) will not necessarily be composed of rock"[726]. *Talmon* has criticized this pronouncement – not only, but primarily – on the basis of the *travaux préparatoires*. By disputing the geological and geomorphological implications of the term "rock", the arbitral tribunal has, according to *Talmon*, "adopted a legislative role rewriting the text of Art. 121 (1)."[727] *Talmon*'s first point of criticism is that the ordinary meaning of the word "rock" implies a geological aspect.[728] And indeed, in everyday conversation, "rock" denominates a material exhibiting a certain durability and outward appearance.[729] According to the Encyclopedia Britannica, a rock is a "naturally occurring and coherent aggregate of one or more minerals"[730]. The Hydrographic Dictionary published by the International Hydrographic Organization (IHO) indicates that "rock" may refer to "[a]n isolated rocky formation or a single large STONE, usually one constituting a danger to NAVIGATION"[731]. The IHO has generally taken a rather neutral position in the discussion on rocks by stating that the "UNCLOS does not explicitly define what a rock is, nor does it distinguish a rock from an island"[732]. While general linguistic use supports *Talmon*'s argument, encyclopedic evidence cannot be our sole point of reference.[733] The nomenclature employed in law-making treaties is often intended to acquire an autonomous meaning potentially differing from a term's meaning in everyday language. *Talmon* also argued that UNCLOS could have refrained from using the term "rock" altogether, and simply referred to "*islands* which cannot sustain human habitation or economic life of their own", if, as this thesis claims, the word "rock" truly does not carry any geological implications. And indeed, this is a wording the drafters could have opted for without changing the meaning of the *Regime of islands* as it is understood in this thesis. However, replacing the *Regime of islands'* reference to "rocks" with the word "islands", would have meant introducing two different types of islands without giving a name to either of these types. A comprehensive legal agreement such as UNCLOS requires a nomenclature allowing its reader to identify different types of islands and link these to the relevant legal consequences. The choice of the term "rocks"

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[726] *South China Sea Arbitration*, para 482, *supra* note 28.
[727] *Talmon,* Article 121 - Regime of Islands in Proelss (ed.), The United Nations Convention on the Law of the Sea - A Commentary (2017) 858 (868).
[728] *Ibid.*
[729] Both general and geological definitions however vary, as is illustrated by *Charney*. See *Charney,* Rocks that Cannot Sustain Human Habitation, The American Journal of International Law 93 (1999) 863 (869, fn 32).
[730] See the Encyclopaedia Britannica <britannica.com/EBchecked/topic/505970/rock>.
[731] International Hydrographic Organization, Hydrographic Dictionary[5], Part I Vol. I (1994) para 4415.
[732] International Hydrographic Bureau, A Manual on Technical Aspects of the United Nations Convention on the Law of the Sea - 1982[4], Special Publication No. 51 (2006) para 4.4.
[733] For the meaning of the term "rock" in general linguistic use see *Dyke, Morgan* and *Gurish.* See *Van Dyke/Morgan/Gurish*, The Exclusive Economic Zone of the Northwestern Hawaiian Islands: When Do Uninhabited Islands Generate an EEZ?, San Diego Law Review 25 (1988) 425 (436).

entails that any discussion of the *Regime of islands* can dispense with the lengthy label of "islands which cannot sustain human habitation or economic life of their own" and instead refer to "rocks", a briefer and an appropriate designation. A consultation of the *travaux préparatoires* in this matter would not seem to provide much guidance as the delegations participating in the drafting process at the Third United Nations Conference on the Law of the Sea were divided on the subject of a geological requirement for "rocks". The representative of Nicaragua for example declared that "the future regime should guarantee the protection and defence of the economic interests of the peoples of islands […] which were completely separate from any continental formation or coastal State, […] regardless of their geo-morphological formation."[734] A set of draft articles submitted by 14 states suggested the opposite, namely that islands not within the proximity of the state to which they belong should be evaluated, among other criteria, in light of their "geographical configuration and their geological and geomorphological structure"[735]. The draft articles also included the definition of a rock as "a naturally formed rocky elevation of ground […]"[736]. It is evident that these 14 delegations were of the opinion that a "rock" should be characterized by its geological or geomorphological composition and consequently advocated for an explicit mention of this requirement in the article itself. However, neither the requirement that a rock should be "rocky" nor the reference to geomorphological formation was incorporated into the final provision. The fact that proposals thereto were rejected can be interpreted to mean that there was insufficient support for the inclusion of a geologic or geomorphologic requirement, leading these delegations to abandon their negotiating objective in the interest of reaching consensus on a final provision. *Talmon* has argued the opposite, finding that the *travaux préparatoires*, and in particular two draft proposals including explicit references to "rocky elevations" show that the term "rock" carries a geological meaning.[737] *Talmon* has also cited the positions taken by Ambassador *Nandan,* representative of Fiji and drafter of Article 121 (3), which was then known as Article 132 (3) of the Single Informal Negotiating Text.[738] In particular, *Talmon* has suggested that *Nandan* would agree that the term "rock" incorporates a geological or geomorphologic aspect because if it didn't, this would produce "an outcome that would have been contrary to the interest of

[734] United Nations Office for Ocean Affairs and the Law of the Sea, The Law of the Sea: Régime of Islands, UN Sales No. E.87.V.11 (1988) 59 (Nicaragua).
[735] *Ibid,* 49 (draft submitted by Algeria, Dahomey, Guinea, Ivory Coast, Liberia, Madagascar, Mali, Mauritania, Morocco, Sierra Leone, Sudan, Tunisia, Upper Volta, Zambia).
[736] *Ibid,* 48 (draft submitted by Algeria, Dahomey, Guinea, Ivory Coast, Liberia, Madagascar, Mali, Mauritania, Morocco, Sierra Leone, Sudan, Tunisia, Upper Volta, Zambia).
[737] *Talmon,* Article 121 - Regime of Islands in Proelss (ed.), The United Nations Convention on the Law of the Sea - A Commentary (2017) 858 (868-872).
[738] *Ibid,* 870.

[Fiji]"[739]. Against this it may be argued that *Talmon* cites *Nandan*'s opposition to denying uninhabited islands an EEZ, an outcome Article 121 (3) averts. Under Article 121 (3), uninhabited islands can still generate an EEZ as they are merely required to be theoretically capable of sustaining human habitation. There is consequently a real possibility that *Nandan* accepted that the provision did not attribute a geological aspect to "rocks", yet found the provision acceptable nonetheless. Beyond this, it seems that *Nandan*'s commitment as Rapporteur of the Second Committee was not just to his home state, but to the Committee as a whole. He was tasked with finding a wording that would enable a compromise among all participating states, not one which served only the interests of Fiji. It would seem inapposite to assume that the *Regime of islands* must be read as serving the interests of Fiji, as opposed to reading it as a compromise serving a variety of concerns and policies.[740] Most importantly, to understand the term "rock" as a reference to a solid mineralogical composition would rob Article 121 (3) of its coherence. It would produce the somewhat absurd result that sand bars above water at high tide, but otherwise incapable of supporting human settlement or economic activity would not fall within the scope of Article 121 (3).[741] They would be entitled to the full suite of maritime zones, despite the fact that they are just as barren and devoid of human activity as comparable features of a more solid and "rocky" quality. It would run contrary to the principle of *bona fides* interpretation to base one's argument on sophistries and insist that the term "rock" refers to a specific material while accepting that this reading inevitably distorts the rule so intensely as to deprive it of all sense.[742] In conclusion, while a "rock" may denominate a solid single object in everyday speech, this definition must not necessarily coincide with "rocks" within the meaning of Article 121 (3). A *bona fide* interpretation consistent with the rules of logic reveals that a "rock" describes a category of island defined by not being able to sustain human habitation or economic life, not by its geological properties. The term "rock" is used as a type description devoid of regulatory content.

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[739] *Ibid.*

[740] For the aims reflected in Article 121 (3), see Part 2 Section 2 IV B 2.

[741] An opinion shared by *Gjetnes*, *Kolb* and the arbitrators in the *South China Sea Arbitration. Gjetnes,* The Spratlys: Are They Rocks or Islands?, Ocean Development & International Law 32 (2001) 191 (193); *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... », Annuaire français de droit international 40 (1994) 876 (904); *South China Sea Arbitration,* para 481, *supra* note 28.

[742] See also *Köck,* Vertragsinterpretation und Vertragsrechtskonvention - Zur Bedeutung der Artikel 31 und 32 der Wiener Vertragsrechtskonvention 1969 (1976) 80.

B. Size

A related question concerns whether the choice of the term "rock" implies that Article 121 (3) applies only to islands below a certain size, as a "rock" would seem to describe a smaller-sized object in everyday language. This has led to a debate over the maximum surface area of rocks. However, even scholars holding that the term "rock" excludes features exceeding a certain size have acknowledged that it remains unknown what the maximum surface area of a rock would be.[743] *Hodgson* and *Smith* have for example interpreted the term "rock" as including a size threshold, namely that of a "smaller sized island"[744]. These two scholars have established an independent terminology distinguishing between rocks, islets, isles and islands on the basis of their respective surface area.[745] While this approach does not appear to have gained much traction,[746] it is a prevalent view among legal scholars that the term "rock" connotes a certain degree of smallness.[747] *Elferink* argued that encyclopaedic definitions of the word "rock" indicate that rocks are inherently small.[748] As has been noted in the previous chapter, the meaning of the term "rock" in everyday language does not necessarily coincide with the legal concept of "rocks" within the meaning of Article 121 (3). Courts and tribunal have largely abstained from commenting on the presumptive size of rocks. There are however a few exceptions: the Supreme Court of Norway has ruled that a feature beyond the size of 13.2 square

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[743] *Van Dyke/Morgan/Gurish*, The Exclusive Economic Zone of the Northwestern Hawaiian Islands: When Do Uninhabited Islands Generate an EEZ?, San Diego Law Review 25 (1988) 425 (437); *Kolb,* L'interprétation de l'article 121, paragraphe e3, 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... », Annuaire français de droit international 40 (1994) 876 (904); *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 (58); *Charney,* Rocks that Cannot Sustain Human Habitation, The American Journal of International Law 93 (1999) 863 (876); *Elferink, Alex G. Oude,* 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.

[744] *Hodgson/Smith*, The Informal Single Negotiating Text (Committee II): A Geographical Perspective, Ocean Development and International Law 3:3 (1976), cited in *Kwiatkowska/Soons,* Entitlement to Maritime Areas of Rocks Which Cannot Sustain Human Habitation or Economic Life of Their Own, Netherlands Yearbook of International Law 21 (1990) 139 (155 et seq).

[745] *Ibid.*

[746] *Kwiatkowska/Soons,* Entitlement to Maritime Areas of Rocks Which Cannot Sustain Human Habitation or Economic Life of Their Own, Netherlands Yearbook of International Law 21 (1990) 139 (155).

[747] *Van Dyke/Morgan/Gurish*, The Exclusive Economic Zone of the Northwestern Hawaiian Islands: When Do Uninhabited Islands Generate an EEZ?, San Diego Law Review 25 (1988) 425 (437); *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... », Annuaire français de droit international 40 (1994) 876 (904); *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 (58); *Charney,* Rocks that Cannot Sustain Human Habitation, The American Journal of International Law 93 (1999) 863 (876); *Talmon,* Article 121 - Regime of Islands in Proelss (ed.), The United Nations Convention on the Law of the Sea - A Commentary (2017) 858 (871).

[748] *Elferink,* The South China Sea Arbitration's Interpretation of Article 121(3) of the LOSC: A Disquieting First, The Blog of the K.G. Jebsen Centre for the Law of the Sea, September 7, 2016 <site.uit.no/jclos/2016/09/07/the-south-china-sea-arbitrations-interpretation-of-article-1213-of-the-losc-a-disquieting-first/>.

kilometres can not be categorized as a "rock"[749]. The decision in the *South China Sea Arbitration*, on the other hand, largely eliminated size as a relevant component of the status assessment, stating "that — although size may correlate to the availability of water, food, living space, and resources for an economic life — size cannot be dispositive of a feature's status as a fully entitled island or rock and is not, on its own, a relevant factor."[750] The tribunal firmly bases this assessment on the decision made by the drafters of the provision not to incorporate a size criterion into Article 121 (3). Marine rocks and cliffs come in varying sizes, permitting no inference as to what is commonly or in the specific context of UNCLOS understood to be the usual magnitude of a rock. In dictionaries and the essays of law of the sea experts alike, the presumed size threshold separating rocks from islands in the narrow sense remain indistinct. To ascribe a reference to a precise size to the term "rock" would thus mean to go beyond the provision's wording. It is further difficult to imagine that the drafters were in favour of including such a straightforward distinction as size, but then chose to hide it so elaborately. The perhaps unfortunate turn of phrase "rock" may have simply derived from the broadening general recognition that Rockall, a small granite islet (0,784 km^2) off the coasts of Ireland and Great Britain, is exactly the kind of island Article 121 (3) was created for. Rockall was in this way mentioned as an illustrative example of a "rock" during negotiations.[751] In conclusion, an islands' size can only have an indirect effect on its legal status. This indirect effect comes into focus when we consider that "human habitation" and "economic life" often do not take place on islands below a certain size. The relevance of an island's surface area is consequently but a side effect of the two main conditions of Article 121 (3),[752] as opposed to being inferable from the use of the term "rock". To summarize, the term "rock" appears to have been included in order to establish a succinct legal term denoting islands that cannot sustain human habitation or economic life of their own. The word "rock" in Article 121 (3) seems to contain neither an allusion to geological composition nor to size.

II. Adequacy versus Existence – Rocks that "Cannot" or Rocks that "Do Not"?

Article 121 (3) specifies that rocks that *cannot* sustain human habitation or economic life do not generate entitlement to an EEZ or continental shelf. Does this mean that to avoid being

[749] Supreme Court of Norway, Judgment, May 7, 1996, 624 cited in *Gjetnes,* The Spratlys: Are They Rocks or Islands?, Ocean Development & International Law 32 (2001) 191 (192).
[750] *South China Sea Arbitration,* para 538, *supra* note 28.
[751] *Anderson,* British Accession to the UN Convention on the Law of the Sea, International and Comparative Law Quarterly 46 (1997) 761 (778).
[752] The idea of size not as a primary characteristic, but as a by-product of "human habitation" and "economic life" is furthermore endorsed by the decision in the *South China Sea Arbitration. South China Sea Arbitration,* para 538, *supra* note 28.

labelled a "rock", an island must actually exhibit a population or an economic life? Or does the mere capability thereto suffice? While its reliance on theoretical capacities is perhaps an unfortunate aspect of Article 121 (3),[753] scholars mostly agree that islands need only hold the potential to sustain habitation.[754] This is certainly supported by a primarily text-based interpretation. If the drafters had intended otherwise, the provision would have read "do not" instead of "cannot".[755] It is important to remember that islands may be currently uninhabited or unused for reasons other than their unfitness in that respect. For example, both "human habitation" and "economic life" were for a long time impossible in the Senkaku Islands group, due to the decision by the Japanese central government to prevent trespassing or even construction works on any of the Senkaku Islands, so as not to aggravate tensions with neighbouring China.[756] An administrative decision not to put a certain territory to use can not be equated with an island's unfitness for usage. While the actual presence of a community or entrepreneurial activities on an island may thus strongly indicate the capability to sustain human habitation or economic life, this presence is not a prerequisite to an island's EEZ or continental shelf. Surveying the phrase "cannot sustain" in light of its context or its object and purpose does not disprove this interpretation. Mostly, the declarations and statements of states remain too opaque to allow for any definite conclusions concerning their stance on this particular issue. In rare cases, states do adopt a position on the matter.[757] Bangladesh, for example, has declared very clearly that a "present population is probative evidence of an island's ability to sustain human habitation"[758]. Bangladesh evidently perceived the suitability of human habitation as the primary criterion, and its *de facto* presence merely as a convenient means of substantiating the

[753] *O'Keefe* has criticized that the reliance on an island's theoretical capacity to sustain human habitation or economic life makes Article 121 (3) easy to circumvent. *O'Keefe,* Palm-Fringed Benefits: Island Dependencies in the New Law of the Sea, International and Comparative Law Quarterly 45:2 (1996) 408 (412).

[754] *Gjetnes* opines that a feature need not be actually inhabited, as long as the theoretical aptness for inhabitation can be demonstrated. *Gjetnes,* The Spratlys: Are They Rocks or Islands?, Ocean Development & International Law 32 (2001) 191 (195); see also *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... », Annuaire français de droit international 40 (1994) 876 (902); *Kwiatkowska/Soons,* Entitlement to Maritime Areas of Rocks Which Cannot Sustain Human Habitation or Economic Life of Their Own, Netherlands Yearbook of International Law 21 (1990) 139 (160 et seq); *Gewirtz,* Limits of Law in the South China Sea, East Asia Policy Paper 8 (2016) 9; *Talmon,* Article 121 - Regime of Islands in Proelss (ed.), The United Nations Convention on the Law of the Sea - A Commentary (2017) 858 (872).

[755] As has been argued by the United States in the *Howland Island Case*. *Howland Island Case*, Opposition of the United States to defendant's motion to dismiss for lack of subject matter and *in rem* jurisdiction, December 28, 2007, 12, *supra* note 413.

[756] Jurisdiction over remote Senkakus comes with hot-button dangers, The Japan Times, May 18, 2012, <japantimes.co.jp/news/2012/05/18/news/jurisdiction-over-remote-senkakus-comes-with-hot-button-dangers/#.WIiOw1zRdzk>.

[757] *Howland Island Case,* Opposition of the United States to defendant's motion to dismiss for lack of subject matter and *in rem* jurisdiction, December 28, 2007, 12, *supra* note 413.

[758] *Bay of Bengal Case (Bangladesh/Myanmar)*, Reply of Bangladesh, March 15, 2011, fn 136, *supra* note 328.

former. Still, for the most part, states prefer to limit their statements to reiterating the exact wording of Article 121 (3),[759] or conversely to declaring that the feature in question entitles the owning state to a territorial sea, but not to maritime zones beyond that.[760] In other cases, the parties have felt it necessary to clarify that a feature is both capable of sustaining habitation and also actively sustains habitation.[761] State practice generally lacks the consistency necessary to draw conclusions in this matter.[762] What is lacking is in particular the kind of near-universal agreement on interpretation demanded by Article 31 (3) (b) VCLT.[763] International courts and tribunals have mostly avoided the question of whether capacity or existence is a constitutive element of "human habitation" or "economic life". The exception to this rule is the *South China Sea Arbitration*, which includes the following pronouncement:

> "[Article 121 (3)] is not concerned with whether the feature actually does sustain human habitation or an economic life. It is concerned with whether, objectively, the feature is apt, able to, or lends itself to human habitation or economic life. That is, the fact that a feature is currently not inhabited does not prove that it is uninhabitable. The fact that it has no economic life does not prove that it cannot sustain an economic life."[764]

The above statement would appear to be a straightforward endorsement of the concept of "capacity" over that of "existence". And yet, the arbitral tribunal attenuated its opinion as follows:

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[759] This approach was taken in multiple official statements reacting to what was perceived as a misguided classification of Aves Island. Letter dated 19 June 1997 from the Government of Antigua and Barbuda with regard to maritime treaties and a protest with regard to the status granted to "Isla Aves", Antigua and Barbuda, Law of the Sea Bulletin 35 (1997) 97; Note dated 16 July 1997 addressed to the Secretary-General of the United Nations referring to the bilateral maritime boundary delimitation treaties, St. Kitts and Nevis, Law of the Sea Bulletin 35 (1997) 98 et seq; Note dated 8 August 1997 addressed to the Secretary-General of the United Nations referring to the bilateral maritime boundary delimitation treaties, Saint Vincent and the Grenadines, Law of the Sea Bulletin 35 (1997) 100; see also Note verbale, China, CML/2/2009, February 6, 2009 <un.org/Depts/los/clcs_new/submissions_files/submission_jpn.htm>.

[760] Department of Foreign Affairs (Philippines), Philippine Position on Bajo de Masinloc (Scarborough Shoal) and the waters within its vicinity, April 18, 2012 <gov.ph/2012/04/18/philippine-position-on-bajo-de-masinloc-and-the-waters-within-its-vicinity/>.

[761] In the *Black Sea Case,* Ukraine has in this way submitted that the feature it owns – Serpents' Island - is neither uninhabited nor uninhabitable. Ukraine has taken the position that Serpents' Island "can- and does – support human habitation", evidently desiring to cover both the capacity for inhabitation and actual habitation. *Black Sea Case,* Counter-Memorial submitted by Ukraine on May 19, 2006, Vol. 1, paras 7.37, 7.40, *supra* note 310. Judge *Vukas* of the ITLOS similarly stressed that drawing an EEZ around islands that are both uninhabited and uninhabitable appears problematic. *Monte Confurco Case,* Declaration of Budislav Vukas, December 18, 2000, *supra* note 172.

[762] For subsequent state practice to be admissible as a means of treaty interpretation, it is required that states parties to the treaty interpret the specific provision in a uniform manner. *Villiger,* The Rules on Interpretation: Misgivings, Misunderstandings, Miscarriage? - The 'Crucible' lntended by the International Law Commission in Canizzario (ed.), The Law of Treaties Beyond the Vienna Convention (2011) 105 (111).

[763] See also Part 2 Section 1 I A.

[764] *South China Sea Arbitration,* para 483, *supra* note 28.

> "The term 'life' suggests 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. […] The phrase presupposes ongoing economic activity."[765]

All of a sudden, it is regarded as insufficient that an island in the narrow sense be *capable* of sustaining economic life. The citation above shows that the tribunal was of the opinion that the potential an island holds due to its mineral deposits must be *realized* and, moreover, used for the benefit of a local community.[766] This apparent contradiction in an international award years in the making sheds light on how difficult it can be to interpret a provision that bases its legal assessment on theoretical possibilities, yet fails to elaborate what these possibilities should precisely entail. With evidence obtainable from state practice and judicature both inconclusive and rare, we return to the results from the initial, textual approach - namely that an island's "capacity" is all that is asked for. This reading is occasionally mirrored by the *travaux préparatoires*: in this way, on the occasion of the signing of UNCLOS, the Iranian delegation has made it known that "[i]slets situated in enclosed and semi-enclosed seas which potentially can sustain human habitation or economic life of their own but, due to climatic conditions, resource restriction or other limitations, have not yet been put to development [qualify as islands in the narrow sense]."[767] In sum, it is strongly indicated that the textual approach to interpretation should prevail and the phrasing "cannot" is indeed a reference to an island's theoretical capabilities. This finding is significant considering that, if the legal distinction between "rocks" and "islands in the narrow sense" depended on whether people are presently residing on the island or using it for economic purposes, the sovereign right of a state to exploit the resources of the EEZ or continental shelf would hinge on the decision of private individuals to move to or establish a business on the island in question. However, as has been shown, the decisive factor is ultimately not whether an island is inhabited or not, but whether an island is capable of supporting residents or economic activity. This entails that the decisions of private individuals do not ultimately determine the existence of sovereign rights, although they may provide evidence as to an island's suitability to sustain human habitation or economic life.[768]

[765] *Ibid,* para 499.
[766] *Ibid,* para 500.
[767] United Nations Office for Ocean Affairs and the Law of the Sea, The Law of the Sea: Régime of Islands, UN Sales No. E.87.V.11 (1988) 113 (Iran).
[768] See Part 2 Section 2 V F 3 and Part 2 Section 2 VI E 2.

III. Alternative or Cumulative Requirements - Does the *Regime of islands* Use the Term "Or" while Meaning "And"?

The use of the word "or" in Article 121 (3) would seem to imply that an island must only be capable of sustaining either "human habitation" or "economic life", not both, in order to acquire the legal status of an "island in the narrow sense". Yet, this opinion is not universally shared. The contrary position argues that "human habitation" and "economic life" are mutually dependent and thus form a uniform concept, thereby implying that "or" in truth means "and". This chapter will explore the merits of both positions, which will be referred to as the theory of disjunctive requirements and the theory of cumulative requirements, respectively. We shall also briefly study a third stance, which positions itself somewhere in the middle between the abovementioned viewpoints.

A. The Theory of Cumulative Requirements

The theory of cumulative requirements maintains that, pursuant to Article 121 (3), an island must exhibit both the capacity for "human habitation" *and* "economic life" in order to generate entitlement to the EEZ and continental shelf. This digression from the verbatim text is justified by arguments ranging from the provision's legislative history,[769] to the official Norwegian text to the fact that "human habitation" and "economic life" are frequently interdependent and overlap.[770] First, we shall address support for the theory of cumulative requirements in international doctrine: *Kwiatkowska* and *Soons* have described attributing a conjunctive meaning to "or" as "perhaps preferable"[771]. They have however added that, due to technological advancement, "economic life" can exist separately from "human habitation",[772] a notion that seems to support a disjunctive reading of "or". *Tanaka* has on the other hand found that "it appears difficult to imagine economic life totally detached from human life"[773]. *Van Dyke* has noted that "it might be more logical to view [human habitation and economic life] as both

[769] *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... », Annuaire français de droit international 40 (1994) 876 (906).
[770] *Gjetnes,* The Spratlys: Are They Rocks or Islands?, Ocean Development & International Law 32 (2001) 191 (194); *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... », Annuaire français de droit international 40 (1994) 876 (906); *South China Sea Arbitration,* Hearing on the Merits and Remaining Issues of Jurisdiction and Admissibility, November 25, 2015, 85, *supra* note 28.
[771] *Kwiatkowska/Soons,* Entitlement to Maritime Areas of Rocks Which Cannot Sustain Human Habitation or Economic Life of Their Own, Netherlands Yearbook of International Law 21 (1990) 139 (164).
[772] *Kwiatkowska/Soons,* Entitlement to Maritime Areas of Rocks Which Cannot Sustain Human Habitation or Economic Life of Their Own, Netherlands Yearbook of International Law 21 (1990) 139 (165).
[773] *Tanaka,* Reflections on the Interpretation and Application of Article 121(3) in the South China Sea Arbitration (Merits), Ocean Development and International Law 48:3-4 (2017) 365 (368).

required [in an island in the narrow sense]".[774] *Kolb* has found that "human habitation" and "economic life" are in essentials inseparable.[775] *Gjetnes* has noted that the Norwegian translation of the provision, in particular the number of commas in Article 121 (3) lends weight to the theory of cumulative requirements: "This one comma could be interpreted to imply that the conditions of human habitation and economic life must *both* be fulfilled"[776]. Nevertheless, *Gjetnes* ultimately found that the apparent deviation from the English text is attributable to linguistic differences and not to the perception that "or" in truth carries a cumulative meaning. Support for the theory of cumulative requirements is often based on the *travaux préparatoires*,[777] or more precisely on a statement made by the delegation from the Dominican Republic clarifying the meaning it ascribed to the final version of the *Regime of islands*. In this statement, it was explained that the Dominican Republic "interpreted 'or' in the first line to mean 'and'".[778] Both *Kolb* and *Kwiatkowska/Soons* have found that the fact that the *travaux préparatoires* discuss the requirements of "human habitation" and "economic life" conjointly provides evidence that "or" carries a cumulative meaning.[779] The submissions of parties to international proceedings have revealed that coastal states occasionally support a cumulative reading of the word "or" in Article 121 (3). In the *Black Sea Case*, Ukraine found that "[human habitation and economic life] have to be read conjunctively, given that both are introduced by the single verb 'cannot sustain'"[780] Romania agreed and emphasized the conceptual interdependency of "human habitation" and "economic life".[781] In a similar line of argument, the Philippines submitted that the term "or" means "and" because of the "interrelated nature of […] 'human habitation' and 'economic life'"[782] during the *South China Arbitration*. In view of the Philippines, the grammatical construction of Article 121 (3) proved that "or" denotes

[774] *Howland Island Case,* Deposition of Jon Van Dyke, October 31, 2007, 78, *supra* note 413.
[775] *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... », Annuaire français de droit international 40 (1994) 876 (906).
[776] *Gjetnes,* The Spratlys: Are They Rocks or Islands?, Ocean Development & International Law 32 (2001) 191 (194).
[777] *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... », Annuaire français de droit international 40 (1994) 876 (906).
[778] See United Nations Office for Ocean Affairs and the Law of the Sea, The Law of the Sea: Régime of Islands, UN Sales No. E.87.V.11 (1988) 99 (Dominican Republic).
[779] *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... », Annuaire français de droit international 40 (1994) 876 (906); *Kwiatkowska/Soons,* Entitlement to Maritime Areas of Rocks Which Cannot Sustain Human Habitation or Economic Life of Their Own, Netherlands Yearbook of International Law 21 (1990) 139 (157).
[780] *Black Sea Case,* Counter-Memorial submitted by Ukraine on May 19, 2006, Vol. 1, para 7.40, *supra* note 310.
[781] *Black Sea Case,* Reply submitted by Romania on December 22, 2006, para 5.19, *supra* note 310.
[782] *South China Sea Arbitration,* Hearing on the Merits and Remaining Issues of Jurisdiction and Admissibility, November 25, 2015, 85, *supra* note 28.

cumulative requirements: "it is precisely the negative, disabling phraseology of Article 121(3) ["cannot"] that renders the conditions stated cumulative in nature."[783] This opinion was rejected by the arbitral tribunal.

B. The Theory of Disjunctive Requirements

The theory of disjunctive requirements is first and foremost in line with a semantic interpretation of Article 121 (3): "or" is understood as "or". An island in the narrow sense is defined by its capacity to sustain *either* human habitation *or* economic life, the fulfillment of both criteria is not required. A reading that embraces the disjunctive meaning of "or" leads to a situation where a greater number of islands meet the qualifications of an "island in the narrow sense", as only one of the two criteria of Article 121 (3) has to be met. This result stays true to the objectives of the *Regime of islands* and the EEZ which notably include the goal of expanding the reach of maritime zones for the benefit of the population of the coastal states.[784] The majority of scholars agree that the term "or" carries a disjunctive meaning.[785] *Elferink* has remarked that the ordinary meaning of the provision's text suggests disjunctive criteria.[786] *Song* has not laid out his reasons in detail, but from his practical application of Article 121 (3), it is evident that he holds the view that only either "human habitation" or "economic life" have to be sustainable on an island in the narrow sense.[787] *Charney* has noted that the fact that an earlier version of the *Regime of islands* employed the word "and", which was later replaced by "or", indicates that the drafters made a conscious decision to establish alternative criteria.[788] As has been described earlier, the *travaux préparatoires* have also been cited in support of the

[783] *Ibid.*
[784] See Part 2 Section 2 IV B 2.
[785] *Charney,* Rocks that Cannot Sustain Human Habitation, The American Journal of International Law 93 (1999) 863 (868); *Elferink,* The Islands in the South China Sea: How Does Their Presence Limit the Extent of the High Seas and the Area and the Maritime Zones of the Mainland Coasts?, Ocean Development & International Law 32 (2001) 169 (173 et seq); *Song,* The South China Sea Arbitration Case Filed by the Philippines against China: Arguments Concerning Submerged Features, Low Tide Elevations and Islands in *Wu/Zou* (eds.), Arbitration Concerning the South China Sea - Philippines versus China (2016) 179-180; *Gjetnes,* The Spratlys: Are They Rocks or Islands?, Ocean Development & International Law 32 (2001) 191 (194 et seq); *Talmon,* Article 121 - Regime of Islands in Proelss (ed.), The United Nations Convention on the Law of the Sea - A Commentary (2017) 858 (878-879).
[786] *Elferink,* The Islands in the South China Sea: How Does Their Presence Limit the Extent of the High Seas and the Area and the Maritime Zones of the Mainland Coasts?, Ocean Development & International Law 32 (2001) 169 (173 et seq).
[787] *Song,* The South China Sea Arbitration Case Filed by the Philippines against China: Arguments Concerning Submerged Features, Low Tide Elevations and Islands in *Wu/Zou* (eds.), Arbitration Concerning the South China Sea - Philippines versus China (2016) 179-180.
[788] *Charney,* Rocks that Cannot Sustain Human Habitation, The American Journal of International Law 93 (1999) 863 (868).

cumulative theory,[789] yet *Charney*'s argument would appear to present a more convincing case for the disjunctive understanding of "or". In legal proceedings, states habitually invoke the requirement of the sustainability of human habitation *or* economic life, suggesting the disjunctive nature of "or". However, this conduct could also simply be conditioned by the practice of making a verbatim reference to Article 121 (3),[790] as opposed to any wish to profess an opinion on the meaning of the word "or".

C. The Middle Course: Disjunctive in Theory, Cumulative in Practice

The middle course between the disjunctive and the cumulative theory is the favored approach of the most recent and – in view of its detail and comprehensiveness – most important international decision in the context of the definition of "rocks", the *South China Sea Arbitration*. Indeed, *Hafner* has observed that the "[a]ward is rather undecided on the term 'or,'"[791]. While initially holding that, according to the laws of grammar and logic, "or" in the context of Article 121 (3) should be understood as carrying a disjunctive meaning,[792] the legal consequences the arbitral tribunal has drawn from its interpretation are more in line with a cumulative reading of the phrase. The wording of Article 121 (3) was ultimately dismissed, with the tribunal asserting that "human habitation" and "economic life" are "linked in practical terms, regardless of the grammatical construction of Article 121(3)."[793] It was argued that while "Article 121(3) is disjunctive"[794], "as a practical matter, the tribunal considers that a maritime feature will ordinarily only possess an economic life of its own if it is also inhabited by a stable human community."[795] The arbitral tribunal in particular noted that the use of "[t]he term 'life' suggests 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"[796]. There are certain aspects to this approach that merit a closer examination. First, it is inconsistent to determine that the word "or" in Article 121 (3) is disjunctive, yet apply "human habitation" and

[789] See *Gjetnes,* The Spratlys: Are They Rocks or Islands?, Ocean Development & International Law 32 (2001) 191 (194); *Kwiatkowska/Soons,* Entitlement to Maritime Areas of Rocks Which Cannot Sustain Human Habitation or Economic Life of Their Own, Netherlands Yearbook of International Law 21 (1990) 139 (157).
[790] *Colombian Islands Case,* Reply of Nicaragua, September 18, 2009, paras 5.14, 5.17, *supra* note 34; *Colombian Islands Case,* Rejoinder of Colombia, June 18, 2010, paras 5.26, 5.27, *supra* note 34; *Bay of Bengal Case (Bangladesh/Myanmar),* Memorial of Bangladesh, July 1, 2010, para 7.38, fn 261, *supra* note 328.
[791] *Hafner,* Some Remarks on the South China Sea Award: Itu Aba versus Clipperton, Chinese (Taiwan) Yearbook of International Law and Affairs 34 (2016) 1 (7).
[792] *South China Sea Arbitration,* paras 494-496, *supra* note 28.
[793] *Ibid,* para 497.
[794] *Ibid,* para 544.
[795] *Ibid,* para 544.
[796] *Ibid,* para 499.

"economic life" in a decidedly cumulative fashion to practical cases. Secondly the use of the word "life" in "economic life" as a descriptor of economic activity does not imply that "local human activity" is required. Indeed, the contrary is indicated by Article 17 (2) (b) (iii) of Annex III UNCLOS,[797] where the term "economic life" is used to describe mining projects, a form of commercial activity that, while often requiring maintenance personal, can thrive despite a minimal human presence. Thirdly, the cumulative interpretation of "or" is based on the supposed inseparability of "human habitation" and "economic life". "Human habitation" and "economic life" may often overlap, but not always, as there are economic activities that may exist independently from habitation, such as resource extraction. With new scientific and technological breakthroughs to be expected, it further seems that the number of unmanned facilities on remote islands is likely to increase rather than decline. Nevertheless, the arbitral tribunal has relied on the following rationale: economic undertakings such as mining on otherwise deserted islands do not constitute "economic life of its own" because they do not benefit a local population (because there is none). In other words, "economic life" is – among other characteristics – defined by being beneficial to a local community. Naturally, this specific definition of "economic life" means that there is always an overlap between "human habitation" and "economic life". Still, this does not explain why the arbitral tribunal chose to define "economic life" as incorporating a settlement aspect in the first place. *Talmon* and *Elferink* have likewise criticized the award's reasoning in this respect. *Talmon* has stated that the notion that economic activities such as fishing within the territorial sea could not qualify as an economic life if it is not accompanied by a stable local population on the island itself "amounts to a rewriting of Art. 121(3)"[798] where "or" is replaced by "and". *Elferink* noted that, while the tribunal had initially embraced the disjunctive theory, it soon chose to add a "critical caveat".[799] In particular, *Elferink* emphasized that "there is no support for the tribunal's position that the drafters intended that the phrase 'economic life of their own' should be read as 'economic life of their own benefiting a local population'".[800]

[797] For further information on Article 17 (2) (b) (iii) of Annex III UNCLOS see Part 2 Section 2 VI B.
[798] *Talmon,* Article 121 - Regime of Islands in Proelss (ed.), The United Nations Convention on the Law of the Sea - A Commentary (2017) 858 (878).
[799] *Elferink,* The South China Sea Arbitration's Interpretation of Article 121(3) of the LOSC: A Disquieting First, The Blog of the K.G. Jebsen Centre for the Law of the Sea, September 7, 2016 <site.uit.no/jclos/2016/09/07/the-south-china-sea-arbitrations-interpretation-of-article-1213-of-the-losc-a-disquieting-first/>.
[800] *Elferink,* The South China Sea Arbitration's Interpretation of Article 121(3) of the LOSC: A Disquieting First, The Blog of the K.G. Jebsen Centre for the Law of the Sea, September 7, 2016 <site.uit.no/jclos/2016/09/07/the-south-china-sea-arbitrations-interpretation-of-article-1213-of-the-losc-a-disquieting-first/>.

D. Conclusion

While there have been valid arguments in support of either theory, it appears that a stronger case can be made for the disjunctive meaning of the word "or" in Article 121 (3). As noted, a textual approach to understanding the *Regime of islands* indicates that the provision establishes alternative criteria. This is the impression immediately imparted on a person upon reading the provision, as it is the solution in line with grammaticism.[801] It is also important to remember that the specific wording of Article 121 (3) allowed the negotiators to strike a delicate compromise between the interests of states who own offshore territories and those who don't, a compromise that should not be readily dismissed.[802] Changing the content of the rule from "or" to "and" would blatantly and arbitrarily alter this balancing of interests in favor of states who do not count islands among their territories. Blatantly, because the cumulative theory is so evidently in conflict with the provision's wording. Arbitrarily, because it is not justified by the commonly recognized means of interpretation. To the argument that human habitation and economic life are inseparable,[803] it may be replied that economic ventures unaccompanied by human settlement might have been unusual in the past. Yet today, research facilities or drilling enterprises employing a very limited number of staff members, whose presence may only be required for certain periods of the year, appear entirely conceivable.[804] As we have seen, governmental positions on the meaning of "or" often contradict each other and are overall sparse, which leads us to conclude that state practice is too opaque and too fragmented to allow for its use as a means of interpretation.[805] While some remain undecided,[806] there seems to be an overall preference for the disjunctive theory among scholars. Finally, as *Kwiatkowska*/*Soons* and *Gjetnes* have rightly observed,[807] on the basis of the *travaux préparatoires,* arguments can be made in support of both the conjunctive and the disjunctive theory. While the *travaux préparatoires* may seem equivocal, they ultimately make a stronger argument for the

[801] *South China Sea Arbitration,* paras 494-496, *supra* note 28.
[802] Part 2 Section 1 II.
[803] *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... », Annuaire français de droit international 40 (1994) 876 (906).
[804] As argued by *Kwiatkowska* and *Soons* in 1990, "the concept of economic life existing in isolation from population will be unavoidable in the future". *Kwiatkowska/Soons,* Entitlement to Maritime Areas of Rocks Which Cannot Sustain Human Habitation or Economic Life of Their Own, Netherlands Yearbook of International Law 21 (1990) 139 (165).
[805] *Tanaka* has noted that, in a general sense, "it is highly difficult to find evidence to prove the existence of 'extensive and virtually uniform' State practice and *opinio juris* with regard to Article 121(3)." See *Tanaka,* The International Law of the Sea (2015) 69.
[806] *Vukas* for instance points out that "the relationships between the components of [Article 121 paragraph 3] are rather unclear". *Volga Case,* Declaration of Budislav Vukas, December 23, 2002, para 6, *supra* note 172.
[807] *Kwiatkowska/Soons,* Entitlement to Maritime Areas of Rocks Which Cannot Sustain Human Habitation or Economic Life of Their Own, Netherlands Yearbook of International Law 21 (1990) 139 (163 et seq); *Gjetnes,* The Spratlys: Are They Rocks or Islands?, Ocean Development & International Law 32 (2001) 191 (194).

disjunctive theory than they do for the cumulative theory. Both *Kolb* and *Kwiatkowska/Soons* have found that the fact that the *travaux préparatoires* discuss the requirements of "human habitation" and "economic life" conjointly provides evidence that "or" carries a cumulative meaning.[808] However, the joint processing of both criteria can be attributed to the fact that they serve a common purpose and are part of the same provision, which may have rendered it more expedient to deal with them conjointly. While it is true that, at the closing of the drafting session, the Dominican delegation "interpreted 'or' in the first line to mean 'and'"[809], this pronouncement can only be attributed to one state. Changing the wording from the original "and" to "or" was a decision carrying the approval of the collective of delegations present and thereby carries greater weight for the purpose of interpretation.[810] It has also been argued that the *travaux préparatoires* show that "human habitation" and "economic life" are part of one and the same criterion with "economic life" being of a secondary importance.[811] This seems at odds with the suggestion, voiced during the Third United Nations Conference on the Law of the Sea, to rely on "economic life" alone.[812] These considerations show that evidence supporting the theory of cumulative requirements is not clearly deductible from the *travaux préparatoires*. The *travaux préparatoires* do not justify attributing a cumulative meaning to the word "or" in Article 121 (3).

IV. "Of their own" – on Autarchy and Dependence in Society and Business

Scholars and experts have devoted particular attention to the fact that islands in the narrow sense must be capable of sustaining human habitation or economic life *of their own*. This phrasing has occasionally been interpreted as the inclusion of a requirement for self-sufficiency,

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[808] *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... », Annuaire français de droit international 40 (1994) 876 (906); *Kwiatkowska/Soons,* Entitlement to Maritime Areas of Rocks Which Cannot Sustain Human Habitation or Economic Life of Their Own, Netherlands Yearbook of International Law 21 (1990) 139 (157).

[809] See United Nations Office for Ocean Affairs and the Law of the Sea, The Law of the Sea: Régime of Islands, UN Sales No. E.87.V.11 (1988) 99 (Dominican Republic).

[810] The Romanian draft proposal, which most closely mirrors the final version of Article 121 (3) changed the original description from "uninhabited and without economic life" to "cannot be inhabited (permanently) or which does not or cannot have its own economic life". This change is also reflected in the informal working papers and later the single working document. See *Platzöder,* Third United Nations Conference on the Law of the Sea - Documents of the Caracas Session 1974 (1975) 103, 168; United Nations Office for Ocean Affairs and the Law of the Sea, The Law of the Sea: Régime of Islands, UN Sales No. E.87.V.11 (1988) 30, 40 (Romania); 73 (single working document). The evolution from "and" to "or" is presented in further detail in *Charney,* Rocks that Cannot Sustain Human Habitation, The American Journal of International Law 93 (1999) 863 (868, fn 26).

[811] *Kwiatkowska/Soons,* Entitlement to Maritime Areas of Rocks Which Cannot Sustain Human Habitation or Economic Life of Their Own, Netherlands Yearbook of International Law 21 (1990) 139 (157).

[812] Denmark similarly highlighted the importance of "economic life", while making no reference to "human habitation". United Nations Office for Ocean Affairs and the Law of the Sea, The Law of the Sea: Régime of Islands, UN Sales No. E.87.V.11 (1988) 43 (Turkey), 55 (Denmark).

the precise form and degree of which remains unknown.[813] Determining with any reasonable precision the required degree of independence from outside support can present quite a challenge. Which essentials must be provided for locally and to what extent is government assistance a problem? Or, as *Gewirtz* has pointedly asked, "[i]f chickens can survive, reproduce, and be eaten there, is that sufficient?"[814]. There are a number of arguments that have been made in support of the view that "human habitation" or "economic life" must be possible without outside support. When addressing these arguments, we will start with opinions and observations relating to the provision's wording, before moving on to the topic of what is revealed by the provision's purpose and context.

A. The Argument from the Wording of Article 121 (3)

1. Self-sufficient Settlements or Self-sufficient Enterprises?

It may be argued that the phrase "cannot sustain human habitation or economic life of their own" means that a certain degree of self-sufficiency is required in *both* "human habitation" and "economic life".[815] Given the specific order of words, the interpreter may choose from one of two antithetic solutions, that both conform in equal measure with the laws of grammar. One might either argue that both "human habitation" and "economic life" must be sustainable "of their own", thereby viewing the adjunct "of their own" as a series qualifier. On the other hand, one can reasonably hold that "of their own" refers to "economic life", but not to "human habitation", because "economic life" holds the position of the last antecedent. In common law jurisdictions, there are specific rules guiding the interpreter when confronted with these grammatical constellations, called the "canons of construction"[816]. However, the fact that international law does not employ these canons as well as their questionable objectivity, that has given rise to debate even in common law systems,[817] speak against their detailed exploration in this thesis. While an analysis of the English language version of the *Regime of islands* thus

[813] See for example *Kolb*, who argues that while „economic life" does not require a state of complete autarchy, absolute dependency is not acceptable either. *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... », Annuaire français de droit international 40 (1994) 876 (907 et seq); see also *South China Sea Arbitration,* para 500, *supra* note 28.
[814] *Gewirtz,* Limits of Law in the South China Sea, East Asia Policy Paper 8 (2016) 9.
[815] See for example *Kolb*, who appears to regard "of their own" as a phrase relevant to both "human habitation" and "economic life". *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... », Annuaire français de droit international 40 (1994) 876 (907 et seq).
[816] *Rosenkranz,* Federal Rules of Statutory Interpretation, Harvard Law Review 115:8 (2002) 2085 (2141).
[817] *Ibid,* 2148.

fails to provide a clear solution to the problem at hand, the equally authoritative French and Spanish versions provide valuable insight. To ensure clarity, both versions of Article 121 (3) are reproduced below.

French:

> "Les rochers qui ne se prêtent pas à l'habitation humaine ou à une vie économique propre n'ont pas de zone économique exclusive ni de plateau continental."

Spanish:

> "Las rocas no aptes para mantener habitación humana o vida económica propia no tendrán zona económica exclusiva ni plataforma continental."

According to the rules of French grammar, if an adjective is meant to apply to both objects within an enumeration, the adjective should be employed in its plural form. If the adjective following two nouns separated by the conjunction "or" is used in its singular form – as is the case in "habitation humaine ou à une vie économique propre" – this indicates that the adjective qualifies only the last noun.[818] The French version of Article 121 (3) uses the adjective "propre" – which translates to "of their own" – instead of using the plural from, which would be "propres". Therefore, the adjective, "propre", qualifies "vie économique", but not "habitation humaine". "Propre" is thus intended as the last antecedent, not as a series qualifier. As Romanic languages, French and Spanish share a common origin, which is why French and Spanish grammatical rules relevant to the interpretational matter at hand resemble each other. The Spanish version uses the adjective "propia", which translates to "of their own", in its singular form, instead of the plural form, which would be "propias". This signifies that "propia" is aligned only with the noun that precedes it, not with both nouns.[819] The French and Spanish versions use formulations that intend to convey the same meaning as the English variant, yet they are more precise in nature. The precision in the French and Spanish languages, facilitated by case-specific word endings, reveals that "of their own" refers to a characteristic that is meant to qualify only "economic life", but not "human habitation".

2. Opinions on Autarchy in Legal Doctrine

Those arguing in favor of a certain degree of self-sufficiency in both "human habitation" and "economic life" often emphasize the importance of the use of the phrase "of their own". There is some scholarly consensus that not all kinds of external support are detrimental to the

[818] *Briet,* Savoir Accorder l'Adjectif (1996) 47.
[819] *de Bruyne,* Spanische Grammatik (1993) 98.

sustainability of "human habitation" and "economic life of [its] own".[820] *Charney* has compared the official versions of Article 121 (3) in different languages and reaches the conclusion that, at least in English, French and Spanish, the text allows "the meaning to include the acquisition of necessities from outside sources, based on the economic value or resources of the feature"[821]. The Chinese version reveals, according to *Charney*, that "[Article 121 (3)] does not require the ability to survive independently"[822]. *Charney* concluded that the prerequisite of "economic life" can be regarded as complied with "as long as the feature can generate revenues sufficient to purchase the missing necessities"[823]. There is an undeniable struggle to draw the line between a disqualifying and a non-disqualifying degree of outside support. In applying this definition of "economic life" it appears that, at the very least, successful mining operations fulfill the required conditions. According to *Charney*'s interpretation of Article 121 (3) any "economic life" must consequently not only be profit-oriented, but must generate a specific minimum level of income, namely the sum necessary to purchase missing necessities. This approach is not without difficulties. In particular, it raises the question of how projects with high launching costs are to be classified, and at what point they would theoretically reach the required profitability and thereby "economic life"-status. Another scenario potentially not considered in *Charney*'s approach is that of an island with a production site pertaining to a manufacturing process that stretches over multiple facilities and countries. The facility on the island may not be profitable when looked at in imagined isolation and may not generate "revenues sufficient to purchase the missing necessities". And yet, the island and its facility may still be a valuable component within the larger – profitable – company. Would *Charney* view such a facility as capable of sustaining "economic life"? *Gjetnes* has tended towards an opinion similar to *Charney*'s: while complete self-sufficiency is, according to *Gjetnes*, not required, "the island's own resources must provide at least part of the basis for its economic life"[824]. *Gjetnes* furthermore recognized the importance of exploitable deposits of hydrocarbons and reasons that "[s]upport from the outside must be allowed in order to realize the economic value that an island may hold".[825] *Root* has suggested that "a reasonable amount of engineering and outside

[820] *Kwiatkowska/Soons,* Entitlement to Maritime Areas of Rocks Which Cannot Sustain Human Habitation or Economic Life of Their Own, Netherlands Yearbook of International Law 21 (1990) 139 (168); *Gewirtz,* Limits of Law in the South China Sea, East Asia Policy Paper 8 (2016) 9.
[821] *Charney,* Rocks that Cannot Sustain Human Habitation, The American Journal of International Law 93 (1999) 863 (871).
[822] *Ibid.*
[823] *Ibid.*
[824] *Gjetnes,* The Spratlys: Are They Rocks or Islands?, Ocean Development & International Law 32 (2001) 191 (198).
[825] *Ibid,* 197, 198.

assistance is acceptable to prove capability of sustaining the required showings (a desalination plant on a formation that does not have potable water or the importation of trees or food, perhaps)"[826]. *Kolb* has pointed out that any dependency should be reasonable in light of the prevailing circumstances. While absolute reliance should be avoided, absolute autarchy is not necessary either.[827] *Kolb* refrained from defining a maximum degree of dependency, instead including a broad reference to the "abuse of rights" barrier.[828] *Kwiatkowska* and *Soons* have contributed to this debate by invoking the decision of the Conciliation Commission in the *Jan Mayen (Iceland/Norway)* case. In the opinion of these two scholars the Conciliation Commission's ruling supports the notion that "the maintenance by islands of an economic life of their own would not seem necessarily to exclude external support for a not necessarily permanent population"[829]. The consensus thus appears to be that while external support is not *per se* detrimental to the status of an island in the narrow sense, an island's reliance on it can reach a degree where one can no longer qualify the activity on the island as "economic life of [its] own". But not only scholars have commented on the *Regime of islands'* relation to autarchy, the subject was also very briefly addressed by Bangladesh in the *Bay of Bengal Case (Bangladesh/Myanmar)*. In this context, Bangladesh argued that St. Martin's Island should be recognized as an island in the narrow sense because it "is extensively cultivated and produces enough food to meet a significant proportion of the needs of its residents."[830] While the ITLOS did not further comment on this statement, the subject received far more attention by the arbitral tribunal adjudicating in the *South China Sea Arbitration*, which embraced the requirement of a certain degree of self-sufficiency.[831] It this way, the arbitral tribunal explained that "[e]conomic activity that can be carried on only through the continued injection of external resources is not within the meaning of 'an economic life of their own.' Such activity would not be the economic life of the feature as 'of its own', but an economic life ultimately dependent on support from the outside."[832] The arbitral tribunal further elaborated that while the economic life should not

[826] *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 (81).
[827] *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... », Annuaire français de droit international 40 (1994) 876 (907 et seq).
[828] Whether island building or outside support of an island population can amount to an "abuse of rights" is discussed in Part 2 Section 3. See also *ibid,* 908.
[829] *Kwiatkowska/Soons,* Entitlement to Maritime Areas of Rocks Which Cannot Sustain Human Habitation or Economic Life of Their Own, Netherlands Yearbook of International Law 21 (1990) 139 (169).
[830] *Bay of Bengal Case (Bangladesh/Myanmar)*, Memorial of Bangladesh, July 1, 2010, para 2.18, *supra* note 328. The *Bay of Bengal Case (Bangladesh and Myanmar)* is covered in more detail in Part 1 Section 2 II B 8.
[831] See also *Bowett*, The Legal Regime of Islands in International Law (1979) 34, cited in *Kwiatkowska/Soons,* Entitlement to Maritime Areas of Rocks Which Cannot Sustain Human Habitation or Economic Life of Their Own, Netherlands Yearbook of International Law 21 (1990) 139 (169).
[832] *South China Sea Arbitration,* para 500, *supra* note 28.

"rely […] predominantly"[833] on outside resources, "[t]rade and links with the outside world do not disqualify a feature to the extent that they go to improving the quality of life of its inhabitants."[834] The arbitral tribunal appeared to be of the opinion that funds and shipments providing what is essential to "economic life" (or "human habitation")[835] demonstrate that there can be no sufficiently independent "economic life" on an island, while shipments delivering goods that improve the life of the inhabitants, but ultimately remain dispensable, are not detrimental to the finding that an island sustains "economic life". Separating disqualifying external support from non-disqualifying external support may be difficult in practice. What does it mean for an enterprise or settlement to "predominantly" rely on outside support? The award opposed the recognition of resource extraction as a form of "economic life", and yet such ventures are usually undertaken in the hope that the island's very own resources will richly compensate the mining organization for ongoing expenses. One could argue that mining enterprises thus "predominantly" rely on the island's intrinsic qualities, not outside support. It was the arbitral tribunal's position that trade "improving the quality of life of its inhabitants"[836] is not at odds with the island sustaining an "economic life of [its] own". The tribunal failed to explain which kind of wares merely "improve" life on an island and which are evidence of predominant reliance on outside support. It appears debatable whether, for example, imported supplementary foodstuffs to ensure a healthy diet, air-conditioning systems, sanitary facilities or pharmaceuticals are mere luxury goods aimed at "improving life" or show that there is predominant reliance on trade to sustain the population.

The contradictions of the *South China Sea Arbitration* have drawn the attention of other scholars as well. *Elferink* has criticized the tribunal's "mischaracterization of the relationship between external resources and the economic life that an island can sustain of its own"[837]. He added that not "the extent of support from the outside as such" should be relevant, but rather how this support "relates to the resources or services the island has of its own", seemingly requiring that economic activity should be "the result of the presence of resources or services of the island".[838] *Tanaka* has noted that the tribunal did not specify the degree of dependence

[833] *Ibid.*
[834] *Ibid,* para 550.
[835] It should, at this point, be recalled that the arbitral tribunal often treats the criteria of "human habitation" and "economic life" as a single criterion, not two. See Part 2 Section 2 III C.
[836] *South China Sea Arbitration,* para 550, *supra* note 28.
[837] *Elferink,* The South China Sea Arbitration's Interpretation of Article 121(3) of the LOSC: A Disquieting First, The Blog of the K.G. Jebsen Centre for the Law of the Sea, September 7, 2016 <site.uit.no/jclos/2016/09/07/the-south-china-sea-arbitrations-interpretation-of-article-1213-of-the-losc-a-disquieting-first/>.
[838] *Ibid.*

that would be disqualifying.[839] It should also be noted that, during the drafting process of the *Regime of islands*, at least one state has taken a definite stance on the topic of autarchy by remarking that the phrase "economic life of their own" does not indicate "complete self-sufficiency"[840]. In sum, while certain scholars and states, as well as the most prominent international decision addressing the *Regime of islands* have found that Article 121 (3) requires that islands in the narrow sense should be at least partly self-sufficient, this position brings with it multiple ambiguities and consequently appears unsuited for practical application. Adding a requirement for – either partial or total – self-sufficiency to the *Regime of islands* does not clarify the provision's meaning or facilitate its application.

3. The Equivalence between Islands in the Narrow Sense and Continental Territories

The wording of Article 121 (3) can be read as an attempt to confer an EEZ and continental shelf upon islands that mirror conditions on continental states. Continental states are, after all, commonly capable of sustaining "human habitation" and "economic life" and are, as a matter of course, entitled to the full spectrum of maritime zones. It makes sense that territories sharing such vital characteristics as being inhabited and contributing to economic output should be equally entitled to maritime zones. If we expand on this theoretical concept of islands in the narrow sense deriving their entitlement to an EEZ and continental shelf from their resemblance to continental territories, it becomes apparent that, in general, neither continental states nor island states function completely independently from imports, and that islands featuring large populations reliant on regular supply shipments, are – in respect of their economic or demographic usefulness – not fundamentally different from continental states. Relying on imports in order to sustain local populations has become the norm in continental and island states alike: to name just one example, the 28 member states of the European Union held a share of 14.8% in the global market for imports in 2014.[841] 6% of imports in the EU member states were made up of food and drink, 4% of raw materials and 30% of energy.[842] It would seem paradoxical to demand that islands in the narrow sense be self-sufficient, given that self-

[839] *Tanaka,* Reflections on the Interpretation and Application of Article 121(3) in the South China Sea Arbitration (Merits), Ocean Development and International Law 48:3-4 (2017) 365 (369).
[840] United Nations Office for Ocean Affairs and the Law of the Sea, The Law of the Sea: Régime of Islands, UN Sales No. E.87.V.11 (1988) 97 (Venezuela).
[841] See Eurostat – Statistics Explained, Shares in the World Market for Imports (2014) <http://ec.europa.eu/eurostat/statistics-explained/index.php/File:Shares_in_the_world_market_for_imports,_2014_(%25_share_of_world_imports)_YB16.png>.
[842] See Eurostat – Statistics Explained, EU28 Imports by Products Group (2013) <http://ec.europa.eu/eurostat/statistics-explained/index.php/File:EU28_imports_by_products_group,_2013.PNG>.

sufficiency is not a trait in "human habitation" or "economic life" as it occurs on continental states, which are the territories the legal concept of the "island in the narrow sense" appears to be modelled after. *Talmon* has expressed a similar sentiment in noting that "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"[843]. A comparable critique was made by Jamaica during the Third United Nations Conference on the Law of the Sea and can be found in the *travaux préparatoires*.[844]

4. The Definitive Link

Judging from the wording of Article 121 (3), it is possible that "of their own" was never intended as a reference to an indeterminate degree of autarchy, but as an indication that an island's characteristics should match the use it is put to. This understanding shall be explored below.

The stipulation that "economic life" must be sustained by an island "of [its] own" may indicate that there should be intrinsic characteristics to the island that render it especially suited for the activity in question. We shall call this connection between locality and activity the "definitive link". This terminology is not entirely novel. Both *Van Dyke* and the *South China Sea Arbitration* have mentioned the requirement of a "link" or "real link" that should exist between any "human habitation" or "economic life" and an island in the narrow sense.[845] The phrasing "of [its] own" points to the necessity of pre-existing conditions that are in some way favorable to or aid in the establishment of the economic enterprise in question. If the conditions prevailing on the island do not qualify the island for the specific use, the island would not seem to support the activity "of [its] own". The island would not appear valuable for the specific purpose it is put to. Economic value – or alternatively value as a potential place of residence – is however the *raison d'être* of the EEZ and continental shelf in the context Article 121 (3). On these grounds, it seems well within the wording and aim of Article 121 (3) to require a connection between locality and usage. *Talmon* appears to have taken a similar view, noting that "Art. 121 (3) requires […] the 'basic capacity' of a feature to sustain human habitation or economic life

[843] *Talmon,* Article 121 - Regime of Islands in Proelss (ed.), The United Nations Convention on the Law of the Sea - A Commentary (2017) 858 (877).
[844] United Nations Office for Ocean Affairs and the Law of the Sea, The Law of the Sea: Régime of Islands, UN Sales No. E.87.V.11 (1988) 64 (Jamaica).
[845] Interestingly, the *South China Sea Arbitration* notes that there should be a "link" between an island and its economic life, but argues that this "link" requires that the economic life take place on dry land. See *South China Sea Arbitration,* para 503, *supra* note 28; *Howland Island Case,* Deposition of Jon Van Dyke, October 31, 2007, 72, *supra* note 413.

of its own"[846]. This "basic capacity" may then, according to *Talmon,* be further refined and expanded upon without this being detrimental to an island's status.[847] In the case of industrial fishing within an island's territorial sea, the definitive link is apparent from the presence of fish in numbers permitting commercial exploitation. The location and purpose seem perfectly matched. The link between an island and its usage may on the other hand be questioned if economic efficiency is low in the sense that the specific type of economic usage appears misplaced, absurd or conditional upon a prohibitive amount of effort. It is for instance a sign that the definitive link is lacking if there is no apparent reason why the specific location was chosen for the particular enterprise. Under such circumstances, the "economic life" appears artificially implanted. Operating an online casino and naming a location on the island as its headquarters would, for example, in no way exemplify an island's usefulness for the specific purpose. Such an enterprise may be established anywhere and lacks a meaningful connection to the territory whose maritime zones it supposedly justifies. Its location on the island thus fails to convey a statement on the island's inherent capabilities and its worth. The theory of the "definitive link" thus offers a solution far more practical than the approach requiring self-sufficiency. In addition, the "definitive link" is inferable from the wording of the *Regime of islands* and is capable of furthering its purpose of singling out those islands that are economically valuable by virtue of their properties. We may therefore abandon the idea of a necessarily "autarchic" economic life in favor of adopting the solution of requiring an economic activity that matches the island's environment.

B. The Argument from Object and Purpose

This chapter will explore whether a thorough enquiry into the object and purpose of Article 121 (3) reveals that the description of islands in the narrow sense as capable of "sustain[ing] human habitation or economic life of their own" is in fact a reference to island communities living under autarchic or at least partially self-sufficient conditions. In order to achieve this, we shall first look into the aims behind the EEZ regime in general, before addressing objectives specific to the *Regime of islands*. We shall also consider expert opinions on the matter and address the *travaux préparatoires*.

[846] *Talmon,* Article 121 - Regime of Islands in Proelss (ed.), The United Nations Convention on the Law of the Sea - A Commentary (2017) 858 (873).
[847] *Ibid.*

1. Object and Purpose of the EEZ Regime

When it comes to naming the main motive for the establishment of the EEZ regime, opinions are divided. Where some experts point to a desire to protect the livelihood of coastal communities,[848] others contend that states were motivated by the benefits the EEZ would confer on the national economy.[849] In his capacity as a judge in the *Volga Case*, *Vukas*, whose position in this regard has gone on to influence other notable experts,[850] remarked that "the protection of the economic interests of the coastal States, and in particular of their population in the coastal areas, has been the essential factor in establishing this new régime at sea"[851]. For confirmation of the importance of coastal communities to the development of the EEZ system, *Vukas* pointed to Article 61 (3). This provision deals with a very different matter, namely with the conservation of the earth's living resources. In particular, Article 61 (3) aims to counteract the practice of overfishing, *inter alia* by confirming the Maximum Sustainable Yield (MSY) as the highest permissible catch volume. The "economic needs of coastal fishing communities" are mentioned in this context only as a factor to be taken into account when calculating the MSY. Article 61 (3) references coastal fishing communities only in this very limited context, rendering it difficult to take the provision as confirmation that such communities are relevant in a broader context, or even vital to the adoption of the EEZ regime. While *Vukas* underscored the relevance of coastal communities to the EEZ regime, he simultaneously acknowledged that the overarching motivation driving the adoption of the EEZ was to generate economic benefits for coastal states, as made evident in the above cited description of "economic interests" as the "essential factor".[852] Despite *Vukas*' nuanced view, other scholars have taken his words as a confirmation of the primary importance of coastal subsistence communities in all matters related to the EEZ. Leaning on the position taken by *Vukas*, *Van Dyke* argued that the underlying purpose of an EEZ for island territories "was to protect the economic interests of the coastal communities that depended on the resources of the sea and thus to promote their

[848] *Howland Island Case,* Declaration of Jon Van Dyke in Support of Defendant's Motion to Dismiss, October 26, 2007, para 7, *supra* note 413; *Gjetnes,* The Spratlys: Are They Rocks or Islands?, Ocean Development & International Law 32 (2001) 191 (194); *South China Sea Arbitration,* para 514, *supra* note 28.
[849] *Extavour,* The Exclusive Economic Zone - A Study of the Evolution and Progressive Development of the International Law of the Sea (1978) 177; *Hafetz,* Fostering Protection of the Marine Environment and Economic Development: Article 121(3) of the Third Law of the Sea Convention, AM. U. INT'L L. REV 15 (2000) 583 (591).
[850] *Diaz/Dubner/Parent,* When is a "Rock" an "Island"? - Another Unilateral Declaration Defies "Norms" of International Law, Michigan State Journal of International Law 15 (2007) 519 (543); *Van Dyke,* Legal Issues Related to Sovereignty over Dokdo and Its Maritime Boundary, Ocean Development & International Law 38 (2007) 519 (545).
[851] *Volga Case,* Declaration of Budislav Vukas, December 23, 2002, para 5, *supra* note 172.
[852] *Ibid.*

economic development and enable them to feed themselves"[853]. *Gjetnes* agreed in stating that the EEZ and continental shelf were incorporated in UNCLOS "because it seemed appropriate to allow coastal populations to have a primary right and responsibility to exploit and manage resources in the waters and on the continental shelf adjacent to their coasts."[854] In the absence of an indigenous population, *Gjetnes* added, these zones should not be permitted. Despite the emphasis on indigenous population, *Gjetnes* has taken the view that "complete self-sufficiency"[855] is not required in islands in the narrow sense. It should not be overlooked that, despite placing significant emphasis on the role of coastal communities, neither *Vukas, Van Dyke* nor *Gjetnes* have expressed a belief that to "sustain human habitation or economic life" means to enable an autarchic lifestyle and neither do they believe that imports are detrimental to an island's status as an "island in the narrow sense". The same cannot be said of the award in the *South China Sea Arbitration*, which endorsed a precondition of partial self-sufficiency for islands in the narrow sense. While its proclamation that "the purpose of the exclusive economic zone […] was to extend the jurisdiction of States over the waters adjacent to their coasts and to preserve the resources of those waters for the benefit of the population of the coastal State"[856] fully acknowledged that the EEZ was created to benefit the coastal states' populations, the award also heavily emphasized the "legitimate priority in favor of littoral peoples to benefit from the natural resources"[857]. From these conclusions the tribunal went on to assert that an island in the narrow sense "must have the ability to support an independent economic life, without relying predominantly on the infusion of outside resources"[858]. The economic activity must relate to "local, not imported" resources which must in turn benefit a local population.[859] It is explained that "[Article 121 (3)] serves to disable tiny features from […] generating enormous entitlements to maritime space that would serve not to benefit the local population, but to award a windfall to the (potentially distant) State"[860]. Having initially maintained that the EEZ is supposed to benefit the "population of the coastal State"[861], the tribunal ultimately dismissed the mainland population of the coastal state as "potentially

[853] *Howland Island Case,* Declaration of Jon Van Dyke in Support of Defendant's Motion to Dismiss, October 26, 2007, para 7, *supra* note 413.
[854] *Gjetnes,* The Spratlys: Are They Rocks or Islands?, Ocean Development & International Law 32 (2001) 191 (194).
[855] *Ibid,* 198.
[856] *South China Sea Arbitration,* para 513, *supra* note 28.
[857] *Ibid,* para 514.
[858] *Ibid,* para 500.
[859] *Ibid*.
[860] *Ibid,* para 516.
[861] *Ibid,* para 513.

distant"[862]. This appears a somewhat curious position, given that the population of the coastal state may derive benefits from an EEZ surrounding a small island even if the island is uninhabited, or inhabited by a population depending on imports. The EEZ can be of interest to the general population as its members may be employed in or own fishing and mining enterprises operating on and around the island. State-owned enterprises exploiting maritime resources, aided by a functional redistribution mechanism, further hold the potential to elevate the general population's standard of living. The arbitral tribunal justified its prerequisite that an island community be self-sufficient by arguing that "the link between a maritime feature and the people of the coastal State becomes increasingly slight"[863] otherwise. The tribunal seemed to contradict itself in arguing that any activity taking place on an island could only be called "economic life" within the meaning of Article 121 (3) if it "accrue[s] […] benefit for the feature or its population"[864], while simultaneously holding that the EEZ is not "narrowly intended to preserve the resources of the zone for the population of that island"[865]. Beyond these discrepancies, it seems uncertain how the tribunal's restrictive view of requiring near-autarchic conditions on islands in the narrow sense would benefit coastal communities. It should be remembered that the tribunal's findings in this matter remain a bit of an outlier. As discussed, scholars generally take a step back from attributing an outsized importance to littoral peoples and autarchic communities. Outside the *Regime of islands*, UNCLOS does not grant rights to the EEZ depending on coastal population levels, showing that the EEZ – a "multifunctional resource zone"[866] – has many uses beyond sustaining coastal communities. Among those functions are the exploitation of natural resources on a larger scale, scientific research, marine environmental protection and the laying of submarine cables and pipelines.[867] Indeed, the EEZ serves numerous purposes that in no way affect coastal communities,[868] and extends far beyond the breadth necessary to safeguard the needs of communities relying on subsistence fisheries. The legal implications of the EEZ system illustrate that the EEZ was supposed to yield "economic benefits, which […] would accrue to the coastal state from the exploration and exploitation of [its] resources"[869]. Or, as others have noted, "UNCLOS III was prompted by the

[862] *Ibid,* para 516.
[863] *Ibid,* para 517.
[864] *Ibid,* para 500.
[865] *Ibid,* para 517.
[866] *Kwiatkowska,* The 200 Mile Exclusive Economic Zone in the New Law of the Sea (1989) 4.
[867] Art 56, 58 UNCLOS.
[868] See Art 56 UNCLOS.
[869] *Extavour,* The Exclusive Economic Zone - A Study of the Evolution and Progressive Development of the International Law of the Sea (1978) 177.

expansive claims of coastal States in Latin America over their coastal waters"[870], which indicates that the predominant concern of coastal states in establishing the EEZ system was to enable the exploitation of maritime areas for the benefit of all kinds of commercial undertakings.[871] As scholars *Kwiatkowska* and *Soons* have noted, "[t]he economic potential of living resources was the main motivation behind the establishment of the EEZ by both developing and industrialized states, as the mineral resources were already subject to the exclusive control of the coastal state under the traditional continental shelf regime."[872] The coastal states succeeded in advancing their goals: the EEZ brought about a significant enlargement of exclusive exploitation areas, especially compared to the legislation previously in force. In the words of *Charney*, "it is plain that the negotiators favored the interests of the coastal states by expanding their maritime areas to new zones and limits set out in the text [of UNCLOS]"[873]. He continued by arguing that the EEZ has "the underlying purpose of accelerating the socio-economic development of states and reducing the inequalities existing between industrial and developing countries"[874]. This objective is reflected in UNCLOS' call for the "realization of a just and equitable international economic order"[875]. In order to achieve such progress, it seems that a coastal state should be able to harness the ocean's resources and allow for their exploitation on an industrial scale. UNCLOS' focus on accelerating socio-economic development thusly illustrates that the EEZ was envisioned as a driver of economic growth, thus benefitting the population of the coastal state *as a whole*. In sum, there is relatively broad consensus on the finding that the concept of the EEZ was created to benefit the economy and general population of coastal states. Even those experts who find that the protection of small coastal communities played an outsized role in the adoption of the EEZ, do not believe that this entails that an EEZ may only be awarded to islands functioning under near-autarchic conditions, with the exception of the decision handed down in the *South China Sea Arbitration*.

[870] *Hafetz,* Fostering Protection of the Marine Environment and Economic Development: Article 121(3) of the Third Law of the Sea Convention, AM. U. INT'L L. REV 15 (2000) 583 (591).
[871] *Diaz, Dubner* and *Parent* agree in highlighting that "In summary, the purpose behind the establishment of an exclusive economic zone is to give coastal States and mid-ocean, archipelagic States preferential rights of fishing in adjacent waters." *Diaz/Dubner/Parent,* When is a "Rock" an "Island"? - Another Unilateral Declaration Defies "Norms" of International Law, Michigan State Journal of International Law 15 (2007) 519 (545).
[872] *Kwiatkowska,* The 200 Mile Exclusive Economic Zone in the New Law of the Sea (1989) 2.
[873] *Charney,* Rocks that Cannot Sustain Human Habitation, The American Journal of International Law 93 (1999) 863 (865).
[874] *Kwiatkowska,* The 200 Mile Exclusive Economic Zone in the New Law of the Sea (1989) 2.
[875] Preamble of UNCLOS.

2. Object and Purpose of Article 121 (3)

Article 121 (3) is a provision preventing rocks from generating maritime zones that would be disproportionate in view of their limited demographic or economic usefulness. In so far as this involves a limit to continental shelf claims, the provision would seem to serve the equitable distribution of the riches of the seabed in areas beyond national jurisdiction, also referred to as the common heritage of mankind. Beyond this, the *Regime of islands* reflects a multitude of interests and concerns that are not always compatible with one another, which may be why its purpose is sometimes considered controversial.[876] A look at the relevant *travaux préparatoires* reveals that the aims and principles of particular importance to the drafters included not only the preservation of the common heritage of mankind, but establishing a hierarchy among different types of islands, consolidating the legal equality of all islands, protecting state sovereignty, ensuring the access of the population of the coastal state to marine resources, economic justice and equity. Several participants to the conference described the final version of Article 121 (3) as a balance between varying interests, a balance they felt should not be abandoned in an effort to renegotiate the *Regime of islands*.

a. Protection of the Common Heritage of Mankind

The common heritage principle originally intended to "counter the idea that the sea was a *res communis* and the seabed *res nullius* open for appropriation"[877]. It is a principle protecting the global commons, which are areas that are open to the use of all states.[878] In the context of UNCLOS, the common heritage principle entails that the Area, which is the "seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction"[879] cannot be claimed as sovereign territory and cannot be appropriated.[880] Under the guidance of the International Seabed Authority, all states are required to co-operate internationally in the exploration and utilization of the ocean floor and deep seabed. Mankind as a whole, via its representative the International Seabed Authority, is competent to control and manage matters relating to the deep seabed.[881] As *Wolfrum* has explained, "States Parties are meant to act as a kind of trustee on behalf of mankind as a whole"[882]. The common heritage principle differs from the freedom of

[876] *Beckman/Bernard,* The Significance of Offshore Geographic Features to Maritime Claims in *Wu/Zou* (eds.), Arbitration Concerning the South China Sea - Philippines versus China (2016) 189.
[877] *Wolfrum,* Common Heritage of Mankind in Wolfrum (ed.), The Max Planck Encyclopedia of Public International Law (2015) para 11.
[878] *Ibid,* para 1.
[879] Art 1 (1) (1) UNCLOS.
[880] Art 137 UNCLOS.
[881] Art 157 (1) UNCLOS.
[882] *Wolfrum,* Common Heritage of Mankind in Wolfrum (ed.), The Max Planck Encyclopedia of Public International Law (2015), para 15.

the high seas in that the latter must be exercised in a spirit of cooperation so as not to impinge on the freedoms of other states, while the former goes beyond that and intends to safeguard the interests of humankind. The perhaps most controversial aspect of UNCLOS' common heritage principle is its goal of achieving distributive justice: according to Article 140, "[a]ctivities in the Area shall, […] be carried out for the benefit of mankind as a whole […] and taking into particular consideration the interests and needs of developing States". In order to meet this goal in practice, UNCLOS sets forth that technology and some revenues shall be shared, developing states shall receive preferential treatment and the International Seabed Authority shall exercise jurisdiction over deep seabed mining activities.[883] Specifically, "[t]he coastal State shall make payments or contributions in kind in respect of the exploitation of the non-living resources of [the outer continental shelf]"[884]. The payments shall initially amount to 1% of the annual value of production, but rise by 1% annually until the 12th year of production.[885] The payments are to be made every year after the first five years of production to the International Seabed Authority, which is in charge of redistributing them to party states on the basis of equitable sharing criteria.[886] The prominent role of the principle of the common heritage of mankind in the law of the sea is evident both from its general recognition in UNCLOS' preamble and from UNCLOS' Part XI, which elaborates on its more specific legal effects. We also know that states involved in the drafting process of the *Regime of islands* held the opinion that this provision should bear in mind the common heritage principle. The prevention of encroachment on the international area and the maritime zones of other states has even been described by some as the "main purpose"[887] of paragraphs two and three of the *Regime of islands*. The *Regime of islands* takes account of the interests of the international community, including those of landlocked and geographically disadvantaged states,[888] and promotes the equitable utilization of resources.[889] In the drafting stage, Colombia felt that the final version of the *Regime of islands* "would help to preserve the common heritage in the oceans"[890]. Turkey expressed concern that the *Regime of islands* may have the effect of "diminish[ing] the area destined to

[883] Art 82, 144, 148, 150 (d), 151, 152 UNCLOS.
[884] Art 82 (1) UNCLOS.
[885] Art 82 (2) UNCLOS.
[886] Art 82 (4) UNCLOS.
[887] United Nations Office for Ocean Affairs and the Law of the Sea, The Law of the Sea: Régime of Islands, UN Sales No. E.87.V.11 (1988) 42 (Romania).
[888] *Ibid,* 65 (Tunisia); 106 (German Democratic Republic).
[889] See also *Dipla,* Le régime juridique des îles dans le droit international de la mer (1984) 82 et seq. For the importance of the equitable distribution of resources to UNCLOS see its preamble.
[890] United Nations Office for Ocean Affairs and the Law of the Sea, The Law of the Sea: Régime of Islands, UN Sales No. E.87.V.11 (1988) 108 (Colombia).

make up the common heritage of mankind"[891]. These misgivings over the *Regime of islands'* impact on the common heritage of mankind were echoed by Singapore.[892] Romania found that "the question of islands had to be considered within the new parameters of the enlarged 12-mile territorial sea, the 200-mile economic zone and the concept of the common heritage of mankind"[893]. Greece and Algeria also invoked the common heritage principle in the context of the *Regime of islands.*[894] From these statements we may conclude that the protection of the common heritage of mankind had at least some impact on the discussions surrounding the adoption of the *Regime of islands. Talmon* has in this context noted that Article 121 (3) aims to mitigate the "unprecedented encroachment of coastal State jurisdiction"[895] that would have resulted from granting all islands, regardless of their adequacy for inhabitation or use, equal legal status and to "contribute to a more equitable distribution of the resources of the sea"[896]. Valid continental shelf claims drawn on the basis of remote and isolated islands undoubtedly limit the Area and thereby the common heritage of mankind. Article 121 (3) has the effect of constraining the capacity of islands to decrease the Area, and it seems as though this effect was intentional.

b. Polar Opposites: Equality and Subdivision

The most salient source of disagreement among the states participating in discussions relevant to the *Regime of islands* at the Third United Nations Conference on the Law of the Sea was the matter of whether or not all islands should be treated alike. One faction of states pursued the objective of upholding and consolidating the principle of legal equivalence among all high tide elevations that had been set forth in the 1958 Conventions.[897] The opposing faction aimed to introduce a hierarchy among different types of high tide elevations, with would entail differences in the maritime zones each of these types were entitled to.[898] This controversy has already been addressed at the relevant point in this thesis and shall consequently not be re-

[891] *Ibid,* 27 (Turkey).
[892] *Ibid,* 61 (Singapore).
[893] *Ibid,* 41 (Romania).
[894] *Ibid,* 68 (Algeria); 34 (Greece).
[895] *Talmon,* Article 121 - Regime of Islands in Proelss (ed.), The United Nations Convention on the Law of the Sea - A Commentary (2017) 858 (860).
[896] *Ibid.*
[897] United Nations Office for Ocean Affairs and the Law of the Sea, The Law of the Sea: Régime of Islands, UN Sales No. E.87.V.11 (1988) 27 (Cyprus); 31, 33, 53 (Greece); 34 (Fiji); 34, 51 (New Zealand); 34, 53 (Western Samoa); 34, 56 (Tonga); 51 (Uruguay); 60 (Canada); 62 (France); 62 (Venezuela); 63 (Jamaica); 66 (United Kingdom); 89, 105 (Japan); 103 (Iran); 107 (Brazil); 107 (Portugal); 108 (Australia); 108 (Ecuador).
[898] *Ibid,* 25 (Tunisia); 27, 43 (Turkey); 30 (Romania); 52 (Madagascar); 54, 55, 107 (Denmark); 61 (Singapore); 48 (Dahomey); 48 (Guinea); 48 (Ivory Coast); 48 (Liberia); 48 (Mali); 48 (Mauritania); 48 (Sierra Leone); 48 (Sudan); 48 (Upper Volta); 48 (Zambia); 88 (Algeria); 88 (Bangladesh); 88 (Cameroon); 88 (Iraq); 88 (Libya); 88 (Morocco); 88 (Nicaragua); 88 (Somalia).

examined here.[899] The antithetical nature of the abovementioned objectives prevented the adoption of a provision resolving all outstanding issues to the satisfaction of the participants. A solution of sorts was found in the *Regime of islands* emphasizing the legal equivalence of all islands in principle while still adding an exception to this rule for a type of island considered exceptionally unusable, the "rock".

c. Protection of State Sovereignty

Another objective that appears to have been central to the formation of the *Regime of islands*, is ensuring respect for state sovereignty and the privileges associated with this principle. That the *Regime of islands* was intended to guarantee the protection of the tenets of state sovereignty is especially evident from the statements made by France, New Zealand, Portugal, Spain, Tonga, Western Samoa and Venezuela at the Third United Nations Conference on the Law of the Sea.[900] Among the "fundamental principles" forming the basis of the *Regime of islands*, Spain identified "first, the territorial unity and integrity of the State, including the territorial waters and the air space above them; secondly, the indivisibility of the sovereignty of the State over its territory, continental or maritime; and lastly the sovereign equality of all States, great or small, insular or archipelagic, continental or 'mixed'"[901]. According to Spain, respect for the indivisibility of state sovereignty signified that all islands should be entitled to the same maritime zones.[902] New Zealand similarly viewed entitlement to maritime zones as an expression of state sovereignty, explaining further that state sovereignty could not vary depending on "a calculation of the size of a State, its population or other factors"[903]. Indeed, state sovereignty was mostly referenced as an argument in favor of upholding the legal equivalence of all islands,[904] as introducing categories of islands with fewer maritime zones than continental territories would "deny [states owning island territories] full State sovereignty"[905].

[899] Part 2 Section 1 II.
[900] United Nations Office for Ocean Affairs and the Law of the Sea, The Law of the Sea: Régime of Islands, UN Sales No. E.87.V.11 (1988) 26 (France); 51 (New Zealand); 53 (Western Samoa); 56 (Tonga); 70 (Spain); 103 (Venezuela); 107 (Portugal).
[901] *Ibid,* 70 (Spain).
[902] *Ibid.*
[903] *Ibid,* 51 (New Zealand).
[904] *Ibid,* 26 (France); 56 (Tonga); 103 (Venezuela); 107 (Portugal).
[905] *Ibid,* 53 (Western Samoa).

d. Safeguarding Coastal States' Access to Marine Resources

Naturally, the eventual legal content of Article 121 (3) was influenced, in part, by a desire to ensure that coastal states and their populations have access to, and benefit from, the marine resources off their coasts. Some saw the provision as a form of special protection for littoral peoples.[906] Singapore stated that it accepted the "interests of the people and the desire to marshal the resources of ocean space for their development" [907] as an important rationale underlying Article 121 (3). Micronesia further explained why access to marine resources is of vital interest to island territories: "Small islands which have no land resources to speak of need the benefits of an economic zone and the sea's resources within it more desperately than any other territories. It would not be equity to deny the sea's resources to those who need them most."[908] This focus was also endorsed by Nicaragua and New Zealand.[909]

It should also be noted that the *Regime of islands* is part of the "basic trend of the [Third United Nations Conference on the Law of the Sea] towards a considerable enlargement of the authority of States over the seas"[910]. The incentive of furthering and protecting commercial use appears logical from the mention of "economic life" in Article 121 (3). If the adoption of Article 121 (3) was not to some extent driven by the wish to authorize economic exploitation of the EEZs surrounding islands, it would have been unnecessary to include a reference to potential economic usages. What is notable absent from the *travaux prépartoires*, is any evidence of a desire to limit entitlement to the EEZ or continental shelf to islands with an economy that can thrive independently from imports or any indication that "human habitation" and "economic life" are required to be possible under natural conditions. While local populations' dependence on marine resources was often mentioned, it was never indicated that the communities to be protected were limited to those *solely* surviving on local resources. Independency from imports was not in any way the defining characteristic of the communities described as in need of advocacy and protection.

e. Equity and Economic Justice

Invocations of the principle of equity can be found throughout the drafting history of Article 121 (3) and in various contexts. Its vital role is *inter alia* evident from Madagascar's general

[906] *Ibid,* 27 (Cyprus). Micronesia, Turkey, Argentina, Trinidad and Tobago and Singapore furthermore similarly stressed the dependency of island populations on oceanic resources. See *ibid,* 25 (Denmark), 28 (Micronesia), 45 (Turkey), 46 (Argentina), 57 (Trinidad and Tobago), 61 (Singapore).
[907] *Ibid,* 61 (Singapore).
[908] *Ibid,* 28 (Micronesia).
[909] *Ibid,* 59 (Nicaragua); 28 (New Zealand).
[910] *Ibid,* 34 (Greece).

announcement that "the principles of equity should govern the establishment of a special régime for small islands"[911]. France similarly called for a provision marked by "respect for the requirements of equity"[912]. The principle of equity was furthermore explicitly invoked by Colombia, Singapore and the United Kingdom.[913] The goal of ensuring the equitable utilization of marine resources was repeatedly emphasized.[914] According to Ecuador and Algeria, the *Regime of islands* should not merely comply with the principle of equity, but should advance economic justice among states. Ecuador proclaimed that Article 121 (3) should be part of "a just and equitable system of international co-operation which would make it possible to narrow the enormous gap between rich and poor countries"[915]. Algeria called for "[m]easures […] that would preclude already developed countries or those enjoying more than one seacoast from seriously injuring the interests of other countries, especially the least favoured from the economic point of view"[916].

f. A Balance of Interests

Article 121 (3) was shaped by concerns over the preservation of the common heritage of mankind, the perceived need for a hierarchy among different types of islands, the wish to consolidate the complete legal equality of all islands, the desire to ensure respect for state sovereignty, an interest in guaranteeing access to marine resources, the drive for economic justice and an overall respect for the principle of equity. Despite the at times opposing nature of these objectives, a compromise – today's Article 121 (3) – was ultimately achieved. Some of the participants to the Third United Nations Conference on the Law of the Sea described this compromise as the "balance" enabling a conclusion of the subject and were anxious to retain this balance.[917] Colombia in particular found that "article 121 reflected a unique and delicate balance and would help to preserve the common heritage in the oceans"[918]. This balancing of interests entails that, in any practical application of Article 121 (3), the objectives that ultimately prevail in the case at hand depend on its circumstances. If an island's usefulness in terms of potential for settlement or economic activity is verifiable, Article 121 (3) acts as a safeguard protecting the sovereign rights of the owing state to the oceanic resources retrievable from the island's EEZ and continental shelf. Where an island cannot satisfy these criteria, the *Regime of*

[911] *Ibid,* 52 (Madagascar).
[912] *Ibid,* 63 (France).
[913] *Ibid,* 55 (Colombia); 61 (Singapore); 66 (United Kingdom).
[914] *Ibid,* 27 (Turkey), 55 (Denmark), 61 (Singapore).
[915] *Ibid,* 47 (Ecuador).
[916] *Ibid,* 26 (Algeria).
[917] *Ibid,* 107 (Korea); 107 (Tunisia); 108 (Ecuador).
[918] *Ibid,* 108 (Colombia).

islands works in favour of the protection of the common heritage by barring continental shelf claims around islands.

3. Deterrence

The tribunal in the *South China Sea Arbitration* has explained that relying on conditions other than natural ones in the classification of islands "would create perverse incentives for States to undertake such actions to extend their maritime zones to the detriment of other coastal States and/or the common heritage of mankind"[919]. It is implied that the *Regime of islands* serves as a deterrent against island building. The Philippines elaborated that an island in the narrow sense had to be capable of sustaining a settlement under conditions that can only be described as autarchic: the import of technology, structural changes or external supplies were considered detrimental to any confirmation of "human habitation or economic life of their own".[920] The Philippines' arguments as expressed during hearings illustrated that this interpretation was regarded as justified by the perceived necessity of creating a deterrent against island building. It was in particular stated that the classification of the Spratly Islands as "rocks" would be beneficial since this would cause "[t]he race to occupy and enlarge [small islands], at the expense of regional stability and precious ecosystems, [to] lose steam"[921]. Furthermore, "the incentives to acquire and build more would no longer exist, and therefore the prospects would be greatly enhanced for a peaceful negotiated solution to the most contentious issue fuelling the dispute between China and its neighbours"[922]. While UNCLOS does aim to promote international cooperation and the peaceful settlement of disputes, this overall goal cannot overrule the wording and purpose of a specific provision in order to accommodate a solution that one party perceives as beneficial to regional stability in a single case. As *Gidel* has pointed out, attempting to transform solutions tailored towards resolving certain regional particularities into rules of general international law constitutes an error potentially engendering grave consequences.[923] The claimant's perspective has consequently been criticized for relying on grounds of politics and policy, instead of "law-based" arguments.[924] While island building can indeed cause considerable political tensions and environmental harm, there are other

[919] *South China Sea Arbitration,* para 509, *supra* note 28.
[920] *Ibid,* paras 414 - 415.
[921] *South China Sea Arbitration,* Hearing on the Merits and Remaining Issues of Jurisdiction and Admissibility, Day 2: November 25, 2015, 129, *supra* note 28.
[922] *Ibid,*130.
[923] *Gidel,* Le droit international public de la mer: La mer territoriale et la zone contiguë, Vol. 3 (1934) 704-705.
[924] *Gewirtz,* Limits of Law in the South China Sea, East Asia Policy Paper 8 (2016) 10.

international norms better suited to address the problem,[925] which were invoked in the award rendered in the *South China Sea Arbitration*. Whether island building can lead to an "abuse of rights" within the meaning of Article 300 UNCLOS is addressed in Part 2 Section 3.

C. The Argument from the Immediate Legal Context and the Requirement of "natural conditions"

1. Must "human habitation" and "economic life" Be Sustainable under Natural Conditions?

The argument has been made that "human habitation" and "economic life" must be sustainable on an island in the narrow sense under natural conditions, meaning prior to an eventual human settlement. This opinion is closely connected to the view that islands in the narrow sense must sustain habitation or economic life under near-autarchic conditions, but goes even farther. It is maintained that, not only must "human habitation" or "economic life" be sustainable without relying on imports, but that this must be possible prior to any form of human interference with an island's natural environment. In the *Black Sea Case*, Romania in this way contested the notion that Serpents' Island was an island in the narrow sense on the basis that "human survival on the island is dependent on supplies, especially of water, from elsewhere and that the natural conditions there do not support the development of economic activities."[926] This stance entails that infrastructure facilities or external supply lines introduced by man do not point towards an island's habitability as they are not an expression of an island's "natural" capacities but rather artificially implanted. Given that the *South China Sea Arbitration* has argued strongly in favor of the view that "human habitation" and "economic life" must both be possible under "natural conditions",[927] its statements relating thereto shall be examined in detail below.

Where artificial alterations have taken place, the arbitral tribunal consulted historical records of natural conditions in order to complete its assessment of the legal status of a selection of islands.[928] The arbitrators cited three reasons for their decision in this regard: requiring natural

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[925] The arbitral tribunal found that the construction works undertaken by China on some of the Spratly Islands were unlawful due to the environmental damage they caused and the failure to provide the tribunal with the required environmental impact assessment. This led the tribunal to the conclusion that there had been a breach of Articles 192, 194(1), 194(5), 197, 123, and 206. Furthermore, the construction activities had permanently destroyed evidence of the natural conditions on certain islands, a conduct that amounted to a violation of the obligation to "abstain from any measure capable of exercising a prejudicial effect in regard to the execution of the decision to be given and, in general, not allow any step of any kind to be taken which might aggravate or extend the dispute". An obligation confirmed in the case *Electricity Company of Sofia and Bulgaria.* See Permanent Court of International Justice, *Electricity Company of Sofia and Bulgaria (Belgium/Bulgaria),* Interim Measures of Protection, Order of 5 December 1939, PCIJ Series A/B, No. 79, 194 (199); *South China Sea Arbitration,* paras 993, 1173, *supra* note 28.

[926] *Black Sea Case,* para 180, *supra* note 310.

[927] *South China Sea Arbitration*, para 508, *supra* note 28.

[928] *Ibid,* para 578.

conditions enabling "human habitation" "maintain(s) the structure apparent across Articles 13 and 121", ensures that the provision constrains "States from claiming for themselves potentially immense maritime space" and is consistent with "the words 'of their own' which qualify 'an economic life'".[929] The present chapter will address the issue of whether the use of the words "naturally formed" in Article 121 (1) and Article 13 implies that "human habitation" and "economic life" must be possible under "natural conditions", i.e. in the absence of human interference with nature.

As a rule of customary international law as well as by virtue of UNCLOS,[930] the specific attributes distinguishing islands from low-tide elevations on the one side and the continental mainland on the other are required to persist "naturally". The rule that low-tide elevations whose altitude was artificially increased do not qualify as "islands" has indeed been part of codified law since the 1956 LOS Articles.[931] The relevant provisions in UNCLOS are Article 13 and in Article 121 (1):

> *"Article 13*
> *Low-tide elevations*
> 1. A low-tide elevation is a **naturally formed** area of land which is surrounded by and above water at low tide but submerged at high tide. […]
>
> *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. […]
>
> [emphasis added]"

As can be seen, the requirement of a natural origin applies to all qualities generally ascribed to islands: the surrounding waters and the location of the feature above sea level must prevail naturally.[932] It would – for example – constitute an interpretation in bad faith to argue that a concrete embankment or any other construction that raises the sea level of a low-tide elevation may turn it into an island in the narrow sense. And yet, requiring that an island in the narrow sense must be capable of sustaining a population in its natural state and thereby transposing the natural origin rule from the first paragraph of Article 121 to its third paragraph seems

[929] *Ibid,* paras 509, 510.
[930] See also *Dipla,* Le régime juridique des îles dans le droit international de la mer (1984) 28.
[931] Art 10 (Commentary) of the 1956 LOS Articles, *supra* note 36.
[932] *Root* has suggested a different meaning. According to *Root*, the word "naturally" can be understood to merely qualify the word "formed". See *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 (79).

problematic.[933] Paragraphs one and three of Article 121 complement one another, but they deal with distinct issues. While Article 121 (1) outlines the basic characteristics of all islands, paragraph three defines the minimum standard of usefulness requested of islands generating entitlement to the EEZ and continental shelf. Paragraph one aims to distinguish islands from low-tide elevations and artificial installations and structures,[934] such as oil platforms. It is not intended to define "human habitation". The need for a natural origin is not reiterated in paragraph three,[935] and the different nature of the criteria of paragraph one and three respectively would not seem to indicate that the provision's drafters intended a universal application of the prerequisite of a natural origin. Seemingly supportive of this view, *Dubner* has noted that it would have been advantageous to add the words "without artificial addition" to Article 121 (3) in order to improve clarity.[936] Another reason why the words "naturally formed" in all probability were never intended to define the meaning of "human habitation" or "economic life" lies therein that, while what is "natural" and what is not is comparatively easy to discern in the case of geographical data such as sea levels, this is not the case with the multifaceted criteria of "human habitation" and "economic life". It would, for example, appear difficult to distinguish between construction works that would rob a feature of its status as an island in the narrow sense and measures that, while aiding human survival, are "natural". Indeed, the majority of scholars having addressed this issue agrees that while all islands must be naturally formed – which is to say above water at high tide in their natural state – this does not entail that the circumstances enabling human habitation must equally prevail naturally.[937] The *South China Sea Arbitration* found the availability of potable water to be a crucial element in the assessment of the sustainability of human habitation. And yet, it did not consider a

[933] *O'Keefe* is of the opinion that one would have to specifically insert an unwritten requirement for a "natural capacity" into the *Regime of islands*. Otherwise, he argues, "Article 121(3) seems to countenance the grant of maritime zones to almost any skerrick of land that is still high and dry when the tide is in". *O'Keefe,* Palm-Fringed Benefits: Island Dependencies in the New Law of the Sea, International and Comparative Law Quarterly 45:2 (1996) 408 (412).

[934] Art 60 UNCLOS.

[935] *Charney,* Rocks that Cannot Sustain Human Habitation, The American Journal of International Law 93 (1999) 863 (867).

[936] *Dubner,* The Spratly "Rocks" Dispute – A "Rockapelago" Defies Norms of International Law, Temple International and Comparative Law Journal 9 (1995) 291 (305).

[937] See *Kolb*, who argues that the advancement of technology may render an island inhabitable and may thus also alter its legal status. *Charney* adds that "the text of [Article 121 (3) UNCLOS] does not specify that the conditions set out there must also exist naturally." *Van Dyke/Morgan/Gurish* espouses a similar view: "Nations can, of course, establish 'stable communities' and maintain them". This kind of population is, according to *Van Dyke/Morgan/Gurish,* a sufficient basis for an EEZ claim. *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... », Annuaire français de droit international 40 (1994) 876 (906); *Charney,* Rocks that Cannot Sustain Human Habitation, The American Journal of International Law 93 (1999) 863 (867); *Van Dyke/Morgan/Gurish*, The Exclusive Economic Zone of the Northwestern Hawaiian Islands: When Do Uninhabited Islands Generate an EEZ?, San Diego Law Review 25 (1988) 425 (487).

desalinisation plant to be an indicator of inhabitability, as it does not form part of the island's "natural state".[938] Simultaneously, other forms of water recovery aided by human construction, such as "rain water collection and storage", which would seem to necessitate building a water reservoir or cistern, were not perceived as interfering with the requirement for natural conditions.[939] It is a distinction that seems slightly arbitrary. Similarly, one may question whether the arbitral tribunal in the *South China Sea Arbitration* would regard the settlements of the 1 200 inhabitants of the pacific island of Tikopia, who pride themselves in having been able to maintain their traditional – and thereby largely autarchic – lifestyle, as "human habitation". The surface area of Tikopia measures just five square kilometres, and yet its inhabitants are for the most part self-sufficient due to their expertise in farming and fishing.[940] In 2002, cyclone Zoe caused a breach in the natural dam which led saltwater to leak into the island's large freshwater lake.[941] This endangered the local flora, which in turn threatened the survival of the inhabitants. A crisis could only be averted through external financial assistance and donations. Had there been no outside intervention, the island may have become uninhabitable. If we were to apply the views and statements of the arbitral tribunal in the *South China Sea Arbitration* to this particular case, the result would in all probability be that this is no longer a constellation were human habitation is possible under "natural conditions" and the island would consequently be classified as a "rock". However, the people of Tikopia are an indigenous population, sustained by the resources of the island they live on – exactly the kind of community Article 121 (3) is – according to the views of the arbitral tribunal – designed to benefit and protect.[942] To some scholars, the elevations of the Okinotorishima atoll are clearly "rocks", due to the fact that, some years ago, prior to human intervention, the coral reef had little capacity for either "human habitation" or "economic life".[943] This was due to the very limited surface area of the two high tide protrusions, which put together amounted to only 9.36 square meters.[944] In the meantime, the island's surface area has been artificially expanded and – supported by a platform on stilts – facilities have been added, which may even qualify as a

[938] *South China Sea Arbitration,* para 511, *supra* note 28.
[939] *Ibid,* para 615.
[940] *Baldwin, James,* Across Islands and Oceans – A Journey Alone Around the World By Sail and By Foot (2012) 123.
[941] *Ibid,* 141.
[942] For the link between the EEZ and littoral peoples see *South China Sea Arbitration*, paras 514 - 515, *supra* note 28; for the predominant focus on littoral peoples in interpreting Article 121 (3) see paras 517, 621, 623.
[943] *Song,* The Application of Article 121 of the Law of the Sea Convention to the Selected Geographical Features Situated in the Pacific Ocean, Chinese Journal of International Law 9 (2010) 663 (694); *Diaz/Dubner/Parent,* When is a "Rock" an "Island"? - Another Unilateral Declaration Defies "Norms" of International Law, Michigan State Journal of International Law 15 (2007) 519 (531).
[944] For further information on the properties of Okinotorishima see Part 1 Section 3 II E.

form of "economic life". Completed construction works include concrete encasings of the high-tide elevations resulting in a combined surface area of 5.654 square kilometres, a low-tide elevation similarly encased by concrete, a helicopter landing pad, a marine research facility and a meteorological station. It is important to remember, as has been explained at the beginning of this chapter, that islands are defined as "naturally formed" high-tide elevations. This entails that no structural or artificial measure is legally capable of turning a low-tide elevation into an "island".[945] Therefore, the low-tide elevation encased by concrete and the research facility on stilts in the shallow waters of the beach are only relevant to the evaluation of "human habitation" and "economic life" by virtue of their being within the territorial sea of the high-tide elevations, to which the sovereignty of the owning state irrevocably extends. The low-tide elevation encased by concrete and the research facility on stilts are not islands themselves, but the economic life on them is regarded as the high-tide elevations' "economic life of their own", due to being located in their territorial sea.[946] As discussed, naturalness is only required in those attributes that define a feature as an "island" not in those that further define it as an "island in the narrow sense". We cannot dismiss "economic life" on Okinotorishima as invalid in light of the island's erstwhile properties. Instead, those applying the *Regime of islands* must verify whether the research facility on Okinotorishima meets the definition of an "economic life"[947]. We know that the legal status of an island is not permanent.[948] Furthermore, the fact that a natural island has undergone construction work enhancing its capacity to sustain human habitation or economic life does not preclude the island from EEZ or continental shelf entitlement. From the finding that "human habitation" and "economic life" are not required to be sustainable under natural conditions, it follows that land reclamation enlarging the surface area of a high-tide elevation may lead to a change in status from "rock" to "island in the narrow sense" if "human habitation" or "economic life" becomes sustainable on the island.[949] This position is however contentious.[950]

The mere possibility of engaging in land reclamation projects in future can be regarded as an insufficient legal basis for the assessment of an island's status, due to being too far removed

[945] *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 (76-77).
[946] For a discussion of the differences between economic life occurring on dry land, within the territorial sea or within the EEZ, see Part 2 Section 2 VI D 1.
[947] See Part 2 Section 2 VI D 2; Part 2 Section 2 VI D 4; and Part 2 Section 2 VI D 3 for the criteria of contribution to GDP, permanency and a definitive link respectively.
[948] Part 2 Section 1 V A.
[949] See Part 2 Section 3 IV B.
[950] *South China Sea Arbitration,* para 508, *supra* note 28.

from the actual circumstances that prevail on an island.[951] On the whole, while Article 13 and Article 121 (1) state that islands and low-tide elevations are by definition "naturally formed", this requirement would not seem to automatically imply that "human habitation" or "economic life" within the meaning of Article 121 (3) must be sustainable on an island in its natural condition.

2. The Requirement of "natural conditions" in the Context of Contemporary Island Societies

According to the arbitral tribunal's decision in the *South China Sea Arbitration*, it is advisable to base the examination of an island's capacity for "human habitation" on the characteristics of the island's environment as it was prior to an eventual colonization rather than consider a current population.[952] Furthermore, the arbitral tribunal has found that such a population should, by and large, be able to sustain themselves even in the absence of external support, such as imported goods.[953] This view would seem to suggest that, in requiring the sustainability of "human habitation", Article 121 (3) actually dictates that only islands that are capable of supporting autarchic hunter-gatherer societies under natural conditions shall have an EEZ and continental shelf. However, an island may be unsuitable for an autarchic hunter-gatherer society, while still being valuable for the purpose of modern inhabitation. Self-sufficiency and alimentation through local produce are far from the norm in contemporary small island communities. Despite ambitions to switch to renewable energy sources, Small Island Developing States (SIDS)[954] often depend heavily on imports. Pacific SIDS, for instance, "are almost completely reliant on the importation of fossil fuels, with the notable exception of Papua New Guinea, which is an oil and gas producer".[955] High levels of imported fossil fuels are required due to their use in transportation and in generators providing electricity for refrigeration, air conditioning, lighting, and household appliances.[956] The way of life on these islands is no longer defined by the model of subsistence economies. On the contrary, it is reported that "[m]odern transportation has largely replaced traditional forms of transportation,

[951] Part 2 Section 2 V F 1 b.
[952] *South China Sea Arbitration,* para 578, *supra* note 28.
[953] *Ibid,* para 500.
[954] The group of Small Islands Developing States or SIDS encompasses 57 states located across the Atlantic, the Indian Ocean, the Mediterranean Sea, the South China Sea, the Caribbean and the Pacific. Due to their geographic and demographic particularities, SIDS share certain distinct challenges including a vulnerability to natural disasters, remoteness, scarcity of natural resources, cost-intensive transportation and communication services, the impossibility to profit from economies of scale and others. For a list of all SIDS, see the site of the United Nations Department of Economic and Social Affairs at <https://sustainabledevelopment.un.org/topics/sids/list>.
[955] *Dornan,* Renewable Energy Development in Small Island Developing States of the Pacific, Resources 4 (2015) 490 (495).
[956] *Ibid,* 493, 494.

and is almost entirely reliant on oil-based products such as petroleum and heavy fuel oil"[957]. Contemporary infrastructure on islands often involves dependence on imported foodstuffs. According to the Food and Agriculture Organization of the United Nations (FAO), "[i]n SIDS countries, food imports, as opposed to national food production, are by far the largest source of food. In at least seven countries in the Caribbean, 80 percent or more of available food is from imports."[958] In individual states, dependency is even higher: in the Cook Islands, 92 percent of the available food is imported, while this percentage figure reaches 95 percent in St. Kitts and Nevis.[959] Unfortunately, this trend seems to be intensifying rather than declining. Between 1995 and 2011, every SIDS in the Caribbean has reported a rise in its dependence on imported foodstuffs.[960] In light of how common reliance on imported fuel and food is on islands and in island states, it appears improbable that the term "human habitation" was intended as referring exclusively to populations sustaining themselves through locally produced goods. After all, not even scholars embracing the most restrictive definition of islands in the narrow sense would argue that the islands of St. Kitts and Nevis, that – with a total surface area of 261 km^2 – represent the smallest state in the Americas – are "rocks". From the fact that 95 percent of their food is imported we may conclude that it may be impossible to adequately provide for their populations via local produce. And yet, these islands are not considered to be "rocks". Due to their limited surface area, island states, for example the Maldives, must often specialize on a certain sector such as tourism for income, with little room left for a local food industry. Similarly, the Norwegian town of Longyearbyen, located on the Svalbard archipelago is entirely dependent on foodstuffs flown in by plane, because the harsh climatic conditions rule out any form of agriculture.[961] Requiring that comestibles are produced locally appears detached from the realities of demographics and better suited to a former era, when subsistence economies were more prevalent.

D. Conclusion

In light of recent state practice, especially since the subject has been raised in the *South China Sea Arbitration,* it is essential to provide an answer to the question of whether, and to what extent "human habitation" and "economic life" on an island in the narrow sense is required to be sustainable in the absence of external support.

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[957] *Ibid,* 493.
[958] Food and Agriculture Organization of the United Nations, State of Food Security and Nutrition in Small Island Developing States (SIDS), Publication I5327E/1/01.16 (2016) 3 <fao.org/3/a-i5327e.pdf>.
[959] *Ibid.*
[960] *Ibid.*
[961] For further information regarding Svalbard see Part 2 Section 2 V E 5.

In summary, the understanding that the phrase "of their own" requires that "human habitation" or "economic life" be sustainable under autarchic or near-autarchic conditions does not contribute to an interpretation of the *Regime of islands* that is coherent or implementable. The view that UNCLOS' focus on protecting the livelihoods of coastal communities implies that "human habitation" and "economic life" refer exclusively to communities that do not require outside assistance such as imported goods, can be rejected. On the one hand, this interpretation would not, in fact, benefit island communities. To interpret being capable of sustaining "human habitation or economic life of their own" to mean "sustain without outside support" would have run completely counter to the interests of the delegations invoking the protective function of the *Regime of islands* vis-à-vis coastal communities. None of these states would have supported tying entitlement to the EEZ and continental shelf to the requirement of self-sufficiency, as this would have effectively limited the possibility to claim EEZs, to the detriment of the people they sought to protect. Dependency on a certain amount of imports falls within the realm of the conventional and should not be detrimental to entitlement to maritime zones. On the other hand, circumstances paint a picture of Article 121 (3) as a provision serving and reconciling multiple objectives. While the desire to benefit coastal populations was certainly among those objectives, economic advancement and increasing the overall quality of life for all of the coastal states' citizens were just as important. The protection of the common heritage of mankind also seems to have played a prominent role. It would consequently seem an exaggeration to hold that the sustenance of coastal communities was so fundamental to the formation of the EEZ or the *Regime of islands* that any interpretation of Article 121 (3) must be guided by the principle that it should serve no more and no less than the interest of littoral peoples. In sum, Article 121 (3) represents a balancing of interests, where the well-being of coastal peoples is only one of many objectives. We have also examined an argument that features most prominently in the award rendered in the *South China Sea Arbitration*, namely, that "human habitation" or "economic life" must be sustainable on an island in its "natural" state prior to human interference with nature. While subsistence fishery remains an important food source in Pacific islands cultures,[962] reliance on import and trade has become increasingly common. It should not be surprising that some alterations, such as the construction of residential buildings, port facilities and other infrastructure installations, are necessary for – or indeed inherent to – human habitation. As *Talmon* has noted, "human habitation and economic life always depend on

[962] Subsistence fishery for instance plays a vital role in the following six Pacific island states. The percentage of the total population employed in subsistence fishing amounted to 5 - 9.9 % in Papua New Guinea, 10.4 % in the Solomon Islands, 3.6 % in Fiji, 21.2 % in Kiribati, 7.2 % in Tonga and 6.6 % in the Marshall Islands in 1996. See *Quanchi,* Atlas of the Pacific Islands (2003) 15, 68.

human activity or involve technological enhancements and extraneous materials"[963]. *Tanaka* has added that "as a matter of practice, it would be difficult for humans to settle in a maritime feature or to sustain economic life without introducing some sorts of artificial addition"[964]. Due to scarcity in space and resources, small islands are hardly ever capable of sustaining a modern community without prior interference with nature.[965] The characteristics that define an "island", that is the quality of consisting of "land", its protuberance at high tide and its enclosure by water, must exist naturally pursuant to Article 121 (1). The characteristic defining an "island in the narrow sense", that is the sustainability of human habitation or economic life, is not required to exist naturally.[966] In sum, it appears that an island's "human habitation" or "economic life" is not required to be autarkic, and neither must it be possible under entirely natural conditions. The words "of their own" can be more accurately understood as establishing that there should be a connection between the "economic life" of an island and the island itself. This connection, called the definitive link,[967] entails that the economic use the island is put to should be useful.

V. The Demographic Component – "Human Habitation"

How do we define "human habitation"? Is it a term encompassing any kind of human presence on an island or does it, as is often claimed, refer to a "stable community"[968]? Seeing that the *Regime of islands* offers no further explanation of what is indicated by the phrase "human habitation", the reader is left to interpret the provision "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose"[969]. This chapter will consult the opinions of legal experts and examine the meaning of the term both in sociology and in law. Given that, in any interpretation, "relevant rules of international law applicable in the relations between the parties"[970] are to be taken into account together with the context of a provision, we shall also consider how questions relating to inhabitation and residency are dealt with in other fields of international law. Following the assessment of the meaning of "human habitation", this chapter will move on to the question of an uninhabited islands' theoretical capacity to sustain human habitation, and finally address the

[963] *Talmon,* Article 121 - Regime of Islands in Proelss (ed.), The United Nations Convention on the Law of the Sea - A Commentary (2017) 858 (873).
[964] *Tanaka,* Reflections on the Interpretation and Application of Article 121(3) in the South China Sea Arbitration (Merits), Ocean Development and International Law 48:3-4 (2017) 365 (369).
[965] Part 2 Section 2 IV C.
[966] Part 2 Section 2 IV C 1.
[967] See Part 2 Section 2 IV A 4.
[968] *Van Dyke/Morgan/Gurish*, The Exclusive Economic Zone of the Northwestern Hawaiian Islands: When Do Uninhabited Islands Generate an EEZ?, San Diego Law Review 25 (1988) 425 (438).
[969] Art 31 (1) VCLT.
[970] Art 31 (3) (c) VCLT.

opportune method employed when assessing whether an island bears the capacity to sustain human habitation.

A. Legal Doctrine

A commonly cited maxim is that "human habitation" refers to a "stable community"[971]. As early as 1934, long before the advent of UNCLOS, *Gidel* found that islands were characterized by natural conditions that allowed for a "résidence stable de groups humains organisés".[972] 48 years later, UNCLOS coined the term "human habitation", but did not offer any further definition of the term. This led to a diverse range of expert opinions. At one end of the spectrum, human habitation, as envisaged by *Van Dyke,* comprises "at least"[973] 50 people and possibly stretches over more than one generation: "human habitation" implies that one "should look for families, children being born and raised"[974]. *Van Dyke* has also suggested that UNCLOS requires a "real link"[975] to exist between a coastal community and the island sustaining it in order for an island to be the basis of EEZ or continental shelf entitlement. An "unreal link" on the other hand, would consist of "unnatural" changes that have been brought about "just for the purposes of getting [an EEZ]"[976]. *Song* has endorsed the 50-people-threshold.[977] At the other end of the spectrum, scholars stick to rather vague interpretations that leave essential questions open due to the ambiguity of the term "human habitation". In this manner, *Diaz*, *Dubner* and *Parent* have found that the term indicates the existence of "residential potential"[978], while *Charney* has suggested that "some capacity"[979] for habitation should be detectable. These authors have not elaborated on the magnitude the "potential" or "capacity" should take. *Kolb* has commented that requiring a specific number of inhabitants is unbefitting in the context of

[971] *Gjetnes,* The Spratlys: Are They Rocks or Islands?, Ocean Development & International Law 32 (2001) 191 (195); *Van Dyke/Morgan/Gurish*, The Exclusive Economic Zone of the Northwestern Hawaiian Islands: When Do Uninhabited Islands Generate an EEZ?, San Diego Law Review 25 (1988) 425 (437); *Kolb* similarly refers to „groupes humains stablement implantés et organisés » in *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... », Annuaire français de droit international 40 (1994) 876 (906).
[972] «stable residence of organized groups of humans » *fr. Gidel,* Le droit international public de la mer: La mer territoriale et la zone contiguë, Vol. 3 (1934) 684.
[973] *Howland Island Case*, Deposition of Jon Van Dyke, October 31, 2007, 166, *supra* note 413.
[974] *Ibid,* 166.
[975] *Ibid,* 72.
[976] *Ibid,* 72.
[977] *Song* states that human habitation entails that at least 50 people live on the island and applies this threshold to Howland Island, Baker Island, Clipperton Island, Minamitorishima and Okinotorishima. *Song,* The Application of Article 121 of the Law of the Sea Convention to the Selected Geographical Features Situated in the Pacific Ocean, Chinese Journal of International Law 9 (2010) 663 (695 et seq).
[978] *Diaz/Dubner/Parent,* When is a "Rock" an "Island"? - Another Unilateral Declaration Defies "Norms" of International Law, Michigan State Journal of International Law 15 (2007) 519 (531).
[979] *Charney,* Rocks that Cannot Sustain Human Habitation, The American Journal of International Law 93 (1999) 863 (868).

Article 121 (3).[980] Another point of interest concerns whether it is possible to speak of "human habitation" if all residents pertain to the same occupational group, such as personnel employed on a research facility. *Kolb* has opined that it takes an "existence beaucoup plus global"[981] than that, which seems to imply that "human habitation" is a reference to a more complex community going beyond the degree of social integration usually achieved in organized vocational groups such as research facilities or military deployments. *Clagett* has seemingly embraced this position in clarifying that deployments and scientific personnel stationed on an island do not meet the threshold of "human habitation"[982]. He is joined in this opinion by *Van Dyke, Morgan* and *Gurish*, who have specified that "[i]nfrequent visits from interested scientists would not constitute a stable community sufficient to create an EEZ for a rock or islet"[983]. *Kwiatkowska* and *Soons*, on the other hand have taken the stance that an island such as "Aves Island, which supports an oceanographic research base manned and operated all the year round (under the navy's protection), could be claimed as sustaining human habitation"[984]. Lastly, scholars have addressed the question of how much time a group of individuals must spend on an island before their presence amounts to "human habitation". *Charney* as well as *Kwiatkowska* and *Soons* have found that "human habitation does not require that people reside permanently on the feature"[985].

B. From "Human Habitation" to the "Community"

From a textual perspective, "human habitation" means just that – that an island must be capable of providing people with housing space. Other necessities of life, such as food supply lines, health care, employment opportunities, education and other basic services are not mentioned in Article 121 (3), but seem implicitly covered, as settlements will not be able to endure in their absence. The phrasing "human habitation" retains the same meaning throughout all six authentic translations, with the exception of the Russian translation, which requires in more

[980] *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... », Annuaire français de droit international 40 (1994) 876 (906).
[981] *Ibid.*
[982] *Clagett,* Competing Claims of Vietnam and China in the Vanguard Bank and Blue Dragon Areas of the South China Sea: Part I, Oil & Gas L. & Tax'n Review 13 (1995) 375 (386), cited in *Gjetnes,* The Spratlys: Are They Rocks or Islands?, Ocean Development & International Law 32 (2001) 191 (195).
[983] *Van Dyke/Morgan/Gurish*, The Exclusive Economic Zone of the Northwestern Hawaiian Islands: When Do Uninhabited Islands Generate an EEZ?, San Diego Law Review 25 (1988) 425 (438).
[984] *Kwiatkowska/Soons,* Entitlement to Maritime Areas of Rocks Which Cannot Sustain Human Habitation or Economic Life of Their Own, Netherlands Yearbook of International Law 21 (1990) 139 (175).
[985] *Charney,* Rocks that Cannot Sustain Human Habitation, The American Journal of International Law 93 (1999) 863 (868); *Kwiatkowska/Soons,* Entitlement to Maritime Areas of Rocks Which Cannot Sustain Human Habitation or Economic Life of Their Own, Netherlands Yearbook of International Law 21 (1990) 139 (166).

general terms the sustainability of "human life"[986] rather than "human habitation". The case could be made that the Russian text is more accurate, because it uses a term that more clearly includes necessities other than housing. For understanding "human habitation" as only referring to the capacity to provide living space is nonsensical. If the infrastructure required in order to achieve a stable food supply, access to health care, employment opportunities, and educational facilities is impossible to provide, settlement will not take place, housing space will not be created and "human habitation" will not occur. This is particularly evident in the case of isolated islands, where these services can often not be provided for externally. If "human habitation" does not relate to housing space alone, what do we understand by this criterion? We shall follow *Kolb*'s advice and refrain from taking Article 121 (3) too literally.[987] Article 121 (3) contrasts a social with an economic prerequisite, "human habitation" is juxtaposed with "economic life". One of these criteria must be so strongly pronounced that the sovereign right of the coastal state to resources surrounding the island outweighs the goal of preserving the common heritage of mankind.[988] In other words, the usability of the island – as the central distinction criterion from "rocks" – is required to reach such levels of significance and visibility that the establishment of an EEZ or continental shelf around the feature cannot be called excessive. One or two residents would not seem to be enough to shift the balance towards the priority of resource sovereignty, as a resulting EEZ claim would still appear disproportionate to the curtailment of the high seas. Allowing one person's decision to leave or stay on an island to determine the legal status of the island would lead to legal instability, an effect that can be avoided by requiring the capacity to sustain an entire community. While "economic life" is a reference to professional activity, "human habitation" stresses the social component of our lives. The "community" is a designation that undeniably incorporates such a social component, which is why it is so fitting to describe "human habitation" as a community. It is a term widely embraced among scholars,[989] and was also used to define "human habitation" by the arbitral tribunal ruling in the

[986] "Скалы, которые не пригодны для поддержания жизни человека" is the phrase from the Russian version referring to life in general. The termini employed in the authentic Arabic, Chinese, French and Spanish texts all translate as "human habitation". These termini are: habitación humana, habitation humaine, الت البشرية السكنى and 人类居住.

[987] *Kolb* notes that the text of Article 121 (3) should only be the starting point to our considerations. *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... », Annuaire français de droit international 40 (1994) 876 (902).

[988] For the balancing of interests underlying Article 121 (3), see Part 2 Section 2 IV B 2.

[989] *Gjetnes,* The Spratlys: Are They Rocks or Islands?, Ocean Development & International Law 32 (2001) 191 (195); *Van Dyke/Morgan/Gurish*, The Exclusive Economic Zone of the Northwestern Hawaiian Islands: When Do Uninhabited Islands Generate an EEZ?, San Diego Law Review 25 (1988) 425 (437); *Kolb* similarly refers to „groupes humains stablement implantés et organisés » in *Kolb,* L'interprétation de l'article 121, paragraphe 3, de

South China Sea Arbitration.[990] We conclude that "human habitation" refers to a group of individuals linked by social ties that is best described as a community.

C. A Sociologic Take on the "Community"

For present purposes, it would naturally be convenient if there were a sociologic or ethnologic definition of the "community" highlighting such details as the number of people that are part of a typical "community". However, the term carries a variety of meanings in sociology, and has seen its usefulness contested. While sociologists sometimes argue that the concept of the "community" is so ill-defined, that the term should be avoided altogether,[991] it is also claimed that "community" "can be defined with reasonable precision"[992]. Following an examination of 94 definitions of "community", *Hillery* has found that the one aspect they all have in common is that they "deal with people" and that there is no agreement beyond this point.[993] *Scott/Marshall* have admitted that "there is no clear and widely accepted definition of just what characteristic features of social interaction constitute the solidaristic relations typical of so-called communities"[994], but nevertheless define a "community" as "a wide-ranging relationship of solidarity over a rather undefined area of life and interests"[995]. In sum, while sociologic definitions of the "community" are unspecific in nature, they uniformly confirm that the constitutive element of any "community" is that its members are bound together by solidarity. In the context of the *Regime of islands*, it is noteworthy that a "wide-ranging relationship of solidarity"[996] between individuals takes time to form and is usually a marker of familial life. The cohesion of economic enterprises such as corporations is, by contrast, based on the interest of securing economic livelihood or pursuing professional interests, rather than social attachment. This would seem to hint at the fact that staff members that reside on an island on a temporary basis and are separated from their social circle due to their stationing on the island cannot form a "community" and thereby do not qualify as "human habitation". Some insight can be gained from what has been said about "societies" – understood as a group of people not only living in a certain territory but sharing a "distinct identity" – in sociology. Sociologist *Giddens* has explained that "[s]ome societies, like those of hunters and gatherers, are very small,

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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... », Annuaire français de droit international 40 (1994) 876 (906).

[990] *South China Sea Arbitration,* para 491, *supra* note 28.

[991] *Etzioni,* Community in Turner (ed.), The Cambridge Dictionary of Sociology (2006) 83 (83).

[992] *Ibid.*

[993] *Hillery,*Definitions of Community - Areas of Agreement, Rural Sociology - Devoted to Scientific Study of Rural Life 20:2 (1955) 111 (117).

[994] *Scott/Marshall*, A Dictionary of Sociology[3] (2009) 108.

[995] *Ibid,* 107.

[996] *Ibid.*

numbering no more than a few dozen people". This could imply that a "society" – and *a maiore ad minus* – a "community" can refer to a very limited number of people.

D. Localization of Natural Persons in International and European Law

The necessity to legally qualify a person's location is not unique to the law of the sea. Both international and European laws have addressed this topic and in so doing have developed a distinct terminology. In European law, the link between a person and a specific locality can be evaluated by reference to the "habitual place of residence", which in turn depends on the "centre of interests"[997] or "centre of life"[998]. Usage of these terms is common in international legal studies as well. The conventions adopted by the Hague Conference on Private International Law, which cover a wide range of domains,[999] routinely refer to the habitual residence as a decisive criterion. Additionally, double taxation agreements often replicate the concept of "residence" from the Model Convention with Respect to Taxes on Income and on Capital (OECD Model Convention) published by the Organisation for Economic Co-operation and Development (OECD). The definitions and qualifications of a person's place of residence throughout varying fields of international law raises the question whether they are reflective of a common theme that is of potential interest to our understanding of the *Regime of islands*.

1. Habitual Residency and the Center of Interests

a. Residency in the OECD Model Convention

Juridical double taxation agreements are signed in order to avoid a situation where taxes are imposed for the same income or capital in more than one state. In an effort to introduce a uniform standard, the Council of the OECD has recommended that its members follow the OECD Model Convention when concluding bilateral tax treaties.[1000] As liability to taxation is commonly based on a natural person's status as a "resident", it is naturally crucial that the OECD Model Convention clarify what being a "resident" entails. According to the OECD Model Convention, a resident of a state is a person "liable to tax therein by reason of his

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[997] See European Court of Justice, *Reference for a preliminary ruling from the Korkein Hallinto-oikeus (Finland)*, Judgment, April 2, 2009, C-523/07, OJ C 141, paras 38 et seq [hereinafter *Reference for a preliminary ruling from the Korkein Hallinto-oikeus*].

[998] A phrase employed in order to draw a distinction to the concept of the "domicile". It is however less frequently used than the term "centre of interests". See *ibid,* para 31.

[999] The most widely ratified Hague Conventions on Private International Law deal with the abolition of legalization (Apostille), service of process, taking of evidence abroad, access to justice, international child abduction, intercountry adoption, conflicts of laws relating to the form of testamentary dispositions, maintenance obligations and the recognition of divorces.

[1000] OECD Publishing, Model Tax Convention on Income and on Capital: Condensed Version (2017) 9 [hereinafter OECD Model Convention].

domicile, residence, place of management or any other criterion of a similar nature"[1001]. Where, by this definition, a person is a resident of two states at the same time, "he shall be deemed to be a resident only of the State in which he has a permanent home available to him; if he has a permanent home available to him in both States, he shall be deemed to be a resident only of the State with which his personal and economic relations are closer (centre of vital interests)"[1002]. The OECD Model Convention implicitly embraces the idea that this "centre of vital interests" is a pre-existing concept borrowed from domestic legal systems.[1003] This seems to indicate that there is a consensus spanning across different legal systems which finds that residency is characterized by personal and economic ties. Needless to say, this approach to residency is reflected in double taxation agreements across the globe.[1004]

b. Residency in the Case Law of the European Court of Justice

The concept of a person's residence as the place where his "centre of vital interest" is located is ubiquitous within the legal framework of the European Union.[1005] It is entrenched in

[1001] Art 4 (1) OECD Model Convention, *supra* note 1000.
[1002] *Ibid,* Art 4 (2) (a).
[1003] *Baker,* The expression "centre of vital interests" in Article 4(2) of the OECD Model Convention in Guglielmo (ed.), Residence of Individuals under Tax Treaties and EC Law (2010) 167 (173).
[1004] See for example the double taxation agreements entered into by the United States and its partners in trade: Art 4 (2) (A) Income Tax Convention with the Russian Federation, June 17, 1992 <https://www.irs.gov/Businesses/International-Businesses/Russia---Tax-Treaty-Documents>; Art 4 (2) (A) Tax Convention with the Republic of India, September 12, 1989, <https://www.irs.gov/Businesses/International-Businesses/India---Tax-Treaty-Documents>; Art 4 (2) (a) United States - Canada Income Tax Convention, September 26,1980 <https://www.irs.gov/Businesses/International-Businesses/Canada---Tax-Treaty-Documents>; Art 4 (2) (a) Convention Between The United States Of America And The Federal Republic Of Germany For The Avoidance Of Double Taxation And The Prevention Of Fiscal Evasion With Respect To Taxes On Income And Capital And To Certain Other Taxes, August 29, 1989 <https://www.irs.gov/Businesses/International-Businesses/Germany----Tax-Treaty-Documents>; Art 4 (3) (a) Convention Between The Government Of The United States Of America And The Government Of Japan For The Avoidance Of Double Taxation And The Prevention Of Fiscal Evasion With Respect To Taxes On Income, March 8, 1971 <https://www.irs.gov/Businesses/International-Businesses/Japan---Tax-Treaty-Document>;
[1005] *Hilbig-Lugani* draws attention to the eminent role of the "habitual residence" in: European Parliament and Council of the European Union, Regulation on the law applicable to contractual obligations (Rome I), 593/2008, OJ L 177, June 17, 2008; European Parliament and Council of the European Union, Regulation on the law applicable to non-contractual obligations (Rome II), 864/2007, OJ L 199, July 11, 2007; Council of the European Union**,** Regulation concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, 2201/2003, OJ L 338, November 27, 2003; Council of the European Union**,** Regulation on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations, 4/2009, OJ L 7, December 18, 2008; Council of the European Union**,** Regulation implementing enhanced cooperation in the area of the law applicable to divorce and legal separation, 1259/2010, OJ L 343, December 20, 2010; The Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance, November 23, 2007 <https://www.hcch.net/en/instruments/conventions/full-text/?cid=131>; European Parliament and Council of the European Union, Regulation on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession, 650/2012, OJ L 201, July 4, 2012. See *Hilbig-Lugani,* Divergenz und Transparenz: Der Begriff des gewöhnlichen Aufenthalts der privat handelnden natürlichen Person im jüngeren EuIPR und EuZVR, Zeitschrift für Gemeinschaftsprivatrecht 1 (2014) 8 (8).

European private international law and particularly prominent in private international family law.[1006] While disparities in the use of the terminology in European law do exist, the European Court of Justice (ECJ) has identified the "center of main interests" as a term that can usually be equated with that of the "habitual residency".[1007] As others have deplored,[1008] both primary and secondary rules of European law offer little to no concrete definition of what constitutes an individual's "residence", "habitual residence" or "centre of interests". This is why we need to resort to the pertinent case law of the ECJ, which has on multiple occasions pronounced its opinion on the matter. The examples below illustrate the meaning the ECJ has attributed to the concept of the "habitual residence". It should be noted that the definition of the "habitual residence" is – and should be – adapted to some extent to the legal field the term is applied in,[1009] and that the digests below deal with different domains. And yet, the view exists that there is a single, widely recognized, definition of "habitual residence", which may for instance be applicable to the entire European law of civil procedure.[1010] In *Di Paolo*, a case concerned with the prerequisites for receiving unemployment benefits, the ECJ determined that the state wherein a person was residing designated a location "where the worker, although occupied in another Member State, continues habitually to reside and where the habitual centre of his interests is also situated"[1011]. Additionally, "account should be taken of the length and continuity of residence before the person concerned moved, the length and purpose of his absence, the nature of the occupation found in the other Member State and the intention of the person concerned as it appears from all the circumstances"[1012]. As the ECJ reiterated in *Fernández*, the place of habitual residence is where a person has established "the permanent or habitual centre of his interests"[1013]. The judgment also emphasized that this action should be undertaken with the intention that the residence "be of a lasting character"[1014]. The *Fernández* decision dealt with expatriation allowances under the Staff Regulations applicable to officials

[1006] *Fawcett,* Residence and domicile of individuals in private international law in Guglielmo (ed.), Residence of Individuals under Tax Treaties and EC Law (2010) 3 (29 et seq).
[1007] *Hilbig-Lugani,* Divergenz und Transparenz: Der Begriff des gewöhnlichen Aufenthalts der privat handelnden natürlichen Person im jüngeren EuIPR und EuZVR, Zeitschrift für Gemeinschaftsprivatrecht 1 (2014) 8 (8).
[1008] *Hahn,* Die Verortung der natürlichen Person im Europäischen Zivilverfahrensrecht (2011) 92.
[1009] See *Fawcett,* Residence and domicile of individuals in private international law in Guglielmo (ed.), Residence of Individuals under Tax Treaties and EC Law (2010) 3 (34); *Hahn,* Die Verortung der natürlichen Person im Europäischen Zivilverfahrensrecht (2011) 129.
[1010] See *Hahn,* who regards the "centre of life" as the sole criterion relevant to identifying the "habitual place of residence" and additional features, such as the intended duration of the stay, as redundant. *Hahn,* Die Verortung der natürlichen Person im Europäischen Zivilverfahrensrecht (2011) 92, 107.
[1011] European Court of Justice, *Di Paolo*, Judgment, February 17, 1977, C-76/76, ECR 315, 325.
[1012] *Ibid.*
[1013] European Court of Justice, *Pedro Magdalena Fernández/Commission of the European Communities,* Judgment, September 15, 1994, C-452/93 P, ECR I-04295, para 22.
[1014] *Ibid.*

of the Commission of the European Communities. While once more stressing the role of the habitual "centre of interests", the ECJ added in *Adanez-Vega* – again a case concerned with the conditions for receiving unemployment benefits – "it is important to consider the family situation of the worker as well as the reasons that have led him to move, and the nature of the work"[1015]. In adjudicating in family and domestic relations law, the ECJ delivered a preliminary ruling in 2009 stating that the "habitual residence" of a child depends on the "degree of integration by the child in a social and family environment"[1016]. Furthermore, "the duration, regularity, conditions and reasons for the stay on the territory of a Member State and the family's move to that State, the child's nationality, the place and conditions of attendance at school, linguistic knowledge and the family and social relationships of the child in that State must be taken into consideration"[1017]. In sum, opinions on the meaning of "habitual residence" coincide on a European level insofar as they uniformly regard the "centre of interests" as the key criterion.[1018] Both from an international as well as from a European perspective it is further evident that this centre may be ascertained by weighing a person's personal and economic relations. Other aspects which may affect the "centre of interests" include the length, continuity and purpose of the stay as well as the resident's occupation, intentions, family situation, nationality, degree of integration and linguistic knowledge. To what extent these characteristics shall be pertinent depends upon the relevant field of law.

2. Towards an Objective International Standard

When the *Regime of islands* was drafted, there was a desire to increase clarity in the provisions governing islands. In particular, states expressed a wish for "clear criteria"[1019] as opposed to what was described as the "enigmatic definitions"[1020] of the 1958 Conventions. In spite of this objective, the *Regime of islands* introduced the legal criterion of the sustainability of "human habitation", the correct interpretation of which is not immediately obvious to the reader, as UNCLOS refrains from further explaining this term. Perhaps in an effort to clarify or render the *Regime of islands* more easily applicable, scholars have suggested additional requirements

[1015] European Court of Justice, *Roberto Adanez-Vega/Bundesanstalt für Arbeit*, Judgment, November 11, 2004, C-372/02, ECR I-10761, para 37.
[1016] *Reference for a preliminary ruling from the Korkein Hallinto-oikeus, supra* note 997.
[1017] *Ibid.*
[1018] The centre of interests in this way represents the "akzeptierter Begriffskern" or "recognized nucleus of a concept". *Hilbig-Lugani,* Divergenz und Transparenz: Der Begriff des gewöhnlichen Aufenthalts der privat handelnden natürlichen Person im jüngeren EuIPR und EuZVR, Zeitschrift für Gemeinschaftsprivatrecht 1 (2014) 8 (9).
[1019] See also United Nations Office for Ocean Affairs and the Law of the Sea, The Law of the Sea: Régime of Islands, UN Sales No. E.87.V.11 (1988) 59 (Nicaragua).
[1020] *Ibid,* 44 (Turkey).

qualifying "human habitation". *Van Dyke* has suggested the 50-people-threshold.[1021] *Song* on the other hand has identified "fresh water", "vegetation", "material" and "community" as factors that distinguish rocks from islands in the narrow sense.[1022] While the 50-people-threshold or criteria such as the presence of vegetation seem practical, they are not, as such, inferable from the *Regime of islands* and thus appear slightly arbitrary. By comparison, it would seem that applying a widely recognized international standard, represented in national legal systems, international law and European law presents us with a more objective and less arbitrary alternative, because it has already been accepted as viable and practical by the international community, if in a different context. Indeed, the standard of the "habitual residence" as used in international tax law and European law allows us to determine under which circumstances states would usually consider an individual present at a location a "resident". It is a tried and tested method of identifying the residency status of natural persons. In the context of the *Regime of islands*, we may ask ourselves whether it is fitting to define "human habitation" as a "community of habitual residents". Social integration is vital to both concepts: as discussed earlier,[1023] "human habitation" designates more than mere housing facilities. The requirement of a certain degree of social integration is also integral to the definition of a "resident" in international tax law and European law, where this element of social cohesion is referred to as the "center of interests" and recognized as a defining characteristic of residency. What is more, applying the standard of "habitual residency" to the *Regime of islands* would allow us to resolve the issue of whether or not people staying on an island because of their military deployment, a business trip or a vacation, while not giving up their primary residence on the mainland, form a "human habitation". Such a group of people would notably not meet the standard of a "community of habitual residents" if their center of interests, or the hub of their personal and professional lives, is not located on the island. Ultimately, it would seem more transparent to apply the international recognized threshold of "habitual residency" to the *Regime of islands*, rather than introducing arbitrary criteria that are entirely new to international law. "Habitual residence" – as a concept applied throughout different legal systems – requires some adaptation depending on the legal field it is used in,[1024] and would have to be customized to suit the

[1021] *Van Dyke*, Disputes Over Islands and Maritime Boundaries in East Asia in Hong/Van Dyke (eds.), Maritime Boundary Disputes, Settlement Processes, and the Law of the Sea Vol. 65 (2009) 39 (68).
[1022] *Song,* The Application of Article 121 of the Law of the Sea Convention to the Selected Geographical Features Situated in the Pacific Ocean, Chinese Journal of International Law 9 (2010) 663 (697).
[1023] See Part 2 Section 2 V B.
[1024] See *Fawcett,* Residence and domicile of individuals in private international law in Guglielmo (ed.), Residence of Individuals under Tax Treaties and EC Law (2010) 3 (34); *Hahn,* Die Verortung der natürlichen Person im Europäischen Zivilverfahrensrecht (2011) 129.

particularities of the law of the sea.[1025] That states and international courts and tribunals may come to understand "human habitation" as a "community of habitual residents" should not be ruled out as the award in the *South China Sea Arbitration* seems to hint at this possibility by clarifying that the necessary threshold is that of a "permanent or habitual residence"[1026].

E. "Human habitation" in the *Regime of islands*

This chapter explores the characteristics of an ongoing "human habitation". By contrast, the theoretical capacity to sustain "human habitation" is examined in Part 2 Section 2 V F.

1. Population Size

While attempts have been made to more closely define the number of individuals it takes to constitute "human habitation", the precise population size remains a mystery. Article 121 (3) provides no indication as to the population size required in islands in the narrow sense. One might be tempted to settle for a distinct minimum size and apply it wherever necessity arises, as this would undoubtedly facilitate the assessment of the legal status of islands. But as *Kolb* has so eloquently noted in his work on Article 121 (3), in interpretation, what is seductive, is also dangerous.[1027] Deciding on a fixed number such as 50 individuals bears the risk of leaving out smaller, yet functional communities.[1028] In the *South China Sea Arbitration*, the arbitral tribunal has also rejected the idea of a precise minimum size and noted that "[s]uch a community need not necessarily be large, and in remote atolls a few individuals or family groups could well suffice."[1029] The wording of Article 121 (3), its context and its objective exhibit concepts that are too general in nature to allow reliable conclusions as to the specific number of inhabitants required. Additionally, the sociologic definition of the "community" is too vague to allow for conclusions as to its usual size.[1030] It thus becomes necessary to reject the idea of a specific minimum number. According to sociologic theory, a "community"[1031] refers to a group of

[1025] The term "habitual residence" in European Union law is also to be defined autonomously. See *Hahn,* Die Verortung der natürlichen Person im Europäischen Zivilverfahrensrecht (2011) 102.
[1026] *South China Sea Arbitration,* para 489, *supra* note 28.
[1027] Commenting on the question of whether past inhabitation affirms an island's habitability at present, *Kolb* noted: « L'argument est séduisant. Mais comme tout ce qui est séduisant il est dangereux..». See *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... », Annuaire français de droit international 40 (1994) 876 (905).
[1028] For the 50-people-threshold see *Van Dyke* and *Song*: District Court of Guam*, United States of America vs. Marshalls 201*, Deposition of Jon Van Dyke, October 31, 2007, Civil Case No. 06-00030, 166; *Song,* The Application of Article 121 of the Law of the Sea Convention to the Selected Geographical Features Situated in the Pacific Ocean, Chinese Journal of International Law 9 (2010) 663 (695 et seq).
[1029] *South China Sea Arbitration,* para 542, *supra* note 28.
[1030] See Part 2 Section 2 V C.
[1031] *Ibid.*

people held together by ties of solidarity, meaning that one individual alone does not suffice. The fact that an island supports a one-person population such as a lighthouse keeper does not show that it is capable of sustaining human habitation.[1032] One light house keeper is not a "community" and even two or three seem unfit to meet this description. Therefore, we cannot agree with the Ukrainian position that the installation of a lighthouse around 1837 and the concomitant presence of one or more lighthouse keepers on Serpents' Island shows that "the Island is clearly capable of supporting human habitation"[1033]. Certainly, one may agree that the presence of lighthouse keepers means that "there has been a continuous human residential presence on the island all year around"[1034]. And yet, "residential presence" is not the same as "human habitation". Due to the very limited number of residents and the absence of family members, this population would not seem to satisfy the definition of a "community". Accepting one-person-populations as evidence of "human habitation" would result in a severe decline in visibility and publicity for the legal status of islands. Or, in the words of the arbitral tribunal adjudicating in the *South China Sea Arbitration,* "providing the basic necessities for a sole individual would not typically fall within the ordinary understanding of human habitation: humans need company and community over sustained periods of time"[1035]. The more substantial the size of a population, the more likely it would seem that a community marked by solidarity and family ties has formed. In the *Bay of Bengal Case (Bangladesh/Myanmar)*, it was debated whether or not the 7,000 residents on St. Martin's Island amounted to a "human habitation" within the meaning of UNCLOS.[1036] While this assessment certainly also hinges on the permanence of the settlement and the closeness of their social ties, the population number as such certainly seems compatible with the concept of a "community".

2. Physical Presence and Communities Relying on Networks of Islands

Ongoing "human habitation" requires that residents be physically present. The entry of a person's name into an official residential register is neither necessary nor *eo ipso* conclusive.

[1032] While lighthouses are mostly mentioned in the context of the capacity to sustain economic life, some authors discuss whether they may also be seen as an indicator of human habitation. *Gjetnes* has declared that lighthouse keepers "cannot be accepted as proof of sustainable habitation". *Brown* on the other hand has merely asked "Would the presence of a lighthouse keeper, supplied from without, provide evidence of habitability?". See *Gjetnes,* The Spratlys: Are They Rocks or Islands?, Ocean Development & International Law 32 (2001) 191 (199); *Brown,* Rockall and the Limits of National Jurisdiction of the UK, Marine Policy, July (1978) 181 (206).

[1033] *Black Sea Case,* Rejoinder submitted by Ukraine on July 6, 2007, para 4.43, *supra* note 310. For further information on the dispute over the status of Serpents' Island, which was central to the *Black Sea Case*, see Part 1 Section 2 II B 7.

[1034] *Black Sea Case,* Counter-Memorial submitted by Ukraine on May 19, 2006, Vol. 1, para 7.43, *supra* note 310.

[1035] *South China Sea Arbitration,* para 491, *supra* note 28.

[1036] For further information on the *Bay of Bengal Case (Bangladesh/Myanmar)* see Part 1 Section 2 II B 8.

This is a consequence of Article 121 (3) being a provision focused on on-site circumstances rather than official documentation. The registration may have an indicative effect in case it is accompanied by an actual presence on the island as it represents a manifestation of the intent to reside. Furthermore, the fact that people name the island in question as their place of origin, while not or no longer residing there is quite irrelevant to the question of whether or not an island hosts a community at present.[1037] While the residents' presence on the island is not required to be continuous, it should be recurrent. An individual's temporary absence from the island for professional or recreational reasons is not at odds with him or her being part of a long-term socially well-integrated community. Where a person is absent from the island for prolonged periods or has multiple residences at their disposal, it is advisable to identify the residence featuring relatively stronger social ties. This is what is referred to as the "centre of vital interests"[1038] in international tax law. Applied to the *Regime of islands*, this would entail that, in the case of people with more than one residence, they can only be part of an island's "human habitation" if their center of interests is also on the island.

We shall now turn to a particular theory, according to which, "human habitation" does not necessarily mean that people stay on the island itself, but on nearby islands.[1039] Where coastal communities depend on a network of islands for their livelihood, some of which they do not inhabit, it is argued, the uninhabited islands that are part of this network should still be considered as sustaining human habitation. The particular choice of words in Article 121 (3), namely that "rocks" are defined as islands that "cannot *sustain* human habitation" as opposed to islands that "cannot be inhabited" seems to have left room for argument. While "sustain" may thus be perceived as implying a nurturing function that can perhaps be carried out separately from the provision of living space, it is important not to attribute too much importance to the verb "sustain". The equally authoritative French version of Article 121 (3) after all merely proclaims that rocks that are not apt for human habitation should have no EEZ or continental shelf.[1040] The French version does not use a word comparable to "sustain" and refrains from making any other reference to a "nurturing" function, which seems to indicate

[1037] Despite the absence of any kind of past or present population, 122 Japanese citizens have cited Okinotorishima as their place of origin. Statements of affiliation of this nature do not impact the assessment under Article 121 (3). See *Diaz/Dubner/Parent,* When is a "Rock" an "Island"? - Another Unilateral Declaration Defies "Norms" of International Law, Michigan State Journal of International Law 15 (2007) 519 (523 et seq).

[1038] Art 4 (2) (a) OECD Model Convention, *supra* note 1000.

[1039] *Van Dyke/Morgan/Gurish*, The Exclusive Economic Zone of the Northwestern Hawaiian Islands: When Do Uninhabited Islands Generate an EEZ?, San Diego Law Review 25 (1988) 425 (437).

[1040] The French version of Article 121 (3) reads as follows: "Les rochers qui ne se prêtent pas à l'habitation humaine ou à une vie économique propre n'ont pas de zone économique exclusive ni de plateau continental." The verb "se prêter à" translates to "be apt for".

that, under Article 121 (3), it is relevant whether an island is suitable for actual inhabitation, not whether it can provide foodstuffs to the population of another island. Nevertheless, scholars have suggested that Island A's capability to supply a population on nearby Island B with commodities such as fruit or fish, might be sufficient proof that island A "sustains" the inhabitants on Island B, even in the absence of residents on Island A itself. *Van Dyke*, *Morgan* and *Gurish* have supported this line of reasoning in a joint article and cited the example of an island "visited on a regular basis by fishers from neighboring islands who use it as a base to harvest the living resources of the area"[1041]. *Kolb* has not been averse to this concept either. Pointing to the importance of developing states and local communities to the creation of Article 121 (3), he highlighted that such a reading would benefit these communities and should consequently be given fair consideration.[1042] *Talmon* has in this context explained that "the focus should not be on the capacity of the individual rock but on the capacity of the group [of islands] to collectively sustain human habitation and economic life"[1043]. The arbitral tribunal adjudicating in the *South China Sea Arbitration* has also contributed to the nearby-population-rule. Despite the tribunal's general rule that "economic life" and "human habitation" are linked in practical terms and are thus both required in any island in the narrow sense,[1044] the tribunal proclaimed as follows:

> "One exception to that view should be noted for the case of populations sustaining themselves through a network of related maritime features. The Tribunal does not believe that maritime features can or should be considered in an atomized fashion. A population that is able to inhabit an area only by making use of multiple maritime features does not fail to inhabit the feature on the grounds that its habitation is not sustained by a single feature individually."[1045]

This exception for populations relying on a network of islands is only necessary due to the arbitral tribunal's restrictive interpretation of viewing "human habitation" and "economic life" as cumulatively required. If the tribunal had recognized that "human habitation" and "economic life" are alternative, not cumulative requirements, it may have concluded that an island providing vital supplies to a neighboring population is enabling economically relevant activity

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[1041] *Van Dyke/Morgan/Gurish*, The Exclusive Economic Zone of the Northwestern Hawaiian Islands: When Do Uninhabited Islands Generate an EEZ?, San Diego Law Review 25 (1988) 425 (437).
[1042] *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... », Annuaire français de droit international 40 (1994) 876 (907).
[1043] *Talmon,* Article 121 - Regime of Islands in Proelss (ed.), The United Nations Convention on the Law of the Sea - A Commentary (2017) 858 (872).
[1044] *South China Sea Arbitration,* paras 497, 544, *supra* note 28.
[1045] *Ibid,* para 544.

and consequently sustains economic life. The arbitral tribunal described the intended beneficiaries of its position as populations "able to inhabit an area only by making use of multiple maritime features"[1046]. This definition would seem to also apply to fishermen earning their living by engaging in commercial fishing on nearby islands because there is no other source of income available to them. Such commercial fishermen are however explicitly not protected by the arbitral tribunal's exception: in the context of evaluating small-scale fishing expeditions in the waters surrounding Itu Aba, the arbitral tribunal ruled that the island failed the definition of an island in the narrow sense, because "the very fact that the fishermen are consistently recorded as being 'from Hainan', or elsewhere, is evidence for the tribunal that they do not represent the natural population of the Spratlys. Nowhere is there any reference to the fishermen 'of Itu Aba', 'of Thitu', or 'of North Danger Reef'"[1047]. It would seem slightly contradictory to hold that "populations sustaining themselves through a network of related maritime features" must not inhabit each of these features, but that fishermen supporting their livelihood through fishing in the waters surrounding Itu Aba is insufficient because the fishermen do not come from islands in the immediate vicinity, but from the distant island of Hainan. For while the Chinese island of Hainan is at a great distance from Itu Aba and other islands in the Spratly Archipelago,[1048] the fact that a community is "sustained" by the island under examination, remains unchanged. In the opinion of the arbitral tribunal, the defining characteristic appeared to be whether or not the society in question was a traditional or indigenous community depending on subsistence fishing or farming. The arbitral tribunal in particular cited the traditional way of life in parts of Micronesia as an example.[1049] This reference to Micronesia may have been made with the intention of illustrating that communities have to be within close proximity of one another if they are to be protected under the nearby-population-rule. Yet, there appears to be little reason why fishing expeditions originating from other coastal communities that live in a less traditional manner or face a longer journey to their fishing destination should be discriminated against and forfeit access to the EEZ and continental shelf. *Kolb* and *Van Dyke*/*Morgan*/*Gurish* have expressed opinions that are to some extent in conformity with the decision reached in the *South China Sea Arbitration*. They too have perceived "human habitation" and "economic life" as a single criterion,[1050] which is why they

[1046] *Ibid*.
[1047] *Ibid,* para 618.
[1048] The Chinese island of Hainan is separated by a distance of approximately 539.6 nm from Itu Aba, an island pertaining to the Spratly Archipelago. *Ibid,* para 401.
[1049] *Ibid,* para 497.
[1050] *Van Dyke/Morgan/Gurish*, The Exclusive Economic Zone of the Northwestern Hawaiian Islands: When Do Uninhabited Islands Generate an EEZ?, San Diego Law Review 25 (1988) 425 (437); *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

concluded that arrangements had to be made for islands that provide goods, but are devoid of human habitation. It is – according to this view – not permissible to establish an EEZ and continental shelf around an island merely generating economic revenue but incapable of sustaining human habitation, as the two conditions are inseparable. Thus, the concept of "sustaining human habitation" must be stretched to incorporate islands merely used for fishing, agriculture or the production of other basic goods. This theoretical construct becomes unnecessary if one perceives "human habitation" and "economic life" as separate requirements. If "or" within the context of "human habitation or economic life" is understood as a reference to disjunctive criteria, islands providing vital goods to a community generate an EEZ and continental shelf by virtue of sustaining economic life. With a view to both the wording and the context of Article 121 (3), it hence seems that the nearby-population-rule is neither indicated by Article 121 (3), nor necessary.

3. Duration of Residency

The wording of Article 121 (3) does not explicitly state for how long residents have to stay on an island before their settlement amounts to a "human habitation". The *travaux préparatoires* seem to show that at least some states felt that a permanent stay was required. During the drafting stages of the *Regime of islands*, 14 states considered it relevant to an island's legal status whether its conditions prevented a "permanent settlement" and – unsuccessfully – made the case for the inclusion of this criterion into the *Regime of islands*.[1051] What is more, a temporary stay can be arranged on virtually any island, which entails that, if we were to accept temporary visits to islands as evidence of "human habitation", we would rob this criterion of its distinctive quality. It is also important that, in defining "human habitation" as a community, we have implicitly recognized that the term excludes temporary stays. After all, a community and its inherent social connections take time to form. Where it is clear from the outset that the individuals staying on an island will only live there for a limited time period, due to, for example, occupational reasons, this will effectively prevent the development of a community. If a substantial part of the population has on the other hand chosen to reside on the island in a permanent fashion, while only some of its members are on the island for a temporary assignment, the minor demographic changes caused by the immigration and emigration of the

pas à l'habitation humaine ou à une vie économique propre... », Annuaire français de droit international 40 (1994) 876 (906).

[1051] United Nations Office for Ocean Affairs and the Law of the Sea, The Law of the Sea: Régime of Islands, UN Sales No. E.87.V.11 (1988) 49 (draft submitted by Algeria, Dahomey, Guinea, Ivory Coast, Liberia, Madagascar, Mali, Mauritania, Morocco, Sierra Leone, Sudan, Tunisia, Upper Volta und Zambia).

latter do not affect the island's status, as the community as such endures. The view that "human habitation" connotes a permanent population is reflected in the works of prominent scholars and international decisions. As explained in the *South China Sea Arbitration*, "with respect to 'human habitation', the critical factor is the non-transient character of the inhabitation"[1052]. While no reference is made to a particular time frame, the award notes that Article 121 (3) refers to a community of people that have "chosen to stay and reside on the feature in a settled manner"[1053]. *Gjetnes* has highlighted that fishermen finding shelter on an island during the fishing season do not constitute "human habitation", as the duration of their stay is inevitably too short.[1054] We shall explore the significance of the duration of stay with the help of two types of uses common among islands that are otherwise devoid of human activity: scientific research and military bases. While employment conditions naturally vary, scientific research personnel will often work on a temporary basis, acquiring scientific data to be processed later on at their respective home universities. Permanently running stations may also be operated and maintained by different employees on a rotational basis, leading to high levels of population fluctuations. Often, the employee will leave behind his social and familial ties, and the short duration of his stay on the island may prevent him from forming the kind of social attachments that qualify a community. The temporary nature of the stay of research personnel thus usually prevents a community from forming. For a practical example of an isolated island used for scientific research, we may look to Heard Island. Its pristine subantarctic environment and remoteness render it largely hostile to human life, leaving it uninhabited, safe for occasional scientific research parties. These visits only occur on an intermittent basis and would thus seem to fail to reach the threshold of "human habitation".[1055] The question of the permanence of the community is furthermore relevant in the context of evaluating islands that serve militaristic purposes. According to the *South China Sea Arbitration* "a purely official or military population, serviced from the outside, does not constitute evidence that a feature is capable of sustaining human habitation."[1056] But is this position justified? While military outposts are often comprised of small, temporarily stationed units, facilities can reach dimensions comparable to that of small cities.[1057] It is easy to see why one of these examples is closer to the definition of

[1052] *South China Sea Arbitration,* para 542, *supra* note 28.
[1053] *Ibid,* para 489.
[1054] *Gjetnes,* The Spratlys: Are They Rocks or Islands?, Ocean Development & International Law 32 (2001) 191 (196).
[1055] Encyclopaedia Britannica, Heard Island and McDonald Islands <https://www.britannica.com/place/Heard-and-McDonald-Islands>.
[1056] *South China Sea Arbitration,* para 550, *supra* note 28.
[1057] As of 2010, the largest US mainland military base, Fort Bragg, is inhabited by as much as 29.183 people, with 85,3% of households including children under the age of 18.

a "community" than the other. Whether an island serving exclusively military purposes is home to a "human habitation" depends on whether the service members, administrative personnel, staff and family members, who may have immigrated within the framework of family reunification programs, together form a community of habitual residents. A small-scale group of soldiers whose respective assignment to the island is limited to six months constitutes insufficient evidence of "human habitation". Legal relevance extents to all individuals residing on a feature, which means that if some long-term inhabitants remain on the island on a permanent basis while other service members rotate on a half-year basis, the latter are to be excluded from the legal consideration while the former must be carefully evaluated. If the stay of these individuals is of a lasting nature, it may well be that they have formed a community. A clue indicating whether a specific military base qualifies as "human habitation" can also be found in its size and the number of service members. The larger the facility, the more likely it is that it hosts long-term residents, be they civilian personnel, soldiers or the families of service members. Whether military installments constitute a form of "human habitation" depends on the degree of social integration as well as the continuity and duration of the deployment.

4. Intention to Reside

While the *Regime of islands* does not explicitly list this requirement, the provision's context and purpose indicate that "human habitation" is a reference to community members who voluntarily reside on an island. If people are forced to stay on an island against their will, as in the case of shipwrecked persons, their stay is not a reliable indicator of residential potential. Rather, they may stay on the island despite the fact that the island's environmental conditions are detrimental to their health, simply because they have no other option. By way of comparison, the European Court of Justice has also found that "habitual residence" requires that an individual intends to reside at a specific location.[1058] In 1761, 60 slaves and their owners were shipwrecked on the sandy beaches of Tromelin, an island no more than 0.8 square kilometers in size.[1059] The slaveowners prevented the slaves from boarding the makeshift vessel made from debris. The slaves were forced to remain behind on Tromelin, while their owners perished at sea. 15 years later, only eight survivors were left and could be saved from their isolation on Tromelin. Undoubtedly, they had formed a community: they were connected by social ties and the island had been the center of their lives for the significant period of 15 years.

[1058] The relevant pronouncement was made in the context of expatriation allowances. European Court of Justice, *Pedro Magdalena Fernández/Commission of the European Communities,* Judgment, September 15, 1994, **C**-452/93 P, ECR I-04295, para 22.
[1059] *Schalansky,* Taschenatlas der Abgelegenen Inseln[5] (2014) 108 et seq.

The severe decimation of the population however shows that their stay cannot be taken as evidence of Tromelin's capacity to sustain a human habitation. Another form of involuntary stay is imprisonment in state-run correctional facilities, a use for small islands that was quite common during the 18th and 19th century.[1060] Today, the majority of prison islands have closed down their penitentiary facilities and have been converted into nature reserves or tourist attractions. Well-known former prison islands include: Alcatraz in the San Francisco Bay, Robben Island – the South African prison where black political leaders such as Nelson Mandela were held during apartheid and Chateau d'If, the royal castle on a French coastal rock that was repurposed in 1634 as a detention facility and inspired Alexandre Dumas' novel *The Count of Monte Cristo*.[1061] İmralı is a rare example of a prison island still in use as of today: on this Turkish territory Kurdish rebels, including rebel leader Abdullah Öcalan, are detained.[1062] Prison populations cannot legally be said to constitute a "human habitation" because their presence is compulsory and thereby incapable of proving that an island is particularly apt for inhabitation. Inmates are separated from their families and social circles, intend to leave at the earliest possibility, and usually conceive of their stay as temporary. These aspects would seem to illustrate that prison populations do not classify as the long-term, solidaristic community that is indicated by the *Regime of islands*.

5. Social Integration and Solidarity

As we have seen, "human habitation" within the meaning of the *Regime of islands,* "habitual residency" as it is defined in European law,[1063] and the term "resident" in international tax law are all associated with a certain degree of integration into local society through social and familial connections.[1064] Social integration to the degree required in the *Regime of islands* does usually not exist where the people staying on an island only do so for part of the year, for instance because their residence on the island is a secondary or holiday home. In European law and international tax law, this element of social integration is called the "centre of interests". In the law of the sea, scholars have hinted at a requirement not all that dissimilar to that of the "centre of interests", noting that "human habitation" is a reference to a "stable community"[1065].

[1060] *Cohen,* Prisons and Penal Settlements in Gillespie/Clague (eds.), Encyclopedia of Islands (2009) 767.
[1061] *Ibid,* 770 et seq.
[1062] *Ibid.*
[1063] European Court of Justice, *Barbara Mercredi/Richard Chaffe*, Judgment, December 22, 2010, C-497/10 PPU, ECR I-14309, para 47.
[1064] See above Part 2 Section 2 V B and Part 2 Section 2 V D 1.
[1065] *Gjetnes,* The Spratlys: Are They Rocks or Islands?, Ocean Development & International Law 32 (2001) 191 (195); *Van Dyke/Morgan/Gurish*, The Exclusive Economic Zone of the Northwestern Hawaiian Islands: When Do Uninhabited Islands Generate an EEZ?, San Diego Law Review 25 (1988) 425 (437); *Kolb* similarly refers to „groupes humains stablement implantés et organisés » in *Kolb,* L'interprétation de l'article 121, paragraphe 3, de

As *Van Dyke* has explained, "human habitation" implies that one "should look for families, children being born and raised"[1066]. The arbitral tribunal delivering its award in the *South China Sea Arbitration* similarly found that it was legally relevant to the evaluation of "human habitation" whether individuals present on the island were "accompanied by their families" [1067]. Additionally, the tribunal explained that it understood "human habitation" to designate "a stable community of people for whom the feature constitutes a home"[1068]. It seems noteworthy that this is the same terminology that is employed in the OECD Model Convention, where a person is a resident liable to taxation where he "has a permanent home available to him", followed by the explanation that where a person has more than one home, residency is determined by the "centre of vital interests".[1069] In case a group of people staying on an island have multiple residences at their disposal, looking for the center of their social and familial connections would appear to be an appropriate standard capable of distinguishing residents from visitors in the law of the sea as well. In international tax law, the "centre of interests" depends on which locality evinces closer personal and economic relations with the person in question.[1070] While an individual may have more than one home, it is only possible to have one centre of interests,[1071] as there is always one place of residence featuring relatively stronger connections. Stronger social and economic ties can be indicated by factors such as employment conditions, family situation and the length and constancy of the stay. Human presence on an island sometimes occurs as a by-product of economic ventures. If these are long-term projects, such as resource extraction, they may trigger the establishment of socially well-integrated communities, even on otherwise deserted islands. Economic enterprises create employment and attract a workforce whose members may be encouraged to take their families along, triggering investments in infrastructure. In this context, the requirement of social integration inherent to "human habitation" could be used to separate residents from visitors. If an individual, while employed locally, has little social ties on the island, keeps a second home on the mainland and is always absent from the island when on leave, he or she seems to fail the requirement of social

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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... », Annuaire français de droit international 40 (1994) 876 (906).

[1066] *Howland Island Case*, Deposition of Jon Van Dyke, October 31, 2007, 166, *supra* note 413.

[1067] *South China Sea Arbitration,* para 618, *supra* note 28.

[1068] *Ibid,* para 618.

[1069] Art 4 (2) (a) OECD Model Convention, *supra* note 1000.

[1070] Its role in the law of the sea is in this regard comparable to that of the "centre of vital interests" in Article 4 (2) of the OECD Model Convention. *Baker,* The expression "centre of vital interests" in Article 4(2) of the OECD Model Convention in Guglielmo (ed.), Residence of Individuals under Tax Treaties and EC Law (2010) 167 (171).

[1071] *Ibid,* 172.

integration. For an illustrative example, we may look to the Russian settlement Barentsburg on Spitsbergen, an island part of the Svalbard archipelago.[1072] Barentsburg is a coal mining town governed by the Russian State Trust Arcticugol', which is the administration of the mine.[1073] This state-controlled company "operates the mine and the settlement's social infrastructure, repairs buildings, manages hotels, the brewery and the school, and recruits all personnel. The mine personnel, as well as school teachers, doctors, and caterers are recruited via Arcticugol's Moscow head office".[1074] Thus, while Barentsburg may have been founded for economic purposes, it provides its residents with more than mere employment. This enables the presence of employees' spouses and life partners, who can enter the local workspace, and children, who may attend a nearby school. Thus, it is possible for the residents of Barentsburg to accommodate their families and establish social ties, thereby forming a "human habitation". The example of Barentsburg is useful for explanatory purposes. However, on a practical level, the status of Spitsbergen as an island in the narrow sense is uncontroversial due to the presence of larger settlements than Barentsburg and numerous economic enterprises.[1075] Economic activity on Svalbard is regulated by the Svalbard Treaty,[1076] which postulates that Svalbard is under Norwegian sovereignty, while remaining a visa-free zone where all citizens and companies of the States Parties may set up residence and are granted equal access to specified economic opportunities such as mining and fishing.[1077] There is longstanding disagreement over the geographical scope of the Svalbard Treaty, specifically whether its rules apply to Svalbard's EEZ and continental shelf, which Norway denies.[1078] Norway has not declared an EEZ for Svalbard, although it has maintained that it could lawfully do so, and has instead established a Fisheries Protection Zone around Svalbard aiming to conserve and manage living marine resources.[1079] Norway further claims a continental shelf for Svalbard, and has submitted the limits of the corresponding outer continental shelf to the Commission on the Limits of the

[1072] Svalbard is a Norwegian archipelago in the Arctic Ocean, located roughly between the North Pole and the northern coast of Norway.
[1073] *Gerlach/Kinossian*, Cultural landscape of the Arctic: 'recycling' of soviet imagery in the Russian settlement of Barentsburg, Polar Geography 39:1 (2016) 1 (2).
[1074] *Ibid,* 8.
[1075] Longyearbyen, a Norwegian settlement on Spitsbergen, is home to a diverse community of individuals that are employed in sectors such as tourism, geologic research and mining. The total population of Svalbard fluctuates seasonally, but composes roughly 3000 people. See also Encyclopaedia Britannica <https://www.britannica.com/place/Svalbard#ref285403> and City Population - Population Statistics for Countries, Administrative Areas, Cities and Agglomerations <citypopulation.de/Svalbard.html> for demographic statistics.
[1076] Treaty concerning the Archipelago of Spitsbergen, February 9, 1920, Australian Treaty Series No 10 (1925).
[1077] *Ibid,* Art 2, Art 3.
[1078] *Østhagen/Raspotnik,* Crab! How a dispute over snow crab became a diplomatic headache between Norway and the EU, Marine Policy 98 (2018) 58 (59).
[1079] *Ibid.*

Continental Shelf, which has issued recommendations in the matter in 2009.[1080] These recommendations have led Norway to amend and supplement its submission on multiple points, but do not address the geographical scope of the Svalbard Treaty.[1081]

The requirement of relatively stronger social integration furthermore allows us to differentiate between residents and temporarily present research personnel. Often, scientific personnel will leave family members behind because the island on which the research facility is built lacks the necessary infrastructure to accommodate and employ them or to provide educational facilities to children. Macquarie Island is a prime example.[1082] This island would be completely devoid of human life if it weren't for its vast subantarctic research station encompassing more than 30 separate buildings. Among other facilities, its personnel has access to a doctor's surgery, stores, workshops, and communications services. Employees even report that the "community sense"[1083] among the station's staff makes a positive contribution to their experience. And yet, in light of the absence of family members, the limited duration of the individual stay – the population shrinks to as few as sixteen people in winter – and associated likelihood of secondary residences on the mainland, it would not seem that the required "community" has developed. It appears that a research facility sustaining "human habitation" on an otherwise deserted island is, while not an altogether impossible scenario, the exception, rather than the norm. Whether or not the personnel operating a research facility amounts to "human habitation" is a mostly academic question, since islands supporting research stations are ordinarily to be classified as islands in the narrow sense by virtue of their being able to sustain "economic life".[1084]

F. The Theoretical Capacity to Sustain Human Habitation

While the preceding chapter has endeavored to shine light on what actual "human habitation" within the meaning of Article 121 (3) looks like, this chapter will focus on what it means for an island to bear the capacity thereto. An island's environment may after all be generally favorable to inhabitation and have a surface area large enough to support a settlement, all while remaining uninhabited. That a feature can qualify as an island in the narrow sense despite the fact that it is uninhabited is evident primarily from the wording of the *Regime of islands*, in particular from

[1080] 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 Norway in respect of Areas in the Arctic Ocean, the Barents Sea and the Norwegian Sea on 27 November 2006, March 27, 2009.
[1081] *Elferink,* The Continental Shelf in the Polar Regions: Cold War or Black-Letter Law?, Netherlands Yearbook of International Law 40 (2009) 121 (157 et seq).
[1082] For further information, see Australian Government - Department of the Environment and Energy - Australian Antarctic Division, Macquarie Island Station <antarctica.gov.au/living-and-working/stations/macquarie-island>.
[1083] Australian Government - Department of the Environment and Energy - Australian Antarctic Division, Macquarie Island Station <antarctica.gov.au/living-and-working/stations/macquarie-island/living>.
[1084] Part 2 Section 2 VI D 2.

the use of the verb "can".[1085] We shall now focus our attention on the practical methods that have been developed in order to assess the required suitability for habitation. As the preceding chapters have shown, "human habitation" is perhaps best described as a long-term socially well-integrated community. This chapter will use the shorter term "habitability" to designate said capacity. The necessity of judging an island's habitability has sparked debate and led to the development of a variety of methods. Some scholars have embraced the use of environmental factors such as the availability of spring water as clues pointing towards habitability, a method referred to here as relying on "habitability indicators". The use of habitability indicators raises its very own questions: are they required to exist in an island's natural state or can they be introduced to an island via human innovation?[1086] Must their introduction merely be theoretically possible or must these habitability indicators be present on the island at the time of the claim? If we apply these questions to, for instance, the often cited habitability indicator of the availability of potable water, we have to consider which of these constellations reliably indicate habitability and which do not: water is derived from natural springs. Cisterns are used for the collection of rainwater. A desalinization plant has been built on an island. The construction of a desalinization plant is technically feasible on an island. But the theory of habitability indicators is not the only relevant approach. We shall also address what historical evidence of a former settlement can tell us about an island's present habitability. Lastly, we shall focus on the comparative approach, which asks whether an island's habitability can be illustrated by showing that comparable islands are actively sustaining human habitation.

1. The Theory of Habitability Indicators

This thesis uses the designation *theory of habitability indicators* to describe the view that certain environmental properties reliably predict whether islands across the spectrum bear the theoretical capacity to sustain human habitation.

a. Natural Habitability Indicators

The perhaps most commonly cited indicators considered to provide evidence that human habitation is sustainable on an island are the availability of food, potable water, and shelter.[1087]

[1085] Part 2 Section 2 II.

[1086] For an example where natural shortages in drinking water were overcome, it is instructive to look to the Crimean Peninsula. The Crimean Peninsula has so few natural sources of drinking water it traditionally depended on freshwater inflows from the North Crimean Canal to keep its level of ground water. Following the Ukrainian cutoff from this source in 2014, Crimea's ground water was threatened by salinization due to seawater incursion. Crimea's Groundwater Sources at Risk of Salinization, World Water News by Ooskanews, December 10, 2014, <https://www.ooskanews.com/story/2014/12/crimea-s-groundwater-sources-risk-salinization_163246>.

[1087] *Gjetnes,* The Spratlys: Are They Rocks or Islands?, Ocean Development & International Law 32 (2001) 191

Lesser known indicators include the presence of tillable soil, plants and animals.[1088] The scholar having provided the most in-depth analysis of this approach is *Gjetnes,* who has described the "availability of food, fresh water, and shelter" as "the main characteristic of an island that is capable of sustaining human habitation".[1089] He has further indicated that these "essential needs"[1090] must be accessible in the islands' natural state: "one might […] require that the people living on the island be supported by the natural resources of the feature itself"[1091]. *Gjetnes* legal opinion has been echoed in international cases, namely in the *Black Sea Case* and the *South China Sea Arbitration.* In the course of the *Black Sea Case*, Romania specifically claimed that Serpents' Island was a rock within the meaning of the *Regime of islands* because it was "devoid of natural water sources and virtually devoid of soil, vegetation and fauna"[1092]. The theory of habitability indicators has been fully embraced by the arbitral tribunal adjudicating in the *South China Sea Arbitration*, which took the position that "[a]t a minimum, sustained human habitation would require that a feature be able to support, maintain, and provide food, drink, and shelter to some humans to enable them to reside there permanently or habitually over an extended period of time."[1093] The arbitral tribunal closely examined the agricultural potential of the Spratly Islands.[1094] Importantly, it was also argued that an island in the narrow sense had to be able to meet these basic needs in its natural state, as the tribunal understood "the phrase "cannot sustain" to mean "cannot, without artificial addition, sustain."[1095]

Relying on natural habitability indicators yields questionable results for a number of reasons. *Kwiatkowska* and *Soons* have described the use of factors such as "potable water, fertile soil, natural resources and vegetation, or the island's climate"[1096] as unhelpful, noting that these characteristics do not reliably indicate habitability. Indeed, certain requirements such as the availability of potable water, may be met, and yet the island in question may remain uninhabitable.[1097] It should also be noted that the absence of the listed habitability indicators in an island's natural state does not reliably indicate that human habitation is unsustainable. For

(196); *South China Sea Arbitration,* para 490, *supra* note 28.
[1088] *Black Sea Case,* para 180, *supra* note 310.
[1089] *Gjetnes,* The Spratlys: Are They Rocks or Islands?, Ocean Development & International Law 32 (2001) 191 (196).
[1090] *Ibid.*
[1091] *Ibid,* 195.
[1092] *Black Sea Case,* para 180, *supra* note 310.
[1093] *South China Sea Arbitration,* para 490, *supra* note 28.
[1094] *Ibid,* paras 594 et seq.
[1095] *Ibid,* para 510.
[1096] *Kwiatkowska/Soons,* Entitlement to Maritime Areas of Rocks Which Cannot Sustain Human Habitation or Economic Life of Their Own, Netherlands Yearbook of International Law 21 (1990) 139 (167).
[1097] See the example of Semisopochnoi Island below in Part 2 Section 2 V F 4.

example, the absence of natural spring water does not automatically preclude habitability as this shortcoming may be offset by the construction of desalinization plants. If the soil is too hard or arid to allow for farming, food may still be procured by relying on importing goods or on industrial food production. Another reason why the use of natural habitability indicators is unbefitting, is that this approach assumes that an island that is able to "sustain human habitation" is really a reference to an island that, at the bare minimum, can "sustain an autarchic hunter-gatherer society". The capacity to sustain human habitation is after all considered dependent on the natural occurrence of food, fresh water and shelter, and the only type of settlement requiring such conditions are autarchic hunter-gatherer societies. Contemporary societies – and in particular island communities – habitually depend on the import of food and other essentials, on technological solutions to extreme weather conditions, on government subsidies or on expatriate remittances. Ignoring the reality of modern life on islands, it is nevertheless claimed that "human habitation" requires that an island offers possibilities such as "shelter" in its natural state. More precisely, the award rendered in the *South China Sea Arbitration* held that there should be "naturally occurring vegetation capable of providing shelter"[1098], which illustrates that there was an underlying opinion that "human habitation" refers to a society constructing their dwellings from local vegetation, as opposed to imported building materials. There is however no reason to believe that UNCLOS' drafters considered the autarchic hunter-gatherer society as an appropriate template for "human habitation". Requiring that the conditions enabling "human habitation" exist in an island's natural state – i.e. prior to human interference with nature – or implying that an island in the narrow sense must be a suitable environment for an autarchic hunter-gatherer society is irreconcilable with the wording, context and object of Article 121 (3), as has already been addressed.[1099] In light of how common reliance on imported fuel and foodstuffs is in islands and island states, it is improbable that UNCLOS' drafters wished to base the *Regime of islands* on the archaic model of a population sustaining itself by consuming only locally produced goods.[1100] Nor is it indicated that the drafters desired to discriminate against island communities that require outside assistance to maintain their livelihoods by denying such islands an EEZ.

[1098] *South China Sea Arbitration,* para 615, *supra* note 28.
[1099] See Part 2 Section 2 IV.
[1100] See Part 2 Section 2 IV C 2.

b. Artificial Habitability Indicators

We have found that an interpretation of the *Regime of islands* in line with Article 31 VCLT does not support the notion that the conditions enabling "human habitation" have to prevail naturally.[1101] Consequently, we shall consider the relevance of factors such as the living conditions and infrastructure on an island regardless of whether these conditions are "natural" or a consequence of human innovation. If we apply these wide ranging habitability indicators, this means that the availability of water, food, shelter, medical care and other necessities of life determine the question of whether an island is habitable. According to this approach, it no longer matters whether the listed conditions prevailed in the island's natural state. Some scholars seem open to this possibility. *Song*, for example, has described an island devoid of natural sources of potable water, but equipped with a desalinization plant, as capable of sustaining human habitation.[1102] And indeed, there is merit to this approach: the availability of food stuffs, drinking water, housing, medical care and other infrastructure does make it more likely that an island can harbor the kind of long-term community that Article 121 (3) requires. Still, some problems remain.

Choosing to assess an island's capacity for human habitation on the basis of preselected properties such as the availability of food, potable water, tillable soil or shelter forces the interpreter to make a decision: either these indicators must prevail on the specific island or their realization must merely be possible at the time of evaluation. The former option appears arbitrary: there seems to be no compelling reason why an island featuring adequate potential building sites, yet is devoid of dwellings should receive a different legal status than an island where construction works on housing have already taken place. The inherent capabilities and properties of these islands may be the same, with the only difference being whether the respective owning state has invested in infrastructure projects or not. In contrast, if we assume that the fact that certain demands to infrastructure could be met on a theoretical level does - of its own - not prove an island's habitability, we are led to the conclusion that uninhabited islands must already be fully equipped with infrastructure such as housing space, a central water supply and grocery stores, if they are to fall into the category of islands in the narrow sense. Demanding that the utilities needed to prepare a specific island for the arrival of residents be present at the time of the claim however results in a redefinition of Article 121 (3). Such a reading would move the provision's content from requiring that an island in the narrow sense *can* sustain

[1101] See Part 2 Section 2 IV C.

[1102] *Song,* The South China Sea Arbitration Case Filed by the Philippines against China: Arguments Concerning Submerged Features, Low Tide Elevations and Islands in *Wu/Zou* (eds.), Arbitration Concerning the South China Sea - Philippines versus China (2016) 176.

human habitation, to demanding that it *does.*[1103] For after going to such lengths as ensuring drinking water distribution, constructing dwellings and establishing a food supply, it would be unusual if the island were not intended for actual inhabitation. What is more, insisting that "human habitation" can only be sustained once the required infrastructure is available, would put financially weaker states at a serious disadvantage. If there are indeed such properties that can reliably be invoked in support of an island's habitability, it thus appears that it cannot be necessary that all of them already prevail on the island at the time of the claim. However, relying on whether or not specific habitability indicators *could* be met appears to produce vague outcomes as well: those applying the *Regime of islands* would be required to assess whether an island constitutes a suitable foundation for the hypothetical construction of infrastructure facilities.

The inconsistencies ensuing from the use of habitability indicators go even further. The theory of habitability indicators may induce states to argue that even the smallest islands and those featuring the most hostile environments are theoretically capable of sustaining "human habitation", because they could – in theory – be structurally altered in a way that would render them suitable for inhabitation.[1104] It is important to mention at this point that the artificial enhancement of the landmass of a high-tide elevation does not turn an island into an "artificial island, installation or structure".[1105] An island retains its status as a "naturally formed area of land"[1106] despite being enlarged through the process of land reclamation or the grafting of corals.[1107] However, attempting to assess whether an island would theoretically be capable of sheltering a population if it were not only artificially enhanced but also developed up to the point where a community of habitual residents could live without having to forego access to drinking water, food supplies or shelter means to rely to a substantive degree on conjectural reasoning. One need not only calculate the chances of the land reclamation being a successful one, but also the required dimensions of the infrastructure to be as well as whether the relevant climatic circumstances are favourable to colonization. The interpreter would have to defer to assumptions and probabilities and base a legal assessment on conditions that cannot be determined or reviewed with any reasonable degree of certainty. Additionally, the criteria that

[1103] Why it is that the mere capacity to sustain human habitation or economic life is sufficient, is addressed in Part 4 Section 2 II.

[1104] See *O'Keefe,* Palm-Fringed Benefits: Island Dependencies in the New Law of the Sea, International and Comparative Law Quarterly 45:2 (1996) 408 (412).

[1105] Artificial islands are discussed in Articles 60 and 80 UNCLOS. See also *Talmon,* Article 121 - Regime of Islands in Proelss (ed.), The United Nations Convention on the Law of the Sea - A Commentary (2017) 858 (864).

[1106] Art 121 (1) UNCLOS.

[1107] See also Part 2 Section 1 III A. The impact of construction works on the legal status of islands is explored in further detail in Part 2 Section 3.

have been identified as relevant, such as the availability of housing space, infrastructure, potable water and food supplies depend upon the dimensions of the surface area of an island, rendering it a basic criterion and starting point. The individual habitability indicators thus merge, become indistinguishable and are simply no longer relevant to the assessment of very small islands, since the only subject of evaluation in this scenario is, whether the island can be artificially enlarged so as to support the infrastructure required for inhabitation. This evaluation, determined by the composition of the seabed, the existing shore and climatic conditions, seems to such a degree removed from the actual circumstances that prevail on the island that is seems unbefitting to accept them as a foundation of the assessment of an island's legal status. The illustrated inconsistencies arise on the one hand from UNCLOS' omission to explain what the "capacity" to sustain human habitation specifically entails and on the other hand from relying on individual habitability indicators. Equating the capability of an island to sustain human habitation with the fulfillment of a few well-selected qualifications may appear like a simple solution to a complicated question, but it ultimately yields contradictory results.

2. The Comparative Approach

The comparative approach suggests that the most effective way to assess an uninhabited island's theoretical capacity to sustain human habitation is to look at features that exhibit a similar environment but are inhabited by a community of habitual residents. The similarity should ideally extend to the size of the surface area, but the more environmental factors overlap, the more convincing a case can be made that the feature in question is an island in the narrow sense. This method avoids persisting on the priority of arbitrarily selected properties and instead examines the overall picture. If there are inhabited archipelagos or islands of a similar size and matching environmental conditions, it is indicated that the island under examination has not been colonized due to reasons other than lacking the capacity thereto. It is for instance conceivable that an island has remained uninhabited for the sole reason of having been declared part of an environmental protection area.[1108] Land reclamation as such is, according to this theory, not detrimental the status as an island in the narrow sense so long as the feature is in its natural state an island, which is to say a high-tide elevation.[1109] If it is a feature that is naturally above water at high tide, but has subsequently seen its surface area artificially enlarged, what matters most in the evaluation of its status is whether islands of comparable dimensions and

[1108] Such as is the case in large parts of the Galapagos Islands, with 97.5 % of the archipelago's land area forming a national park.
[1109] See Part 2 Section 1 III A.

characteristics shelter a "human habitation". While this approach to assessing uninhabited islands under Article 121 (3) may seem simplistic, it overs a practical solution and avoids the inconsistencies associated with the theory of habitability indicators.

3. Historical Evidence

An island's potential for habitation may also be corroborated by historical evidence. If an island provided a home to a community of habitual residents in the past and conditions on the island have remained similar, or have at least not deteriorated since, the population could in all likelihood return. Or, as *Talmon* has noted, "[t]hat an uninhabited island in the past supported a human population establishes at least a strong presumption that it is able to sustain human habitation"[1110]. Still, if an island has never been inhabited, this does not automatically imply that it lacks the capacity thereto, as there are other potential causes that may prevent colonization.[1111] Likewise, even if an island once actively sustained human habitation, natural or man-made events may since have rendered it uninhabitable. For an example of such a situation, we have to look no further than Pagan, an island whose 300 inhabitants could fortunately be evacuated in the wake of a volcanic eruption in 1981, but saw much of their infrastructure destroyed. Citing the continuing threat to public safety from seismic activity, the US government has so far not responded to any of the resettlement petitions submitted by the displaced inhabitants and their families.[1112] The island's history of settlement in this case fails to show that it remains habitable today. As *Tanaka* has explained, it would seem "that historical evidence of human habitation or economic life of its own can only serve as evidence of capacity in the past and that the past capacity must continue to exist for a maritime feature to be a fully entitled island"[1113]. Relying on the evidence from an island's historic usage alone, would in many cases fail to provide a complete picture of an island's capacities.

4. Conclusion

It appears that individual habitability indicators alone, such as potable water, food, shelter and tillable soil, cannot reliably predict whether an island is capable of sustaining human habitation, because their absence neither denies nor confirms this capacity. Even the award rendered in the

[1110] *Talmon,* Article 121 - Regime of Islands in Proelss (ed.), The United Nations Convention on the Law of the Sea - A Commentary (2017) 858 (874).
[1111] See Part 2 Section 2 II.
[1112] The island is currently under consideration as a testing site for military scenarios in the Pacific. See also Island of Pagan opposes plan to use it for Marine invasion training, Los Angeles Times, May 17, 2015 <latimes.com/world/asia/la-fg-marines-invade-20150517-story.html#page=1>.
[1113] *Tanaka,* Reflections on the Interpretation and Application of Article 121(3) in the South China Sea Arbitration (Merits), Ocean Development and International Law 48:3-4 (2017) 365 (368).

South China Sea Arbitration, which generally adopts a favorable view of habitability indicators, adds that they may only be useful in relatively clear-cut cases.[1114] The decision in the *South China Sea Arbitration* is noteworthy for drawing a distinction between islands allowing only for human survival and islands enabling a settled habitation. The former were considered rocks, the latter islands in the narrow sense. Whether "habitation" is possible was evaluated using the habitability indicators food, water and shelter, which were sometimes referred to as "physical characteristics".[1115] At the same time, it was noted that "[i]t will be difficult, if not impossible, to determine from the physical characteristics of a feature alone where the capacity merely to keep people alive ends and the capacity to sustain settled habitation by a human community begins."[1116] *Charney* has theoretically commended the employment of habitability indicators, and argued that they "add a level of stability to the provision and limit the prospective diminution of the commons"[1117]. Yet, he found that reliance on individual characteristics such as tillable soil or potable water was in conflict with the *travaux préparatoires.*[1118] What makes habitability indicators so unreliable is that, despite the absence of fresh water, shelter or other necessities, an island may still be capable of sustaining human habitation. The area in question could be suitable for further development, which means that it may bear the potential to sustain a population. While requiring the *natural* occurrence of habitability indicators would seem to solve the problem of assessing the success of hypothetical infrastructure projects, this approach faces the problem that it would appear to be in violation of both the wording and the objectives of the *Regime of islands*.[1119] What is more, even if an uninhabited island meets certain parameters, this does not automatically entail that human habitation is a possibility. Semisopochnoi island, for example, boasts a comparatively vast surface area of 221,7 km^2, fresh water and local wildlife which could theoretically serve as a food source.[1120] However, due to its extreme isolation and harsh arctic climate, no human has ever lived on the island and it is unlikely that inhabitation will come to pass in future. Settlement appears generally unsustainable on this island, and yet, strict reliance on selected habitability indicators would not necessarily lead us to this conclusion. Habitability indicators may point us in one or the other direction in the assessment of islands, but they fail to produce conclusive results. They retain a certain degree of usefulness as parameters applied in the comparative approach. If

[1114] *South China Sea Arbitration,* para 548, *supra* note 28.
[1115] *Ibid,* para 490.
[1116] *Ibid,* para 548.
[1117] *Charney,* Rocks that Cannot Sustain Human Habitation, The American Journal of International Law 93 (1999) 863 (870).
[1118] *Ibid.*
[1119] See Part 2 Section 2 IV C.
[1120] *Schalansky,* Taschenatlas der Abgelegenen Inseln[5] (2014) 182 et seq.

conditions prevailing on one island match those of another, these islands are comparable. The comparative approach should nevertheless be applied in a restrictive fashion, meaning that an island should only be employed as an object of comparison where physical characteristics show that the islands under examination are truly equivalent. It may prove helpful to examine an island's history and former use, in particular whether it used to be inhabited by a long-term socially well-integrated community. As has been shown, the approach from historical usage is only capable of providing insight in select cases, which is why we cannot rely on it exclusively. Considering the uncertainties that may result from relying on historic evidence or on pre-established habitability indicators, it is the comparative approach that would seem to offer the most convincing solution and should thus be the method primarily relied on. Its focus on the overall picture of an island's capacities ensures a transparent and straightforward assessment.

G. Method of Assessment

This chapter will present a condensed version of the approach to verifying whether an island is capable of sustaining human habitation. The foundation and the individual aspects of this approach have been explored in full detail in the preceding chapters. The assessment looks slightly different depending on whether the island under examination features an active population or not. Furthermore, in any trial charged with assessing the status of an island allegedly capable of sustaining human habitation or economic life, the burden of proof rests with the party that would benefit from the feature's status as an island in the narrow sense.[1121]

1. Assessment of Inhabited Islands

It is proposed that not just any presence of human beings qualifies as "human habitation" within the sense of Article 121 (3). To fulfil this qualification, the local population should have formed a long-term community held together by social and familial ties. Whether this is the case depends on an island's population size, the duration and constancy of the inhabitants' stay and their intentions with regard to residency. In cases where multiple residences are at the disposal of the inhabitants, it is suggested that the assessment should hinge on the relatively stronger social connections.

[1121] *Van Dyke/Morgan/Gurish*, The Exclusive Economic Zone of the Northwestern Hawaiian Islands: When Do Uninhabited Islands Generate an EEZ?, San Diego Law Review 25 (1988) 425 (438).

2. Assessment of Uninhabited Islands

If we find an island to be either not frequented by humans at all or at least not inhabited by a long-term socially well-integrated community, we may still examine its potential to sustain such a community *in theory*. The potential therefore may be confirmed by historical evidence or via a comparison with islands of similar characteristics. If an island sustained human habitation in the past, this will often point towards present inhabitability, so long as conditions on the island have since remained favorable to settlement.[1122] If they have not, or if there is no evidence of a former settlement to begin with, this method offers no definite answers. Consequently, the most relevant approach remains the comparison with similar islands. Studying an active population on a second island allows us to draw conclusions as to the possibilities for communal life on the island under examination, provided of course that the two islands' size, climatic conditions and other relevant environmental determinants are similar.[1123] The population on the island we use as an object of comparison should of course meet the standard of "human habitation" we have already discussed, which is that of a long-term socially well-integrated community.

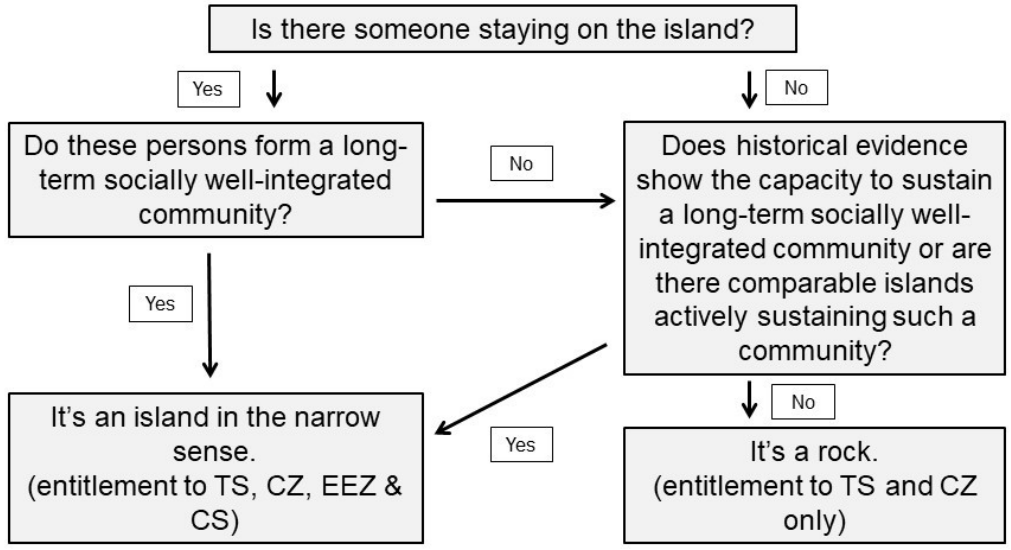

Fig. 1 Assessing an island's normative status based on actual and potential population

Abbreviations:

EEZ	*Exclusive Economic Zone*
CS	*Continental Shelf*
TS	*Territorial Sea*
CZ	*Contiguous Zone*

[1122] Part 2 Section 2 V F 3.
[1123] See Part 2 Section 2 V F 2.

VI. "Economic life of their own"– The Complexities of Measuring Economic Value

Despite the fact that the *Regime of islands* treats "economic life" as though it were a self-evident criterion, this term raises more issues than it would seem to solve. In particular, the interpreter is left with the question of what separates commercial from noncommercial activity, what the smallest unit of economic activity entails and whether "economic life" carries an autonomous meaning or is derivative from economic theory. Besides considering the phrasing, purpose and context of the provision, we will look to subsequent state practice, international judicature and legal scholars for their opinions on the meaning of "economic life". Following an overview of prominent views, this chapter shall discuss whether the comparatively elaborate description of the term "economic life" that was included in another, very different and less controversial, context of UNCLOS is of legal relevance to the interpretation of the *Regime of islands*.[1124] We shall then direct our attention to economic theory and its implications for the *Regime of islands*. Subsequently, this chapter will present an autonomous interpretation of "economic life" for the purposes of the *Regime of islands*, which addresses whether economic life is supposed to take place within particular confines, for how long it has to endure and whether it has to represent a rational utilization of the territory. It is an interpretation that focusses on "economic life" as a component of the economy as a whole, a unit defined by its contribution to the coastal state's Gross Domestic Product. Having established what it means for an island to sustain economic life, we shall finally discuss the appropriate method when assessing the – as yet – unrealized potential for "economic life".

A. "Economic Life" in Legal Doctrine

Scholars have suggested varying occupations, enterprises and circumstances as indicative of an island's capacity to sustain economic life. Potential forms of economic life include guano harvesting, wildlife preservation and marine environmental protection, weather observation posts, a lighthouse or "other aid to navigation"[1125] or fisheries.[1126] The mere capacity for economic life is on the other hand supposedly inferable from conditions favorable to polar bear hunting and the possible extraction of mineral resources in the territorial sea.[1127] Scholars have

[1124] Art 17 (2) (b) (iii) of Annex III UNCLOS.
[1125] *Kwiatkowska/Soons,* Entitlement to Maritime Areas of Rocks Which Cannot Sustain Human Habitation or Economic Life of Their Own, Netherlands Yearbook of International Law 21 (1990) 139 (167).
[1126] Guano harvesting was especially relevant to the status of Aves Island. *Ibid,* 161, 167, 168; *Hafetz,* Fostering Protection of the Marine Environment and Economic Development: Article 121(3) of the Third Law of the Sea Convention, AM. U. INT'L L. REV 15 (2000) 583 (626).
[1127] *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 (60); *Charney,* Rocks that Cannot Sustain Human Habitation, The American Journal of International Law 93 (1999) 863 (868).

debated the ability of the following enterprises to fulfill the qualifications of "economic life": the operation of radio stations, the collection of birds' eggs, tourism, running a virtual casino, a military base or a research facility.[1128] Expert opinions in this field are far from uniform. *Gjetnes* has above all emphasized that "there needs to be some kind of restriction as to the kind of economic activity required"[1129]. Another question that resurfaces frequently concerns the location of the resources validating an island's capability to sustain economic life. Is it necessary that natural resources can be found on land, or may they also be derived from the territorial sea, the EEZ or the continental shelf? *Gjetnes* has highlighted that, if one were to apply a strict literary interpretation, this "would indicate that fisheries [regardless of the affected zone] do not qualify. An island or rock must of its own be capable of sustaining economic life."[1130] *Van Dyke/Morgan/Gurish* and *Charney* on the other hand have taken the position that resources drawn from an island's territorial sea may corroborate its status as an island in the narrow sense.[1131] However, if one would go so far as to recognize resources derived from the EEZ as evidence of "economic life", this would, according to *Van Dyke/Morgan/Gurish* and *Kolb,* result in a *post hoc* justification problem,[1132] as the EEZ would retroactively generate economic life. Scholars have furthermore debated whether the expression "economic life of their own" implies that an island's economy must function independently from imports or at least from imports of a certain kind. This debate has already been extensively covered and shall not be repeated here.[1133] It has also been discussed whether it is appropriate to understand the demand for "economic life" in Article 121 (3) as requiring profitability or an activity of a commercial nature.[1134] Alternatively, "economic life" could stand for "economic value", a position supported by *Charney*. He has noted that "[Article 121 (3)] seems merely to require proof that the rock actually has some capacity for human habitation or *economic value* for

[1128] *Kwiatkowska/Soons,* Entitlement to Maritime Areas of Rocks Which Cannot Sustain Human Habitation or Economic Life of Their Own, Netherlands Yearbook of International Law 21 (1990) 139 (165); *Gjetnes,* The Spratlys: Are They Rocks or Islands?, Ocean Development & International Law 32 (2001) 191 (198, 199).
[1129] *Gjetnes,* The Spratlys: Are They Rocks or Islands?, Ocean Development & International Law 32 (2001) 191 (197).
[1130] *Ibid,* 196.
[1131] *Van Dyke/Morgan/Gurish*, The Exclusive Economic Zone of the Northwestern Hawaiian Islands: When Do Uninhabited Islands Generate an EEZ?, San Diego Law Review 25 (1988) 425 (486); *Charney,* Rocks that Cannot Sustain Human Habitation, The American Journal of International Law 93 (1999) 863 (868).
[1132] *Van Dyke/Morgan/Gurish*, The Exclusive Economic Zone of the Northwestern Hawaiian Islands: When Do Uninhabited Islands Generate an EEZ?, San Diego Law Review 25 (1988) 425 (438); *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... », Annuaire français de droit international 40 (1994) 876 (907).
[1133] Part 2 Section 2 IV A 2.
[1134] This interpretation is explicitly rejected by *Kwiatkowska* and *Soons.* See *Kwiatkowska/Soons,* Entitlement to Maritime Areas of Rocks Which Cannot Sustain Human Habitation or Economic Life of Their Own, Netherlands Yearbook of International Law 21 (1990) 139 (175).

society [emphasis added]"[1135]. *Charney* has explained that "a feature would not be subject to Article 121(3) disabilities if it were found to have valuable hydrocarbons (or other characteristics of value, e.g., newly harvestable fisheries in its territorial sea, or perhaps even a location for a profitable gambling casino) whose exploitation could sustain an economy sufficient to support that activity through the purchase of necessities from external sources."[1136] In the context of his own subdivision of islands, *Hodgson* has agreed that the value of islands is created by their "utility to the state and in particular to the inhabitants of the state – because it is for the people that the state has been established"[1137]. He noted that the value of rocks is by nature "negligible or non-existent"[1138], even if they are used to support navigational lights. *Gjetnes* has endorsed the criterion of "economic value", but added that "[i]t must be argued that the resource can represent economic value *over a certain period* of time [emphasis added]"[1139]. *Charney* has also addressed the temporal dimension to "economic life" and argued that "[t]he *travaux préparatoires* also show that human habitation does not require […] that the economic life be capable of sustaining a human being throughout the year"[1140]. Lastly, there appear to be mixed opinions on the economic life on islands that are part of a Marine Protected Area (MPA).[1141] *Hafetz* has found MPAs to be economically valuable.[1142] *Vukas*, on the other hand, seemed to deny that MPAs may impact an island's classification under Article 121 (3)[1143].

B. "Economic Life" in Annex III

"Economic life" is most prominently referenced in Article 121 (3), but UNCLOS also contains a second, more marginal mention in Article 17 (2) (b) (iii) of Annex III. The fact that this provision relies on "economic life" as a legally relevant concept has attracted less attention than its use in the *Regime of islands* due to the fact that Article 17 (2) (b) (iii) of Annex III concerns procedural rather than substantive law. Article 17 (2) (b) (iii) of Annex III does not confer rights or impose obligations directly affecting the subjects of international law, it merely stipulates

[1135] *Charney,* Rocks that Cannot Sustain Human Habitation, The American Journal of International Law 93 (1999) 863 (868).
[1136] *Ibid,* 870.
[1137] *Hodgson,* Islands: normal and special circumstances (1973) 18.
[1138] *Ibid.*
[1139] *Gjetnes,* The Spratlys: Are They Rocks or Islands?, Ocean Development & International Law 32 (2001) 191 (197).
[1140] *Charney* views "human habitation" and "economic life" as one combined criterion, not two. See *Charney,* Rocks that Cannot Sustain Human Habitation, The American Journal of International Law 93 (1999) 863 (868).
[1141] *Van Dyke,* Legal Issues Related to Sovereignty over Dokdo and Its Maritime Boundary, Ocean Development & International Law 38 (2007) 157 (196); *Volga Case,* Declaration of Budislav Vukas, December 23, 2002, para 7 et seq, *supra* note 172.
[1142] *Hafetz,* Fostering Protection of the Marine Environment and Economic Development: Article 121(3) of the Third Law of the Sea Convention, AM. U. INT'L L. REV 15 (2000) 583.
[1143] *Volga Case*, Declaration of Budislav Vukas, December 23, 2002, para 7 et seq, *supra* note 172.

the specifics of UNCLOS' legislative process. The specific paragraph is part of a long-winded provision that enumerates objective criteria the International Seabed Authority is required to respect when exercising its competence to adopt or apply specific rules, regulations and procedures.[1144] The provision in question specifically governs the duration of mining operations, stipulating that these shall take account of "the economic life of the mining project, [take] into consideration such factors as the depletion of the ore, the useful life of mining equipment and processing facilities and commercial viability."[1145] While this provision thus very much appears to contain a definition of "economic life", it can unfortunately not be *mutatis mutandis* transposed into the *Regime of islands*. For one thing, "economic life" within the meaning of Article 121 (3) boasts a much wider application area encompassing not only resource extraction, but also the uses of the water column, the currents and winds above the surface of the oceans, to say nothing of tourism or in fact any economic activity that may take place on dry land. But not only is Article 17 (2) (b) (iii) of Annex III distinguished from the *Regime of islands* by its reference to the extremely confined range of activities relating to mining operations, the motive for resorting to "economic life" as a legal standard in Annex III is also fundamentally different from the reason "economic life" features as a criterion in the *Regime of islands*. The two mentions are barely comparable, as Annex III describes the kind of economic activity that is profitable to such an extent that it is deemed proportionate that the International Seabed Authority participate in the revenue derived from it.[1146] The *Regime of islands*, on the other hand, uses the term "economic life" to find out whether it is at all justified to classify a specific island as a territory which entails entitlement to the EEZ and continental shelf. The requisite degree of profitability or economic worth of an operation is thus high with regard to Annex III. In the absence of an explicit statement to the contrary, in the context of the *Regime of islands*, "economic life" may also refer to enterprises of a more moderate scale than mining operations. Profitability is an important aspect to "economic life" within the meaning of Annex III, as it is a prerequisite to paying shares in profits. However, it seems unlikely that profitability is at all relevant to the definition of "economic life" within the meaning of the *Regime of islands,* as will be demonstrated in the chapters that follow.[1147] In sum, it appears that discrepancies in the scope of application of the two provisions as well as in their respective legal consequences have a prohibitive effect on the admissibility of applying the definition of

[1144] Art 17 (2) (b) (iii) UNCLOS.
[1145] Art 17 (2) (b) (iii) UNCLOS.
[1146] Art 150 (d) UNCLOS; Art 13 Annex III UNCLOS.
[1147] Part 2 Section 2 VI C 1.

"economic life" contained within Article 17 (2) (b) (iii) of Annex III by way of analogy to the *Regime of islands.*

C. "Economic Life" in Economic Theory

1. Profitability

Article 17 (2) (b) (iii) of Annex III is, as has been illustrated, vastly different from the *Regime of islands* both in terms of its purpose and its legal consequences. Still, the reference to "commercial viability" in Article 17 (2) (b) (iii) of Annex III does raise the question whether some degree of profitability may be indeed inherent to both uses of the term "economic life" in UNCLOS. While the relevance of the concept of profitability to Article 17 (2) (b) (iii) of Annex III is evident from being explicitly mentioned, any impact it has on the meaning of Article 121 (3) must be justified by the *Regime of island*'s wording, purpose and context. The question of whether "economic life" equals a profitable economic activity has been considered before. *Gjetnes* has mentioned "economic viability"[1148] as a potentially important criterion, but overall perceived "economic life" primarily as referring to the question of whether or not an island has economically valuable resources.[1149] *Talmon* has opined that "[e]conomic 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"[1150]. *Diaz/Dubner/Parent* have shown themselves not averse to a profitability requirement either, having argued that islands sustaining "economic life" should exhibit "commercial […] or industrial"[1151] potential. The *South China Sea Arbitration* proclaimed that "economic life" points to the requirement of a "basic level of viability"[1152]. *Kwiatkowska* and *Soons* have addressed the issue by inquiring whether "economic life" is necessarily "commercial" in nature,[1153] and seem to have answered this question in the negative.[1154] For an explanation of what it means for an enterprise to be profitable, we need to look no further than economic theory: according to *Gabler*, profitability is a certain rate of return, that is to say the ratio between a performance variable and the invested

[1148] *Gjetnes,* The Spratlys: Are They Rocks or Islands?, Ocean Development & International Law 32 (2001) 191 (199).
[1149] *Ibid,* 198.
[1150] *Talmon,* Article 121 - Regime of Islands in Proelss (ed.), The United Nations Convention on the Law of the Sea - A Commentary (2017) 858 (877).
[1151] *Diaz/Dubner/Parent,* When is a "Rock" an "Island"? - Another Unilateral Declaration Defies "Norms" of International Law, Michigan State Journal of International Law 15 (2007) 519 (531).
[1152] *South China Sea Arbitration,* para 499, *supra* note 28.
[1153] *Kwiatkowska/Soons,* Entitlement to Maritime Areas of Rocks Which Cannot Sustain Human Habitation or Economic Life of Their Own, Netherlands Yearbook of International Law 21 (1990) 139 (165).
[1154] *Ibid,* 168.

capital within a billing period.[1155] *Gabler*'s definition also shows that the concept of "profitability" is multidimensional, and may vary depending on whether a payment-related or a balance sheet-related approach is applied. Additionally, institutions such as schools or hospitals can operate on a profit-oriented or a non-profit basis, without this making a difference in the kind of services they provide. It would seem arbitrary to hold that a for-profit school qualifies as "economic life", while the same facility, but operating under governmental oversight, does not. Different sectors require different benchmarks when it comes to measuring profitability.[1156] "Profit" or "revenue" can hence be quite an elusive concept and consequently one that is not the most suitable distinction criterion in the context of the *Regime of islands*. A sewage treatment plant, for example, yields no revenues; it is in its nature to operate at a loss. The only advantage it brings is the clean water that is channeled back into the river or reservoir. And yet, operating the plant may prove beneficial to the company that owns it, as it may need clean water in order to operate or it may be compensated by means of government subsidies or tax breaks. In all of these scenarios, it is difficult to detect whether the operation of the plant is profitable or how much revenue it creates. Another problem that arises from the perception that profitability is a vital element in any occurrence of "economic life" would be that, in practice, companies and undertakings considered valuable are not automatically profitable. This can for instance be illustrated by using the example of Tesla Motors. Despite being one of the most highly valued corporations in the world, Tesla Motors only reached profitability a decade after it was founded, a fact that, according to Tesla Motors evidenced that the corporation had "[e]xceeded [their] own targets for deliveries"[1157]. Similarly, Mark Zuckerberg, CEO of Facebook, launched his original website under the name "Thefacebook" in February 2004 and by May 2005 his enterprise attracted investments with a value of up to US$ 12.7 million. Yet, his company only achieved profitability in 2009.[1158] Again, this benchmark was considered to have been reached "ahead of schedule"[1159]. Both of these companies are and were decidedly profit-oriented, but not profitable in their early phases. They were deemed valuable due to their presumed potential. Given their value and impact on the national economy, it is difficult to argue that they were not an expression of "economic life". Profitability-based conceptions of

[1155] *Breuer,* Rentabilität in Roberts (ed.), Gabler Wirtschaftslexikon[17] P-Sk (2010) 2586.
[1156] For the example of the banking sector see *Hahn,* Testing for Profitability and Contestability in Banking, WIFO Working Papers 261 (October 2005).
[1157] Tesla Motors Inc., First Quarter 2013 Shareholder Letter, May 8, 2013 <http://files.shareholder.com/downloads/ABEA-4CW8X0/1981467894x0x661989/EE71D11B-3563-489C-9471-9319FD963626/Q1_13_Shareholder_Letter.pdf>.
[1158] Facebook reaches profitability ahead of schedule, Marketing Week, September 16, 2009 <https://www.marketingweek.com/2009/09/16/facebook-reaches-profitability-ahead-of-schedule/>.
[1159] *Ibid.*

"economic life" do not take development phases and costs sufficiently into account and consequently produce the bizarre result that highly valued corporations may still not qualify as "economic life". It would appear inapposite to state that any form of "economic life" must by definition create revenue.

2. Economic Actions

According to economic theory, even managing the budget of one household constitutes an economic act, due to its nature as a *rational disposition over scarce resources for the fulfilment of given purposes*.[1160] A look at the concept of "economic life" in economic theory also shows that any form of human coexistence is considered to lead to economic behavior. Additionally, economic theory, in particular neoclassical economic theory, considers the famous literary character of Robinson Crusoe, who is shipwrecked on an isolated island, to be the "archetypical economic man"[1161]. Crusoe may be "[r]educed to economic life lived solely in relation to quantities of goods and labour"[1162], but in economic theory, his actions constitute "economic life" nonetheless. According to economic theory, any human presence thus seems to automatically entail "economic life", meaning that "human habitation" and "economic life" are essentially one and the same. Such a wide-ranging understanding of "economic life" appears unbefitting in the context of the law of the sea, as adding the criterion of "economic life" to the *Regime of islands* only makes sense if it in some way differs from, or goes beyond, "human habitation". What is more, a lone castaway would seem to fall short of the required degree of publicity and legal certainty that should accompany any assessment of the legal status of islands under Article 121 (3).

3. Microeconomic Classification Models

We might also try to look at "economic life" from a less theoretical and more practical perspective. Most microeconomic classification models divide businesses into microenterprises, small, medium and large enterprises.[1163] Even the smallest such category does

[1160] *ger.* "rationale Disposition über knappe Mittel zur Erfüllung gegebener Zwecke"; see *Helmstädter,* Wirtschaftstheorie – Band I: Mikroökonomische Theorie[4] (1991) 2.
[1161] *Söllner,* The Use (and Abuse) of Robinson Crusoe in Neoclassical Economics, History of Political Economy 48:1 (2016) 35 (37).
[1162] *Watson,* Competing Models of Socially Constructed Economic Man: Differentiating Defoe's Crusoe from the Robinson of Neoclassical Economics, New Political Economy 16:5 (2011) 609 (614).
[1163] See for example the classification according to the Recommendation of the European Commission: European Commission, Recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises, C (2003) 1422, OJ L 124 20/5/2003, 36.

not require a minimum number of employees,[1164] with the single-person company being a recognized economic entity.[1165] In an effort to align "economic life" within the meaning of Article 121 (3) with this classification system, we might argue that an island sustains "economic life" as long as it is established that it hosts a company that meets the characteristics of at least the smallest category. However, a specific economic activity, such as fishing, may be economic in nature regardless of whether it takes place within the standardized format of a corporation or not, which is why the legal structure of the undertaking in question is an untenably arbitrary criterion and thus to be rejected. It might be also be added that there is no reasonable explanation why "economic life" should involve the establishment of an entire company on an island and not just a branch office or facility thereof.

4. Production

In economics, "production" denotes the provision of goods and services that are scarce in the sense that there is demand for them on the relevant market.[1166] Wares that were manufactured, but do not find a buyer on the market are regarded as expenditure. Depending on the relevant political system, governments may operate under a legal monopoly in sectors such as the military, the judiciary, health care or public broadcasting services. These monopolies eliminate market formation, which makes it easy to distinguish between the public and the private sector in economics. Employing the economic conception of "production" as an indicator of "economic life" in the context of the *Regime of islands* however appears questionable. For what is a useful tool for distinguishing between public and private in economic theory does not necessarily coincide with what one would generally perceive to be economic or non-economic. If we assume that the provision of services becomes part of national "production" as soon as the government gives up its monopoly position, privatizes a sector and thereby creates a market, we are immediately confronted with inconsistencies in our understanding of "economic life". If we distinguish "economic life" from "government tasks" by relying on market participation, the consequence may for example be that – following a partial privatization of the military sector - private security companies carrying out tasks formerly assigned to the military bestow an island with "economic life". There is no possible justification why an island serving military purposes should be able to generate an EEZ and continental shelf depending on whether the

[1164] According to the definition set forth in the relevant Recommendation by the European Commission, microenterprises shall employ maximally 10 individuals. There is however no minimal requirement as to the number of staff members. *Ibid.*

[1165] See *Wenny,* Ein-Personen-Unternehmen: die Rolle der Unternehmensform im wirtschaftlichen Wandel, die soziale und wirtschaftliche Stellung von Selbständigen ohne eigene Beschäftigte (1999).

[1166] *Helmstädter,* Wirtschaftstheorie – Band I: Mikroökonomische Theorie[4] (1991) 113 et seq.

soldiers are directly employed by the government or are remunerated for the same tasks by interposed subcontractors. This would constitute an untenably arbitrary result. The underlying rationale can also be extended to health care and educational institutions, which may be run either as state agencies or as profit-oriented private companies. The definition of "economic life" as the production of a ware or service sought after on the appropriate market does not provide a satisfactory solution.

5. Gross Domestic Product

Gross Domestic Product (GDP) is a widely-used indicator of economic performance and "has become standard internationally in private and public economic analyses"[1167]. It is "an aggregation of expenditures for goods and services-outlays made for private consumption, business investment, and government"[1168] calculating the economic output generated within the confines of a certain territory for a pre-determined accounting period by aggregating the market value of all final products. "GDP can be measured according to the value of either what is produced and sold or what is demanded and bought."[1169] In other words, GDP is a measure of economic activity. Any contribution to GDP can be expressed in monetary terms. Every employee who is remunerated and every end product that is sold add to a state's GDP. It would seem that contribution to GDP is an appropriate starting point when defining the smallest possible unit of "economic life". Reliance on GDP recognizes the economic dimension of Article 121 (3), narrows down the kind of human activities that may constitute "economic life" and pays tribute to the objective of awarding economically valuable islands an EEZ and continental shelf. Comprehending every activity contributing to GDP as an expression of "economic life" may however lead to an inadmissibly broad understanding of "economic life" that would incorporate even the most insignificant of activities. We must remember that the legal distinction between rocks and islands in the narrow sense should be outwardly apparent to an extent that allows the international community to accurately appreciate the veracity of a given maritime claim. For example, a one-time touristic excursion to a remote island does add to GDP as the activity engenders the payment of tourist guides and the consummation of travel and accommodation services by clients. And yet, this cannot mean that the island sustains economic life, as the legal classification of islands would carry no meaning if it were to depend

[1167] *Backhouse,* Gross domestic product in Greenwald (ed.), The McGraw-Hill Encyclopedia of Economics[2] (1994) 486 (488).
[1168] *Ibid,* 486.
[1169] *Taylor,* The Instant Economist (2012) 119.

on such entirely transitory events. It would seem that the fact that an economic activity contributes to GDP is merely a starting point, and that additional thresholds are required.

D. „Economic Life“ in the *Regime of islands*

The way GDP measures economic activity provides us with a useful starting point to understanding the economic dimensions of the *Regime of islands*. The standard of the GDP can naturally only be applied *mutatis mutandis* and must be put into context. This chapter shall consequently explore the significance of the GDP to the definition of "economic life". It shall further examine the spatial boundaries of "economic life", the link between locality and usage and the timespan during which the economic activity must be sustainable. Lastly, this chapter shall discuss economic activities that have received particular attention for their potential impact on the legal status of islands.

1. Offshore Resources and the Spatial Boundaries of "Economic Life"

When determining the geographical scope of Article 121 (3), three possibilities present themselves: "economic life" may refer to activities on an island's dry land, to activities on land or within the territorial sea, or – this being the broadest interpretational angle – it may refer to activities on land, within the territorial sea or anywhere within the range of the EEZ and continental shelf. This question becomes relevant where the home port or the residences of a fishing community are on an island different from the island they use for fishing. Can an island that is used solely for the lucrative catch area in its territorial sea generate an EEZ? This question has occasionally been addressed in international proceedings. In the *Jan Mayen Case (Denmark/Norway)* of 1993,[1170] Denmark notably submitting that, in the absence of a harbor, "[t]he Norwegian fishing in the area does not serve to sustain economic life on Jan Mayen. Norwegian fishing must therefore be regarded as irrelevant […]. Norwegian fishing vessels in the Jan Mayen area operate from the remote Norwegian mainland"[1171]. As the state exercising sovereignty over Jan Mayen, Norway naturally disagreed with this opinion. Norway both extensively highlighted Jan Mayen's importance to the fishing industry and explained that, even if UNCLOS were theoretically applicable, Jan Mayen would not be found to be a "rock".[1172] While the ICJ refrained from adopting an explicit stance on the relevancy of coastal fisheries

[1170] See Part 1 Section 2 II B 4.
[1171] International Court of Justice, Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark/Norway), Memorial submitted by the government of the Kingdom of Denmark on July 31, 1989, Vol. 1, para 302.
[1172] *Jan Mayen Case (Denmark/Norway)*, Counter-memorial submitted by the government of the Kingdom of Norway on May 11, 1990, Vol. 1, paras 119 et seq, 445, *supra* note 290.

to Article 121 (3) in the *Jan Mayen Case (Denmark/Norway)*,[1173] its view on the matter can be implicitly assumed from its decision in the *Colombian Islands Case.* In this case, the ICJ's judgment included the appreciation that Quitasueño was a "rock" within the meaning of Article 121 (3),[1174] a position that was notably taken despite Colombia's repeated assertions that the island – while marked by an unusable dry area – was surrounded by rich fishing grounds.[1175] The *South China Sea Arbitration* has adopted this position and declared that fishery within an island's territorial sea does not indicate that an island sustains economic life,[1176] as economic life is in this scenario merely sustained by the "adjacent waters" of the island, not by the island itself.[1177] It was explained that "[d]istant fisherman exploiting the territorial sea surrounding a small rock and making no use of the feature itself, however, would not suffice to give the feature an economic life of its own."[1178] "Economic life" is – according to this view – only relevant if it occurs on permanently dry land. As a result, the arbitral tribunal discounted Scarborough Shoal – a feature surrounded by rich fishing grounds but marked by unusable and tiny high-tide protrusions – as a "rock".[1179] It is noteworthy that *Song*, whose evaluation of the legal status of Scarborough Shoal preceded the *South China Sea Arbitration,* has reached the opposite conclusion: according to *Song*, the historical usage of the surrounding waters as a fishing zone evidenced the island's capacity to sustain economic life.[1180] As *Gjetnes* has rightly pointed out, sovereignty over an island as such already grants the owning state exclusive access to the territorial sea surrounding it, regardless of the island's status as a rock or island in the narrow sense.[1181] It would appear erroneous to argue that the resources and economic enterprises within an island's territorial sea - such as fishing or raw material extraction - are not part of the island's *own* economic life, given that authority over the territorial sea is inextricably linked to sovereignty over the island. Just as the dry land area of an island, its territorial sea is part of the sovereign territory of the coastal state.[1182] We must not ignore that "the essential function of the concept of the territorial sea in law was to extend the national land territory over a certain

[1173] See Part 1 Section 2 II B 4.
[1174] *Colombian Islands Case*, para 238, *supra* note 34.
[1175] *Colombian Islands Case*, Counter-Memorial submitted by Colombia on November 11, 2008, Vol. 1, paras 2.26, 2.27; *Colombian Islands Case,* Rejoinder of Colombia, June 18, 2010, para 5.35, *supra* note 34.
[1176] *South China Sea Arbitration,* para 503, *supra* note 28.
[1177] *Ibid.*
[1178] *Ibid.*
[1179] *Ibid,* para 556.
[1180] *Song,* The South China Sea Arbitration Case Filed by the Philippines against China: Arguments Concerning Submerged Features, Low Tide Elevations and Islands in *Wu/Zou* (eds.), Arbitration Concerning the South China Sea - Philippines versus China (2016) 179-180.
[1181] *Gjetnes,* The Spratlys: Are They Rocks or Islands?, Ocean Development & International Law 32 (2001) 191 (198).
[1182] Art 2 UNCLOS.

limited maritime area"[1183]. The *travaux préparatoires* indeed show that states involved in the drafting process supported granting islands used only for fishing in coastal areas an EEZ and continental shelf. For such islands were considered "all the same as vital a part of [the Micronesian] economy and livelihood as some islands that may have permanent dwellings on them"[1184]. It is thus indicated that the territorial sea is an inseparable component of the island itself, that fishing on a permanent and regular basis within this area constitutes an economic life sustained by the island of its own, and that Scarborough Shoal may thus fall into the category of an "island in the narrow sense". Similarly, the Brazilian Saint Peter and Saint Paul Rocks, who are outwardly inhospitable and deserted, harbor "one of the most important fishing sites of northeastern Brazil"[1185]. As long as fishing takes place within the islands' territorial sea, there is certainly "economic life" within the sovereign territory of these islands. It would not seem to matter that the resources vital to this "economic life" are derived from the territorial sea rather than from dry land. On the other hand, it would appear that activities taking place seawards of the territorial sea limit are irrelevant to the status of islands. Scholars *Kolb* and *Van Dyke/Morgan/Gurish* have noted that to take into consideration resources and activities that occur exclusively in the EEZ or on the continental shelf would constitute a logical fallacy,[1186] a *circulus vitiosus* where the cause - "economic life" - and the effect - EEZ entitlement - are inverted. This view has also been reiterated in the *South China Sea Arbitration,* where it is found that "[i]t would be circular and absurd if the mere presence of economic activity in the area of the possible exclusive economic zone or continental shelf were sufficient to endow a feature with those very zones."[1187] *Talmon* has countered that there is "not necessarily any circularity of argument here"[1188] as the exploitation of fishing grounds within 200 nm of rocks may precede UNCLOS. *Talmon* concluded that "[t]he 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'" [1189]. *Hafner* has added that "the text of the UNCLOS

[1183] United Nations Office for Ocean Affairs and the Law of the Sea, The Law of the Sea: Regime of Islands, UN Sales No. E.87.V.11 (1988) 32 (Greece).
[1184] *Ibid,* 29 (Micronesia).
[1185] Encyclopaedia Britannica, Saint Peter and Saint Paul Rocks <https://www.britannica.com/place/Saint-Peter-and-Saint-Paul-Rocks>.
[1186] *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... », Annuaire français de droit international 40 (1994) 876 (907); *Van Dyke/Morgan/Gurish*, The Exclusive Economic Zone of the Northwestern Hawaiian Islands: When Do Uninhabited Islands Generate an EEZ?, San Diego Law Review 25 (1988) 425 (438).
[1187] *South China Sea Arbitration,* para 502, *supra* note 28.
[1188] *Talmon,* Article 121 - Regime of Islands in Proelss (ed.), The United Nations Convention on the Law of the Sea - A Commentary (2017) 858 (878).
[1189] *Ibid.*

does not contain any indication that the economic life of its own was meant to exclude fishery activities"[1190]. Recognizing economic activity that occurs only within the boundaries of the purported EEZ, but does not lead to any economic activity on dry land or within the territorial sea of a feature, as an island's "economic life of [its] own" appears problematic because it changes the nature of the EEZ. The EEZ was designed as a maritime zone coastal states are entitled to depending on an island's physical capacities. Recognizing economic activity occurring exclusively within the EEZ as "economic life of [an island's] own", would change the nature of the EEZ to that of an option right: if a coastal state so desires, it has the prior right to fish within 200 nm of rocks appertaining to its territory. To assert this right, the coastal state is required to dispatch fishing vessels to the waters surrounding the rock, otherwise it cannot claim the EEZ. In this scenario, Article 121 (3) can no longer be described as conferring rights depending on an island's objectively ascertainable characteristics. Rather, it becomes a provision stipulating that where a coastal state wishes to exploit the waters within 200 nm of a rock, it has a right to do so. It would seem that an interpretation leading to this outcome should be avoided, seeing as it is in conflict with the *Regime of islands*' aim to tie maritime entitlements to the potential for "human habitation" and "economic life", as opposed to the will of the owning state. Furthermore, contrary to the territorial sea, the EEZ and continental shelf are not zones where coastal states enjoy *sovereignty.*[1191] The EEZ and continental shelf are merely areas where coastal states are entitled to individual, clearly defined *sovereign rights.*[1192] Sovereignty over the territorial sea denotes comprehensive authority with exceptions, such as other states' right to innocent passage. The "sovereign rights" of a coastal state in its EEZ, on the other hand, are rights assigned in an area characterized by an extensive set of rights and duties *all states* hold and are bound by.[1193] *Hafner* has noted that the existence of these "sovereign rights" does not entail that the coastal state's authority within the EEZ and on the continental shelf is exclusive: other states have usage rights within these zones as well.[1194] The express qualification of the rights enjoyed by the coastal state in the EEZ and continental shelf as "sovereign" may, according to *Hafner*, be altogether redundant because this adjective is of no explanatory value in this context.[1195] The territorial sea is an extension of territorial sovereignty that is inseparably linked to the island itself. The EEZ and continental shelf on the

[1190] *Hafner,* Some Remarks on the South China Sea Award: Itu Aba versus Clipperton, Chinese (Taiwan) Yearbook of International Law and Affairs 34 (2016) 1 (7).
[1191] Art 2 UNCLOS.
[1192] Art 56 (1) (a) UNCLOS.
[1193] Art 58 UNCLOS.
[1194] *Hafner,* Die seerechtliche Verteilung von Nutzungsrechten (1987) 263.
[1195] *Ibid,* 264.

other hand, do not confer the same degree of authority and come with a far more limited set of rights to the coastal state. Therefore, it would seem inapposite to recognize activities occurring exclusively within an island's EEZ or continental shelf as part of the island's "own" economic life. The areas where "economic life" within the meaning of Article 121 (3) may take place include an island's dry land, the internal waters and the territorial sea.

2. Contribution to GDP

According to Article 121 (3), an island's value to the owning state – be it for the purpose of colonization or for economic use – should be reflected in the island's entitlement to maritime zones. If the capacity to sustain "economic life" alludes to an island's economic value, this leaves us with the question of how to measure this value. As noted above,[1196] a straightforward way would be to verify whether the island's economy contributes to the coastal state's general economic output, that is to say, its GDP, as this is a widely-used and recognized standard. That the island in question sustains economic activity contributing to GDP – be it the hotel services of a tourist resort or fishing in its territorial sea – appears an appropriate minimum standard. All types of on-site facilities such as production plants, mining operations or commercial fishing ventures contribute to national economic performance and would accordingly qualify as an island's economic life. An economic enterprise contributing to GDP is also a visible manifestation of economic worth, which means that the legal status is based on outwardly apparent criteria, thereby ensuring that neighboring states can establish with relative certainty which islands are actively sustaining economic life. In communities relying on subsistence fishing and farming, products may remain within the boundaries of a self-contained economic system where goods are exchanged by bartering. Due to the difficulties fiscal authorities face in monitoring such transactions, it may appear as though this kind of economy does not contribute to GDP. Economists take the position that bartering "should be included in GDP but may go unreported"[1197]. The fact that transactions in subsistence communities are often not reported to tax authorities does not change their economic nature: goods and services are consumed within a country in return for compensation. From an economic perspective, they thus contribute to GDP in the same way as any other commercial activity, and should consequently not be excepted from the range of activities capable of generating "economic life" within the meaning of Article 121 (3). It is also important to remember that communities relying on subsistence fisheries already play a vital role in the assessment of an island's legal status as

[1196] Part 2 Section 2 VI C 5.
[1197] *Lippert/Walker*, The Underground Economy: Global Evidence of its Size and Impact (1997) 6.

they usually constitute "human habitation".[1198] Reliance on GDP contribution makes it easy to distinguish economic from recreational activities. As long as there is no remuneration involved, recreational pursuits typically do not affect GDP. A private individual occasionally dropping by an island in order to fish and relax fails to engage in economic behavior and realizes no economic value. His enjoyment of solitude and scenery does not contribute to GDP, as he is simply taking advantage of the general permission to visit and fish for recreational purposes and is under no obligation to pay for it. Naturally, the result of this assessment changes if the individual expands his focus from a purely recreational one to a commercial one by selling the catch. The wares would participate in the market for fish and become a factor in national economic performance. In a similar way, the act of fishing takes on a new role if it is not taken up by a lone visitor in search of relaxation, but by tourists enjoying an organized group tour in return for payment. Participation in organized group tours or the stay at resorts may even represent an important source of income to the island and the state it appertains to. The island in question can thus be said to harbor "economic life" by virtue of a prospering tourist industry. Each good or service that is consumed is reflected in the state's GDP, which is what makes the GDP a useful measuring tool for economic performance. These measures also apply to the case of lighthouses situated on isolated islands. As has been shown above, the existence of a lighthouse alone is not enough to prove an island's capability to sustain "human habitation".[1199] And yet, a lighthouse may be valuable to shipping or as a place of employment. Lighthouses ensure safe passage and thereby increase the profitability of international trade. The instructions and information lighthouses provide represent a service that is provided in return for payment, meaning that it contributes to GDP. It would not seem to make a difference that it is the coastal state, and not the immediate beneficiary of the service, shipping companies, who remunerates those operating the lighthouse. This classification of lighthouses as a potential form of "economic life" neatly aligns itself with the context in which the *Regime of islands* is set, or more precisely with Article 7(4), which ties the permission to use low-tide elevations as base points for the delimitation of straight baselines, among other things, to the local presence of lighthouses. This provision shows that, according to the standards set by UNCLOS, a lighthouse may justify states in their claim to a larger maritime zone. Successfully operating meteorological stations contribute to GDP in a similar way, and may qualify as an island's "economic life". *Kwiatkowska* and *Soons* have found that the *Jan Mayen Case*

[1198] Fishing communities will often conform to the standard of a long-term socially well-integrated community, thereby forming a "human habitation". See Part 2 Section 2 V E.
[1199] See Part 2 Section 2 V E 1.

(Iceland/Norway) supports this view, noting that "[t]he Jan Mayen Conciliation Commission, by recognizing that Jan Mayen was not a rock within the meaning of Article 121, paragraph 3 certainly created an important precedent for regarding navigational need, guano or other resources as evidence of the existence of economic life despite the lack of permanent habitation"[1200]. And while it would indeed seem that navigational aids are relevant to the assessment of an island's "economic life", this finding does not appear inferable from the cited Report and Recommendations by the Conciliation Commission. To be sure, the Conciliation Commission has devoted a chapter to the geography and geology of Jan Mayen wherein it has acknowledged the existence of a meteorological station.[1201] The Conciliation Commission added that Jan Mayen's characteristics as outlined in its chapter "Jan Mayen: Geography and Geology" evidenced that Jan Mayen was not a rock within the meaning of Article 121 (3), but an island.[1202] As a result, the Conciliation Commission ultimately revealed very little substantive information on its interpretation of Article 121 (3), as it did not link the legal status of Jan Mayen to any characteristic in particular. It is left unclear whether Jan Mayen is considered to be an island in the narrow sense because of its substantial size of 373 km^2, because of its meteorological station, because "[b]etween thirty and forty people live throughout the winter on […] the island"[1203] or simply because there was a pre-existing agreement between the parties that Jan Mayen was not a rock. As a consequence, scholars have attributed varying degrees of importance to the Conciliation Commission's conclusions. As noted above, *Kwiatkowska* and *Soons* have perceived them as affirmation of the economic value of guano deposits, navigational aids and other exploitable resources. *Elferink,* on the other hand, has noted that the Conciliation Commission's classification of Jan Mayen "does not seem particularly relevant in most cases in which interpretation of article 121(3) of the LOS Convention is required"[1204], due to the island's large surface area. *Charney* has seconded this view, holding that the question of "human habitation" and "economic life" was immaterial to the assessment of Jan Mayen, as the island was too big to qualify as a rock anyway.[1205] The Conciliation Commission's omission to state its reasons for classifying Jan Mayen as an island

[1200] *Kwiatkowska/Soons,* Entitlement to Maritime Areas of Rocks Which Cannot Sustain Human Habitation or Economic Life of Their Own, Netherlands Yearbook of International Law 21 (1990) 139 (168).
[1201] *Conciliation Commission on the Continental Shelf area between Iceland and Jan Mayen: Report and recommendations to the governments of Iceland and Norway*, Decision, June 1981, 27 RIAA 1, 9-10 [hereinafter *Jan Mayen Case (Iceland/Norway)*].
[1202] *Ibid,* 10.
[1203] *Ibid.*
[1204] *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 (61).
[1205] *Charney,* Rocks that Cannot Sustain Human Habitation, The American Journal of International Law 93 (1999) 863 (871, fn 34).

in the narrow sense can in all likelihood be attributed to the fact that this classification was uncontroversial from the outset.[1206] In practice, meteorological stations are often the sole source of human activity on particularly small and isolated islands. Three examples of such islands are Bear Island, Tromelin Island and Clipperton Island, which all feature meteorological stations.[1207] Meteorological offices may seem an unusual example of "economic life": the weather forecast is often available free of charge, creating the impression that these offices pursue primarily scientific, as opposed to commercial, goals. However, weather forecast systems are of immense value to certain industries,[1208] impact the national economy and are not truly available at no charge. On the contrary, the weather forecast is often subsidized by the state, and thereby financed through taxation. Based on the frequency with which households consume meteorological data, the United States Department of Commerce indeed finds that the aggregate annual valuation of weather forecasts in the United States amounts to approximately $31.5 billion.[1209] To this figure we must further add formidable savings from the improvement of natural disaster forecasts.[1210] Bear Island, Tromelin Island and Clipperton Island would therefore seem to sustain "economic life", even though they are deserted safe for their respective meteorological stations. The Kerguelen Islands in the Indian Ocean would seem to constitute another example of the capacity to sustain "economic life" being corroborated by the presence of a research base and scientific center. The research center Port-aux-Français is permanently manned, the work force fluctuates between 50 and 100 people, depending on the time of year.[1211] Both the employees' salary and the monetary value of the research contribute to GDP. The legality of an EEZ surrounding the Kerguelen islands has been contested, with judge *Vukas* having declared the EEZ around these islands to be "questionable" and possibly in

[1206] According to *Linderfalk*, the fact that the legal status of Jan Mayen was beyond dispute is indicated by the pre-existing 1980 Agreement between Iceland and Norway. *Charney* has similarly reported that the legal status was "unquestioned" between the parties before the Conciliation Commission. *Linderfalk*, The Jan Mayen Case (Iceland/Norway): An Example of Successful Conciliation in Tomuschat/Mazzeschi/Thürer (eds.), Conciliation in International Law – The OSCE Court of Conciliation and Arbitration (2017) 193 (202, fn 46); *Charney,* Rocks that Cannot Sustain Human Habitation, The American Journal of International Law 93 (1999) 863 (871, fn 34).
[1207] *Gjertz,* Bear Island in Nuttall (ed.), Encyclopedia of the Arctic (2005) 213; *Foer/Thuras/Morton,* Atlas Obscura (2016) 221; for weather conditions on Clipperton Island see <accuweather.com/en/fr/clipperton-island/2273675/weather-forecast/2273675>.
[1208] For the corresponding economic valuation techniques, see *Lee/Lee,* The Economic Value of Weather Forecasts for Decision-Making Problems in the Profit/Loss Situation, Meteorological Applications 14 (2007) 455.
[1209] United States Department of Commerce - Economics and Statistics Administration, The Value of Government Weather and Climate Data, September 2, 2014 <esa.doc.gov/economic-briefings/value-government-weather-and-climate-data>.
[1210] *Ibid.*
[1211] Administration of the Territory of the French Southern and Antarctic Lands (*Territoire des Terres australes et antarctiques françaises – TAAF),* <taaf.fr/L-archipel-de-Kerguelen>; Encyclopaedia Britannica, Kerguelen Islands <https://www.britannica.com/place/Kerguelen-Islands>; Atlas Obscura, Kerguelen Islands <atlasobscura.com/places/kerguelen-islands>.

violation of "the letter and spirit of the provisions on the exclusive economic zone"[1212], a statement that was unfortunately not accompanied by further explanatory remarks. While this thesis categorizes research facilities as "economic life" on the basis of their contribution to GDP, their economic value is also apparent from their role in the development of new cosmetic and health products. Coral reefs can serve as research sites for new molecular structures to be used in therapeutic applications and in cosmetics and food biotechnology.[1213] Marine molecules have been tested for their potential impact on tumor development and their antiviral agents may aid in the treatment of patients infected with dengue virus (DENV) and human immunodeficiency virus type 1 (HIV-1).[1214] There is also research into anticancer drugs isolated from marine sponges.[1215] The right to market the final medical product made possible through research in this area is economically valuable. Having established that lighthouses, meteorological stations and research facilities contribute to GDP, we must further inquire after their usefulness in the particular location and their permanence, requirements that will be touched upon below. For exclusive reliance on GDP contribution would entail that even transitory economic activity, such as research merely consisting in the collection of rock samples, amounts to an "economic life". This would be especially troublesome in light of the fact that the individual "economic life" should exhibit a minimum level of visibility in order to assure legal certainty. It is for this reason that additional requirements regarding duration and usefulness are suggested below.

3. The Link between Location and Usage

In order to qualify as an island's "economic life of [its] own", any economic activity must represent a useful application of the island's characteristics and resources. The usage is required to match the island's environment, which means that there should be intrinsic characteristics to the island that render it especially suited for the activity in question. In the present thesis, this connection is referred to as the "definitive link", the concept of which has already been explained more thoroughly above.[1216] This chapter shows the application of the "definitive link" in practice. As has been discussed in the previous chapter, there is a distinct economic worth to useful and operational lighthouses, stemming from the fat that they provide a service increasing

[1212] *Monte Confurco Case,* Declaration of *Budislav Vukas*, December 18, 2000, *supra* note 172; see also Part 1 Section 2 II A 2.
[1213] *Motuhi/Mehiri/Payri/La Barre/Bach,* Marine Natural Products from New Caledonia: A Review, Marine Drugs 14:3 (2016).
[1214] *Ibid,* 31, 47.
[1215] *Da Silva/Rodrigues,* Natural products: an extraordinary source of value-added compounds from diverse biomasses in Brazil, Chemical and Biological Technologies in Agriculture 1:14 (2014) 2.
[1216] See Part 2 Section 2 IV A 4.

the safety of shipping. This service can be provided because of the location of the island and is thus linked to the island's intrinsic characteristics. Another way of phrasing it would be to say that the lighthouse is useful in this particular location. This confirms that there is a definitive link between location and economic activity. Conversely, there is no longer a definitive link if the lighthouse has become redundant or abandoned, be this because technology has brought forth mobile navigation systems surpassing it in efficiency or because the affected shipping routes can be safely accessed irrespective of the lighthouse. In such a case, there would no longer be a correlation between the locality and the "economic life" as there would no longer be a reason why this particular island should host a lighthouse. To name one example, the abandoned lighthouse on Clipperton Island fails to prove that the island bears the capacity for "economic life".[1217] Even if the lighthouse were reopened in order to corroborate concomitant EEZ claims, this would not result in an affirmation of "economic life", as the redundancy of a lighthouse in this particular location engenders that there can be no definitive link. In the context of research facilities the definitive link entails that the scientific endeavor must make sense in the particular location. Wherever facilities are set up not because research is promising, but due the coastal state's hope that doing so will justify expanded maritime zones, a closer look will usually show that there is no transparent correlation between activity and location. The government of a coastal state may for instance choose to set up a scientific outpost despite the fact that the site is unlikely to yield any scientifically relevant findings. In such a case the island cannot be described as particularly well-adapted to the purpose it is put to. None of its characteristics seem to qualify it for this kind of use, meaning that there is no link between the location and the economic activity. The concept of the "definitive link" can be illustrated by examining shell companies and offshore financial centers on islands. There were over 95.000 registered companies on the Cayman Islands in 2015, close to twice as many as residents.[1218] In 2008, US president Barack Obama famously criticized the situation surrounding one - outwardly unremarkable - building in particular, Ugland House, as the potentially "biggest tax scam on record" for sheltering more than 12,000 corporations.[1219] These examples show that in order for a company to be established on an island, not all jurisdictions require that the board or any personnel are physically present on this island. It is instead legally possible to run these companies remotely while the company headquarters are nominally located on the island.

[1217] For further information on the properties of and controversies surrounding Clipperton Island, see Part 1 Section 3 II B.
[1218] Tax Justice Network, Narrative Report on Cayman Islands, September 23, 2015, 1.
[1219] The Cayman Islands – home to 100,000 companies and the £8.50 packet of fish fingers, The Guardian, January 18, 2016, <https://www.theguardian.com/us-news/2016/jan/18/the-cayman-islands-home-to-100000-companies-and-the-850-packet-of-fish-fingers>.

Financial transactions subject to the taxation regime of offshore financial centers such as the Cayman Islands are often entirely disconnected from the island in a physical sense, as the goods or services traded never reach its shores, but are nonetheless taxed at the rates stipulated by the island state.[1220] Tax optimization and evasion are issues affecting predominantly island territories: 75% of the territories scholars and international organizations have identified as tax havens are islands.[1221] Scholars have paid little attention to the role of islands as tax havens in the context of Article 121 (3), although it has been remarked that an online casino could easily be established on a small island, potentially providing evidence of "economic life".[1222] Tax records may certainly generate the impression of an ongoing economic activity on an island. However, Article 121 (3) calls on the interpreter to evaluate actual conditions and capacities, not theoretical and bureaucratic constructs. A company lacking any on-site personnel or facilities, or a company having established only a "token office" for representative purposes may still generate income contributing to GDP. This income does not stem from any economic activity occurring on the island itself. A company registered within a tax haven may employ staff and pursue its commercial goals in a way similar to any other commercial enterprise within its industry, just not necessarily on the island itself. The fact that there is no economic activity on the island *at all* may be difficult to verify, as a token office or presence may be dispatched to the island. Such a presence however fails the definition of "economic life" as there can be no link between the island and its economic usage whatsoever. We may recall that Article 121 (3) stipulates that an island must be capable of sustaining economic life "of [its] own" and that this means that the island must possess some inherent properties qualifying it for the specific use it is put to. In the event that the island is merely chosen for the fiscal advantages its laws offer, it is evident that the island in a physical sense is of no value for the specific economic purpose. Laws and regulations – not the island's actual environment – have created incentives for the establishment of companies. The fiscal benefits offered by the island's tax regime would seem to render the territory uniquely qualified for the purpose it is put to. And yet, these benefits do not originate from the island itself but stem from legislative or political decisions disconnected from the island's properties as such. In the absence of a connection between island and enterprise, token offices alone do not amount to "economic life" within the meaning of Article 121 (3).

[1220] *Shaxson,* Treasure Islands – Tax Havens and the Men Who Stole The World (2012) 11 et seq.

[1221] This percentage is based on a listed of tax havens compiled by *Hines Jr.,* which largely coincides with the corresponding list by the OECD. See *Hines Jr.,*Treasure Islands, Journal of Economic Perspectives 24:4 (2010) 103 (104).

[1222] *Gjetnes,* The Spratlys: Are They Rocks or Islands?, Ocean Development & International Law 32 (2001) 191 (198).

4. Duration

Is there a "lifespan" to an economic "life"? In light of the relevance of an island's legal status to maritime entitlements, it appears obvious that factual circumstances determining the outcome of the status assessment should all in all be recognizable to the international community. Such recognizability and transparency cannot be achieved if the "economic life" in question is extremely short-lived. The choice of the term "life" by itself seems to suggest that a single economic act does not suffice. "Life" indicates an aggregate of economic acts that co-exist or complement one another, all while remaining active during an entire "lifespan" or operational period. The decision handed down in the *South China Sea Arbitration* agrees that "economic life" should be non-transitory, a finding it attributes to the fact that "sustain" contains a temporal element. The arbitral tribunal has noted: "A one-off transaction or short-lived venture would not constitute a sustained economic life."[1223] An island may have been unusable in the past, but have developed the capacity for "economic life" over time due to changes in its environment, a process that can lead to a change in the island's legal status.[1224] At a certain point in time, an island may begin to show signs of economic life. It would however not fit within the broader purpose of the *Regime of islands* if "economic life" were understood as a criterion capable of flickering on and off again every time a professional landscape photographer drops by for an afternoon of shooting pictures, a location is rented for a single event such as a wedding, a one-time commercial fishing expedition or a brief visit by scientific staff conducting research for a pharmaceutical company takes place. Even if the prerequisites of GDP contribution and a definitive link to the locality are met, it would be contrary to the objectives pursued in the *Regime of islands* to allow such ephemeral economic activities to justify an islands' entitlement to an EEZ and continental shelf. Similarly, setting up a lone art piece, such as a statue or other object of esthetic or cultural value, on a deserted island often comes with an – albeit small-scale – contribution to GDP, if the personnel involved in the process is paid. Nevertheless, it remains a one-time economic act that fails to convincingly demonstrate an island's economic value. Short-term activities such as those enumerated above operate beneath the radar of an "economic life". They are also lacking in their visibility to the international community. "Economic life" is easily observable if the activity is of a lasting nature or – if it has only been launched recently – if it is conceived as such. Perpetuity is not required, yet the "economic life" should at the very least take the form of a long-term project. Periods of inactivity in the economic cycle are on the

[1223] *South China Sea Arbitration,* para 499, *supra* note 28.
[1224] Part 2 Section 1 V A.

other hand not as such detrimental to the finding that an island sustains "economic life". It is required that the economic activity repeats itself or is directed towards recurrence. Whether a specific economic undertaking meets the description of a long-term project must be assessed on a case-by-case basis. According to this view, both resource extraction and tourism are typical examples of an island harboring "economic life". They are long-term economic projects contributing to GDP that are only possible under specific circumstances, namely if there are mineral resources or a manifest recreational potential, respectively. Deposits of natural gas or petroleum will of course be depleted at some point, yet this renders their exploitation no less valuable and their contribution to GDP no less significant. Travel and other tourist services are often only available during the appropriate season. Islands in the Arctic Ocean, such as Svalbard, are only open to tourism during the artic summer, while travel agencies advertising trips to the tropics must take account of the monsoon season. Despite these prolonged breaks in economic activity, which may endure for several months, these islands may still register as islands sustaining "economic life", as long as the economic activity is scheduled to resume. Interruptions of this kind do not harm the island's classification as an island in the narrow sense due to the very nature of tourism services as dependent on the seasons. In sum, one-time transactions or transitory undertakings do not constitute "economic life". What is required is that the economic activity is of a lasting nature or is regularly resumed, depending on the nature of the economic usage.

5. Economic Activities Having Received Particular Attention in Practice or Doctrine

a. Resource Extraction

Given that prospecting and development of crude oil, natural gas and other mineral resources contributes to GDP, may endure for several years and is only made possible by the physical characteristics of an island, it would appear that these endeavors are usually straightforward examples of "economic life". This opinion is not universally shared. It was notably opposed in the *South China Sea Arbitration*, at the conclusion of which the arbitral tribunal noted that "purely extractive economic activities, which accrue no benefit for the feature or its population, would not amount to an economic life of the feature as 'of its own'"[1225]. There is little explanation as to why there must be a local population in order for an activity to be "economic" or why the proceeds of this activity are required to be invested locally.[1226] The arbitral tribunal

[1225] *The South China Sea Arbitration,* para 500, *supra* note 28.

[1226] *Elferink* criticizes the tribunal's failure to recognize the economic value of extractive activities along similar lines. *Elferink,* The South China Sea Arbitration's Interpretation of Article 121(3) of the LOSC: A Disquieting First, The Blog of the K.G. Jebsen Centre for the Law of the Sea, September 7, 2016

stated that the "mere presence" of resources was not reflective of the capacity to sustain economic life as "some level of local human activity" is required.[1227] This opinion seems to be in contradiction with both the tribunal's stance that an island in the narrow sense must not actively sustain an economic life, and the wording of Article 121 (3) which states that islands in the narrow sense must be able to sustain human habitation or economic life, not that human habitation or economic life must be ongoing.[1228] The arbitral tribunal has based its finding that extractive activities are not "economic life" on the use of the phrase "of their own" in Article 121 (3).[1229] This argument fails to convince as the exploitation of natural resources is only ever possible because of an island's very own natural composition. Resource extraction is not uncommon on small off-shore features, rendering it difficult to imagine that the drafters of UNCLOS would include the criterion of "economic life" without having considered this potential use. The demand for mineral resources has gone so far as to lead to the depletion of deposits of gold, manganese, bauxite, phosphate and oil in the small island developing states of Fiji, Vanuatu, Haiti, Nauru and Trinidad and Tobago, respectively.[1230] Some scholars have furthermore debated whether guano harvesting on Aves Island met the description of "economic life".[1231] In principle, guano harvesting appears as much an expression of economic life as any other form of resource exploitation. However, given that this specific form of "economic life" cannot be resumed because the guano deposits on Aves Island are depleted,[1232] guano harvesting cannot be the basis of Aves Island's classification as an "island in the narrow sense".[1233] The text of UNCLOS itself seems to view mining operations as entirely capable of generating an "economic life". In an otherwise unrelated context, Article 17 (2) (b) (iii) of Annex III in this way explains that "[t]he duration of exploitation should be related to the economic life of the mining project"[1234], a turn of phrase that would seem to indicate that extractive activities and "economic life" are not mutually exclusive concepts. All in all, it seems that there is little justification for the argument that resource extraction is not an expression of

<site.uit.no/jclos/2016/09/07/the-south-china-sea-arbitrations-interpretation-of-article-1213-of-the-losc-a-disquieting-first/>.

[1227] *South China Sea Arbitration,* para 499, *supra* note 28.

[1228] See above Part 2 Section 2 II.

[1229] *South China Sea Arbitration*, para 500, *supra* note 28.

[1230] *Briguglio,* Small Island Developing States and Their Economic Vulnerabilities, World Development 23:9 (1995) 1615 (1618).

[1231] *Kwiatkowska/Soons,* Entitlement to Maritime Areas of Rocks Which Cannot Sustain Human Habitation or Economic Life of Their Own, Netherlands Yearbook of International Law 21 (1990) 139 (161).

[1232] Encyclopaedia Britannica, Bird Island < https://www.britannica.com/place/Bird-Island-islet-Caribbean-Sea>.

[1233] For the inference of the capacity for economic life from historic evidence and the limits to this method see Part 2 Section 2 VI E 2.

[1234] Reference is made to Article 17 (2) (b) (iii) of Annex III. See above Part 2 Section 2 VI B for further information.

"economic life". Its proceeds are reflected in the GDP, its staff is entitled to remuneration and the temporal threshold usually poses no particular difficulties, as the exploitation process is often open-ended.

b. Marine Environmental Protection

While protecting endangered species and biospheres can seem like a non-economic aim, research shows that the global economy could greatly benefit from increased environmental protection. Air pollution and climate change cause extreme weather conditions such as floods, draughts and violent storms. These natural disasters endanger populations, damage infrastructure and adversely affect crops, which leads to malnutrition. Dealing with the effects of extreme weather phenomena requires an enormous financial effort. Studies show that the damage from air pollution and climate change already incurred costs as high as $1.2 trillion, or 1.6 percent of global GDP in 2010.[1235] This figure is projected to rise: by 2030, net average global losses will amount to 3.2% of global GDP.[1236] In this respect, it is within the economic interest of coastal states to preserve endangered habitats and promote climate-friendly uses of islands.[1237] But does this mean that environmental protection qualifies as "economic life" within the meaning of Article 121 (3)? Scholars remain divided. *Hafetz* has taken the position that, under very specific circumstances, environmental protection should be recognized as a form of "economic life", arguing that states "should not be penalized for taking steps to protect the marine environment in a way that also enhances economic value"[1238]. *Hafetz* has stated that a MPA must show economic value if it is to be classified as "economic life" and has listed numerous potential benefits associated with MPAs including "increased fishing stocks, tourist spending, products from coral reefs, and health benefits from reduced pollution"[1239]. *Hafetz*' legal classification of islands under environmental protection comes with strict safeguards: before there can be any confirmation of "economic life" *Hafetz* requires not only economic benefit, but that the MPA is part of a concentrated and coherent environmental management plan and that the responsible state commits to maintaining the marine preserve for perpetuity.[1240] In this way, *Hafetz* has gradually edged away from the actual terms of Article

[1235] DARA Group/Climate Vulnerable Forum, Climate Vulnerability Monitor: A Guide to the Cold Calculus of A Hot Planet[2] (2012) 17.
[1236] *Ibid.*
[1237] *Keller/Gleason/McLeod/Woodley/Airamé/Causey/Friedlander/Grober-Dunsmore/Johnson/Miller/Steneck,* Climate Change, Coral Reef Ecosystems, and Management Options for Marine Protected Areas, Environmental Management 44 (2009) 1069 (1077 et seq).
[1238] *Hafetz,* Fostering Protection of the Marine Environment and Economic Development: Article 121(3) of the Third Law of the Sea Convention, AM. U. INT'L L. REV 15 (2000) 583 (611).
[1239] *Ibid,* 627.
[1240] *Ibid,* 629.

121 (3), which of course do not suggest a perpetual commitment to the economic activity, nor do they set forth any formal conditions such as a management plan. It may be that *Hafetz* chose these additions in order to render his definition of "economic life" less expansive and more acceptable to an international community weary of the excessive appropriation of ocean space by coastal states. The impact of environmental protection areas on the legal status of islands has also come up in a case before the ITLOS and has received particular attention in the concomitant declaration of judge *Vukas.*[1241] The subject was broached following the argument made by Australia that the EEZ around Heard and McDonald Island was advantageous due to the "desirability of there being a coastal state which is responsible for the maintenance and conservation of the environment, including the preservation of marine resources"[1242]. In his separate declaration, *Vukas* rejected the concept of environmental preservation as a form of economic life on the ground that adequate preservation measures, incorporated in the Convention on the Conservation of Antarctic Marine Living Resources (CCAMLR),[1243] were already in place. He specifically described it as "unnecessary and confusing if individual States adopt and apply their own measures in the exclusive economic zone they have proclaimed inside the area of application of the CCAMLR." He also hinted at the possibility that Australia's argument was an act of desperation made for want of alternative foundations for its EEZ claim.[1244] In essentials, *Vukas'* line of argument seems geographically limited to the application area of the CCAMLR and generally omits any comment on whether he would generally deny or confirm that there is economic value to MPAs. It should be noted that the link between environmental protection and EEZ entitlement was not the focal point of the *Volga Case*. Australia only addressed this matter extremely briefly and without reference to any particular environmental protection plan.[1245] *Vukas'* opinion, as voiced in his separate declaration, was supported by *Van Dyke,* who has noted that enhancing the effectiveness of resource preservation, while useful,[1246] does not merit the award of exclusive maritime zones.[1247] *Van Dyke* has agreed that the protection of the marine environment is best regulated by multilateral treaties, such as the CCAMLR.[1248] UNCLOS' provisions show that the need for environmental

[1241] *Volga Case,* Declaration of Budislav Vukas, December 23, 2002, para 7 et seq, *supra* note 172.
[1242] *Volga Case,* Public Sitting on December 12, 2002, at 3 p.m., ITLOS/PV.02/02, 24, *supra* note 172.
[1243] Convention on the Conservation of Antarctic Marine Living Resources, May 20, 1980, 1329 UNTS 48.
[1244] *Volga Case,* Declaration of Budislav Vukas, December 23, 2002, 126 ILR 433, para 7, *supra* note 172.
[1245] *Volga Case*, Public Sitting on December 12, 2002, at 3 p.m., ITLOS/PV.02/02, 24, *supra* note 172.
[1246] See also *Van Dyke/Morgan/Gurish*, The Exclusive Economic Zone of the Northwestern Hawaiian Islands: When Do Uninhabited Islands Generate an EEZ?, San Diego Law Review 25 (1988) 425 (442 et seq).
[1247] *Van Dyke,* Legal Issues Related to Sovereignty over Dokdo and Its Maritime Boundary, Ocean Development & International Law 38 (2007) 157 (196).
[1248] *Ibid.*

protection measures is taken seriously,[1249] with the preamble paying tribute to the cause in its – admittedly rather tentative – assurance that UNCLOS "recogniz[es] […] the desirability of establishing […] a legal order […] which […] will promote […] the […] protection and preservation of the marine environment". Still, the official declaration as a nature preserve, a simple formality, does not change the *de facto* capabilities of a given island and neither can it elicit a status change from "rock" to "island in the narrow sense". For an example of the economic value of a protected island, we may consider Howland Island, an uninhabited Pacific island with a surface area of about 1.6 square kilometers,[1250] which has been part of a wildlife refuge since 1974.[1251] The declaration as a protected habitat has preserved the island's natural environment, yet this does not change the fact that past settlement attempts have failed and the island's sole source of economic activity, guano mining, is no longer possible due to the depletion of local guano deposits in 1878.[1252] U.S. Fish and Wildlife Service personnel visit the island only every two years on average, which means that there is no regular GDP contribution from the employment of preservation personnel stationed on the island. Despite the establishment of the Howland Island National Wildlife Refuge, the island would thus seem to remain a "rock" in the legal sense. If the mere declaration as a protected habitat were on the other hand sufficient evidence of "economic life", any rock, no matter how small or useless, could be turned into an "island in the narrow sense" via this route, an outcome that seems at odds with the provision's purpose of binding EEZ entitlement to objective and transparent criteria. Even *Hafetz* has agreed that MPAs are not capable of creating an "economic life" out of thin air.[1253] Any state claiming an EEZ or continental shelf on the basis of a MPA is obligated to demonstrate that it is foregoing a real economic benefit in not exploiting the islands capacities for economic use. In other words, the state would have to invoke the island's theoretical capacity for "economic life", the assessment of which will be discussed in detail in the

[1249] *Hafetz,* Fostering Protection of the Marine Environment and Economic Development: Article 121(3) of the Third Law of the Sea Convention, AM. U. INT'L L. REV 15 (2000) 583 (596).
[1250] Encyclopaedia Britannica, Howland Island <https://www.britannica.com/place/Howland-Island>.
[1251] See U.S. Fish & Wildlife Service, Howland Island <https://www.fws.gov/refuge/howland_island/>.
[1252] For information on the guano mining industry, see United States General Accounting Office, House of Representatives, Committee on Resources, Report to the Chairman, U.S. Insular Areas, November 7, 1997, GAO/OGC-98-5, 55. For a history of the short-lived settlement Itascatown, which was installed with a view to bolstering territorial claims, visit the archives of the Hawaiian Kamehameha School, from which "settlers" were selected and sent to Howland Island without informing them of the destination or purpose of their journey under <kapalama.ksbe.edu/archives/historical/huipanalaau/where.php> or consult the account of events as offered by the U.S. Fish & Wildlife Service, A Story of the Hui Panalā'au of the Equatorial Pacific Islands (2013) <https://www.fws.gov/uploadedFiles/Region_1/NWRS/Zone_1/Pacific_Reefs_Complex/Howland_Island/Documents/hui%20panalaau.pdf>.
[1253] See also *Hafetz,* Fostering Protection of the Marine Environment and Economic Development: Article 121(3) of the Third Law of the Sea Convention, AM. U. INT'L L. REV 15 (2000) 583 (614).

appropriate chapter below.[1254] In this way, *Hafetz'* theory on the economic value of MPAs neatly inserts itself into the definition of the "capacity to sustain economic life" as outlined in this thesis. States choosing to preserve valuable biospheres instead of exploiting them are not penalized, as they are free to base their EEZ claim on the unrealized yet verifiable capacity of an island to sustain "economic life". It should also be noted that, if the official declaration as a MPA is accompanied by the deployment of a permanent on-site workforce, the salaries of the conservation officers contribute to GDP and are thusly a form of "economic life". The establishment of a MPA may often be combined with an economic use that poses no threat to the environment or one that is strictly monitored in order to protect native species. For example, on the US territory of Palmyra Atoll in the Northern Pacific, the U.S. Fish and Wildlife Service, a private conservation group called The Nature Conservancy and the Palmyra Atoll Research Consortium (PARC) work together in an effort to conserve, protect and study the natural environment of this otherwise uninhabited atoll.[1255] Their presence is of a permanent nature, and the salaries of the on-site workforce contribute to GDP. Additionally, conservation efforts are combined with the tightly regulated possibility of engaging in touristic activities such as wildlife viewing, environmental education, wildlife photography and fishing.[1256] Here, tourist services may constitute an "economic life" in their own right, independent from the economic opportunities that remain unexploited for reasons of preservation. Such an example can also be found in Cocos Island, which is a UNESCO world heritage site, part of Cocos Island National Park and at the same time a scuba diving hotspot.[1257] Examples like Cocos Island show that economic life and environmental preservation are not necessarily mutually exclusive.

c. Military Facilities

Historically, military facilities once offered a solid legal basis for claiming maritime zones. In 1923, Resolution Four adopted by the Imperial Conference stipulated that the term "island" referred to "territory permanently above high water in normal circumstances and capable of use or habitation"[1258]. The qualification as an "island" engendered entitlement to a zone of territorial waters three miles wide. Importantly, the concomitant Explanatory Memorandum clarified that

[1254] Part 2 Section 2 VI E.

[1255] The Nature Conservancy, Palmyra Atoll <nature.org/ourinitiatives/regions/northamerica/unitedstates/hawaii/palmyraatoll/>.

[1256] See U.S. Fish & Wildlife Service, Palmyra Atoll <https://www.fws.gov/refuge/Palmyra_Atoll/visit/visitor_activities.html>.

[1257] Encyclopaedia Britannica, Cocos Island <https://www.britannica.com/place/Cocos-Island>.

[1258] Imperial Conference 1923, Report of Inter-Departmental Committee on the Limits of Territorial Waters, Document T.118/118/380, Public Record Office Ref. F. O. 372/2108 (1924) 5, cited in *Brown,* Rockall and the Limits of National Jurisdiction of the UK, Marine Policy, July (1978) 181 (206).

"use" stood for "some definite commercial or defence purpose"[1259]. Defense purposes have thus historically played an important role in the classification of islands, producing the same legal effects as other commercial uses. Today, defense purposes are not explicitly referred to in the *Regime of islands*, which has led to some doubt as to whether islands used exclusively for military purposes can engender entitlement to an EEZ and continental shelf. *Kolb, Gjetnes* and *Charney* have argued that such islands should not be viewed as supporting an "economic life". These scholars appear to classify military installments as a use *sui generis*, which cannot be recognized as either "human habitation" or "economic life". According to *Kolb,* to recognize that military facilities may have an "economic life" would rob the term "economic life" of its distinctiveness.[1260] To this it may be responded that Article 121 (3) was the result of a lengthy and delicate negotiation process with the generic term "economic life" being chosen in the interest of reaching consensus and therefore on purpose. The broad scope of "economic life" is intentional. Scholars *Gjetnes* and *Charney* have expressed agreement with *Kolb*'s views on the basis of the *travaux préparatoires*.[1261] The relevant statement was made by the Turkish delegate during the Third United Nations Conference on the Law of the Sea, who held that "military and police installations were not sufficient justification for establishing an economic zone"[1262]. This assertion – while certainly supportive of the view that military uses are excluded from the definition of "economic life" – was neither repeated nor contradicted nor otherwise discussed in the proceedings that followed, at least according to publicly available records. It can thus be regarded as representative of the opinion of at least one state, but not necessarily reflective of a consensus shared by all those present. The statement in question was furthermore made in the context of a draft version of Article 121 (3) that was rejected by the committee and therefore had very little impact on the final version of Article 121 (3). The *South China Sea Arbitration* has pronounced that "a purely official or military population, serviced from the outside, does not constitute evidence that a feature is capable of sustaining human habitation"[1263]. This pronouncement must of course be understood in the context of the tribunal's stance that reliance

[1259] *Ibid.*
[1260] *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... », Annuaire français de droit international 40 (1994) 876 (883, fn 45).
[1261] *Gjetnes,* The Spratlys: Are They Rocks or Islands?, Ocean Development & International Law 32 (2001) 191 (197); *Charney,* Rocks that Cannot Sustain Human Habitation, The American Journal of International Law 93 (1999) 863 (870).
[1262] United Nations Office for Ocean Affairs and the Law of the Sea, The Law of the Sea: Regime of Islands, UN Sales No. E.87.V.11 (1988) 45 (Turkey).
[1263] This statement is relevant not only to the definition of "human habitation" but also to that of "economic life", as they are described as widely interconnected in the arbitral award. *South China Sea Arbitration,* para 550, *supra* note 28.

on imports is generally detrimental to the finding that an island can sustain human habitation or economic life of its own, a position that has already been discussed earlier.[1264] State practice has shown that there is support for the position that military facilities are not to be qualified as "economic life" within the meaning of Article 121 (3). This view is perhaps most notably taken by the Philippines,[1265] but is also supported by Indonesia and Vietnam, who have maintained that the high-tide elevations in the Spratly Islands group are "rocks", despite the fact that some among them support military outposts.[1266] Both Malaysia and Vietnam have not submitted any continental shelf claims emanating from the Spratly Islands, a course of action that would seem reflective of the position that these islands are regarded as "rocks".[1267] This view appears to be opposed by neighboring China, whose government has stated that the Spratly Islands are "fully entitled to Territorial Sea Exclusive Economic Zone (EEZ) and Continental Shelf"[1268]. Subsequent state practice has traditionally only been pertinent to the interpretation of a provision if it "establishes the agreement of the parties regarding its interpretation"[1269]. It would appear that the high standard of an "agreement" on the interpretation of "economic life" has not yet formed, as only the abovementioned, selected states embrace the view that military facilities constitute insufficient evidence of the capacity to sustain "economic life". The opposition to this trend voiced by China, a state especially affected by this discussion, would also seem to stand in the way of the required agreement. The concept of military installments as a use *sui generis* that is neither of an economic nature nor comparable to "human habitation" engenders certain inconsistencies. In order to establish an exception for military facilities on islands, it would be necessary to define the circumstances under which such an exception is warranted. A military installment staffed with government personnel would naturally meet the description of fulfilling a "military purpose", yet the assessment may not be as clear-cut in the case of private security services contractors. These are profit-oriented companies specialized in the provision of military equipment and personnel and are institutionally separated from the government they

[1264] Part 2 Section 2 IV A 2.
[1265] *South China Sea Arbitration*, Memorial of the Philippines, March 30, 2014, Vol. I, para. 5.106, *supra* note 28.
[1266] Note verbale from the Republic of Indonesia to the Secretary-General of the United Nations, 480/POL-703/VII/10, July 8, 2010, unofficial translation <un.org/depts/los/clcs_new/submissions_files/mysvnm33_09/idn_2010re_mys_vnm_e.pdf>; Statement of the Ministry of Foreign Affairs of the Socialist Republic of Viet Nam Transmitted to the Arbitral Tribunal in the Proceedings Between the Republic of the Philippines and the People's Republic of China, Socialist Republic of Viet Nam, December 14, 2014, 5.
[1267] Malaysia and the Socialist Republic of Vietnam, Joint Submission to the Commission on the Limits of the Continental Shelf in Respect of the Southern Part of the South China Sea, May 6, 2009, <un.org/depts/los/clcs_new/submissions_files/mysvnm33_09/mys_vnm2009excutivesummary.pdf>.
[1268] Note verbale from the Peoples Republic of China to the Secretary-General of the United Nations, No. CML/8/2011, April 14, 2011 <un.org/depts/los/clcs_new/submissions_files/mysvnm33_09/chn_2011_re_phl_e.pdf>.
[1269] Art 31 (3) (b) VCLT.

serve. Companies such as these appear no less economic in nature than a mining or fishing operation, which seems to place them firmly in the category of "economic life". Recognizing military facilities as a use *sui generis*, to be classified neither as "human habitation" nor as "economic life" inevitably leads to one of two equally dissatisfying outcomes. Firstly, private security services contractors could be distinguished from the state-run military sector on the basis that they are private, profit-oriented companies whose activity naturally amounts to an "economic life". This outcome would however be arbitrary, as the tasks and purpose of private security services contractors closely mirror those of the military, resulting in an unequal treatment of equal conditions. On the other hand, one could argue that the primary focus of both the military and private security services contractors is national defense, and that they therefore should engender the same legal consequences. This position leaves us with the rather counterintuitive result that a private and profit-oriented company that contributes to GDP is somehow not evidence of "economic life". These considerations show that creating an exception for military services does not fit well into the systemic context of the *Regime of islands*. The primary function of the military is to safeguard national stability and security, which is certainly not a profit-oriented goal. Indeed, the military's mission is more akin to the preservation of a public good, that of peace and security. From this perspective, it is easy to see why operations in the interest of national security do not necessarily meet the definition of an "economic life". On the other hand, the execution of assignments preserving peace and security is but one of many dimensions of any modern-day military. The military branch is also an economic actor, an employer, a buyer and a seller. 46% of the total expenditure of the defense sectors of the 28 EU member states combined goes into the compensation of employees, 31% is used for intermediate consumption of varying goods and services and 20% is devoted to capital investment, such as the purchase of new equipment.[1270] The defense sector undeniably participates in the market and has an impact on GDP. It is this economic dimension to the military – as opposed to its defense function – that seems capable of amounting to an "economic life". We conclude that military facilities are not self-evidently non-economic. The lack of an explicit statement in Article 121 (3) to the effect that military facilities are not "economic life" would therefore seem to support the notion that military uses and "economic life" are not mutually exclusive concepts. The negotiators at the Third United Nations Conference on the Law of the Sea could have excluded military facilities as a form of "economic life" or "human

[1270] Data from 2016; see Eurostat, Government expenditure on defence, available at <https://ec.europa.eu/eurostat/statistics-explained/index.php/Government_expenditure_on_defence#Expenditure_on_.27defence.27_by_type_of_transaction>.

habitation" as a policy decision. Yet, no such exception was included. A military installment's defense mission alone cannot corroborate the legal status as an island in the narrow sense. What on the other hand can evidence the existence of "economic life" on an island are indications that the military installment is acting as an economic agent and contributing to GDP. It is in particular the military's role as an employer that appears relevant to the *Regime of islands*. Any military outpost requires personnel, the remuneration of which contributes to GDP. Not every military installment can be said to automatically trigger "economic life". Just as any other economic activity, military installments must contribute to GDP, be non-transitory, and located on an island that is well-suited to this purpose, if they are to meet the description of an "economic life" within the meaning of Article 121 (3). Military bases should be subjected to the same verification process as other potential forms of economic life.

To conclude, while military facilities certainly have a defense purpose, they may simultaneously have an "economic life" within the meaning of Article 121 (3). At the same time, there is a nascent trend towards the exclusion of islands used for military purposes from the status of "island in the narrow sense" in legal doctrine, international judicature and state practice.[1271] If this trend continues, it may well be that it becomes customary international law superseding the content of Article 121 (3) as it presents itself today. It would seem that, to complete this development, further state practice confirming the trend would be required in order to replace a provision that was adopted with the backing of a substantial part of the international community.

d. Declarative Acts

Individual states have sought to bolster their maritime claims via actions of a declarative nature such as changing part of an island's name from "rock" to "island", publishing historic maps or setting up flags bearing national insignia.[1272] The Japanese municipal government of Goto for instance intended to rename islands for this purpose in 2013. Specifically, plans were announced to make an application to the Geospatial Information Authority of Japan for the removal of the term "iwa", which translates to English as "rock" from the names of three reefs

[1271] This is especially reflected in the *South China Sea Arbitration*, which has denied that soldiers may form a "human habitation". It is safe to assume that the tribunal did not regard military bases as conforming to the standard of "economic life" either, as the tribunal treated human habitation and economic life as widely interconnected. *South China Sea Arbitration,* para 550, *supra* note 28.

[1272] See for example the historic maps submitted by China in support of its claim to the larger part of the South China Sea. *Dupuy/Dupuy,* A Legal Analysis of China's Historic Rights Claim in the South China Sea, The American Journal of International Law 107:1 (2013) 124 (125). See also the installation of the Japanese flag on the Senkaku Islands. Taiwan activists threaten to land on Senkakus if Japan doesn't remove facilities, The Japan Times, March 2, 2015, <japantimes.co.jp/news/2015/03/02/national/politics-diplomacy/taiwan-activists-threaten-to-land-on-senkakus-if-japan-doesnt-remove-facilities/#.WIikyoWcGpl>.

in the Nagasaki Prefecture: Minamiiwa, Iwasenakaiwa and Kitaiwa.[1273] Similarly, in the *Black Sea Case*, the Ukrainian government suggested that the official name of an island was to some degree relevant to its legal status. In particular, Ukraine found that the fact that Serpents' Island had never been referred to as "Serpents' Rock" was indicative of its legal status as an island in the narrow sense. The Ukrainian Counter-Memorial in this way explains that "[w]hile such matters of nomenclature may not be decisive of the legal status of a geographical feature, they are - especially when used over a very long period of time - strongly indicative of the appropriate legal status and raise a presumption in favour of the status which the name indicates."[1274] *Van Dyke* has similarly described the fact that an island's historical name included the term "rock" as "significant" in this context.[1275] Formal acts such as the official designation are however completely unrelated to the actual conditions and capacities of islands and naturally do not affect the assessment under Article 121 (3), regardless of the timespan during which a certain name has been upheld.[1276]

Not only is there no indication that official designations matter to an island's status to be found in the *Regime of islands* itself, to allow such designations to impact the legal status would run counter to the provision's purpose. Article 121 (3) aims to establish objective distinctive criteria. If an island's status could be changed at will via official designation, the classification as an island in the narrows sense would lose all distinctiveness and make the evaluation of an island's capacity for human habitation or economic life entirely redundant. As has been aptly noted by *Gidel* in the context of discussing continental shelf rights, granting maritime entitlements depending on whether an official declaration has been made – *Gidel* refers to this as "l'occupation notionnelle' ou 'fictive'" – is furthermore not advisable due to carrying the risk of states abusing their rights.[1277]

[1273] Goto gov't plans to rename reefs as islands, CCTV.com, September 12, 2013 <english.cntv.cn/program/asiatoday/20131209/105715.shtml>; Govt moves to safeguard border islands, AsiaOne, August 5, 2013 <news.asiaone.com/news/asia/govt-moves-safeguard-border-islands>.

[1274] *Black Sea Case,* Counter-Memorial submitted by Ukraine on May 19, 2006, Vol. 1, para 7.35, *supra* note 310.

[1275] He specifically refers to the Liancourt Rocks, also known as Dokdo in Korean and Takeshima in Japanese. These features were historically called "Sokdo", with "sok" translating to "rock" in English. See *Van Dyke,* Legal Issues Related to Sovereignty over Dokdo and Its Maritime Boundary, Ocean Development & International Law 38 (2007) 157 (197).

[1276] See also *South China Sea Arbitration,* para 482, *supra* note 28; *Talmon,* Article 121 - Regime of Islands in Proelss (ed.), The United Nations Convention on the Law of the Sea - A Commentary (2017) 858 (862).

[1277] *Gidel*, A propos des bases juridiques des prétentions des États riverains sur le plateau continental: les doctrines du « droit inhérent », Zeitschrift für Ausländisches und Öffentliches Recht 19 (1958) 81 (92).

E. The Theoretical Capacity to Sustain "Economic Life"

Article 121 (3) postulates that "rocks that *cannot* sustain […] economic life" shall have no EEZ or continental shelf. The emphasis is on the word "cannot", as it indicates that the mere capacity for economic usage is enough to justify the finding that a feature is an island in the narrow sense.[1278] This much is relatively uncontroversial. Views differ when it comes to identifying which methods reliably demonstrate the theoretical capacity to sustain economic life. This chapter will address the methods developed so far and give thought to novel suggestions. It should be repeated at this point that the theoretical capacity to sustain economic life is tantamount to the potential to sustain activity that contributes to national economic performance, is directed towards the long term and makes sense in view of its locality.[1279]

1. Usability Indicators

This approach assumes that certain physical characteristics, also referred to here as "usability indicators", prove an island's capacity to sustain economic life. The availability of mineral deposits or fish stocks can for example point towards the possible exploitation of pre-existing resources. Actual fishing or mining might have been delayed due to a shortage in funds or uncertainties associated with unresolved sovereignty conflicts. Such hindrances may prevent the launch of individual projects, but they leave the island's capacity for economic exploitation intact. *Charney* has opined that the availability of harvestable fisheries, deposits of hydrocarbons, or even a suitable location for a gambling casino may suffice as evidence of "economic life". These potential uses are, according to *Charney*, required to be able to "sustain an economy sufficient to support that activity through the purchase of necessities from external sources"[1280]. *Gjetnes* has declared that "the words 'able to sustain' must indicate that actual use of the resources is not necessary and that the presence of resources that can support an economic life is sufficient"[1281]. He further specified that "[t]he mere existence of a natural resource cannot, however, be enough. It must be argued that the resource can represent economic value over a certain period of time."[1282] *Gjetnes* has additionally cited a pertinent judgment of the Supreme Court of Norway in order to corroborate his position. In this judgement, the Supreme Court of Norway considered that the possibility of hunting local polar bears illustrated that

[1278] Part 2 Section 2 II.
[1279] Part 2 Section 2 VI D.
[1280] *Charney,* Rocks that Cannot Sustain Human Habitation, The American Journal of International Law 93 (1999) 863 (870).
[1281] *Gjetnes,* The Spratlys: Are They Rocks or Islands?, Ocean Development & International Law 32 (2001) 191 (196).
[1282] *Ibid,* 197.

Abdel Island was capable of sustaining economic life.[1283] Importantly, this was considered an entirely theoretical investment opportunity, since the bears are protected animals. It would seem that to entirely disregard the presence of valuable resources would run counter to the wording of the *Regime of islands'* which clearly envisions the theoretical capacity for economic life as sufficient.[1284] In line with the characteristics of "economic life" discussed in previous chapters,[1285] resources proving that an island bears the capacity for economic life, should be capable of contributing to GDP for a prolonged period. Additionally, the implementation of the envisioned use must have the appearance of a reasonable and economically sound decision, or else there can be no link between the island and its potential usage. These requirements and their origin have been discussed above.[1286] For example, fish stocks in the territorial sea that can be commercially exploited on a regular basis without endangering the stocks' ability to recover, would meet these preconditions: the exploitation of the stocks can contribute on a permanent basis to the GDP. At the same time there is a definitive link between the island and the prospective usage, as the island's proper environment renders economic exploitation possible. On the other hand, mineral resources that, while in high demand for their rarity, cannot be accessed because exploitation is not yet technically feasible are incapable of generating a contribution to GDP, and consequently fail the definition of "economic life". The same holds true for the excavation of materials that can be more easily and cost-effectively obtained through other venues, such as artificial production. In such a case, the linkage between locality and usage would be insufficient because the island is not well-suited to the particular economic purpose. The requirement of continuity in any potential economic life has the effect that the presence of deposits that would be depleted almost immediately or within a few months, fails to demonstrate an island's theoretical capacity for economic life. While usability indicators are capable of providing valuable insight into an island's capabilities, their usefulness may well be limited to cases where an island's capacity for economic life can be inferred from the availability of resources. To begin with, only the presence, not the absence, of usability indicators permits us to draw conclusions as to an island's legal status. An island devoid of exploitable resources may for example still hold significant economic potential, for example as a tourist resort. This signifies that the absence of usability indicators is of limited relevance. Secondly, other recognized forms of "economic life" cannot be as easily inferred from usability indicators as resource extraction, due to depending on a variety of characteristics. Research,

[1283] *Ibid.*
[1284] See Part 2 Section 2 II.
[1285] See Part 2 Section 2 VI D.
[1286] See Part 2 Section 2 IV A 4.

navigation and communication services or tourist enterprises all require vastly different conditions that cannot be summed up in general terms. Nor would it be reasonable to demand that those assessing an island's status enter in to a complex evaluation of whether an island's environment is suitable for any type of economic life imaginable. In the case of uses not related to resource exploitation, it would thus seem that defining individual usability indicators does not further our understanding of Article 121 (3).

2. Historical Evidence

A different and perhaps more promising approach to evaluating the economic potential of an unused island is to investigate whether it has sustained economic life in the past. Former economic life of the kind that could be easily resumed is suggestive of the fact that an island has remained economically valuable.[1287] Overall, the historic usage must correspond to the definition of "economic life" that has already been laid out: "economic life" requires a contribution to national economic performance, permanence and a definitive link to the locality.[1288] The conditions on an island must have remained fairly similar since the cessation of economic activity, or, at the very least, conditions should not have deteriorated to such an extent as to render its resumption impossible or absurd. An example of a non-resumable economic life can be found in the historic mining of – now depleted – guano deposits on various small Pacific islands, including Aves Island, Howland Island and Baker Island.[1289] One must furthermore carefully consider whether discontinuation of the economic activity in question was a consequence of the realization of its operators that the island is indeed an unsuitable site for the envisaged use. Indeed, even if environmental conditions have remained similar since the island's historical period of economic life, such economic activity may have become unsustainable in the meantime. Industrial and technological development may have rendered certain application possibilities obsolete. In such a scenario, the resumption of the specific kind of activity can no longer lead to a useful application of an island's capacities, which means that the definitive link between location and usage is lacking. A case illustrating that historical evidence of economic activity is not always indicative of the current sustainability of "economic life" can be found in the facilities on the arctic island of Uyedineniya,[1290] which include an

[1287] See also *Talmon,* Article 121 - Regime of Islands in Proelss (ed.), The United Nations Convention on the Law of the Sea - A Commentary (2017) 858 (877).
[1288] Part 2 Section 2 VI D.
[1289] Encyclopaedia Britannica, Bird Island <https://www.britannica.com/place/Bird-Island-islet-Caribbean-Sea>; Encyclopaedia Britannica, Howland Island <https://www.britannica.com/place/Howland-Island>; Encyclopaedia Britannica, Baker Island <https://www.britannica.com/place/Baker-Island>.
[1290] *Schalansky,* Taschenatlas der Abgelegenen Inseln[5] (2014) 34 et seq.

abandoned polar observatory and a destroyed weather station. The past existence of an economically valuable institution – in this case a weather station – would not seem to provide evidence that Uyedineniya remains capable of supporting "economic life" today.[1291] On the contrary, that the weather station was destroyed and never rebuilt speaks to the fact that such a station is either no longer useful or simply not viable in the particular location. The extreme weather conditions and accessibility problems prevailing on this arctic island would seem to corroborate the unviability of local "economic life". Lastly it has to be acknowledged that the utility of the approach from historical use is somewhat confined due to the fact that the absence of former economic usage does not reveal an island's lack of capacity to sustain economic life. Islands may remain unexploited for a variety of reasons, such as their declaration as a nature reserve. This entails that an island's past state of idleness is not automatically an indicator of its incapacity to sustain economic life.

3. The Comparative Approach

When assessing the economic potential of as yet unused features, it may prove a useful method of evaluation to look for islands that are similar to the island under evaluation, except in one respect: they actively sustain an "economic life". We shall refer to the island that is devoid of any economic life, but may still bear the potential thereto as "Island A". The object of comparison we will call "Island B": it shares significant similarities with Island A, yet actually shelters a prospering "economic life". Island B should resemble Island A in all relevant aspects. Depending on the kind of economic use Island B is put to, these aspects should include size, climate or remoteness. The more environmental factors overlap, the more convincing a case can be made that Island A is an island in the narrow sense. As has been explained, artificial modifications and construction works facilitating economic life or human habitation on islands are to some extent to be expected on inhabited islands.[1292] They are not detrimental to a feature's status as an island in the narrow sense, provided that the feature was a high-tide elevation to begin with.[1293] However, when applying the comparative approach, the similarities between the islands must extend to their current size, meaning that the possibility of enlarging the surface area is under any circumstances insufficient proof of an island's capacity to sustain economic life. For to base the assessment under Article 121 (3) on the mere possibility that land reclamation could be successful and may or may not produce an environment favorable to

[1291] For the economic value of meteorological data see Part 2 Section 2 VI D 2.
[1292] Part 2 Section 2 IV C 2.
[1293] See Part 2 Section 2 IV C.

economic usage would mean to choose an assessment method that cannot produce a reliable result. Such an approach would contain too many variables and consequently shift the legal assessment too far into the realm of the unascertainable. The economic activity on Island B must furthermore evince all the constitutive elements of an "economic life", as identified in this thesis: the specific economic venture must contribute to GDP, last for a certain period and bear a connection to the locality. The comparative approach and its merits have already been explored in the context of measuring an island's capacity to sustain "human habitation".[1294] The comparative approach may be useful in a variety of constellations including islands that are unused due to having been declared part of a marine protected area, islands that are unused due to their status as disputed territory or because regional instability has as yet prevented the tourism sector from expanding and prospering. The – for instance touristic – value any such feature may nonetheless hold can be assessed by examining the map in search of similar islands with an active tourism industry. Traits that are particularly informative in this regard naturally include the size and climate of the object of comparison, but also its accessibility. If Island A is particularly small and tourists cannot be accommodated locally, it is essential that the island can be accessed by visitors through efficient transport routes. The comparison with similar features may also illustrate that islands of the size in question traditionally have not supported any habitation or economic usage, or have even been officially declared a "rock" by their home state.[1295] In such instances, it seems permissible to draw the conclusion that the Island A lacks the capacity to sustain economic life. A comparison might also show that despite its smallness, islands with similar characteristics to island A support economic life. If the comparative approach for instance reveals that islands of similar size and environmental conditions often support lighthouses, this may indicate that economic life is theoretically sustainable on the island under examination. The theoretical construction of a lighthouse would have to be a sensible investment. If a lighthouse were superfluous at the specific location, there would be no causal connection between the characteristics of the island and its envisioned use for navigational purposes and consequently no "definitive link". Those applying the law still have to evaluate whether the island in question is theoretically capable of sustaining an economic life characterized by its contribution to GDP, its continuity and its usefulness. The same holds true for other kinds of commercial undertakings: if Island B sustains a certain venture, and such an investment would also appear reasonable on Island A, it would appear that Island A is

[1294] See Part 2 Section 2 V F 2.
[1295] As the UK has declared in the case of Rockall. See Part 1 Section 3 II A or *Symmons,* Ireland and the Rockall Dispute: An Analysis of Recent Developments, IBRU Boundary and Security Bulletin (Spring 1998) 78 (83).

capable of sustaining economic life. On the whole, the comparative approach presents us with a method for assessing an island's capacity to sustain economic life that is both comprehensive and straightforward. While usability indicators are so diverse that they cannot be exhaustively listed, the comparative approach may be applied to any kind of island or use.

4. Conclusion

Whether or not an island bears the potential for "economic life" can ultimately be ascertained through reliance on principles similar to those expounded in the context of the evaluation of "human habitation". An important distinction between the assessment of "human habitation" and "economic life" lies therein that, with regard to the latter, there are certain physical characteristics that may play a vital role in the assessment of islands. Some usability indicators, notably the availability of natural resources such as fish and mineral deposits may provide insight into an island's inherent capacities. From the presence of mineral resources it is possible to infer that a long-term contribution to national economic output is possible. In cases other than economic life derived from resource exploitation, it is however difficult to define reliable usability indicators, as potential economic uses are varied and the kind of environment favorable to a specific type of economic usage cannot be generically established. It would also appear prohibitively complex to require that those applying the law screen an island for its aptness to support every economic use imaginable. In circumstances where economic usefulness is not manifest from the presence of exploitable resources, it is therefore recommended to rely on historical evidence or the comparative approach. Former economic activity of the kind that could be easily resumed and meets the definition of "economic life", is highly indicative of an island's present aptness for economic usage. In cases where there is little to no evidence of former economic activity, the comparative approach appears expedient. It illustrates whether other islands resembling the island under examination are currently supporting economic life. If this is the case, the island under examination shares the object of comparison's suitability for economic usage and thereby its legal status. All in all, when judging an island's theoretical aptness for "economic life", it is recommended to rely on a combination of three methods: the capacity may be revealed either by an island's natural resources, its historical usage or a comparison with similar features. Depending on the individual case, one approach may provide more conclusive evidence than the other and might thus be preferable.

F. Method of Assessment

In the interest of clarity, this chapter will present a condensed version of the assessment process for the criterion of "economic life", as it has been gradually revealed in the preceding chapters. There are two different points of departure: either there is some form of ongoing economic activity on an island, or there is not. If there is some form of activity, we must ascertain whether it fulfills the definition of "economic life" that we have established so far: we must ask whether the activity contributes to GDP, is of a permanent nature and is connected to the island through a definitive link. If the island is on the other hand not put to any economic use, the subject of the investigation is the potential or capacity for economic life. The assessment process consequently varies depending on whether the island is completely devoid of human activity or not. It is furthermore relevant that in any formal judicial procedure involving the assessment of an island's capacity to sustain "economic life", the burden of proof rests with the party potentially benefitting from an affirmation of said capacity.[1296]

1. Assessing Ongoing Economic Activity

In the event of evidence of some form of activity that may be perceived as economic in nature, this activity is reviewed for its fulfilment of three requirements. There should be a demonstrable contribution to GDP, the activity should be directed towards the long term, and there should be a definitive link between island and usage, meaning that the island has to be suitable for the chosen purpose. Next, in the case of indications that the economic life would not have been established if it were not for the hope of securing additional exploitation rights from the EEZ and continental shelf surrounding the island, this possibility must be investigated. If these suspicions are confirmed, the claim to an EEZ and continental shelf measured from the base line of the island in question would be dismissed as an "abuse of rights". If there is no indication that gaining an EEZ and continental shelf may have been the *conditio sine qua non* to the launch of the "economic life" or such accusations have revealed themselves to be baseless, we may confirm that the island sustains "economic life" and is an island in the narrow sense.

2. Assessing the Potential for "economic life"

An island that does not currently serve an economic purpose or one that serves an economic purpose that falls short of reaching the threshold of an "economic life" may still bear the theoretical capacity thereto. This means that those applying the law are called upon to evaluate

[1296] *Van Dyke/Morgan/Gurish*, The Exclusive Economic Zone of the Northwestern Hawaiian Islands: When Do Uninhabited Islands Generate an EEZ?, San Diego Law Review 25 (1988) 425 (438).

whether an island is theoretically in a position to sustain an economic activity which would contribute to GDP for an extended period and that would appear useful in the specific location. The capacity to sustain economic life must be observable and demonstrable, it is not a quality that can be assumed in the absence of evidence to the contrary. There are different ways in which it can reveal itself. As has been shown, there may be physical characteristics or "usability indicators" signaling an island's economic value such as the availability of fish stocks or extractable minerals in sufficient quantities within the territorial sea, a location and climate ideal to tourist accommodation or a healthy polar bear population.[1297] In light of the sheer abundance of potential economic uses, usability indicators cannot be defined for every form of "economic life" individually. It would thus appear that the practicality of usability indicators is restricted to rather obvious cases. For example, given that even territories hostile to human life, such as the polar regions, have attracted economically significant numbers of tourists,[1298] it may be difficult to define, in general terms, the characteristics of a potentially successful tourist destination. A promising method involves an investigation into an island's past economic uses. If the historic record reveals that past ventures have fitted the description of "economic life" and could easily be resumed, this too would furnish evidence of an island's capacity. However, both the historic approach and the reliance on usability indicators fail to produce conclusive results if there are neither records of past economic uses nor particularly obvious physical signs pointing towards an island's aptness for a specific economic purpose. The fact that neither of these two methods finds evidence of the capacity to sustain economic life, does not automatically entail that the island in question is incapable of supporting "economic life". The comparative approach, on the other hand, offers a more comprehensive approach to the assessment of islands. If a feature actively sustaining economic life evinces physical characteristics comparable to those of the island under examination, it stands to reason that both share the same legal status. While the comparative approach may often be preferable in light of its wide scope of application, it depends on the circumstances at hand which method is most appropriate. A combination of methods is also conceivable. As in the case of an active, as opposed to theoretical, "economic life", the possibility remains that conditions favorable to economic usage were introduced via structural modifications to the island's natural conditions. It may further be the case that these changes would not have taken place if it weren't for the

[1297] For the Norwegian Supreme Court Decision dealing with the relevance of polar bear stocks to Article 121 (3), see above Part 2 Section 2 VI E 1.
[1298] According to the International Association of Antarctica Tour Operators, 30.904 tourists visited Antarctica in the 2015/2016 season, which represents an increase by 152% since the 2000/2001 season. See International Association of Antarctica Tour Operators, Tourism Statistics <iaato.org/tourism-statistics>.

owning state's ambition to expand the EEZ and continental shelf accordingly. If such an intent is indicated, it should be given due consideration. If it turns out that conditions favorable to "economic life" would indeed not have been introduced to the island if it weren't for the possibility to claim a greater area as an EEZ and continental shelf, such a claim would have to be considered invalid due to its nature as an "abuse of rights" as per Article 300.[1299]

Section 3 Island Building and Abuse of Rights

Regional tensions or a desire to secure existing power structures may entice coastal states to construct buildings or military outposts on islands and claim that these structures – and in particular the "human habitation" and "economic life" they appear to support – justify drawing an EEZ or continental shelf around these islands. Where a coastal state undertakes these construction works with the sole aim of expanding its EEZ or continental shelf, is the resulting EEZ or continental shelf claim a misuse of the *Regime of islands*? Some scholars indeed view this as a scenario potentially calling for recourse to the doctrine of "abuse of rights".[1300] This chapter will give an overview of the abuse of rights principle in international law and explore if and under what circumstances EEZ and continental shelf claims submitted after a period of island building can be qualified as abusive. Lastly, we shall investigate whether the island building projects in the South China Sea and the maritime claims flowing therefrom constitute an abuse of rights.

I. Abuse of Rights - General Definition

According to *Lauterpacht*, "the exercise of a hitherto legal right becomes unlawful when it degenerates into an abuse of rights"[1301]. The principle of abuse of rights "enables courts to take cognizance, without recourse to legislation, of changes in conditions and of social developments."[1302] The origins of the principle are traced back to the Roman law maxim *sic utere iure tuo ut alterum non laedas,* which lays down that individual rights must be exercised

[1299] Part 2 Section 3 III B.
[1300] Van Dyke has agreed that, if conditions are altered „just for the purposes of getting [an EEZ]" there can be no valid claim to an EEZ. *Howland Island Case*, Deposition of Jon Van Dyke, October 31, 2007, 72, *supra* note 413; *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... », Annuaire français de droit international 40 (1994) 876 (904) ; *Clagett,* Competing Claims of Vietnam and China in the Vanguard Bank and Blue Dragon Areas of the South China Sea: Part I, Oil & Gas L. & Tax'n Review 13 (1995) 375 (386), cited in *Charney,* Rocks that Cannot Sustain Human Habitation, The American Journal of International Law 93 (1999) 863 (871, fn 34).
[1301] *Lauterpacht,* The Function of Law in the International Community[2] (2011) 294.
[1302] *Ibid,* 307; see also *Politis,* Le problème des limitation de la souveraineté et la théorie de l'abus des droits dans les rapports internationaux, Recueil des cours 6 (1925) 1 (77).

in a way that does no harm onto others.[1303] The abuse of rights principle is a testament to the evolving nature of law.[1304] An "abuse of rights" occurs where a state exercises its rights in pursuit of an objective that differs from the interests this particular right is intended to safeguard.[1305] The practice of international and quasi-international tribunals confirms the importance of the abuse of rights doctrine in international law.[1306] The doctrine also plays a prominent role within international institutions such as the United Nations and the European Union.[1307] Within the application area of UNCLOS, any abuse of the rights conveyed by the Convention is prohibited by Article 300, which declares that "States Parties […] shall exercise the rights, jurisdiction and freedoms recognized in this Convention in a manner which would not constitute an abuse of right." While *Lauterpacht* has professed the opinion that the concept of abuse of rights is commonly recognized as a general principle of law within the meaning of Article 38 (1) (c) of the ICJ Statute,[1308] this view has been contested.[1309] Criticism of the concept of abuse of rights has in part focused on the conceptional proximity between the principle of good faith and the prohibition of abusing one's rights. *Schwarzenberger* has explained that "[t]he prohibition of abuse of rights is […] obviously a postulate of reasonableness and good faith […]."[1310] There is consequently, according to *Schwarzenberger*, no need for the principle of "abuse of rights" in the law of treaties because there already exists a rule of customary law to the effect that "consensual engagements must be interpreted and applied as *jus aequum*"[1311]. It is a position shared by *Byers,* who has found that "[i]t is also possible to argue that abuse of rights is redundant because it is itself only a more specific expression of a broader principle, namely that of good faith"[1312]. *Lauterpacht* has remarked that the doctrine of the abuse of rights is characterized by a "disturbing elasticity and comprehensiveness"[1313]. For, as *Lauterpacht* has

[1303] *Kiss,* Abuse of Rights in Wolfrum (ed.), The Max Planck Encyclopedia of Public international law (2015) para 2.
[1304] *Politis,* Le problème des limitation de la souveraineté et la théorie de l'abus des droits dans les rapports internationaux, Recueil des cours 6 (1925) 1 (86).
[1305] *Ibid,* 87.
[1306] For an extensive analysis of the relevant case law see *Lauterpacht,* The Function of Law in the International Community[2] (2011) 296-299; or *Byers,* Abuse of Rights - An Old Principle, A New Age, McGill Law Journal 47 (2002) 389 (397 et seq).
[1307] *Kiss,* Abuse of Rights in Wolfrum (ed.), The Max Planck Encyclopedia of Public international law (2015) paras 22-30.
[1308] *Lauterpacht,* The Function of Law in the International Community[2] (2011) 300 et seq, 306.
[1309] *Schwarzenberger,* Uses and Abuses of the "Abuse of Rights" in International Law, Transactions of the Grotius Society 42 (1956) 147 (151); *Kiss,* Abuse of Rights in Wolfrum (ed.), The Max Planck Encyclopedia of Public international law (2015) para 10.
[1310] *Schwarzenberger,* Uses and Abuses of the "Abuse of Rights" in International Law, Transactions of the Grotius Society 42 (1956) 147 (148).
[1311] *Ibid.*
[1312] *Byers,* Abuse of Rights - An Old Principle, A New Age, McGill Law Journal 47 (2002) 389 (411).
[1313] *Lauterpacht,* The Function of Law in the International Community[2] (2011) 312.

warned "in theory, there is no matter normally falling within the domain of the exclusive jurisdiction of the State which could not be brought within the purview of the operation of the prohibition of abuse of rights"[1314]. *Lauterpacht* has warned that "[i]n certain cases freedom of action is socially more important than the prevention of an individual injury"[1315]. Ultimately, *Lauterpacht* appears to be of the opinion that the prohibition of abuse of rights is necessary in order to "frustrate attempts at petty appeal to formal rights" and prevent "selfish claims of State sovereignty".[1316]

II. Island Building and the Potential for Abuse in the *Regime of islands*

In Article 300, UNCLOS explicitly prohibits violations of the principle of good faith and conduct that amounts to an abuse of the rights it conveys.[1317] The prohibition of abuse of rights is often viewed as a consequence of the principle of good faith.[1318] This analysis will center on the concept of abuse of rights rather than on the principle of good faith both as a means to avoid repetition and to ensure that the focus is on the more concrete, as opposed to the more general, principle.

The *Regime of islands* however largely prevents misapplication on its own, without requiring any recourse to the doctrine of "abuse of rights". If construction works take place on a low-tide elevation, this cannot, as per Article 121 (1), entail that an EEZ or continental shelf can suddenly be claimed, as islands must be high-tide elevations in their natural state.[1319] As the arbitral tribunal in the *South China Sea Arbitration* has noted, "a low-tide elevation will remain a low-tide elevation under the Convention, regardless of the scale of the island installation built atop it"[1320]. If an artificial structure that has been built on a low-tide elevation breaches the surface of the ocean at high tide, the correct legal classification of this structure would be that of an artificial island.[1321] Artificial islands generate entitlement to their own "safety zone", but not to an EEZ or continental shelf.[1322]

Next, whenever a coastal state arranges for the colonization of a naturally formed high-tide elevation or creates the appearance of economic use in spite of the island's unsuitability in this

[1314] *Lauterpacht,* The Function of Law in the International Community[2] (2011) 312.
[1315] *Ibid,* 313.
[1316] *Ibid,* 314.
[1317] Art 300 UNCLOS.
[1318] For the differing views of legal experts on the relationship between the principle of good faith and abuse of rights see Part 2 Section 3 I; or *Kiss,* Abuse of Rights in Wolfrum (ed.), The Max Planck Encyclopedia of Public international law (2015) para 22.
[1319] Art 121 (1) UNCLOS; see also Part 2 Section 1 III A.
[1320] *South China Sea Arbitration,* para 305, *supra* note 28.
[1321] See Part 2 Section 1 III A.
[1322] Art 60 (5) UNCLOS.

regard, this effort will usually fail due to the definitions of "human habitation" and "economic life" themselves. "Human habitation" refers to a long-term socially well-integrated community.[1323] Where the conditions for the formation of such a community simply don't exist, its members will not stay on the rock. Importantly, a situation where the government forces residents to remain does not suffice, because "human habitation" presupposes the intention to stay.[1324] If a state were, for example, to decide that a rock is to be used as a detention facility, the detainees cannot form a "human habitation" because they are not on the rock out of their own free will. Likewise, where a state creates the appearance of an "economic life", that does not in actuality serve any economic purpose, such actions will not bestow a legitimate right to claim an EEZ or continental shelf upon the coastal state. An island's "economic life of [its] own" refers to an activity that contributes to GDP, is of a permanent nature and makes sense in view of its locality.[1325] Dispatching a fishing fleet where fishing is not sustainable or building a production facility where the cost is prohibitive does not qualify as an island's economic life. Such attempts at forcing an "economic life" merely show that there is no definitive link between the island and its use: the island is simply not apt for this kind (or perhaps any kind) of economic use.[1326] If a coastal state lays claim to an EEZ or continental shelf emanating from the shores of a rock where neither "human habitation" nor "economic life" is sustainable, but the state as attempted to create the appearance of sustainability by, for example, constructing buildings that serve no purpose other than the manipulation of maritime zones, the coastal state is not abusing its rights. The coastal state would be claiming an EEZ or continental shelf on the basis of sovereignty over a rock that is not capable of sustaining human habitation or economic life. Such conduct would be in open violation of Article 121. An abuse of rights, on the other hand, occurs where a state "technically act[s] within the law"[1327].

There remains one scenario where an EEZ or continental shelf claim may be invalid because it constitutes an abuse of rights. If a coastal state, acting only out of a desire to expand its EEZ or continental shelf, enlarges and develops a rock to the point where "human habitation" and "economic life" become sustainable, and then proceeds to set up a functioning "human habitation" or "economic life" within the meaning of Article 121 (3), would the resulting EEZ or continental shelf claim qualify as "abusive"?

[1323] See Part 2 Section 4.
[1324] See Part 2 Section 2 V E 4.
[1325] See Part 2 Section 4.
[1326] For further information on the requirement of a "definitive link", see Part 2 Section 2 IV A 4.
[1327] International Tribunal for the Law of the Sea, *The M/V "Louisa" Case (Saint Vincent and the Grenadines/ Spain)*, Deposition of M. H. Nordquist, October 5, 2012, ITLOS/PV.12/C18/4/Rev.1, 12.

The following analysis is aligned with *Kiss*' three-way split of the principle of abuse of rights. According to *Kiss*, an abuse of rights may occur where a state "exercises its rights in such a way that another State is hindered in the exercise of its own rights and, as a consequence, suffers injury"[1328], where a "right is exercised intentionally for an end which is different from that for which the right has been created, with the result that injury is caused"[1329] – also referred to as *détournement de pouvoir* – and lastly, where the "arbitrary exercise of its rights by a State, caus[es] injury to other States but without clearly violating their rights"[1330]. Several aspects have to be taken into account. Firstly, UNCLOS imposes restrictions on construction measures in the interest of environmental protection, but island building is not as such a violation of UNCLOS, not even if it occurs on disputed islands.[1331] Nor is it contrary to UNCLOS to claim an EEZ or continental shelf for an island that was artificially altered, as long as it was a natural high-tide elevation prior to the commencement of construction works.[1332] The only basis for an allegation of unlawful conduct would be that the coastal state is acting for the wrong reasons, arbitrary or with an intention to circumvent, in a word, *mala fide*. However, an allegation of bad faith is not on its own sufficient to invalidate a purportedly "abusive" claim. That another has suffered injury from the abuse of rights is a "fundamental element"[1333] of the implementation of this principle in international law. Although the identity of the injured party would have to be assessed for each individual case, it may be argued that the injured party in an abusive EEZ or continental shelf claim will often be the international community. All states are beneficiaries of the freedom of the high seas. If a part of the high seas is unlawfully claimed, other states are hindered in the exercise of their lawful rights including such rights as the freedom to fish on the high seas.[1334] An unlawful continental shelf claim could furthermore diminish the common heritage of mankind, a part of the seas that shall not be appropriated by any individual state but where the right to resources is vested in mankind as a whole.[1335] Shrinking this area would thereby damage the interests of all states. According to *Lauterpacht*, abuse also occurs where "the general interest of the community is injuriously affected as the

[1328] *Kiss,* Abuse of Rights in Wolfrum (ed.), The Max Planck Encyclopedia of Public international law (2015) para 4.
[1329] *Ibid,* para 5.
[1330] *Ibid,* para 6.
[1331] *Davenport,* Island-Building in the South China Sea: Legality and Limits, Asian Journal of International Law 8 (2018) 76 (82).
[1332] See Part 2 Section 2 IV C 1.
[1333] *Kiss,* Abuse of Rights in Wolfrum (ed.), The Max Planck Encyclopedia of Public international law (2015) para 31.
[1334] A right that is subject to UNCLOS' obligations relating to the conservation and management of the living resources of the high seas. See Art 87 (e) UNCLOS.
[1335] Art 137 UNCLOS; for information on the common heritage of mankind see also Part 2 Section 2 IV B 2 a.

result of the sacrifice of an important social or individual interest to a less important, though hitherto legally recognized, individual right"[1336]. Undoubtedly, where states are hindered in their freedom to fish on the high seas or where the common heritage is diminished, a community interest is affected. It is however possible that this is too abstract a damage and that "abuse of rights" refers to a situation where a party suffers injury in a more tangible manner, such as by seeing its own maritime zones threatened by an abusive claim. After all, according to the decision in the *Trail Smelter Case*, abuse requires that "the case is of serious consequence and the injury is established by clear and convincing evidence"[1337]. In the opinion of *Kiss,* where one state exercises his rights in a way that interferes with a second state's enjoyment of rights, the damage incurred by the injured state must furthermore be higher than the benefit accruing to the injuring party. [1338] Such an evaluation is not easily made where no one has been harmed specifically, nor does it appear likely that the abstract damage from the limitation of the freedom to fish on the high seas will be greater than the economic benefit of the injuring state.

Kiss has described a second type of abuse rights, the *détournement de pouvoir*. *Détournement de pouvoir* refers to a situation in international law where a state intentionally uses a right for an end for which it was not created, with the result that injury is caused.[1339] The injury would again be the interference with the freedom of the seas of other states, in particular the freedom to fish. Depending on the case at hand, the injury may also lie in the loss of EEZ access by another state with an overlapping EEZ claim, which would be a more concrete type of damage. If *détournement de pouvoir* in the application of the *Regime of islands* were alleged, it would be required that the injuring state act with the intent of circumventing UNCLOS, which, while possible, is not always easy to prove. After all, as the PCIJ noted in the *Case of the Free Zones of Upper Savoy and the District of Gex,* an abuse of rights cannot be presumed.[1340] On the contrary, the party alleging an abuse of right bears the burden of proof.[1341] According to *Kiss*, the party alleging a *détournement de pouvoir* is also required to prove that the right was "used

[1336] *Lauterpacht,* The Function of Law in the International Community[2] (2011) 294.
[1337] Arbitral Tribunal, *Trail Smelter Case (United States/Canada),* April 16, 1938 and March 11, 1941, Reports of International Arbitral Awards, Vol. III, pp. 1905-1982 (1965).
[1338] *Kiss,* Abuse of Rights in Wolfrum (ed.), The Max Planck Encyclopedia of Public international law (2015) para 4.
[1339] *Ibid,* para 5.
[1340] Permanent Court of International Justice, *Case of the Free Zones of Upper Savoy and the District of Gex (France/Switzerland),* Judgment No. 17, June 7, 1932, Publications of the Permanent Court of International Justice Series A./B. No. 46, para 225.
[1341] Permanent Court of International Justice, *Case Concerning Certain German Interests in Polish Upper Silesia – merits (Germany/Poland),* Judgment No. 7, May 25, 1926, Publications of the Permanent Court of International Justice Series A. No. 7, 30.

in disregard of the purpose for which it was originally intended"[1342]. In the *Nottebohm Case*, *Nottebohm*, a former German national, had applied for and received Liechtenstein nationality during the Second World War, but not in order to "becom[e] wedded to [Liechtenstein] traditions, its interests, its way of life or [to] assum[e] the obligations-other than fiscal obligations"[1343], but solely because he intended to benefit from protections only a neutral state could grant him. *Nottebohm* desired Liechtenstein protection from Guatemalan war measures that had led to his removal from Guatemala – his residency for 34 years. The ICJ ruled that the claim of Liechtenstein in respect of *Nottebohm* was not admissible because Liechtenstein had granted *Nottebohm* nationality for an end nationality was not meant for.[1344] This was concluded from the fact that *Nottebohm* had no abode in or other connection to Liechtenstein, nor was there a record of a prolonged residence.[1345] In short, his intentions where deduced from factual circumstances. In comparison, where an abuse of the *Regime of islands* is alleged, the intention to circumvent would have to be inferred from official communications, or perhaps from a close temporal nexus between neighboring states announcing their opposition to a specific maritime claim and the state in question making it known that there are plans to structurally modify the island on which the claim is based.

Such an intention seemed for instance observable in the announcement by the Japanese government to further develop and fortify the Japanese island Okinotorishima in the wake of the Chinese proclamation stating that Okinotorishima was a mere "rock" within the meaning of Article 121 (3).[1346] Similarly, the construction of a lighthouse and a wharf on the Senkaku Islands in the midst of a political dispute concerning the sovereignty over these very islands gives reason to doubt the existence of genuine "economic life" on the islands.[1347] The facilities were constructed in the wake of a change in leadership from the conciliatory tone of officials such as former Prime Minister Yoshihiko Noda to the more assertive stance on maritime claims of subsequent Prime Minister Shinzō Abe. This leaves us to question whether the lighthouse would have been installed if it weren't for the hope of fortifying maritime claims.

[1342] *Kiss,* Abuse of Rights in Wolfrum (ed.), The Max Planck Encyclopedia of Public international law (2015) para 33.

[1343] International Court of Justice, *Nottebohm Case (Liechtenstein/Guatemala),* Judgment, April 6, 1955, ICJ Reports 1955, 26.

[1344] *Ibid.*

[1345] *Ibid,* 25.

[1346] For a discussion of the controversies surrounding Okinotorishima see Part 1 Section 3 II E above; see also *Diaz/Dubner/Parent,* When is a "Rock" an "Island"? - Another Unilateral Declaration Defies "Norms" of International Law, Michigan State Journal of International Law 15 (2007) 519 (524).

[1347] Taiwan activists threaten to land on Senkakus if Japan doesn't remove facilities, The Japan Times, March 2, 2015, <japantimes.co.jp/news/2015/03/02/national/politics-diplomacy/taiwan-activists-threaten-to-land-on-senkakus-if-japan-doesnt-remove-facilities/#.WIikyoWcGpl>.

There have been occasional incidences of states explicitly declaring that settlements were installed for the purpose of solidifying territorial claims, or where such intentions appear probable. In this way, the U.S. Fish and Wildlife Service, a governmental agency, explains on its website that the governments' historic attempts at colonizing the remote Pacific islands Howland Island, Baker Island and Jarvis Island were motivated by a desire to demonstrate ownership or to "establish the three islands as U.S. territories"[1348]. This plan was put into action by sending students recruited from the Hawaiian Kamehameha School to live on these remote and tiny features.[1349] In a case brought before the national courts of the United States, the government argued that these very attempts at colonizing the islands justify the EEZ of Howland and Baker Island today, as they are evidence of historic "human habitation".[1350] Nevertheless, the former presence of students from the Hawaiian Kamehameha School on Howland and Baker Island appears to demonstrate neither a capacity for "human habitation" nor for "economic life". The island's barrenness, isolation and small size prevented the formation of a lasting community and the residents did not engage in any economic activity.

A similar case may be recognized in the circumstances surrounding the installation of the naval research base on stilts, *Símon Bolívar,* on the sandy beaches of tiny Aves Island.[1351] According to the website of Proyecto Web Isla de Aves (WIdA), which is financed by the Venezuelan National Fund for Science, Technology and Innovation in cooperation with the Venezuelan Ministry of Science, Technology and Innovation, the research station *Símon Bolívar* was founded "for the purpose of exercising sovereignty over Aves Island"[1352] as well as with a view to protecting the environment. With its historically important guano deposits depleted,[1353] the research station is the only use the island is put to, commercial or otherwise. The fact that a state-financed organization explicitly justifies the construction of the research site with the need to bolster territorial claims would seem to support the notion that Aves Island is of no intrinsic value for either "human habitation" or "economic life".

One may argue that a state investing in island building for the sole purpose of solidifying maritime claims, spiting neighbors or any other purpose that is arbitrary because the state isn't

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[1348] U.S. Fish & Wildlife Service, A Story of the Hui Panalā'au of the Equatorial Pacific Islands (2013) <https://www.fws.gov/uploadedFiles/Region_1/NWRS/Zone_1/Pacific_Reefs_Complex/Howland_Island/Documents/hui%20panalaau.pdf>.

[1349] Their story is the subject of the documentary *Under A Jarvis Moon,* available on the international movie database (IMDB) on <imdb.com/video/imdb/vi3879443993/>.

[1350] *Howland Island Case*, page 6 and Deposition Exhibits 13 and 14 of the Plaintiff, *supra* note 413.

[1351] For further information, see Part 1 Section 3 II D.

[1352] Translation from Spanish by the author, "Con la finalidad de ejercer soberanía sobre Isla de Aves y proteger el Refugio de Fauna Silvestre", Proyecto Web Isla de Aves <isladeaves.org.ve/soberania.html#bcnasbo>.

[1353] Encyclopaedia Britannica, Bird Island <https://www.britannica.com/place/Bird-Island-islet-Caribbean-Sea>.

interested in the "human habitation" or the "economic life" as such, but in their legal consequences, is using the *Regime of islands* for an aim it was not intended for, with the result that injury is caused. The state claiming a continental shelf on the basis of *mala fide* construction works, it could be argued, is acting contrary to one of the guiding principles of both the UNCLOS and the *Regime of islands*, the protection of the common heritage of mankind. While the common heritage of mankind is not explicitly referenced in the *Regime of islands*, both the *Regime of islands* and UNCLOS as a whole were substantially influenced by a desire to protect the common heritage of mankind from excessive national claims. We know this because the common heritage of mankind was mentioned several times in the discussions focusing on the creation of Article 121 during the Third United Nations Convention on the Law of the Sea.[1354] The significance of the common heritage of mankind to UNCLOS as a whole is further indisputable from its mention in the preamble and its designation as a principle governing the Area.[1355] Does this entail that applying the *Regime of islands* in a way that curtails the common heritage of mankind constitutes a *détournement de pouvoir*? For a case linking a conflict with overarching treaty objectives to the finding that an abuse of rights took place, we may look to the report of the WTO Appellate Body in *United States—Import Prohibition of Certain Shrimp and Shrimp Products.*[1356] In this case, the WTO was requested to pronounce its opinion on whether or not the United States had abused their rights in imposing a prohibition on the importation of certain shrimp and shrimp products. The United States' policy banned the import of shrimp and shrimp products from states where shrimp were harvested by non-artisanal means in waters populated by sea turtles without the coastal state requiring and enforcing the use of Turtle Excluder Devices (TEDs). The TED reliably allowed sea turtles entangled in the nets of shrimp trawl vessels to escape and survive, which is why the United States regarded it as an effective environmental protection measure justified by Article XX of the General Agreement on Tariffs and Trade (GATT). Article XX GATT stipulates that states parties are authorized to adopt measures "necessary to protect human, animal or plant life or health"[1357] expect in cases where these measures constitute an "unjustifiable discrimination between countries where the same conditions prevail"[1358]. The WTO Appellate Body found the import ban to be unjustified because it violated one of the central tenets of both the GATT and Article XX: the commitment

[1354] See Part 2 Section 2 IV B 2 a.
[1355] See Preamble of the UNCLOS and Art 136 UNCLOS.
[1356] WTO Appellate Body*, United States—Import Prohibition of Certain Shrimp and Shrimp Products (*United States/India, Malaysia, Pakistan, Thailand), Report, October 12, 1998, WT/DS58/AB/R.
[1357] Art XX (b) General Agreement on Tariffs and Trade 1994, April 15, 1994, 33 ILM 1153 (1994) [hereinafter GATT].
[1358] *Ibid,* Art XX.

to multilateral cooperation. The WTO Appellate Body asserted that "the United States ha[d] abused Article XX by unilaterally developing a trade policy, and unilaterally imposing this policy through a trade embargo, as opposed to proceeding down the multilateral path. […] If every WTO Member were free to pursue its own trade policy solutions to what it perceives to be environmental concerns, the multilateral trade system would cease to exist."[1359] This aim of ensuring that states take a multilateral approach to problem solving was also considered intimately connected to Article XX GATT: "[b]y preventing the abuse of Article XX, the chapeau [of Article XX] protects against threats to the multilateral trading system. The prevention of abuse and the prevention of threats to the multilateral trading system are therefore inextricably linked to the object, purpose and goals of Article XX of the GATT 1994"[1360]. It appears that the Appellate Body considered the protection of wildlife, while an explicit goal of Article XX, to be secondary to the dictum that "[member states] must seek multilateral solutions to trade-related environmental problems"[1361]. What conclusions can we draw from the Appellate Body's report that may prove useful in evaluating the potential abuse of the *Regime of islands*? It is certainly possible to come back from reading the Appellate Body's decision with the impression that an application of a right in a way that is contradictory to an overall purpose of the relevant framework indicates that the right was abused. Is a claim based on an island where "human habitation" or "economic life" was installed for the express purpose of enlarging the outer limit of the continental shelf in a similar manner contradictory to the goals of UNCLOS? Affirming the coastal state's continental shelf claim would certainly reduce the common heritage of mankind, which seems contrary to the UNCLOS' goal of preserving this space. However, the basic concept behind the *Regime of islands* is that the reduction of the common heritage *is* indeed permitted if certain prerequisites are met. Islands that have been built upon for the purpose of maritime zone expansion and as a result sustain "human habitation" or "economic life" meet these prerequisites. It is not at all clear from the common heritage principle why these islands should be treated any differently than other islands in the narrow sense, which engender a diminution of the commons in much the same way. Recognizing continental shelf claims around islands altered for the express purpose of changing an islands' legal status from that of a "rock" to that of an "island in the narrow sense" does not seem to violate the central tenets of UNCLOS in the same way as unilateral import bans violate the central tenets of the GATT. UNCLOS and in particular the *Regime of islands* accepts as

[1359] WTO Appellate Body*, United States—Import Prohibition of Certain Shrimp and Shrimp Products (*United States/India, Malaysia, Pakistan, Thailand), Report, October 12, 1998, WT/DS58/AB/R, para 35.
[1360] *Ibid.*
[1361] *Ibid.*

normal that some islands will indeed diminish the earth's common spaces by generating continental shelf claims. If we contrast this with the GATT, the obligation to cooperate and try to find common ground prior to imposing import restrictions does not know the same kind of wide-ranging exceptions. In conclusion, the common heritage principle does not necessarily entail that a state claiming a continental shelf from the shores of an island where construction works took place for the purpose of enlarging maritime zones, is abusing the *Regime of islands*. But does this view not set the *Regime of islands* up for wide-scale abuse by enticing more coastal states to modify their rocks in an attempt to enlarge their maritime zones? As has been explained above, the definitions of "human habitation" and "economic life" themselves already provide safeguards that prevent feigned uses from gaining legal relevance to a certain extent. Should the states parties to the UNCLOS wish for the claiming of maritime zones on the basis of island building to become unlawful under any circumstances, the solution would be to amend UNCLOS accordingly. To assume that maritime zones based on island building are abusive appears artificial as such claims do not seem to be contrary to the objectives pursued by the UNCLOS and the *Regime of islands*.

It seems more than questionable whether a state artificially enlarging and developing an island to the point where "human habitation" or "economic life" can be said to be sustainable is acting contrary to the spirit and purpose of the *Regime of islands*. Article 121 (3) aims to grant an EEZ and continental shelf to those islands, where "human habitation" or "economic life" is sustainable. By encouraging colonization, financing construction projects, or enabling commercial use, a coastal state does nothing more than realize a potential for development the island apparently already held. The end situation of a functioning economy or healthy community is not based on pretense; the capacity for this kind of structural development was apparently always there. Article 121 (3) does after all *not* require that the conditions that enable "human habitation" or "economic life" persist naturally.[1362] The *Regime of islands* could have tied the sustainability of "human habitation" and "economic life" to natural conditions, but the drafters made the choice that only the conditions that an island consist of "land", be elevated above water at high tide, and be surrounded by water are requirements that must be fulfilled in the island's natural state.[1363] It consequently appears reasonable to agree with *Charney*, who has found that "the actuating reasons for the development of the feature are legally irrelevant"[1364].

[1362] Part 2 Section 2 IV C 1.
[1363] *Ibid.*
[1364] *Charney,* Rocks that Cannot Sustain Human Habitation, The American Journal of International Law 93 (1999) 863 (871, fn 34).

III. Potential Legal Consequences of Abusing the *Regime of islands*

If, in a hypothetical case, an international court or tribunal were nevertheless to assert that an abuse of the *Regime of islands* had taken place, the construction works considered to have aimed to circumvent the UNCLOS would have to be ignored in the evaluation of the affected islands. Where an abuse of rights occurs, the legal consequence usually consists therein that the abusive claim is not recognized as valid.[1365]

IV. Island Building in the South China Sea

China and its Southeast Asian neighbors have agreed to work on the adoption of a "code of conduct in the South China Sea [which] would further promote peace and stability in the region"[1366], a diplomatic outreach that has reportedly stalled.[1367] In the meantime, China has pushed forward with substantial construction projects on the Spratly and Paracel Islands. While neighboring states such as the Philippines, Malaysia and Vietnam have also structurally developed islands by adding administrative buildings, wharves, helipads, weather stations and communications facilities, their efforts are not comparable in scale to the island building projects undertaken by China.[1368] Through dredging and landfilling, China created building sites for air and naval bases. The Asia Maritime Transparency Initiative has observed that new facilities built in 2017 alone, including administrative buildings, storage facilities and radiation domes, covered an area of 290,000 square meters.[1369] It is not unreasonable to conclude that construction works in the South China Sea are at least partially motivated by an effort to change the legal status of elevations in order to enlarge maritime zones and ensure access to resources.[1370] There is a close temporal connection between the initiation of the *South China Sea Arbitration* and the sudden commencement of large-scale island building projects

[1365] According to Article 10 of the Treaty Establishing the European Coal and Steel Community, the Court of Justice of the European Communities was, for example, authorized to declare an abusive exercise of the right to veto by one of its member states "null and void". See Treaty Establishing the European Coal and Steel Community, April 18, 1951, 261 UNTS 140.

[1366] Association of Southeast Asian Nations, Declaration on the Conduct of Parties in the South China Sea, October 17, 2012, <https://asean.org/?static_post=declaration-on-the-conduct-of-parties-in-the-south-china-sea-2>.

[1367] South China Sea Photos Suggest a Military Building Spree by Beijing, The New York Times, February 8, 2018, <https://www.nytimes.com/2018/02/08/world/asia/south-china-seas-photos.html>.

[1368] *Davenport,* Island-Building in the South China Sea: Legality and Limits, Asian Journal of International Law 8 (2018) 76 (77).

[1369] Asia Maritime Transparency Initiative, A Constructive Year for Chinese Base Building, Report, December 14, 2017, <https://amti.csis.org/constructive-year-chinese-building/>.

[1370] *Davenport,* Island-Building in the South China Sea: Legality and Limits, Asian Journal of International Law 8 (2018) 76 (78).

undertaken by China,[1371] which would seem to support the notion that these projects were supposed to bolster maritime claims as opposed to being motivated by a genuine interest in using the islands for settlement or economic purposes. Nevertheless, the example of construction projects in the South China Sea seems to illustrate why the abuse of rights principle is ill-equipped to deal with or discourage the phenomenon of island building.

The following assessment is without prejudice to the possibility that island building can be contrary to UNCLOS due to the damage it causes to the environment, as was confirmed with regard to several features evaluated in the *South China Sea Arbitration*.[1372] The assessment of whether or not island building can lead to an abuse of the *Regime of islands*, is furthermore without prejudice to the possibility that island building can constitute a violation of UNCLOS if it occurs in the EEZ or continental shelf of another state.[1373] An example of such a violation was found to have occurred with respect to Mischief Reef in the South China Sea.[1374]

A. An Examination Based on the Understanding that the Underlying Intentions Having Led a State to Develop a Feature Matter in the Evaluation of its Legal Status

This chapter assumes that even an island actively sustaining human habitation or economic life may still not generate entitlement to an EEZ and continental shelf, if its capacity for "human habitation" or "economic life" was facilitated by construction measures that the coastal state initiated with the aim of enlarging its maritime zones. We shall briefly entertain this thought experiment in order to be able to evaluate what this position would mean if applied to the concrete circumstances prevailing in the South China Sea.

As noted by *Kiss*, an abuse of rights occurs where a state uses a right in such a way that a different state is prevented from exercising his rights, with the consequence that injury is caused.[1375] Importantly, the injury of the wronged party must be greater than the benefit accruing to the state supposedly committing the abuse.[1376] Such an evaluation is however near impossible to undertake in the South China Sea, where maritime zones often overlap, and the ocean space claimed by two states at the same time may be of equal value to both states. It is

[1371] *Davenport,* Island-Building in the South China Sea: Legality and Limits, Asian Journal of International Law 8 (2018) 76 (76).
[1372] Reference is made to the islands Johnson Reef, Cuarteron Reef, Fiery Cross Reef and Gaven Reef and the low-tide elevations Hughes Reef, Subi Reef, and Mischief Reef. See *South China Sea Arbitration,* paras 979, 981, 983, *supra* note 28.
[1373] This may amount to a violation of Articles 60 and 80 UNCLOS. See *Davenport,* Island-Building in the South China Sea: Legality and Limits, Asian Journal of International Law 8 (2018) 76 (85).
[1374] *South China Sea Arbitration*, para 1035, *supra* note 28.
[1375] *Kiss,* Abuse of Rights in Wolfrum (ed.), The Max Planck Encyclopedia of Public international law (2015) para 4.
[1376] *Ibid.*

furthermore difficult to assess the value of oil and gas deposits that have been surmised, but the presence of which is not scientifically proven. This also applies to the political value of maritime zone, which cannot easily be measured, compared or expressed in monetary terms. Consequently, it would not appear that an "abuse of rights" of this type has occurred in the South China Sea. *Kiss* has described a second type of "abuse of rights", the *détournement de pouvoir*. A *détournement de pouvoir* would require that China's building projects were motivated by the intention to circumvent UNCLOS, and that China's conduct has caused injury.[1377] However, there appears to be insufficient evidence of China's intention to circumvent the *Regime of islands*. While China has justified some of its maritime zones by citing the *Regime of islands*,[1378] China has also consistently invoked historic title and the validity of the nine-dash line in support of its position.[1379] And while there certainly seems to be a causal connection between the political tensions in the South China Sea and the accelerated island building process, this does not automatically imply that the *Regime of islands* motivated China to build. The dredging of land and fortification of islands can just as easily be attributed to a desire to demonstrate rightful sovereignty, to enforce historic claims or to showcase military power. As *Davenport* has noted, "[t]he sovereignty claims are based on a byzantine combination of historical discovery and usage, and cession by colonial powers, which the claimants have attempted to strengthen through effective occupation"[1380]. Sovereignty however, is a subject not covered by the *Regime of islands.* It can thus not easily be argued that construction works aiming to project sovereign authority are an attempted circumvention of the *Regime of islands*. Furthermore, the fortification and enlargement of Mischief Reef, a low-tide elevation, followed by claims that such elevations amount to territory that can be appropriated and that generates entitlement to maritime zones is contrary to Article 13,[1381] but is not an abuse of the *Regime of islands*. China has not submitted official charts showing the precise extent of its territorial sea, EEZ and continental shelf but relied mostly on the nine-dash line,[1382] which is an imprecise

[1377] *Ibid.*
[1378] See *South China Sea Arbitration,* para 100, *supra* note 28.
[1379] See also *Dupuy/Dupuy,* A Legal Analysis of China's Historic Rights Claim in the South China Sea, The American Journal of International Law 107:1 (2013) 124 (125).
[1380] *Davenport,* Island-Building in the South China Sea: Legality and Limits, Asian Journal of International Law 8 (2018) 76 (77).
[1381] The arbitral tribunal affirmed that Mischief Reef, like any low-tide elevation, is not subject to appropriation and therefore does not generate entitlement to a territorial sea, an EEZ, or a continental shelf. *South China Sea Arbitration,* para 309, *supra* note 28.
[1382] See Note Verbale from the Permanent Mission of the People's Republic of China to the UN Secretary-General, CML/17/2009, May 7, 2009, <un.org/depts/los/clcs_new/submissions_files/mysvnm33_09/chn_2009re_mys_vnm_e.pdf>; Note Verbale from the Permanent Mission of the People's Republic of China to the UN Secretary-General, CML/18/2009, May 7, 2009, <un.org/depts/los/clcs_new/submissions_files/vnm37_09/chn_2009re_vnm.pdf>.

demarcation line that leaves many questions open. Indeed, the imprecision of China's approach to delimitation has prompted the question of "whether that very vagueness is being used as an element of political strategy"[1383]. With "the overall geographical scope of China's maritime claim remain[ing] essentially unclear"[1384], important questions are left unanswered: we do not know which islands China perceives as generating entitlement to an EEZ and continental shelf. And yet, these are vital questions in the evaluation of whether or not an abuse of Article 121 took place.

In conclusion, even if one adopts the viewpoint that an EEZ or continental shelf claim based on construction works undertaken with the aim of enlarging these very zones, constitutes an abuse of the *Regime of islands*, it appears prohibitively difficult to prove that China intended to circumvent Article 121.

B. An Examination Based on the Understanding that the Underlying Intentions Having Led a State to Develop a Feature are Immaterial to its Legal Status

This thesis does not support the position that the motivation behind construction projects can have an impact on an island's status or on the validity of an associated EEZ or continental shelf claim.[1385] When legally distinguishing between rocks and islands in the narrow sense, it matters only whether the island in question is objectively capable of sustaining human habitation or economic life. We shall examine what this means in practice by taking a closer look at the legal status of some the elevations that were front and center during the *South China Sea Arbitration*, which are among the most contested of the region.

1. Scarborough Shoal

Five to seven coral elevations belonging to Scarborough Shoal are naturally above water at high tide, which means that Scarborough Shoal is an island within the meaning of Article 121 (1).[1386] The low-tide elevations that are part of Scarborough Shoal do not *eo ipso* generate entitlement to any maritime zones, yet could be used in the establishment of the baseline of Scarborough Shoal, as they lie within a 12 nm radius.[1387] Scarborough Shoal was categorized as a "rock" in the award concluding the *South China Sea Arbitration* because it is without harbor or settlement.[1388] Scarborough Shoal has however been described as harboring rich fishing

[1383] *Dupuy/Dupuy,* A Legal Analysis of China's Historic Rights Claim in the South China Sea, The American Journal of International Law 107:1 (2013) 124 (124).
[1384] *Ibid,* 128.
[1385] Part 2 Section 3 II.
[1386] *South China Sea Arbitration*, para 555, *supra* note 28.
[1387] Art 13 UNCLOS.
[1388] *South China Sea Arbitration,* para 556, *supra* note 28.

grounds frequented by fishermen from China, the Philippines, Taiwan and Vietnam.[1389] China has even remarked upon the fact that Chinese fishermen have been fishing in this area "[s]ince ancient times"[1390]. As fisheries within an island's territorial sea are as much part of an island's "economic life of [its] own" as any economic activity on dry land,[1391] it would seem that Scarborough Shoal is an island in the narrow sense by virtue of sustaining fisheries. There has, as of 2019, been no land reclamation on Scarborough Shoal, although it has been reported that such measures might be taken in future.[1392]

2. Johnson South Reef, Fiery Cross Reef, Gaven Reef, McKennan Reef and Cuarteron Reef

Johnson Reef is a natural high tide elevation.[1393] It was, in its pristine state, a lagoon composed of coral and volcanic rock that was mostly submerged, but featured several exposed rocks with the largest rock measuring 1.2 m above mean sea level.[1394] Land reclamation and construction projects have since radically changed the scenery. Following its transformation in what appears to be a military and radar base, the island is now equipped with observation towers, a lighthouse, two wind turbines, a multistory building, a radiation dome and a helipad.[1395] The classification of Johnson Reef as a rock or island in the narrow sense depends on whether or not one recognizes that there is an economic aspect to military installments.[1396] As with any type of "economic life", we must ask ourselves whether the activity on Johnson Reef contributes to GDP, is non-transitory, and located on an island that is well-suited to this purpose. In the absence of evidence to the contrary, it would appear that the military installment is permanent, involves the deployment of paid personnel contributing to GDP and does not appear to be superfluous at this location, especially in view of regional tensions. Therefore, it would seem that Johnson Reef qualifies as an island in the narrow sense. The same classification applies to Fiery Cross Reef, Gaven Reef, McKennan Reef and Cuarteron Reef, where conditions are very similar.

[1389] *Ibid,* para 761.
[1390] Ministry of Foreign Affairs, People's Republic of China, *Foreign Ministry Spokesperson Liu Weimin's Regular Press Conference,* April 18, 2012, <nl.china-embassy.org/eng/wjbfyrth/t925289.htm>.
[1391] See Part 2 Section 2 VI D 1.
[1392] South China Sea: Philippines sees Chinese attempt to build on reef near its coast, International Business Times, February 8, 2017 <https://www.ibtimes.co.uk/philippines-sees-chinese-attempt-build-reef-near-its-coast-1605358>.
[1393] *South China Sea Arbitration,* para 351, *supra* note 28.
[1394] *Ibid,* paras 347, 348.
[1395] South China Sea Photos Suggest a Military Building Spree by Beijing, The New York Times, February 8, 2018, <https://www.nytimes.com/2018/02/08/world/asia/south-china-seas-photos.html>.
[1396] For an in-depth analysis of this question, see Part 2 Section 2 VI D 5 c.

3. Itu Aba

Itu Aba is the largest of the Spratly Islands and partially self-sufficient. There are four fresh water wells on Itu Aba,[1397] the quality of which the arbitral tribunal in the *South China Sea Arbitration* has described as "drinkable" and "better than elsewhere".[1398] To a limited degree, the population is furthermore sustained by agricultural produce grown on the island itself: as the arbitral tribunal has remarked, historically, papaya trees, fine palm trees, pineapple trees and sugar cane grew on the island.[1399] Nowadays, there are banana and coconut trees, and the members of the Taiwanese coast guard stationed on Itu Aba eat local vegetables grown in small plots.[1400] While there seem to be no major fishing activity in its territorial sea as of recently, there is evidence that historically, small numbers of fishermen, mostly from Hainan, have fished in the waters surrounding Itu Aba.[1401] On Itu Aba's surface area of approximately 0.43 square kilometres,[1402] there are also a lighthouse, a runway, a port and buildings housing the 150 to 200 staff members.[1403] In order for the members of the coast guard stationed on Itu Aba to have formed a "human habitation", it would be necessary for them to have formed a long-term socially well-integrated community.[1404] While it is difficult to assert whether this is the case from afar, it can not be assumed in the case of an official presence like the coast guard, where personnel is usually stationed on a short-term or rotational basis and is often separated from family. However, if one takes into consideration that bodies such as the coast guard are not without an economic component, as this author does, it would seem that Itu Aba is an island in the narrow sense by virtue of sustaining "economic life". As the arbitral tribunal has observed, the historic use of Itu Aba as a catch area reveals "a pattern of temporary residence on the features for economic purposes" and while the fishing activity has ceased, this "economic life" could presumably be taken up again.[1405] More importantly, the permanent presence maintained by the Taiwanese coast guard is of a significant size, the associated remunerations contribute to GDP, and the outpost fulfills a useful purpose in a heavily trafficked area.[1406] Based on these qualities and the definition of "economic life" as it has been presented in this thesis,[1407] Itu Aba

[1397] *South China Sea Arbitration,* para 582, *supra* note 28.
[1398] *Ibid,* paras 581, 583.
[1399] *Ibid,* para 586.
[1400] Island or Rock? Taiwan Defends Its Claim in South China Sea, The New York Times, May 20, 2018 <https://www.nytimes.com/2018/05/20/world/asia/china-taiwan-island-south-sea.html>.
[1401] *South China Sea Arbitration,* para 615, *supra* note 28.
[1402] *Ibid,* para 401.
[1403] *Ibid.*
[1404] Part 2 Section 4.
[1405] For the significance of evidence of historic usage see Part 2 Section 2 VI E 2.
[1406] For a look at military outpost and their potential role as an expression of "economic life", see Part 2 Section 2 VI D 5 c.
[1407] Part 2 Section 4.

qualifies as an island entitled to both EEZ and continental shelf. In their pronouncements made in the context of the *South China Sea Arbitration* the arbitral tribunal, China and the Philippines all attached considerable importance to the matter of whether or not there are or were fruit trees on Itu Aba and whether the water consumed by its inhabitants is derived from natural springs, from rain water collection, from desalinization plants or from imports.[1408] It would however seem that, in light of the fact that reliance on outside supply networks has become the norm among island nations,[1409] or indeed, the international community in general, a definition that equates "human habitation" or "economic life" with "capacity for agriculture" is not only not covered by the wording of the *Regime of islands*, it is also a definition wholly out of step with contemporary island societies and therefore unbefitting of a dynamic legal framework such as the UNCLOS.[1410]

Section 4 Conclusion of Part Two

The main focus of the second Part of this thesis has been the interpretation of UNCLOS' *Regime of islands*, and in particular its third paragraph, which stipulates that "[r]ocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf". This phrase is correctly understood as stipulating that an island fully entitled to both EEZ and continental shelf must be theoretically[1411] capable of sustaining either a long-term[1412] socially well-integrated[1413] community[1414] or[1415] a long-term[1416] or recurrent activity that contributes to GDP[1417] and that is useful[1418] in the specific location. An "island" is a "*naturally formed* area of land, surrounded by water, which is above water at high tide [emphasis added]"[1419]. "Rocks" and "islands in the narrow sense", being subcategories of "islands",[1420] must also meet these basic requirements. However, the conditions that distinguish an "island in the narrow sense" from a "rock", namely the capacity to sustain human habitation or economic life, are not required to persist in an island's natural state.[1421] This entails that man-

[1408] *South China Sea Arbitration,* paras 100, 428, 431, 437, 581 – 586, *supra* note 28.
[1409] Part 2 Section 2 IV C 2.
[1410] For the argument in favour of applying a dynamic interpretation to the UNCLOS see Part 2 Section 1 I B.
[1411] Part 2 Section 2 II.
[1412] Part 2 Section 2 V E 3.
[1413] Part 2 Section 2 V E 5.
[1414] Part 2 Section 2 V B.
[1415] Part 2 Section 2 III D.
[1416] Part 2 Section 2 VI D 4.
[1417] Part 2 Section 2 VI D 2.
[1418] Part 2 Section 2 IV A 4 and Part 2 Section 2 VI D 3.
[1419] Art 121 (1) UNCLOS.
[1420] See introductory chapter "Remarks on the Terminology Employed".
[1421] Part 2 Section 2 IV C.

made changes to the environment of a natural high-tide elevation, may turn a "rock" into "an island in the narrow sense" if these changes have the effect that human habitation or economic life becomes sustainable on the island. It also means that the requisite "human habitation" may rely on imported goods for survival without detriment to an island's status as an island in the narrow sense. In spite of this, many of the islands in the narrow sense evaluated in the *South China Sea Arbitration* were wrongly identified as "rocks" because they had been structurally altered.[1422] Naturally occurring events, such as volcanic activity, erosion or alluvial deposits may furthermore alter the legal classification of any island or even low-tide elevation.[1423] However, if changes to an island's environment occur during the course of a trial before an international court or tribunal, the final legal classification of the island would have to be based on the time of the claim.[1424]

Members of a "human habitation", or long-term socially well-integrated community, are required to reside on the island out of their own free will[1425] and must be integrated into local society through social[1426] and familial connections. "Economic life" refers to a long-term or recurrent activity that contributes to GDP and that is useful in the specific location. It makes no difference whether this activity takes place on dry land or within an island's territorial sea.[1427] Consequently, long-term and sustainable fishing or drilling within the territorial sea amounts, in and of itself, to an "economic life"; a harbor or residences on the island itself are not required. From these findings, it is possible to draw inferences for the most frequent uses minor islands are put to. Due to a low degree of social integration and the often temporary nature of the staff members' stay, weather stations and research facilities often do not meet the definition of "human habitation",[1428] but will often qualify as "economic life"[1429] because of their long-term contribution to national economic output. This is also true of lighthouses[1430] and military[1431] outposts. Where an island does not currently support any "human habitation" or "economic life", but seems suitable in this respect, there is a need to measure its theoretical capability. Some suggested measuring methods base an island's legal status on whether certain "habitability indicators" – such as arable land, shelter, freshwater and sufficient plants or

[1422] See Part 2 Section 3 IV B and Part 2 Section 2 IV C.
[1423] Part 2 Section 1 V A.
[1424] Part 2 Section 1 V B.
[1425] Part 2 Section 2 V E 4.
[1426] Part 2 Section 2 V E 5.
[1427] Part 2 Section 2 VI D 1.
[1428] Part 2 Section 2 V E 5.
[1429] Part 2 Section 2 VI D 2.
[1430] Part 2 Section 2 V E 1 and Part 2 Section 2 VI D 2.
[1431] Part 2 Section 2 V E 3 and Part 2 Section 2 VI D 5 b.

wildlife to sustain a population – exist in the island's natural state.[1432] Methods overly relying on such natural habitability indicators seem outdated and inapplicable *inter alia* because they equate "human habitation" with pre-industrial societies that are autarchic and indigenous.[1433] An alternative and preferable assessment method would be to evaluate an island's capacities by looking to evidence of past settlements or economic use.[1434] Where this is not instructive, one should compare the island under examination to other islands. If islands with characteristics similar to those of the island under examination actively sustain human habitation or economic life, this allows the conclusion that this would also be possible on the island under examination.[1435] In some instances, environmental factors can provide evidence of an island's theoretical capacity for "economic life": rich fishing grounds or exploitable and verifiable mineral resources can serve to illustrate that "economic life" is possible.[1436] These methods for assessing the theoretical capacity are also relevant to cases where islands are left unexploited after being incorporated into an MPA (Marine Protected Area). Here, any state claiming an EEZ or continental shelf would be obligated to demonstrate that it is foregoing a real economic benefit in not exploiting the island's capacities.[1437]

Some authors have indicated that island building for the express purpose of turning a "rock" into an "island in the narrow sense" may present a problem in view UNCLOS' prohibition of abusing the rights it conveys.[1438] Such conduct does however not constitute an "abuse of rights" because it does not circumvent the *Regime of islands* or its purpose. "Human habitation" and "economic life" are not required to be sustainable in an island's natural environment, which entails that structural measures paving the way for economic or residential use are not contrary to UNCLOS.[1439] The underlying motivations of a state altering the natural environment of an island are thus irrelevant to the island's legal status.[1440]

This part has also commented on the scope of application of the *Regime of islands*. Article 121 (3) is without prejudice to the capacity of rocks that are situated within the territorial sea of the

[1432] Part 2 Section 2 V F 1.
[1433] Part 2 Section 2 V F 4.
[1434] Part 2 Section 2 V F 3 and Part 2 Section 2 VI E 2.
[1435] Part 2 Section 2 V F 2 and Part 2 Section 2 VI E 3.
[1436] Part 2 Section 2 VI E 1.
[1437] Part 2 Section 2 VI D 5 b.
[1438] *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... », Annuaire français de droit international 40 (1994) 876 (904); *Clagett,* Competing Claims of Vietnam and China in the Vanguard Bank and Blue Dragon Areas of the South China Sea: Part I, Oil & Gas L. & Tax'n Review 13 (1995) 375 (386), cited in *Charney,* Rocks that Cannot Sustain Human Habitation, The American Journal of International Law 93 (1999) 863 (871, fn 34); *Howland Island Case,* Deposition of Jon Van Dyke, October 31, 2007, 72, *supra* note 413.
[1439] Part 2 Section 2 IV C 1.
[1440] Part 2 Section 3 II.

mainland or an island in the narrow sense – also referred to as "intraterritorial" rocks – to indirectly expand the size of the coastal state's EEZ and continental shelf by way of their inclusion in the baseline.[1441] This entails that the *Regime of islands* is inapplicable to intraterritorial islands, with one exception: a rock cannot enlarge the coastal state's EEZ or continental shelf on the basis that it lies within the territorial sea of a different rock, even if this second rock is part of the territorial sea baseline of the mainland (prohibition of "leap frogging").[1442] Additionally, the *Regime of islands* is applicable to both isolated islands and islands potentially impacting the delimitation of maritime boundaries between states with opposite or adjacent coasts.[1443]

[1441] Part 2 Section 1 IV A.
[1442] *Ibid.*
[1443] Part 2 Section 1 IV B 1.

PART 3 ROCKS IN GENERAL INTERNATIONAL LAW

Ratified by 167 states and the European Union, UNCLOS is a widely applicable multilateral treaty that is, in principle, designed for worldwide participation.[1444] This objective has yet to be achieved: not all States potentially affected by Article 121 (3) - most notably the United States - have ratified UNCLOS.[1445] Indeed, among the states not having ratified UNCLOS and therefore operating outside the Convention's conventional ambit are fourteen coastal states. Besides the United States, these include Cambodia, Colombia, El Salvador, Eritrea, Iran, Israel, Libya, North Korea, Peru, Syria, Turkey, the United Arab Emirates and Venezuela. The question remains which international norms on the maritime zones of islands apply to states that have not ratified or acceded to UNCLOS. If we assume that third parties are not bound by the *Regime of islands*, we must piece together the applicable law from the relevant legal instruments preceding UNCLOS on the one hand and the remaining body of customary law on the other. It however seems likely that widespread state practice consistent with Article 121 (3) combined with the required *opinio juris* has led to the formation of a rule of customary international law conterminous with Article 121 (3). While some scholars have expressed skepticism,[1446] the ICJ has found that "Article 121 […] has the status of customary international law".[1447] Following a thorough examination of the impact Article 121 (3) has had on customary international law, this thesis shall briefly describe the legal framework that would be applicable if we assume that Article 121 (3) has not become reflective of customary international law. Lastly, we shall look into two other general international law doctrines affecting the maritime zones of islands. These are the Portico Doctrine and the Doctrine of Minor Geographical Features.

Section 1 The Formation of a Customary Rule Conterminous with the *Regime of islands*

As the ICJ found in the *Maltese Islands Case*, "it cannot be denied that the 1982 Convention is of major importance, having been adopted by an overwhelming majority of States ; hence it is clearly the duty of the Court, even independently of the references made to the Convention by

[1444] Consequently, the preamble of UNCLOS states that the Convention shall benefit "all peoples of the world". For the efforts of the Secretary-General of the United Nations to encourage participation see also United Nations, Department of Public Information, Secretary-General Urges Universal Participation in Law of the Sea Convention as General Assembly Commemorates 30-year Anniversary of Essential Treaty, Press Release, SG/SM/14710, December 10, 2012.

[1445] Other coastal States not having ratified UNCLOS: Cambodia, Colombia, El Salvador, Eritrea, Iran, Israel, Libya, North Korea, Peru, Syria, Turkey, United Arab Emirates, Venezuela.

[1446] *Talmon,* Article 121 - Regime of Islands in Proelss (ed.), The United Nations Convention on the Law of the Sea - A Commentary (2017) 858 (861); *Hafner,* Some Remarks on the South China Sea Award: Itu Aba versus Clipperton, Chinese (Taiwan) Yearbook of International Law and Affairs 34 (2016) 1 (16).

[1447] *Colombian Islands Case,* para 139, *supra* note 34.

the Parties, to consider in what degree any of its relevant provisions are binding upon the Parties as a rule of customary international law"[1448]. The omnipresence of UNCLOS in all matters relating to the law of the sea, combined with the sheer frequency with which the *Regime of islands* is invoked in international discourse raises the question of whether the provision has, in part or in total, become reflective of customary international law. As observed by the ILC, the process of customary law emerging on the basis of treaty provisions "is a process that is not lightly to be regarded as having occurred"[1449]. The following chapters will take a close look at whether the legal prerequisites for the completion of this process have been met with regard to the *Regime of islands*, and in particular with regard to its third paragraph.

I. Methodology

A. Traditional Legal Sources for the Creation of Custom

As a general rule, international treaties only create rights and obligations *inter partes*.[1450] An exception to this norm is referenced in Article 38 VCLT, which affirms the possibility of a conventional stipulation becoming customary international law. Customary international law, in turn, is defined by the Statute of the ICJ as "general practice accepted as law"[1451]. To meet this description, states must align their conduct with a specific rule, in this case the *Regime of islands,* all while acting under the impression that they are obligated to do so, which is referred to as the requirement of *opinio juris*. The ICJ's judgments addressing the issue of the legal requirements for the creation of customary international law are furthermore widely cited and regarded as an important guide on the matter. In recent years, the ILC has taken a particular interest in the subject of customary law, and has so far published sixteen Draft Conclusions on Identification of Customary International law.[1452] In the course of this work, the ILC has laid down specific conditions that it finds have to be fulfilled before a conventional rule can be said to reflect customary law.

B. "Instant" Custom

The legal materials cited above as the groundwork of the present-day concept of custom, namely the VCLT, the Statute of the ICJ, the case law of the ICJ and the findings of the ILC,

[1448] *Maltese Islands Case,* para 27, *supra* note 279.
[1449] International Law Commission, Report of the International Law Commission on the Work of its Sixty-eighth Session, A/71/10, 2 May-10 June and 4 July-12 August 2016, Conclusion 11, Commentary (7) [hereafter ILC Draft Conclusions on Identification of Customary International Law].
[1450] Art 34 VCLT.
[1451] Art 38 (b) Statute of the International Court of Justice, June 26, 1945.
[1452] ILC Draft Conclusions on Identification of Customary International Law, 74 et seq, *supra* note 1449.

have in common that they are firmly based on the traditional notion that "custom" in the legal sense only exists where there is state practice and evidence of acceptance as law (= *opinio juris*). But there is a second approach to the identification of customary international law: *Cheng* has found that customary rules can form "instantly" without being preceded by state practice supportive of the relevant legal trend. While *Cheng*'s views have enjoyed some support, they remain controversial. *Mejía-Lemos* has noted that *Cheng*'s concept of "instant" custom has "been met with disapproval and criticism expressed with a varying degree of strength"[1453], has been rejected by international courts and is unsupported by state practice.[1454] Others, such as *Alvarez-Jiménez*, have argued that the ICJ has at times embraced a "Flexible Deductive Approach to the Declaration of Rules of Customary International Law"[1455] which involves a "loosening of the requirements for inference of the existence of opinio juris"[1456]. The position of the ICJ is indeed somewhat ambiguous: seemingly affirming that there is a possibility of customary law forming "instantly", the ICJ declared in the *North Sea Continental Shelf Cases* that "[w]ith respect to the other elements usually regarded as necessary before a conventional rule can be considered to have become a general rule of international law, it might be that, even without the passage of any considerable period of time, a very widespread and representative participation in the convention might suffice of itself, provided it included that of States whose interests were specially affected"[1457]. In the very same decision, the ICJ explained that in the process of customary law emerging from a treaty, it is "an indispensable requirement […] that within the period in question, short though it might be, State practice, […] should have been both extensive and virtually uniform in the sense of the provision invoked"[1458]. The formation of "instant" custom is often discussed in the context of the law of the sea.[1459] So what does the theory of "instant" custom stand for? In 1965, *Cheng* made the revolutionary argument that customary law did not, as had been previously assumed, require both state practice and *opinio juris*, as "there need […] be no usage at all in the sense of repeated practice, provided that the *opinio juris* of the States concerned can be clearly established"[1460]. Practice, or "usage" in the

[1453] *Mejía-Lemos,* Some considerations regarding "'Instant' International Customary Law" fifty years later, Indian Journal of International Law 55:1 (2015) 85 (91).
[1454] *Ibid,* 105, 106.
[1455] *Alvarez-Jiménez,* Methods for the Identification of Customary International Law in the International Court of Justice's Jurisprudence: 2000–2009, International and Comparative Law Quarterly 60 (2011) 681 (687).
[1456] *Ibid.*
[1457] *North Sea Continental Shelf Cases,* para 73, *supra* note 50.
[1458] *Ibid,* para 74.
[1459] *Mejía-Lemos,* Some considerations regarding "'Instant' International Customary Law" fifty years later, Indian Journal of International Law 55:1 (2015) 85 (97).
[1460] *Cheng,* United Nations Resolutions on Outer Space: „Instant" International Customary Law?, Indian Journal of International Law 5 (1965) 23 (36).

terminology of *Cheng*, was suddenly reduced to a means of evidence: "usage, instead of being a constitutive and indispensable element, merely provides evidence of the existence and contents of the underlying rule and of the requisite *opinio juris*"[1461]. *Cheng*'s exclusive focus on *opinio juris* is sometimes referred to as "mono-elementalism"[1462]. With *opinio juris* the sole constitutive element of customary law, *Cheng* naturally found that customary law could form as rapidly as the subjects of international law could form a decision: instantly.[1463] The cause of *Cheng*'s engagement with the nature of customary law was his interest in whether resolutions 1721A and 1962 adopted by the UN General Assembly could *eo ipso* create customary norms or whether they were merely "a means for identifying the existence and contents of a new *opinio juris*"[1464]. *Cheng* found the latter conclusion to be true, because the relevant UN General Assembly resolutions contained only optional principles. The existence of the requisite *opinio juris communis* would have meant that states believed "that what they are enunciating in the resolution represents binding rules of international law"[1465]. *Cheng*'s view attaches great importance to the *intent* of the subjects of international law. If we apply *Cheng*'s findings to the case of Article 121 (3), it becomes obvious that the adoption of Article 121 (3) did not instantly generate a conterminous rule of customary international law, because such a development would not have been covered by *opinio juris communis*. While UNCLOS does aim for universality,[1466] and many of its provisions appear to address non-party states,[1467] it remains a treaty. As a treaty, UNCLOS binds only those states having ratified or acceded to it, it was consequently not intended as a global constitution binding parties and non-parties alike. As noted by the representative of the United States, "[n]either the Conference nor the States indicating an intention to become parties to the Convention have been granted global legislative power"[1468]. The *opinio juris* of the participants shows that "the Convention does not entail rights and obligations for States which are not parties to it, with the exception of rules that correspond

[1461] *Ibid,* 45.
[1462] *Mejía-Lemos,* Some considerations regarding "'Instant' International Customary Law" fifty years later, Indian Journal of International Law 55:1 (2015) 85 (97).
[1463] *Cheng,* United Nations Resolutions on Outer Space: „Instant" International Customary Law?, Indian Journal of International Law 5 (1965) 23 (46).
[1464] *Ibid.*
[1465] *Ibid,* 39.
[1466] According to the preamble of UNCLOS, the Convention shall benefit "all peoples of the world". The Secretary-General of the United Nations regularly encourages states to ratify the Convention. See United Nations, Department of Public Information, Secretary-General Urges Universal Participation in Law of the Sea Convention as General Assembly Commemorates 30-year Anniversary of Essential Treaty, Press Release, SG/SM/14710, December 10, 2012.
[1467] Part 3 Section 1 II C.
[1468] Official Records of the Third United Nations Conference on the Law of the Sea, Vol. XVII, A/CONF.62/WS/37, 243 (United States).

to customary law"[1469]. On more than one occasion, states partaking in the Third United Nations Conference on the Law of the Sea have affirmed that they viewed certain principles described in UNCLOS, such as the right to innocent passage,[1470] the breadth of the territorial sea,[1471] the rights conferred by the EEZ[1472] and the definition of the continental shelf[1473] as reiterations of pre-existing customary rules. These statements did not extend to the *Regime of islands*.[1474] There is only a single example of a state proclaiming that the *Regime of islands* as well, was already binding *qua* customary law at the time of UNCLOS' adoption.[1475] It appears an accurate position to hold that, while certain principles enshrined within UNCLOS were agreed to be of a customary nature *ab initio*, the *opinio juris communis* in respect of Article 121 (3) was that it bound only states having become a party to UNCLOS. The application of *Cheng's* theory therefore leads to the result that Article 121 (3) has not become customary international law "instantly" upon adoption of UNCLOS. The following chapters will examine whether a customary rule corresponding to Article 121 (3) has established itself over time.

C. Pragmatism and Idealism in Customary International Law

Charney has argued that "Article 121(3) is law for all states with respect to the seaward limits of the continental shelf. Because it is also an inherent part of the regime of the exclusive economic zone, the same case can be made that Article121 (3) is binding on states that are not parties to the LOS Convention with respect to that regime."[1476] *Charney* appears to make the argument that individual conventional rules can become binding *qua* custom by virtue of their close association with other rules that have already completed their process of ripening into rules of customary international law. The underlying question here is whether this close association is sufficient proof of the customary law nature of a rule, or whether we have to verify the existence of supportive state practice and *opinio juris* in accordance with the traditional definition of customary law, as endorsed by the ICJ and the ILC. Nearly all coastal

[1469] *Ibid,* 241 (Italy).
[1470] *Ibid,* 241 (France); 242 (Italy).
[1471] *Ibid,* 241 (France); Official Records of the Third United Nations Conference on the Law of the Sea, Vol. XVII, A/CONF.62/SR.189, 76 (Turkey).
[1472] Official Records of the Third United Nations Conference on the Law of the Sea, Vol. XVII, A/CONF.62/WS/37, 244 (United States); Official Records of the Third United Nations Conference on the Law of the Sea, Vol. XVII, A/CONF.62/SR.189, 68 (Yugoslavia).
[1473] Official Records of the Third United Nations Conference on the Law of the Sea, Vol. I, A/CONF.62/ SR.46, 203 (Canada).
[1474] Official Records of the Third United Nations Conference on the Law of the Sea, Vol. IX, A/CONF.62/SR.98, 41 (Switzerland).
[1475] United Nations Office for Ocean Affairs and the Law of the Sea, The Law of the Sea: Régime of Islands, UN Sales No. E.87.V.11 (1988) 112 (Greece).
[1476] *Charney,* Rocks that Cannot Sustain Human Habitation, The American Journal of International Law 93 (1999) 863 (872).

states – including prominent non-party states such as the United States – have made use of the possibility of claiming an EEZ, which has in turn led to the wide-spread recognition of the EEZ regime as customary international law.[1477] According to *Charney*, this recognition incorporates Article 121 (3). *Charney*'s treatment of UNCLOS as an integral whole is supported by its preamble, which stipulates that "the problems of ocean space are closely interrelated and need to be considered as a whole". While Article 298 allows for a set of optional exceptions,[1478] Article 309 generally prohibits reservations to UNCLOS and has thereby lent weight to the argument that no individual rule of UNCLOS is intended to pass into customary law.[1479] The position of Article 121 (3) as an indivisible part of UNCLOS' EEZ and continental shelf system therefore seems envisioned by its drafters, and evokes an image of fairness: it appears equitable to require that states can only benefit from the vast exclusive exploitation zones embedded in UNCLOS as long as they respect the explicitly included limits set for these zones. However, if large numbers of states choose to ignore the restriction embedded in Article 121 (3), it would appear erroneous to argue that the provision has become customary international law by virtue of its close association with the EEZ regime, but in defiance of state practice and concomitant *opinio iuris*. Customary international law is messy in the sense that it does not seamlessly insert itself into pre-existing international treaties. Rather, it is a consequence of *Realpolitik*, a reflection of the *de facto* legal conduct of states. Seemingly in support of this view, *Villiger* has noted that "it is unlikely that State practice and *opinio juris* will concern whole sets of rules, or entire conventions. Rather, States in their practice contribute to the formation of (or apply) individual rules"[1480].

II. From Treaty to Custom

As the ILC has aptly cautioned, "in and of themselves, treaties cannot create customary international law or conclusively attest to it"[1481]. Rather, under certain conditions, "multilateral conventions may have an important role to play in recording and defining rules deriving from custom, or indeed in developing them"[1482].

[1477] The EEZ's standing in customary international law is given additional thought in Part 3 Section 2.
[1478] Article 298, entitled "Optional exceptions to applicability of section 2", allows member States to declare that they will not be bound by the obligation to submit themselves to the compulsory dispute settlement procedure incorporated in section two of UNCLOS. The list of legal matters potentially subject to this declaration covers important issues such as disputes concerning delimitation, sovereignty or historic bays.
[1479] *Harrison,* Evolution of the law of the sea: developments in law-making in the wake of the 1982 Law of the Sea Convention (2007) 44.
[1480] *Villiger,* Customary International Law and Treaties[2] (1997) 176.
[1481] Conclusion 11, Commentary (2) ILC Draft Conclusions on Identification of Customary International Law, *supra* note 1449.
[1482] *Maltese Islands Case*, para 27, *supra* note 279.

A. Categories of Treaty Provisions Reflective of Customary International Law

Under the terms of Conclusion 11 of the ILC's Draft Conclusions on Identification of Customary International Law, there are three possible scenarios in which a conventional provision may be found to be reflective of customary law. According to the first paragraph of Conclusion 11,

> "A rule set forth in a treaty may reflect a rule of customary international law if it is established that the treaty rule:
>
> (a) codified a rule of customary international law existing at the time when the treaty was concluded;
>
> (b) has led to the crystallization of a rule of customary international law that had started to emerge prior to the conclusion of the treaty; or
>
> (c) has given rise to a general practice that is accepted as law (*opinio juris*), thus generating a new rule of customary international law."[1483]

Now, if we look closely at the *Regime of islands* in today's UNCLOS, we may come to realize that there are vast differences in the respective history and recognition of its three paragraphs. As a brief reminder, these are the three paragraphs of Article 121:

> 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.

The rule that islands are naturally formed high tide elevations surrounded by water, and the rule that maritime zones shall be accorded to islands in the same way as to other land territory, that is to say the stipulations of paragraphs one and parts of paragraph two, have existed for a long time. They are firmly entrenched in international law and relatively uncontroversial. "Islands" have been defined as high tide elevations throughout the 20th century, as is evident from the

[1483] Conclusion 11 ILC Draft Conclusions on Identification of Customary International Law, *supra* note 1449.

Imperial Conference 1923,[1484] the 1956 LOS Articles,[1485] and the First United Nations Conference on the Law of the Sea.[1486] Article 10 of the Convention on the Territorial Sea and the Contiguous Zone 1958 defines an island as "a naturally formed area of land, surrounded by water, which is above water at high tide"[1487]. This rule is reproduced in identical terms in today's *Regime of islands.* The 1958 Geneva Conventions laid down that islands generated entitlement to the territorial sea, the contiguous zone and the continental shelf in the same way as any other land area.[1488] This basic understanding of islands appears to have been uncontested among states and judicial bodies prior to the adoption of UNCLOS. It would therefore seem reasonable to hold that the *Regime of islands'* paragraphs one and the part of paragraph two that establishes that the maritime zones of islands are equal to that of other land areas were merely codifying a pre-existing rule. The ICJ has argued in the *Persian Gulf Case* that Article 121 (2) is reflective of customary international law, at least insofar as it postulates that "islands, regardless of their size, in this respect enjoy the same status, and therefore generate the same maritime rights, as other land territory"[1489]. The legal quality of the first two paragraphs of Article 121 as rules of customary international law has also been affirmed in the *Jan Mayen Case (Iceland/Norway)*.[1490] To sum up, paragraph one and the part of paragraph two that establishes that the maritime zones of islands are equal to that of other land areas of the *Regime of islands* seem to fit the scenario described in Conclusion 11 (a) of the ILC's Draft Conclusions on Identification of Customary International Law. The relationship vis-à-vis customary international law of the *Regime of island's* third paragraph, on the other hand, is difficult to ascertain. It contains a distinction between "rocks" and islands that, while not completely unprecedented in international law,[1491] was not common prior to the adoption of UNCLOS and was, in its present form, formulated specifically to address the interests of the states participating in the Third United Nations Conference on the Law of the Sea. It would therefore be quite impossible to apply Conclusion 11 (a) of the ILC's Draft Conclusions on Identification of Customary International Law and conclude that Article 121 (3) was a codification of an

[1484] Imperial Conference 1923, Report of Inter-Departmental Committee on the Limits of Territorial Waters, Document T.118/118/380, Public Record Office Ref. F. O. 372/2108 (1924) 5, cited in *Brown,* Rockall and the Limits of National Jurisdiction of the UK, Marine Policy, July (1978) 181 (206).
[1485] Art 10 of the 1956 LOS Articles, *supra* note 36.
[1486] Art 10 Convention on the Territorial Sea and the Contiguous Zone, *supra* note 72.
[1487] *Ibid.*
[1488] *Ibid*; Art 1 Convention on the Continental Shelf, *supra* note 72.
[1489] *Persian Gulf Case*, para 185, *supra* note 303.
[1490] *Jan Mayen Case (Iceland/Norway)* 3, *supra* note 1201.
[1491] See Imperial Conference 1923, Report of Inter-Departmental Committee on the Limits of Territorial Waters, Document T.118/118/380, Public Record Office Ref. F. O. 372/2108 (1924) 5, cited in *Brown,* Rockall and the Limits of National Jurisdiction of the UK, Marine Policy, July (1978) 181 (206).

existing customary rule. As discussed previously,[1492] we also have no choice but to reject the notion that Article 121 (3) instantly crystallized with its adoption, which would be the scenario described in Conclusion 11 (b) of the ILC's Draft Conclusions on Identification of Customary International Law. If reflective of customary law at all, Article 121 (3) "has given rise to a general practice that is accepted as law (*opinio juris*), thus generating a new rule of customary international law" as per Conclusion 11 (c) of the ILC's Draft Conclusions on Identification of Customary International Law. This possibility necessitates a detailed examination.

B. Treaties Having Obtained Near-Universal Acceptance

According to the ILC, "[t]he extent of participation in a treaty may be an important factor in determining whether it corresponds to customary international law; treaties that have obtained near-universal acceptance may be seen as particularly indicative in this respect"[1493]. UNCLOS holds this special position due to having attracted nearly universal membership: 167 states, among them the vast majority of coastal states, as well as the European Union, are party to UNCLOS. UNCLOS was explicitly named as an example of a treaty having obtained near-universal acceptance by *Wood*, in his function as Special Rapporteur to the ILC.[1494] While the widespread recognition of UNCLOS thus increases the likelihood that at least some of its provisions will come to reflect customary provisions, this does not imply that the legal requirements for the formation of custom, such as state practice and *opinio juris*, decrease in significance.[1495]

C. A Provision of "fundamentally norm creating character"

According to the case law of the ICJ, in order for a customary rule to emerge on the basis of a conventional rule, it is "necessary that the provision concerned should, at all events potentially, be of a fundamentally norm creating character such as could be regarded as forming the basis of a general rule of law"[1496]. This sentiment is shared by the ILC, which refers to the ICJ's pronouncement to this effect in its Draft Conclusions on Identification of Customary International Law.[1497] The view that it is significant whether a conventional rule evinces a

[1492] Part 3 Section 1 I B.
[1493] Conclusion 11, Commentary (3) ILC Draft Conclusions on Identification of Customary International Law, *supra* note 1449.
[1494] International Law Commission, Fifth report on identification of customary international law by Special Rapporteur Michael Wood, A/CN.4/717, March 14, 2018, 39.
[1495] *Ibid.*
[1496] *North Sea Continental Shelf Cases,* para 72, *supra* note 50.
[1497] Conclusion 11, Commentary (7) ILC Draft Conclusions on Identification of Customary International Law, *supra* note 1449.

"norm creating" character is not shared by everyone: as *Danilenko* has explained, "although treaty rules of a general nature are more likely to pass into the *corpus* of general customary law, in principle any treaty provision may acquire a general character as a result of the subsequent developments in state practice"[1498]. Nevertheless, on account of the endorsement of this criterion by both the ICJ and the ILC, some thoughts on its application to the case of the *Regime of islands* appear in order. According to *Villiger*, the norm creating character of a rule can be indicated by its being addressed to "a potentially unlimited, general number of subjects, rather than individualized ones"[1499]. It seems that UNCLOS easily meets this condition. It is designed for worldwide participation and affects all states. The language UNCLOS uses confirms that it is indeed addressed to all states: most articles refer to "States", while only very few are addressed to "States Parties", with the latter provisions being comparatively sparse. Provisions addressed to "States Parties" are to be found in the parts of the Convention covering the rights and obligations in the Area,[1500] the dispute settlement mechanism of UNCLOS and naturally in the parts regulating the signing and ratification of UNCLOS,[1501] as well as accession to it.[1502] The conceptual distinction between "States" and "States Parties" creates the impression that the vast majority of provisions – those addressed to "States" – potentially address all members of the international community, while a selected view provisions – those mentioning "States Parties" – differentiate between states having ratified UNCLOS and those that have not.[1503] Furthermore, UNCLOS, and in particular its provisions pertaining to the entitlement to the EEZ and continental shelf affect coastal states and landlocked states alike. An extension of a coastal state's maritime zones entails a diminution of the earth's common spaces and can thereby be understood as a disadvantage to landlocked states. By addressing and affecting all states, it would seem that the *Regime of islands* has established its general nature and thereby its norm creating character.

D. Reservations

The ICJ has opined that the faculty of making reservations to a conventional provision prevents it from entering into customary law as the associated treaty would "seem to deny to the provisions […] [their] norm-creating character […]"[1504]. The ILC has not shared this strict line

[1498] *Danilenko,* Law-making in the International Community (1993) 161.
[1499] *Villiger,* Customary International Law and Treaties[2] (1997) 177.
[1500] Part XI UNCLOS.
[1501] Part XV UNCLOS.
[1502] Part XVII UNCLOS.
[1503] See also *Harrison,* Evolution of the law of the sea: developments in law-making in the wake of the 1982 Law of the Sea Convention (2007) 43 et seq.
[1504] *North Sea Continental Shelf Cases,* para 72, *supra* note 50.

of reasoning. Rather, the ILC has acknowledged that while "[t]he fact that reservations are expressly permitted to a treaty provision may be significant", it "does not necessarily indicate whether or not the provision reflects customary international law".[1505] UNCLOS prohibits the submission of reservations and exceptions "unless expressly permitted by other articles of this Convention"[1506]. Such exceptions are allowed within the boundaries of Article 298. According to this provision, states may declare themselves exempt from UNCLOS' compulsory procedure entailing binding decisions, a procedure detailed in Articles 286 to 296, but only as far as disputes dealing with select provisions are concerned. For example, a member state may declare that, in the event of a dispute, it will not be bound by UNCLOS' compulsory dispute settlement mechanism to the extent that the dispute addresses military activities.[1507] These "exceptions" appear to meet the ILC's definition of "[r]eservations formulated by virtue of clauses expressly authorizing the exclusion or the modification of certain provisions of a treaty"[1508]. After all, Article 298 contains "a clause expressly authorizing the parties […] to exclude or to modify the legal effect of certain provisions of the treaty with regard to the party that has made the statement"[1509]. In our case, these "certain provisions" are the rules on the compulsory procedure entailing binding decisions. Therefore, according to the ILC's guidelines, exceptions in conformity with Article 298 would seem to "constitute[…] reservation[s] expressly authorized by the treaty"[1510]. Exceptions pursuant to Article 298 have likewise been classified as "reservations" by the arbitral tribunal in the *South China Sea Arbitration*.[1511] The possibility of making exceptions to UNCLOS can however not hinder the emergence of a customary rule on the basis of Article 121 (3), because such exceptions may not be submitted with respect to the application or interpretation of the *Regime of islands*.[1512]

[1505] Conclusion 11 Commentary (5) ILC Draft Conclusions on Identification of Customary International Law, *supra* note 1449.
[1506] Art 309 UNCLOS.
[1507] Art 298 (1) (b) UNCLOS.
[1508] International Law Commission, Guide to Practice on Reservations to Treaties, A/66/10 (2011).
[1509] *Ibid,* 26.
[1510] *Ibid.*
[1511] *South China Sea Arbitration,* para 254, *supra* note 28.
[1512] A member state can declare itself exempt from UNCLOS' compulsory procedure entailing binding decisions, if select provisions of UNCLOS are affected. The *Regime of islands* is not among these select provisions. See Art 298 (1) UNCLOS.

E. State Practice Based on *Opinio Juris*

A treaty provision that was, prior to its adoption, neither a fully-formed customary law provision nor in the middle of the process of crystallizing as customary law, must satisfy the criteria of having "given rise to a general practice that is accepted as law (*opinio juris*)" [1513].

1. The Relevancy of the Practice of Specially Affected States

According to the ICJ, it is vital that state practice considered to confirm the customary status of a rule include that of states that are especially affected by the rule in question.[1514] This is a criterion reiterated by the ILC in the Draft Conclusions on Identification of Customary International Law.[1515] The next step consequently consists therein to identify states that could be described as "specially affected" by Article 121 (3). Our first instinct may be to declare that states whose territories include islands that are unsuitable for inhabitation or economic life must surely be specially affected by Article 121 (3). We will further observe that nearly all states exercising sovereign rights over insular features whose status has given, or might in future give, rise to debate in light of Article 121 (3),[1516] such as the states affected by the South China Sea dispute,[1517] have become parties to UNCLOS. Indeed, of all the states not having acceded to UNCLOS, merely 14 have access to the seas by way of their own coastline. These considerations would seem to confirm that states that are especially affected by Article 121 (3) abide by it – if out of a conventional obligation rather than a customary one. As remarked by *Danilenko*, "[some] areas may lack a distinct group of states having a special interest in the relevant principles and rules"[1518]. *Danilenko* has pointed out that "issues of a global nature, such as those relating to global commons, presumably affect all states without exception"[1519]. And indeed, Article 121 (3) stipulates that "rocks" cannot reduce the Area by generating a continental shelf. The Area is "the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction"[1520] designated to "benefit […] mankind as a whole, irrespective of the

[1513] Conclusion 11 ILC Draft Conclusions on Identification of Customary International Law, *supra* note 1449; Art 38 (b) Statute of the International Court of Justice, June 26, 1945.
[1514] *North Sea Continental Shelf Cases,* para 74, *supra* note 50.
[1515] Conclusion 11 Commentary (7) ILC Draft Conclusions on Identification of Customary International Law, *supra* note 1449
[1516] Most notably Brunei, China, France, Japan, Malaysia, the Philippines, Qatar, Taiwan, the United Kingdom, Vietnam and Yemen.
[1517] This applies to Brunei, China, Malaysia, the Philippines and Vietnam, which all claim varying parts of the Spratly Islands territory, the largest group of islands in the South China Sea. See *Elferink,* The Islands in the South China Sea: How Does Their Presence Limit the Extent of the High Seas and the Area and the Maritime Zones of the Mainland Coasts?, Ocean Development & International Law 32 (2001) 169 (171 et seq).
[1518] *Danilenko,* Law-making in the International Community (1993) 95.
[1519] *Ibid,* 96.
[1520] Art 1 (1) [1] UNCLOS.

geographical location of States, whether coastal or land-locked"[1521]. Article 121 (3) therefore plays the *de facto* role of a provision protecting the global commons from undue appropriation by individual states.[1522] Due to its impact on the global distribution mechanism for marine resources, it can reasonably be held that Article 121 (3) is a rule affecting all states equally. This would imply that there are no "specially affected" states to consider for the purpose of evaluating Article 121 (3). Another reason why placing an undue amount of emphasis on "specially affected" states may be misguided lies therein that, according to *Danilenko*, the label of "specially affected" states may be employed to give undue preference to the acts of the most powerful states which "are always supposed to be 'specially affected' by all or almost all political-legal developments within the international community"[1523]. From this point of view, it seems that the practice of identifying "specially affected" states should be avoided because it tends to promote hegemony to the detriment of the sovereign equality of all states. Nevertheless, in practice, much of the state practice to be examined will hail from coastal states who have a vested interest in Article 121 (3) either because their territory encompasses a presumed "rock" or because their territory borders the waters surrounding a foreign "rock", as these are the states most likely to actively participate in the ongoing discussion of what qualifies a "rock".

2. Conventional Obligations vs. Customary Obligations

In order to affirm the customary law status of Article 121 (3), the evidence has to show that states have aligned their conduct with this provision while acting under the impression that customary law obligates them to do so. However, Article 121 (3) is above all a conventional rule: interactions between state parties that are consonant with the *Regime of islands* primarily confirm the states' recognition of a conventional obligation. Only if there are specific indications to this effect can conduct between states parties be interpreted as based on the states' conviction that they are bound by a rule that is both conventional and customary. As the ILC has found, "[i]t is important that States can be shown to engage in the practice not (solely) because of the treaty obligation, but out of a conviction that the rule embodied in the treaty is or has become customary international law."[1524] The ILC Draft Conclusions on Identification of Customary International Law confirms that "[g]iven that the concordant behaviour of parties to the treaty among themselves could presumably be attributed to the treaty obligation, rather

[1521] Art 140 (1) UNCLOS.
[1522] See also Part 2 Section 2 IV B 2 a.
[1523] *Danilenko,* Law-making in the International Community (1993) 96.
[1524] Conclusion 11 Commentary (4) ILC Draft Conclusions on Identification of Customary International Law, *supra* note 1449.

than to acceptance of the rule in question as binding under customary international law, the practice of such parties in relation to non-parties to the treaty, and of non-parties in relation to parties or among themselves, will have particular value."[1525] The ILC stops short of declaring that conduct by party states *inter se* is completely without relevance in the evaluation of customary rules. On the other end of the spectrum of opinion, *Villiger* appears to have implied that the practice of member states matters just as much, as "if and when the convention attracts quasi-universal membership, […] a customary rule will presumably have come to stand alongside the conventional rule" [1526]. This would seem to be an – if not widely supported – at least practical solution to the problem that in the case of a treaty having reached near-universal membership, it becomes challenging to identify relevant instances of practice by non-party states in view of the likelihood that little to no non-party states interested in the subject of the provision remain. Nevertheless, increased attention shall be given to the conduct of non-party states both amongst themselves and vis-à-vis parties to UNCLOS. Conduct between states that *are* parties to UNCLOS shall be considered relevant in situations where the state expressly declares to be acting on a customary obligation,[1527] as well as in situations involving a member state insisting a non-member state comply with Article 121 (3).

3. Standard of Consistency

How uniform is state practice required to be in order to qualify as the basis of a new customary rule? The ICJ has responded that state practice "should have been both extensive and virtually uniform in the sense of the provision invoked"[1528]. The ILC adds that state practice should be "general, meaning that it must be sufficiently widespread and representative, as well as consistent"[1529]. Not all of the ICJ's rulings support the rigorous standard of "virtually uniform" practice. On other occasions, the ICJ has found that to enable the formation of a new rule of customary international law, the "conduct of States should, in general, be consistent with such [a rule]"[1530], but that the practice is not required to be in "absolutely rigorous conformity with the rule"[1531].

[1525] *Ibid,* Conclusion 11 Commentary (7).
[1526] *Villiger,* Customary International Law and Treaties[2] (1997) 183.
[1527] *Ibid.*
[1528] *North Sea Continental Shelf Cases,* para 74, *supra* note 50; Conclusion 11 Commentary (7) ILC Draft Conclusions on Identification of Customary International Law, *supra* note 1449.
[1529] Conclusion 8 ILC Draft Conclusions on Identification of Customary International Law, *supra* note 1449.
[1530] International Court of Justice, *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua/United States of America),* Judgment, June 27, 1986, para 186.
[1531] *Ibid*.

In the case of Article 121 (3) it would perhaps be an overstatement to speak of a "virtually uniform" implementation, considering that the actual legal content of Article 121 (3) remains subject to an ongoing discussion. As will be shown, the provision has however been consistently invoked since – and even prior to – its adoption. The analysis of case law in Part 1 Section 2 of this thesis show that there are varying interpretations of Article 121 (3), in particular with regard to the definition of "human habitation" and "economic life". The question therefore arises whether these discrepancies in the meaning attributed to Article 121 (3) entail that state practice is inevitably too inconsistent to attest to the provision's standing as a rule of customary international law. *Song* has opined that "mainly because the article lacks precision and because there exists no official or authoritative clarification of the article, State practice is not consistent"[1532]. *Talmon* has voiced a similar view, explaining that "the ambiguity of the language of Art. 121 (3) and conflicting State practice"[1533] justifies doubting the customary law nature of the provision. Tanaka has noted that "it is difficult to identify a uniform interpretation and application of Article 121(3) in state practice"[1534]. Some variation in interpretation is to be expected in customary as well as conventional standards. Especially in the case of provisions worded in general terms, it seems unavoidable that there will be some inconsistency in states' interpretation of regulatory content. To illustrate this point, we may take the example of the standing in customary international law of Article 31 VCLT, entitled *General rule of interpretation,* one of the pillars of international treaty law. Despite the importance of the provision, its application is far from uniform. The wording of its first paragraph as well as comments made by its drafting body, the International Law Committee,[1535] suggest that Article 31 VCLT regards the interpretational means listed, namely "good faith", "the ordinary meaning to be given to the terms of the treaty", "context" and "object and purpose", as equal.[1536] In spite of this, the practice of some states shows that there is support for the idea of a hierarchy among the interpretational means of Article 31 VCLT, which would attribute a relatively greater importance to the textual method.[1537] The practice of states and courts with regard to the

[1532] *Song,* The Application of Article 121 of the Law of the Sea Convention to the Selected Geographical Features Situated in the Pacific Ocean, Chinese Journal of International Law 9 (2010) 663 (697).
[1533] *Talmon,* Article 121 - Regime of Islands in Proelss (ed.), The United Nations Convention on the Law of the Sea - A Commentary (2017) 858 (861).
[1534] *Tanaka,* Reflections on the Interpretation and Application of Article 121(3) in the South China Sea Arbitration (Merits), Ocean Development and International Law 48:3-4 (2017) 365 (373).
[1535] *Villiger,* The Rules on Interpretation: Misgivings, Misunderstandings, Miscarriage? - The 'Crucible' lntended by the International Law Commission in Canizzario (ed.), The Law of Treaties Beyond the Vienna Convention (2011) 105 (114).
[1536] Art 31 (1) VCLT.
[1537] *Villiger,* The Rules on Interpretation: Misgivings, Misunderstandings, Miscarriage? - The 'Crucible' lntended by the International Law Commission in Canizzario (ed.), The Law of Treaties Beyond the Vienna Convention (2011) 105 (115).

existence of a hierarchy between methods of interpretation is thus overall ambivalent.[1538] Despite the fact that questions remain over its interpretation, Article 31 VCLT is nearly uniformly recognized as customary international law, and notably treated as such by the ICJ and other international tribunals.[1539] This agreement on the customary law status of Article 31 VCLT would seem to implicitly acknowledge that some variation in interpretation is not outside the norm. In comparing these circumstances to the question of the status of Article 121 (3) in international law, we find that the situations are similar. As in the case of Article 121 (3), state practice dealing with the customary international law status of the VCLT's rules on interpretation have been described as "inconsistent"[1540]. Both Article 31 VCLT and Article 121 (3) UNCLOS are respectively recognized as the pertinent provision within their area of application, in spite of the variations in their interpretation. While this opinion is not uncontested,[1541] it is thus arguable that the inconsistencies in interpretation remarked upon do not as such stand in the way of Article 121 (3) being reflective of customary international law. Moreover, the ILC has acknowledged that "some inconsistencies and contradictions are […] not necessarily fatal to a finding of 'a general practice'"[1542].

4. Requisite Duration

The ICJ and the ILC both reject the notion that customary law can form "instantly".[1543] Some form of practice is always required, and practice necessitates the passage of time. The ICJ has in particular found that state practice supported by *opinio iuris* must be observable during "the passage of any considerable period of time"[1544] for customary rules to form. A relatively short period of time can be compensated by an "extensive and virtually uniform"[1545] practice. While the ILC notes that "some time must elapse for a general practice to emerge"[1546], this time period need not be long: "Provided that the practice is general, no particular duration is required"[1547]. Instances of practice evidencing that non-party states consider Article 121 (3) to be of a customary law nature have been observable from a multitude of statements, protests and actions

[1538] *Ibid.*
[1539] *Ibid,* 118.
[1540] *Ibid,* 116.
[1541] *Ibid,* 116 -119.
[1542] Conclusion 8 Commentary (7) ILC Draft Conclusions on Identification of Customary International Law, *supra* note 1449.
[1543] See Part 3 Section 1 I B; Conclusion 8 Commentary (9) ILC Draft Conclusions on Identification of Customary International Law, *supra* note 1449.
[1544] *North Sea Continental Shelf Cases,* para 73, *supra* note 50.
[1545] *Ibid,* para 74.
[1546] Conclusion 8 (9) ILC Draft Conclusions on Identification of Customary International Law, *supra* note 1449.
[1547] *Ibid,* Conclusion 8 (2).

ever since 1982, when remarks to this effect were first voiced during the Third United Nations Conference on the Law of the Sea.[1548]

5. State Practice Substantiating the Standing of Article 121 (3) in Customary International Law

The ILC defines state practice as the "conduct of the State, whether in the exercise of its executive, legislative, judicial or other functions"[1549]. Practice can furthermore include physical and verbal acts, or even inaction.[1550] The ILC's non-exhaustive list of forms of state practice mentions "diplomatic acts and correspondence; conduct in connection with resolutions adopted by an international organization or at an intergovernmental conference; conduct in connection with treaties; executive conduct, including operational conduct 'on the ground'; legislative and administrative acts; and decisions of national courts"[1551]. Many of the instances of state practice to be discussed will be verbal acts. This is primarily due to the clarity with which verbal conduct presents itself, a clarity that stands in stark contrast to the vagueness that often accompanies any attempt to divine the legal opinion of any state drawing its maritime boundary off the shores of "rocks". As the ILC has noted, "States exercise their powers in various ways […]. While some writers have argued that it is only what States 'do' rather than what they 'say' that may count as practice for purposes of identifying customary international law, it is now generally accepted that verbal conduct (whether written or oral) may count as practice"[1552].

a. Claims Before International Courts and Tribunals

Claims before international courts and tribunals are a subgroup of state practice that fall under the heading of "executive conduct".[1553] As the ILC once stated, "multipartite conventions signed but not brought into force are frequently regarded as having value as evidence of customary international law"[1554]. *Danilenko* has further shown that, "[i]n a number of cases the I.C.J. has relied on conventions which have not entered into force as evidence of customary international law"[1555]. *Danilenko* described UNCLOS in particular as a "lucid illustration"[1556]

[1548] United Nations Office for Ocean Affairs and the Law of the Sea, The Law of the Sea: Régime of Islands, UN Sales No. E.87.V.11 (1988) 112 (Greece).
[1549] Conclusion 5 ILC Draft Conclusions on Identification of Customary International Law, *supra* note 1449.
[1550] *Ibid,* Conclusion 6 (1).
[1551] *Ibid,* Conclusion 6 (2).
[1552] *Ibid,* Conclusion 5 Commentary (2).
[1553] *Ibid,* Conclusion 6 Commentary (5).
[1554] Report of the International Law Commission to the General Assembly, Yearbook of the International Law Commission 2 (1950) 364 (368).
[1555] *Danilenko,* Law-making in the International Community (1993) 152.
[1556] *Ibid,* 152 et seq.

of the trend of relying on conventions which have not entered into force as evidence of customary international law. A prime example is the *St. Pierre and Miquelon Arbitration*.[1557] Well before UNCLOS entered into force, in 1992, both Canada and France invoked the wording of Article 121 (3) in the *St. Pierre and Miquelon Arbitration*. Neither party was bound by UNCLOS at the time, given that France ratified the Convention in 1996 while Canada acceded to the Convention in 2003. The arbitral tribunal announced that it intended to apply the norms and case law recognized under international law,[1558] which would seem to include rules of customary law. Pronouncements affirming the customary law nature of individual provisions of UNCLOS can indeed be found throughout the award.[1559] The French contention that its Overseas Territories St. Pierre and Miquelon generated entitlement to the EEZ and continental shelf because they could not be equated with "rocks" within the meaning of Article 121 (3) illustrates that France perceived Article 121 (3) as a customary law provision.[1560] The tribunal did not dispute the customary law nature of the *Regime of islands*, but rather seemed to affirm it by referencing Article 121 (2) as an applicable provision.[1561] Another instance of state practice involving a state basing its legal argument not on Article 121 (3) as a conventional provision, but on a customary law rule corresponding to 121 (3), occurred during the 1993 *Jan Mayen Case (Denmark/Norway).* At the time, UNCLOS was not in force and neither Denmark nor Norway, the two parties to the dispute, had ratified UNCLOS. In this dispute, the ICJ found that the applicable law consisted of the 1958 Geneva Convention on the Continental Shelf and, as far as matters relating to fishery zones were affected, customary international law.[1562] The ICJ further concluded that, while UNCLOS could not be invoked on the basis of its conventional legal validity,[1563] it did apply in so far as it laid down "the law governing the boundary of the exclusive economic zone"[1564] because it believed that these parts of UNCLOS were reflective of customary international law. In its Memorial, Denmark explicitly acknowledged that UNCLOS was not in force.[1565] Nevertheless, Denmark invoked Article 121 (3) on multiple occasions, stating for example that "Jan Mayen has no population in the proper sense of the word. It does not have and cannot sustain an economic life of its own"[1566]. From

[1557] For more on the *St. Pierre and Miquelon Arbitration* see Part 1 Section 2 II B 3.
[1558] *St. Pierre and Miquelon Arbitration,* para 36, *supra* note 284.
[1559] *Ibid,* paras 49, 76, 88.
[1560] *Ibid,* para 43.
[1561] *Ibid,* para 49.
[1562] *Jan Mayen Case (Denmark/Norway)*, para 44, *supra* note 290.
[1563] *Ibid,* para 48.
[1564] *Ibid,* para 47.
[1565] *Jan Mayen Case (Denmark/Norway)*, Memorial submitted by the government of the Kingdom of Denmark on July 31, 1989, Vol. 1, para 220, *supra* note 290.
[1566] *Ibid,* para 302.

the discussion of the scope and regulatory content of Article 121 (3) in its Memorial,[1567] it is evident that Denmark considered the provision to be binding upon both itself and Norway, and the only conceivable basis for such a stance is that Denmark held the *opinio juris* that Article 121 (3) was reflective of customary international law. The next instance of state practice concerns the conduct of Colombia during the *Colombian Islands Case.* Since Colombia was – and remains to this day – a non-member state to UNCLOS, the applicable law was customary international law.[1568] The ICJ observed that "[the parties] agree that […] Article 121, on the legal régime of islands, [is] to be considered declaratory of customary international law"[1569]. Colombia confirmed that it was not bound by UNCLOS as a treaty, yet found that "the relevant provisions of the Convention dealing with […] a coastal State's […] entitlement to maritime areas […] reflect well-established principles of customary international law"[1570]. Colombia went on to classify certain high-tide elevations pertaining to its national territory as "rocks" and noted that, as "rocks", these features were entitled to a territorial sea.[1571] Its invocation of Article 121 (3) is consistent with its declaration on the applicability of customary law, as the immediate scope of Article 121 (3) is the "coastal State's […] entitlement to maritime areas"[1572]. This is an example where Article 121 (3) is not only applied by a non-party state as a customary law provision, but the state's *opinio juris* thereto is clearly expressed in its assertion that Article 121 (3) is a "well-established principle[…] of customary international law"[1573]. Nicaragua evidently shared the opinion that Article 121 (3) had become reflective of customary international law. Not only did Nicaragua apply Article 121 (3) to several Colombian islands, it expressed the *opinio juris* that this course of action was warranted because Article 121 (3) "constitutes customary international law"[1574].

b. Official Statements on the International Plane

State practice concerning Article 121 (3) often consists of official statements condemning neighboring EEZ claims perceived as incompatible with the *Regime of islands*. These

[1567] *Ibid*, para 272.
[1568] *Colombian Islands Case,* para 137, *supra* note 34.
[1569] *Ibid,* para 138.
[1570] *Colombian Islands Case,* Counter-Memorial submitted by Colombia on November 11, 2008, Vol. 1, 306, *supra* note 34.
[1571] *Colombian Islands Case*, Rejoinder of the Republic of Colombia, June 18, 2010, para 3.10, *supra* note 34.
[1572] *Colombian Islands Case*, Counter-Memorial submitted by Colombia on November 11, 2008, Vol. 1, 306, *supra* note 34.
[1573] *Ibid.*
[1574] *Colombian Islands Case*, Reply submitted by Nicaragua on September 18, 2009, Vol. 1, 124, *supra* note 34.

statements constitute state practice of the type "executive conduct".[1575] They highlight how "action may at times consist solely in statements"[1576]. In 1997, Antigua and Barbuda, St. Kitts and Nevis and Saint Vincent and the Grenadines, three states that are parties to UNCLOS, made official statements protesting the United States-Venezuelan Boundary Treaty because it would "appear to grant 'Isla Aves' full status of territorial sea, exclusive economic zone and continental shelf"[1577]. These statements are significant to the customary law-status of Article 121 (3) because they constitute protests by member states calling on two non-member states having concluded a bilateral treaty to abide by UNCLOS. Additionally, all three official statements explicitly note that Article 121 (3) is binding upon the United States and Venezuela because it is "recognized in customary international law"[1578]. Despite being very much involved in its drafting process, the United States has to this day not ratified UNCLOS. This is largely due to the opposing stance taken by members of the United States' Senate.[1579] Under the *Reagan* administration, UNCLOS, and in particular its deep seabed mining regime, were seen as forcing "ocean resource socialism" onto the United States.[1580] While these concerns were addressed in the 1994 Implementation Agreement,[1581] domestic fears over potentially detrimental effects to the security and sovereignty of the United States continue to prevent accession.[1582] The United States is not obligated to adhere to UNCLOS on the basis of treaty law, which renders its frequent invocations of UNCLOS deeply relevant to the treaty's standing in customary international law. As noted by *Duff*, "After the adoption of the 1982 Convention, even before

[1575] Conclusion 6 Commentary (5) ILC Draft Conclusions on Identification of Customary International Law, *supra* note 1449.
[1576] *Ibid,* Conclusion 6 Commentary (2).
[1577] Saint Lucia similarly expressed dissatisfaction over the status granted to Aves Island in this way. See letter dated 19 June 1997 from the Government of Antigua and Barbuda with regard to maritime treaties and a protest with regard to the status granted to "Isla Aves", Antigua and Barbuda, Law of the Sea Bulletin 35 (1997) 97; Note dated 16 July 1997 addressed to the Secretary-General of the United Nations referring to the bilateral maritime boundary delimitation treaties, St. Kitts and Nevis, Law of the Sea Bulletin 35 (1997) 98; Note dated 8 August 1997 addressed to the Secretary-General of the United Nations referring to the bilateral maritime boundary delimitation treaties, Saint Vincent and the Grenadines, Law of the Sea Bulletin 35 (1997) 100; Note dated 23 July 1997 concerning its position with regard to Aves Island (Isla Aves), Saint Lucia, Law of the Sea Bulletin 35 (1997) 99.
[1578] Letter dated 19 June 1997 from the Government of Antigua and Barbuda with regard to maritime treaties and a protest with regard to the status granted to "Isla Aves", Antigua and Barbuda, Law of the Sea Bulletin 35 (1997) 97; Note dated 16 July 1997 addressed to the Secretary-General of the United Nations referring to the bilateral maritime boundary delimitation treaties, St. Kitts and Nevis, Law of the Sea Bulletin 35 (1997) 98; Note dated 8 August 1997 addressed to the Secretary-General of the United Nations referring to the bilateral maritime boundary delimitation treaties, Saint Vincent and the Grenadines, Law of the Sea Bulletin 35 (1997) 100.
[1579] *Duff,* The United States and the Law Of The Sea Convention - Sliding Back from Accession and Ratification, Ocean and Coastal Law Journal 11 (2005) 1 (29 et seq).
[1580] *Ibid,* 30.
[1581] General Assembly Resolution 48/263 of July 28, 1994, Agreement Relating to the Implementation of Part XI of the United Nations Convention Law of the Sea, A/RES/48/263.
[1582] *Duff,* The United States and the Law Of The Sea Convention - Sliding Back from Accession and Ratification, Ocean and Coastal Law Journal 11 (2005) 1 (30).

it entered into force, courts in many states, including U.S. courts, relied on some of its provisions, not as applicable governing law itself, but rather as codifying patterns of state practice accepted as law. From the U.S. perspective, many of the provisions of the Convention are mirrors that 'reflect' customary international law"[1583]. But is the *Regime of islands*, and in particular its third paragraph, among the provisions the United States views as binding by virtue of their customary law nature? Statements attributable to the US State Department have confirmed that this is indeed the case. The US State Department has published a study which includes the notice that it "represents the views of the United States Government only on the specific matters discussed therein"[1584]. The study notes that "[t]he United States considers the substantive provisions of the LOS Convention cited in this study to reflect customary international law"[1585]. Furthermore, the study explicitly refers to the *Regime of islands* as a relevant legal source, and conducts an analysis of the legal dispute surrounding the South China Sea Islands on the basis of *inter alia*, Article 121 (3).[1586] The study of the Ministry of Foreign Affairs is a form of "executive conduct"[1587], as it is an example of an organ of the executive branch of government announcing its official viewpoint to an indefinite circle of addressees including the international community and the media.[1588]

c. Conduct in Connection with Treaties

Conduct in connection with treaties is one of the forms of state practice the ILC explicitly recognizes.[1589] This type of practice refers to "all acts related to the negotiation and conclusion of treaties, as well as their implementation"[1590]. This means that the *travaux préparatoires* to a treaty such as UNCLOS may be relevant to the formation of customary law. During the eleventh session of the Third United Nations Conference on the Law of the Sea, Greece issued a statement that appears relevant in this context. The representative of Greece proclaimed that the *Regime of islands* and a list of other provisions "can be, and practically speaking are, considered to be already part of customary international law"[1591]. This is undoubtedly an instance of a non-party state – Greece eventually ratified UNCLOS in 1995 – making his *opinio juris* regarding

[1583] *Ibid,* 12.
[1584] United States Department of State*,* Maritime Claims in the South China Sea, Limits in the Seas 143, December 5, 2014.
[1585] *Ibid,* 8.
[1586] *Ibid,* 23.
[1587] Conclusion 6 (2) ILC Draft Conclusions on Identification of Customary International Law, *supra* note 1449.
[1588] *Ibid,* Conclusion 6 Commentary (5).
[1589] *Ibid,* Conclusion 6 (2).
[1590] *Ibid,* Conclusion 6 Commentary (5).
[1591] United Nations Office for Ocean Affairs and the Law of the Sea, The Law of the Sea: Régime of Islands, UN Sales No. E.87.V.11 (1988) 112 (Greece).

the customary law nature of the *Regime of islands* known. It is as such relevant to the question of the formation of a rule of customary international law conterminous with Article 121 (3). Greece may furthermore be estopped from rescinding its declaration on the customary law-status of the *Regime of islands*[1592]. The statement by Greece reflects the legal views of Greece alone and does not extend to the remaining participants to the conference. Other states having taken an active role in the drafting of UNCLOS, such as the United States, did not share the view that large parts of UNCLOS were already part of customary international law upon conclusion.[1593]

d. Maritime Boundaries

While there are very few examples of states officially retracting their EEZ claims on the basis of Article 121 (3), there are numerous cases of coastal states measuring their EEZs and continental shelves from the baselines of seemingly insignificant features. Indeed, it has been remarked that "[s]tates almost invariably have claimed a continental shelf and exclusive economic zone for all the islands under their sovereignty"[1594]. Several examples of this practice have been discussed above in Part 1 Section 3 II. It is important to note that coastal states' EEZ and continental shelf claims in the surroundings of seemingly insignificant features do not *per se* prove their disregard for the regulatory content of Article 121 (3). Whether or not these claims are in conformity with the *Regime of islands* depends on one's interpretation of Article 121 (3). As soon as the interpreter rejects the most rigorous definitions of the "island in the narrow sense" it comes to light that even very small or remote features may be of economic or residential value. For example, to those understanding Article 121 (3) as stipulating that human habitation or economic life must be sustainable *under natural conditions* on an island entitled to both EEZ and continental shelf,[1595] it is clear that the Japanese claim to EEZ and continental shelf around Okinotorishima, a structurally modified island, is evidence of disregard for the regulatory content of Article 121 (3). Japan, on the other hand, appears to perceive its actions to be in complete conformity with the *Regime of islands*. Indeed, the Japanese government has gone to great lengths to demonstrate the island's usefulness for human habitation and economic

[1592] See *Cheng,* United Nations Resolutions on Outer Space: „Instant" International Customary Law?, Indian Journal of International Law 5 (1965) 23 (43).
[1593] Official Records of the Third United Nations Conference on the Law of the Sea, Volume XVII, A/CONF.62/WS/37, 243.
[1594] *Elferink,* The South China Sea Arbitration's Interpretation of Article 121(3) of the LOSC: A Disquieting First, The Blog of the K.G. Jebsen Centre for the Law of the Sea, September 7, 2016 <site.uit.no/jclos/2016/09/07/the-south-china-sea-arbitrations-interpretation-of-article-1213-of-the-losc-a-disquieting-first/>.
[1595] For a discussion of this line of thought see Part 2 Section 2 IV C.

life.[1596] The validity of Article 121 (3) is thus not challenged by Japan, it is merely that the details of the provision have been understood differently. Japan is of course a party to UNCLOS and can therefore be presumed to apply the *Regime of islands* as a consequence of the *pacta sunt servanda*-principle, as opposed to a customary obligation. The example of Okinotorishima however illustrates why claiming an EEZ or continental shelf on the basis of a small or seemingly insignificant territory does not prove that the claiming state is acting contrary to Article 121 (3). Unfortunately, states often refrain from stating their position on a possible discrepancy between their maritime claims and Article 121 (3),[1597] rendering it difficult to determine their views on the validity of the provision. When accused of a violation of Article 121 (3), states on the other hand tend to argue that the party filing a complaint merely errs on the part of interpretation.[1598] Even when advocating for a reading of Article 121 (3) that is controversial to their neighbors, the conduct of coastal states can still be motivated by the *opinio iuris* that they are conforming to Article 121 (3).

F. Decisions of Courts and Tribunals

According to the ILC, the "[d]ecisions of international courts and tribunals, in particular of the International Court of Justice, concerning the existence and content of rules of customary international law are a subsidiary means for the determination of such rules"[1599]. International decisions thus play an "ancillary role […] in elucidating the law, rather than being themselves a source of international law"[1600]. The valuable insight international judicature is capable of providing is evident from its pronouncements made on the subject of the *Regime of islands*' standing vis-à-vis customary international law. As early as one year prior to the signing of UNCLOS, courts were required to address the matter as a preliminary question: the conciliation commission appointed in the *Jan Mayen Case (Iceland/Norway)* in this way asserted that the *Regime of islands* was "reflecting the present status of international law"[1601], despite the fact that UNCLOS was not yet in force at the time. This conclusion may have been premature. Scholars have pointed out that the conciliation commission failed to mention corroborating case law and therefore insufficiently substantiated its finding.[1602] Furthermore, the conciliation

[1596] See Part 1 Section 3 II E.
[1597] See for instance the case of Clipperton Island above in Part 1 Section 3 II B.
[1598] See for example the arguments submitted by Ukraine in the *Black Sea Case*. *Black Sea Case,* Counter-Memorial submitted by Ukraine on May 19, 2006, Vol. 1, para 7.37, *supra* note 310.
[1599] Conclusion 13 ILC Draft Conclusions on Identification of Customary International Law, *supra* note 1449.
[1600] *Ibid,* Conclusion 13 Commentary (2).
[1601] *Jan Mayen Case (Iceland/Norway)* 3, *supra* note 1201.
[1602] *Kwiatkowska/Soons,* Entitlement to Maritime Areas of Rocks Which Cannot Sustain Human Habitation or Economic Life of Their Own, Netherlands Yearbook of International Law 21 (1990) 139 (174).

commission did not explicitly refer to the third paragraph of Article 121, merely to the *Regime of islands* in general. In the *Persian Gulf Case* in 2001, the ICJ explicitly stated that the status as a provision of customary international law applied to the second paragraph of the *Regime of islands*, but notably failed to make such a pronouncement with regard to its third paragraph which contains the definition of rocks.[1603] In 2012, the *Colombian Islands Case,* a case involving a non-member state to UNCLOS, forced the ICJ to deal with the question of the *Regime of islands*' standing in general international law anew.[1604] The ICJ found that Article 121 in its entirety represented an indivisible regime that had completed its transformation into customary international law.[1605] The ICJ did not corroborate this assessment by pointing to state practice confirming its view, but rather invoked the agreement of the parties to the dispute as to this matter.[1606]

G. Teachings

In accordance with the ILC's Draft Conclusions on Identification of Customary International Law, the "[t]eachings of the most highly qualified publicists of the various nations may serve as a subsidiary means for the determination of rules of customary international law." While *Dipla* stated as early as 1984 that there is a possibility of Article 121 (3) passing into customary international law in future,[1607] scholars have mostly expressed skepticism towards this idea. In 1994, *Kolb* noted that the fact that state practice was the result of a 'politique d'intérêts' hampered the formation of a customary rule conterminous with Article 121 (3).[1608] Overall, international scholars have prevalently attributed a purely conventional character to the third paragraph of Article 121.[1609] *Song* has taken the position that "mainly because the article lacks precision and because there exists no official or authoritative clarification of the article, State practice is not consistent"[1610]. *Talmon* has similarly expressed doubts with regard to the

[1603] *Persian Gulf Case,* para 185, *supra* note 303.
[1604] In the *Colombian Islands Case* opposing Nicaragua and Colombia, the latter state was not a party to UNCLOS. *Colombian Islands Case, supra* note 34.
[1605] *Ibid,* para 139.
[1606] *Ibid.*
[1607] *Dipla,* Le régime juridique des îles dans le droit international de la mer (1984) 101.
[1608] *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... », Annuaire français de droit international 40 (1994) 876 (897).
[1609] *Dipla,* Le régime juridique des îles dans le droit international de la mer (1984) 42; *Kwiatkowska/Soons,* Entitlement to Maritime Areas of Rocks Which Cannot Sustain Human Habitation or Economic Life of Their Own, Netherlands Yearbook of International Law 21 (1990) 139 (175); *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... », Annuaire français de droit international 40 (1994) 876 (899); *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 (59).
[1610] *Song,* The Application of Article 121 of the Law of the Sea Convention to the Selected Geographical Features

customary law-nature of the *Regime of islands*.[1611] It should be noted that the opinion of legal scholars "may offer guidance for the determination of the existence and content of rules of customary international law"[1612], but only in an auxiliary role. As the ILC has pointed out, "writings are not themselves a source of customary international law"[1613].

Section 2 Potential Persistent Objectors

A treaty provision that is found to be reflective of customary international law is generally binding upon all states. However, "[w]here a State has objected to a rule of customary international law while that rule was in the process of formation, the rule is not opposable to the State concerned for so long as it maintains its objection."[1614] *Talmon* has indicated that Turkey and Venezuela may be persistent objectors to Article 121 (3).[1615] Turkey and Venezuela have indeed sharply criticized the *Regime of islands* at the time the provision was conceptualized at the Third United Nations Convention on the Law of the Sea.[1616] While their initial protest is unequivocal, it remains to be seen whether the two states have upheld their objection or whether they have abandoned it. It is after all necessary that the objection be "clearly expressed, made known to other States, and maintained persistently"[1617].

I. Turkey

Turkey expressed concern over UNCLOS' approach to maritime entitlements and delimitation early on during the Third United Nations Conference on the Law of the Sea. The Turkish representative in particular remarked that, "[i]f all islands were to be treated alike or on an equal footing with the continental territories, the application of the various new norms which were envisaged to islands isolated in the vast ocean spaces would diminish the area destined to make up the common heritage of mankind"[1618]. Where does this opposition to equality among insular territories come from? Turkey's position is best understood in context:

Situated in the Pacific Ocean, Chinese Journal of International Law 9 (2010) 663 (697).

[1611] *Talmon,* Article 121 - Regime of Islands in Proelss (ed.), The United Nations Convention on the Law of the Sea - A Commentary (2017) 858 (861).

[1612] Conclusion 14 Commentary (2) ILC Draft Conclusions on Identification of Customary International Law, *supra* note 1449.

[1613] *Ibid.*

[1614] *Ibid,* Conclusion 15 (1).

[1615] *Talmon,* Article 121 - Regime of Islands in Proelss (ed.), The United Nations Convention on the Law of the Sea - A Commentary (2017) 858 (861).

[1616] United Nations Office for Ocean Affairs and the Law of the Sea, The Law of the Sea: Régime of Islands, UN Sales No. E.87.V.11 (1988) 95 (Turkey); 97, 103 (Venezuela).

[1617] Conclusion 15 (2) ILC Draft Conclusions on Identification of Customary International Law, *supra* note 1449.

[1618] United Nations Office for Ocean Affairs and the Law of the Sea, The Law of the Sea: Régime of Islands, UN Sales No. E.87.V.11 (1988) 27 (Turkey).

A. Geographical and Political Background

Turkey was and is involved in several interrelated and ongoing disputes with neighboring Greece, which revolve *inter alia* around the question of sovereignty over and maritime zones affiliated with islands in the Aegean Sea.[1619] Turkey's unique geographical constellation illustrates why the definition of islands capable of generating an EEZ and continental shelf is of interest to Turkey. The eastern Greek islands lie within very short range of Turkey, meaning that treating islands as equal to continental landmasses would narrow Turkey's territorial sea and continental shelf. The Greek island Samos, for example, is at a distance of one nautical mile from the Turkish coastline and other islands lie nearly as close.[1620] A primary point of contention is the solution favored by Greece to extend the territorial sea in the Aegean from 6 to 12 nm. *Van Dyke* has explained that such a scenario "would fill more than three-fourths of the Aegean and would leave very little to be delimited under the principles governing continental shelf delimitation. From Turkey's perspective, and indeed from the perspective of reaching an equitable result to this complicated problem, it is important that the territorial sea claims be kept at the 6-nautical-mile limit in order to leave enough territory to permit an equitable solution to be reached on the continental shelf. [A] strong argument can be made that the territorial sea claims in some parts of the congested Eastern Aegean should be rolled back to 3 nautical miles in order to provide the navigational and overflight freedoms that are so important to Turkey and to third states."[1621] Turkish concerns over the maritime entitlements of islands have not subsided since: as recently as February 2018, the Turkish Foreign Minister denounced a Greek law using the "very small" island of Castellorizo/Meis in order to draw the median line delimiting the Greek and Turkish continental shelf boundaries.[1622] It should be noted that international courts and tribunals follow a practice whereby minor islands can be given reduced or no effect on the median line if this is necessary to secure an equitable result within the meaning of Article 83.[1623] Scholars who disagree with Turkey's arguments have on the other hand noted that Article 121 (2) postulates that the EEZ and continental shelf of islands are to be delimited in the same way as the maritime zones of other land territory and that

[1619] For a detailed analysis of the totality of the maritime disputes between Greece and Turkey in the Aegean Sea, see *Van Dyke,* An Analysis of the Aegean Disputes under International Law, Ocean Development & International Law 36 (2005) 63.
[1620] *Ibid,* 87.
[1621] *Ibid,* 87 et seq.
[1622] See Interview of H.E. Mr. Mevlüt Çavuşoğlu to Kathimerini, Ministry of Foreign Affairs of the Republic of Turkey, 4 February 2018 <http://www.mfa.gov.tr/interview-of-h_e_-mr_-mevlut-cavusoglu-to-kathimerini-4-february-2018.en.mfa>.
[1623] See Part 3 Section 3 II.

therefore the appropriate boundary separating the Greek islands from Turkish territory is the median or equidistance line.[1624]

B. Objection *ab initio* - Dissent at the Third United Nations Convention on the Law of the Sea

Turkey first voiced its opposition to the *Regime of islands* in the course of the drafting process at the Third United Nations Conference on the Law of the Sea.[1625] During the Second Session of the conference in 1974, Turkey advocated for a rule stipulating that "[a]n island situated in the economic zone or on the continental shelf of other States shall have no economic zone or continental shelf of its own if it does not contain at least one tenth of the land area and population of the State to which it belongs"[1626]. Turkey explained that it had submitted this rule specifically because of the challenges to delimitation resulting from its own unique geography, stating that the rule aimed to address "the delicate question of the islands of the continental shelf of [Turkey]."[1627] Such an addition to the *Regime of islands* would of course have deprived numerous Greek islands in the Aegean Sea of their claim to an EEZ or continental shelf. Turkey also made the case that the maritime zones of islands in semi-enclosed seas should "be determined jointly by the States of that area"[1628], which would also have been a rule applicable to Turkey's own situation in the Aegean. During the Seventh Session of the Third United Nations Conference on the Law of the Sea, in 1978, Turkey co-submitted an informal draft that is an exact replica of today's *Regime of islands* with the important difference that it features an additional paragraph, which is reproduced below and highlighted in bold.

"Article 121

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 paragraphs 3 and 4, 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 the present Convention applicable to other land territory.
3. **Islands which because of their geographical location constitute a source of distortion or inequity in the drawing of a boundary line between two or more adjacent or opposite States shall have marine spaces only to the extent compatible with equitable principles and with all geographic and other relevant circumstances.**

[1624] See *Van Dyke,* An Analysis of the Aegean Disputes under International Law, Ocean Development & International Law 36 (2005) 63 (88).
[1625] United Nations Office for Ocean Affairs and the Law of the Sea, The Law of the Sea: Régime of Islands, UN Sales No. E.87.V.11 (1988) 95 (Turkey); 97, 103 (Venezuela).
[1626] *Ibid,* 43 (Turkey).
[1627] *Ibid,* 45 (Turkey).
[1628] *Ibid,* 44 (Turkey).

4. Rocks and islets which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf."[1629]

   [Emphasis added]

From the above informal draft, two things are evident: first, Turkey was in principle willing to accept the by now familiar distinction criteria "human habitation" and "economic life". Second, Turkey wished to see the issue of islands having a distorting effect on the delimitation of states with opposite or adjacent coasts explicitly incorporated into Article 121 (3). The Turkish proposal to this effect failed to garner sufficient support, which lead Turkey to withdraw its approval of Article 121 entirely, calling it "unacceptable"[1630] and lamenting in particular its failure to address the delimitation between states with opposite or adjacent coasts.[1631] While the *Regime of islands'* restrictions on the maritime zones of islands did not go as far as Turkey had envisioned, Turkey still considered the ultimately adopted version of Article 121 preferable to no provision at all. Therefore, Turkey opposed the suggestion circulating in the late stages of the conference that called for the deletion of the phrase "[r]ocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf" from Article 121.[1632] In conclusion, despite the fact that Turkey supported some elements of the *Regime of islands*, such as the distinction between different types on islands based on habitability and economic usability, it ultimately objected clearly and unequivocally to the provision in its totality: during the final stages of the Third United Nations Convention on the Law of the Sea, the Turkish representative declared the *Regime of islands* to be "unacceptable in its [final] form"[1633]. The Turkish objection to the *Regime of islands* thus meets several of the prerequisites laid down in the ILC Draft Conclusions on Identification of Customary International Law: Turkey objected "while the rule […] was in the process of formation"[1634], which is relevant because "[t]he timeliness of the objection is critical"[1635]. Turkey's position as a persistent objector appears "even more assured" as it objected "at the earliest possible moment".[1636] Having been made at an international conference, the objection is furthermore

[1629] *Ibid,* 88 et seq (Algeria, Bangladesh, Cameroon, Iraq, Libya, Madagascar, Morocco, Nicaragua, Somalia, Turkey).
[1630] *Ibid,* 103 (Turkey).
[1631] *Ibid,* 95 (Turkey).
[1632] *Ibid,* 109 (Turkey).
[1633] *Ibid,* 103 (Turkey).
[1634] Conclusion 15 Commentary (5) ILC Draft Conclusions on Identification of Customary International Law, *supra* note 1449.
[1635] *Ibid.*
[1636] *Ibid.*

"communicated internationally"[1637]. The objection can also be said to have been clearly expressed in the sense "that non-acceptance of the emerging rule or the intention not to be bound by it [was] unambiguous"[1638]. Turkey after all decided not to ratify UNCLOS after expressing its discontent with the *Regime of islands* which is an unambiguous way of declaring the will to not be bound by it.

C. Persistent Maintenance of the Initial Objection - Further State Conduct

For an objection to remain valid, it has to be "maintained persistently"[1639] by the objector. Turkey has at regular intervals emphasized in front of the United Nations General Assembly that "the reasons that have prevented Turkey from being a party to the United Nations Convention on the Law of the Sea remain valid"[1640]. This declaration is accompanied by the explanation that "the Convention does not provide sufficient safeguards for special geographical situations and, as a consequence, does not take into consideration conflicting interests and sensitivities arising from special circumstances"[1641]. Turkey has reiterated this declaration yearly and verbatim on the occasion of the United Nations General Assembly calling for universal participation in UNCLOS.[1642] The wording Turkey uses in its regular statements may or may not be interpreted as opposing the *Regime of islands* specifically. Turkey notes that it opposes UNCLOS in view of its treatment of "special geographical situations" and "special circumstances". During the drafting process of UNCLOS, Turkey had also explained its position on the *Regime of islands* by noting that islands were "elements which created special circumstances"[1643] and referred to a situation where islands lie within a semi-enclosed sea as a "special geographic characteristic"[1644]. The wording used in Turkey's yearly protest against UNCLOS' looming universality could therefore be taken as an objection to the *Regime of islands.* However, it is equally possible that the protest is meant as a rebuke to Article 15, which is the provision explicitly referencing "special circumstances". This provision lays down the possibility of deviating from the habitual delimitation method of drawing a median

[1637] *Ibid,* Conclusion 15 Commentary (8).
[1638] *Ibid,* Conclusion 15 Commentary (7).
[1639] *Ibid,* Conclusion 15 (2).
[1640] United Nations, General Assembly, Official Records of the Sixty-seventh Session, A/67/PV.52, December 11, 2012, 28; United Nations, General Assembly, Official Records of the Seventy-second Session, A/72/PV.64, December, 5, 2017, 26.
[1641] United Nations, General Assembly, Official Records of the Sixty-seventh Session, A/67/PV.52, December 11, 2012, 28; United Nations, General Assembly, Official Records of the Seventy-second Session, A/72/PV.64, December, 5, 2017, 27.
[1642] See General Assembly Resolution, Oceans and the Law of the Sea, A/RES/72/73, December 5, 2017.
[1643] United Nations Office for Ocean Affairs and the Law of the Sea, The Law of the Sea: Régime of Islands, UN Sales No. E.87.V.11 (1988) 99 (Turkey).
[1644] *Ibid,* 44 (Turkey).

line between states with opposite or adjacent coasts in case of "special circumstances". The term "special circumstances" has been used by international tribunals and states to describe a wide array of situations, not all of them referring to islands.[1645] In sum, it is questionable whether Turkey's statements before the United Nations General Assembly can be said to have "persistently maintained" Turkey's objection. While Turkey has repeatedly opposed the legal system imposed by UNCLOS in a generalized fashion, it has not named the *Regime of islands* as the part it is opposed to. It is difficult to reconcile the vague phrasing of the Turkish objection with the requirements that the "non-acceptance of the emerging rule […] must be unambiguous"[1646]. Greece has even voiced the position that "repeated references made by Turkey to the provisions of UNCLOS [are] an indication that Turkey accepted UNCLOS provisions as reflecting general customary law"[1647]. Greece made this statement in response to Turkey's allegation that Greece had violated UNCLOS' Part III, which contains the regime of straits.[1648] Turkey's invocation of the regime of straits can, at best, be taken as an acceptance of the regime of straits, not the entire Convention. But there is another sign indicating that Turkey does not in fact oppose the *Regime of islands*. Referring to Greek marine policy in the Aegean, the Turkish Ministry of Foreign Affairs has stated that "[t]here are numerous small islets and rocks in the Aegean ownership of which is not determined by international treaties. Most of those features can not sustain human habitation and have no economic life of their own. Greece has attempted to change their status by opening some of those geographical features to artificial settlement. To this end, Greece has enacted laws and regulations that have no bearing from the point of international law. […] The Kardak formations are not 'islets' but two rocks."[1649] Firstly, this statement invokes the central criteria of Article 121 (3), "human

[1645] Apart from being used to characterize the potentially distorting effects of islands on boundaries, "special circumstances" may refer to a feared cut-off effect in the context of a concave coastline, the unfortunate position of a strip of coastline territory 40 km long and 4 km wide, the "particular geographic location of […] oil resources", the "Squeezing Effect" of being a state with a very short coastline surrounded by states with longer coastlines or even security and navigation concerns. See International Tribunal for the Law of the Sea, *Dispute Concerning Delimitation of the Maritime Boundary between Ghana and Côte D'Ivoire in the Atlantic Ocean*, Counter-Memorial of the Republic of Côte d'Ivoire, April 4, 2016, 183, 187, 190; Arbitral Tribunal, *Arbitration under the Arbitration Agreement between the Government of the Republic of Croatia and the Government of The Republic Of Slovenia Signed On 4 November 2009 (Croatia/Slovenia)*, PCA Case Nº 2012-04, Final Award, June 29, 2017, 298, 305.

[1646] Conclusion 15 Commentary (7) ILC Draft Conclusions on Identification of Customary International Law, *supra* note 1449.

[1647] Note dated 30 June 1997 regarding the Turkish notification dated 22 February 1996 on the interpretative statement made by Greece at the time of both signature and ratification of the United Nations Convention on the Law of the Sea, Greece, Law of the Sea Bulletin 35 (1997) 12.

[1648] Objection to the declaration made by Greece upon signature and ratification of the Convention, Turkey, Law of the Sea Bulletin 30 (1996) 9.

[1649] Ministry of Foreign Affairs of the Republic of Turkey, Background Note on Aegean Disputes, <http://www.mfa.gov.tr/background-note-on-aegean-disputes.en.mfa>.

habitation" and "economic life", verbatim and applies them to the Kardak islands. Secondly, the statement notes that, in violating Article 121 (3), Greece is acting contrary to "international law". "International law" in this context, can only be understood as a reference to a customary law rule as Turkey cannot derive rights and obligations from UNCLOS on the basis of treaty law. While this invocation of Article 121 (3) as "international law" may seem unexpected in light of Turkey's repeated resistance to UNCLOS in front of the United Nations General Assembly, it is actually not at all surprising if we consider that Turkey had actually supported core elements of the *Regime of islands*, and in particular what is today Article 121 (3), during the drafting stages of this provision. The cited remarks are published on the official site of the Turkish Ministry of Foreign Affairs. They are attributable to Turkey as they constitute "executive conduct"[1650] by an organ of the state "exercis[ing] elements of governmental authority"[1651]. In conclusion, Turkey has not persistently objected to the customary international law rule conterminous with Article 121 (3) for two reasons. Firstly, because its yearly protests against the universality of UNCLOS are too general to determine whether Turkey is protesting the *Regime of islands* or other UNCLOS provisions. The objection is therefore neither "clearly expressed"[1652] nor "unambiguous"[1653]. Secondly, Turkey has itself invoked Article 121 (3) as a provision of "international law" and can therefore not be said to consistently protest its application *qua* customary law. After all, "the repeated objections must be consistent overall, that is, without significant contradictions."[1654]

II. Venezuela

Venezuela has criticized the *Regime of islands* in its development phase at the Third United Nations Conference on the Law of the Sea, declined to become a party to UNCLOS and has since been forced to re-engage with Article 121 (3) with respect to some of its island territories. In light of these aspects, it is prudent to ask whether Venezuela might qualify as a "persistent objector" to the *Regime of islands*. "Persistent objector"–status for Venezuela is also considered a possibility in *Proelss*' commentary to UNCLOS.[1655]

[1650] Conclusion 6 (2) ILC Draft Conclusions on Identification of Customary International Law, *supra* note 1449.
[1651] *Ibid,* Conclusion 5 Commentary (2).
[1652] *Ibid,* Conclusion 15 (2).
[1653] *Ibid,* Conclusion 15 Commentary (7).
[1654] *Ibid,* Conclusion 15 Commentary (9).
[1655] Article 121 - Regime of Islands in Proelss (ed.), The United Nations Convention on the Law of the Sea - A Commentary (2017) 858 (861).

A. Objection *ab initio* - Dissent at the Third United Nations Convention on the Law of the Sea

At the Third United Nations Convention on the Law of the Sea, Venezuela approved of putting all high tide elevations on an equal legal basis,[1656] and opposed their subcategorization along demographic characteristics. Venezuela in this way criticized that "[t]he retention of [Article 121 (3)] would institute discrimination between the continental and insular parts of the territory of a State"[1657]. Venezuela also opposed Article 121 (3) on the grounds that it presented problems to interpretation, as "[t]he term 'rocks' was in neither the legal nor the scientific vocabulary and might refer to any island formation"[1658]. It was deplored that "human habitation" and "economic life" were "ambiguous and very relative"[1659] criteria. The Venezuelan representative thus concluded that "the complete deletion of article 121, paragraph 3 […] would, in his delegation's opinion, be the only way to solve such problems and avoid disputes"[1660]. Towards the end of the Third United Nations Conference on the Law of the Sea, Venezuela ultimately found that it "had on other occasions underscored the obscurity and ambiguity of each one of the three paragraphs of article 121" and that, "Article 121 should therefore be deleted".[1661] Venezuela has therefore undoubtedly fulfilled the ILC's prerequisite of having voiced opposition "while the rule […] was in the process of formation"[1662]. Venezuela's stance is bolstered by the fact that it objected "at the earliest possible moment"[1663]. The requirement that "the objection must be communicated internationally"[1664] has also been met, as Venezuela declared its opposition in front of an audience of representatives from a wide array of states. At this stage, there can be no doubt that Venezuela has "clearly expressed"[1665] its objection.

[1656] United Nations Office for Ocean Affairs and the Law of the Sea, The Law of the Sea: Régime of Islands, UN Sales No. E.87.V.11 (1988) 62 (Venezuela).
[1657] *Ibid,* 97 (Venezuela).
[1658] *Ibid.*
[1659] *Ibid.*
[1660] *Ibid.*
[1661] *Ibid,* 103 (Venezuela).
[1662] Conclusion 15 Commentary (5) ILC Draft Conclusions on Identification of Customary International Law, *supra* note 1449.
[1663] *Ibid.*
[1664] *Ibid,* Conclusion 15 Commentary (8).
[1665] *Ibid,* Conclusion 15 (2).

B. Persistent Maintenance of the Initial Objection - Further State Conduct

Venezuela claims an EEZ surrounding Aves Island,[1666] an island the classification of which has already given rise to multiple protests by neighboring states.[1667] Aves Island measures less than two square kilometers in size and is a sandy, sparsely vegetated hazard to shipping.[1668] It is also home to *Simón Bolívar*, a research base on stilts which is permanently inhabited by scientific and military personnel. While the protests of the governments of Antigua and Barbuda, St. Kitts and Nevis, Saint Vincent and the Grenadines and Saint Lucia have emphatically denied Aves Island this capacity, scholars *Kwiatkowska* and *Soons*, have found that "Aves Island […] could be claimed as sustaining human habitation"[1669]. Unfortunately, Venezuela has not commented on whether it considers the *Regime of islands* applicable to Aves Island, and if so, how it would legally classify Aves Island. The situation concerning Aves Island does therefore not provide any clues as to whether or not Venezuela is a persistent objector to the *Regime of islands.* However, Venezuela has repeatedly and publicly expressed opposition to UNCLOS as a whole. Venezuela has abstained from voting on the "Omnibus" Resolution, which is the General Assembly's yearly resolution calling on states to accede to UNCLOS.[1670] Explaining its abstention, Venezuela stressed that it "has repeatedly and consistently objected to the possibility of the Convention being invoked as a conventional or international customary law".[1671] Furthermore, Venezuela has clarified that UNCLOS' provisions are not "applicable to [Venezuela] under international customary law, except for those that the Bolivarian Republic of Venezuela may expressly recognize in future by incorporating them into its domestic legislation. That is because the reasons preventing us from ratifying […] UNCLOS in particular, remain the same"[1672]. The wording of the Venezuelan objection to the Omnibus

[1666] Tratado sobre Delimitación de Áreas Marinas y Submarinas entre República Dominicana y la República de Venezuela, Official Gazette No. 9548, March 3, 1979; see also <marineregions.org/gazetteer.php?p=details&id=8433>.
[1667] See letter dated 19 June 1997 from the Government of Antigua and Barbuda with regard to maritime treaties and a protest with regard to the status granted to "Isla Aves", Antigua and Barbuda, Law of the Sea Bulletin 35 (1997) 97; Note dated 16 July 1997 addressed to the Secretary-General of the United Nations referring to the bilateral maritime boundary delimitation treaties, St. Kitts and Nevis, Law of the Sea Bulletin 35 (1997) 98; Note dated 8 August 1997 addressed to the Secretary-General of the United Nations referring to the bilateral maritime boundary delimitation treaties, Saint Vincent and the Grenadines, Law of the Sea Bulletin 35 (1997) 100; Note dated 23 July 1997 concerning its position with regard to Aves Island (Isla Aves), Saint Lucia, Law of the Sea Bulletin 35 (1997) 99.
[1668] For further information see Part 1 Section 3 II D.
[1669] *Kwiatkowska/Soons,* Entitlement to Maritime Areas of Rocks Which Cannot Sustain Human Habitation or Economic Life of Their Own, Netherlands Yearbook of International Law 21 (1990) 139 (175).
[1670] See General Assembly Resolution, Oceans and the Law of the Sea, A/RES/72/73, December 5, 2017.
[1671] United Nations, General Assembly, Official Records of the Seventy-second Session, A/72/PV.64, December, 5, 2017, 28.
[1672] *Ibid.*

Resolution has remained nearly identical over the years.[1673] Venezuela seems to have advocated for a reversal of the concept of the "persistent objector" in international law. Instead of objecting to a specific customary rule, Venezuela has issued a generalized objection to all customary rules that may emerge on the basis of UNCLOS in an attempt to shield itself from developments in customary international law. Venezuela has declared that it need not designate the rule it is objecting to, but will only designate the rules it is willing to be bound by. This type of reasoning is reminiscent of the argument of the "package deal". The "package deal" involved a group of states arguing that non-parties to UNCLOS were legally prevented from claiming the extended maritime zones of UNCLOS, such as the EEZ, because UNCLOS was a "package deal", to be applied in full or not at all.[1674] However, the development of customary international rules and their effects cannot be prevented or hindered by generalized statements. As has been explained, customary international law is a consequence of *Realpolitik*.[1675] Rules pass into the *corpus* of customary international law individually as a consequence of the corresponding state practice. Just as the signatories to UNCLOS could not prevent the formation of customary rules conterminous with UNCLOS' EEZ provisions, non-party states cannot shield themselves from the effects UNCLOS has on customary law by protesting UNCLOS in its entirety. The persistent objector rule is "subject to stringent requirements"[1676]. As stipulated in the ILC's Draft Conclusions on Identification of Customary International Law, an objection must be "clearly expressed"[1677], which entails that non-acceptance of the emerging rule or the intention not to be bound by it must be unambiguous"[1678]. An objection that contains no reference to the rule that is specifically opposed, cannot be called "clear" or "unambiguous". Therefore, it would seem that Venezuela has "abandoned"[1679] its initially clear-cut objection to the *Regime of islands* and has consequently become bound by the customary international law rule conterminous with the *Regime of islands*.

Section 3 Excursus – Legal Situation in a Scenario where Article 121 (3) Has *not* Given Rise to a Rule of Customary International Law

[1673] United Nations, General Assembly, Official Records of the Sixty-seventh Session, A/67/PV.52, December 11, 2012, 25.
[1674] *Kwiatkowska,* The 200 Mile Exclusive Economic Zone in the New Law of the Sea (1989) 29.
[1675] Part 3 Section 1 I C.
[1676] Conclusion 15 Commentary (2) ILC Draft Conclusions on Identification of Customary International Law, *supra* note 1449.
[1677] *Ibid,* Conclusion 15 (2).
[1678] *Ibid,* Conclusion 15 Commentary (7).
[1679] *Ibid,* Conclusion 15 Commentary (6).

As explained in the preceding section, this thesis comes to the conclusion that Article 121 (3) is reflective of customary international law. In light of the fact that numerous scholars disagree with this view,[1680] we shall briefly highlight the situation in general international law that would be relevant if we were to assume that Article 121 (3) has *not* ripened into custom.

The conventions and conferences preceding UNCLOS stipulated that all high-tide elevations were equally entitled to the same maritime zones.[1681] "Islands" were defined as high tide elevations by participants of the Imperial Conference 1923,[1682] in the 1956 LOS Articles,[1683] and during the First United Nations Conference on the Law of the Sea.[1684] Article 10 of the Convention on the Territorial Sea and the Contiguous Zone 1958 defined an island as "a naturally formed area of land, surrounded by water, which is above water at high tide"[1685]. According to Article 10 of the Convention on the Territorial Sea and the Contiguous Zone, islands generated entitlement to the territorial sea and the contiguous zone in the same way as any other land area.[1686] Article 1 of the Convention on the Continental Shelf applied this rule *mutatis mutandis* to the continental shelf. [1687] International law differentiated between "islands" and "low-tide elevations", but did not legally distinguish between islands based on their capacity for inhabitation or economic activity. We may ask whether this means that, under the hypothetical assumption that Article 121 (3) has not become reflective of customary international law, non-party states to UNCLOS could claim an EEZ and continental shelf around rocks. To this it may be responded that the Third United Nations Convention on the Law of the Sea played a major role in the creation of the EEZ.[1688] A state intending to delimitate the maritime zones of rocks within his territory on the basis of the legal system in place before the Third United Nations Conference impacted international law could consequently not claim an EEZ because this legal system did not know or recognize the EEZ.

On the other hand, when evaluating the legal framework applicable to states that have not ratified UNCLOS today, we cannot ignore the EEZ has become part of customary international law. UNCLOS may have been conceived as a "package deal" to be applied in full or not at all, yet customary rules form individually and in defiance of tidy, interwoven regulatory systems

[1680] See Part 3 Section 1 II G.
[1681] Part 1 Section 1 V.
[1682] Imperial Conference 1923, Report of Inter-Departmental Committee on the Limits of Territorial Waters, Document T.118/118/380, Public Record Office Ref. F. O. 372/2108 (1924) 5, cited in *Brown,* Rockall and the Limits of National Jurisdiction of the UK, Marine Policy, July (1978) 181 (206).
[1683] Art 10 of the 1956 LOS Articles, *supra* note 36.
[1684] Art 10 Convention on the Territorial Sea and the Contiguous Zone, *supra* note 72.
[1685] *Ibid.*
[1686] *Ibid.*
[1687] Art 1 Convention on the Continental Shelf, *supra* note 72.
[1688] *Kwiatkowska,* The 200 Mile Exclusive Economic Zone in the New Law of the Sea (1989) 30.

such as UNCLOS.[1689] Therefore, it is not only the pre-UNCLOS principle of legal equality among all high-tide elevations that informs our legal analysis, but the widespread recognition of the EEZ system as well. In the period stretching from the commencement of the Third United Nations Conference on the Law of the Sea in 1973 to UNCLOS' eventual entry into force in 1994, popular rules and ideas, such as the coastal states' entitlement to an EEZ, that were discussed at the Conference were rapidly transposed into national laws by a significant number of states. Notably, these laws made no mention of the states' right to an EEZ being constrained in the case of islands unsuitable for inhabitation or economic use. *Kwiatkowska* has described UNCLOS' role in the development of the EEZ as neither fully norm-creating nor as simply affirming pre-existing customary laws, arguing that "the elaboration of the EEZ at UNCLOS III began as the progressive development of international law and a decade later, as a result of state practice based on the Conference's texts, that concept emerged as the codification of international law".[1690] This singular legal development has led some, if not all, scholars to believe that the EEZ had become a rule of customary international law even before UNCLOS entered into force.[1691] Therefore, if we assume that Article 121 (3) has not become reflective of customary international law, we must conclude that, as a matter of general international law, non-party states are generally entitled to a 200 nm-wide EEZ off the shores of their territory, even if the territory in question is a "rock" within the meaning of Article 121 (3). [1692]

Section 4 Excursus – Other International Law Doctrines Relevant to Rocks

[1689] The contention that treaty provisions may ripen into customary law simply because they are an inseparable part of a framework, the core rules of which are confirmed as customary, founders on its disregard for the constitutive elements of customary law: practice and *opinio juris*. This issue is more extensively discussed in Part 3 Section 1 I C.

[1690] *Kwiatkowska,* The 200 Mile Exclusive Economic Zone in the New Law of the Sea (1989) 30.

[1691] In 1989, five years prior to UNCLOS' entry into force, *Kwiatkowska* found that state practice affirming the validity of the EEZ could be described as "extensive and virtually uniform", particularly in light of "the number of states that have enacted unilateral legislation on exclusive economic and fishery zones up to 200 miles". The required *opinio iuris* could not only be inferred from said state practice, but was, according to this view, also evident from the states' conviction as it "had been reflected in numerous declarations, drafts and statements made at UNCLOS III". *Extavour*, on the other hand, noted that these unilateral claims to additional maritime zones may not suffice as proof of customary law status as they had not "necessarily been formulated along the lines of the concept of the exclusive economic zone", but had rather been claimed as territorial sea extensions or fishery zones. *Extavour* has in this way found that certain aspects inherent to the EEZ such as pollution-control and scientific research were often not part of the newly declared zones. Such discrepancies in state practice bore, according to *Extavour,* the potential to "undermine[…] or even destroy[…]" "the concept of the exclusive economic zone, as an entity". See *Kwiatkowska,* The 200 Mile Exclusive Economic Zone in the New Law of the Sea (1989) 30, 34; *Extavour,* The Exclusive Economic Zone - A Study of the Evolution and Progressive Development of the International Law of the Sea (1978) 304, 306-307, 313.

[1692] See also *Hafner,* Some Remarks on the South China Sea Award: Itu Aba versus Clipperton, Chinese (Taiwan) Yearbook of International Law and Affairs 34 (2016) 1 (16).

I. The Portico Doctrine

This doctrine dates back to the beginning of the 19th century, and has already been mentioned in the context of the case of the *Anna*, where it played a pivotal role.[1693] The Portico Doctrine derives its name from a pronouncement in *Anna* to the effect that small islands within close vicinity of the coast were not stand-alone territories, but mere atriums or "porticos" to the mainland territory.[1694] As a consequence of their close affiliation with the mainland territory, the waters separating these islands from the mainland formed part of the coastal state's territorial sea.[1695] Over time, the Portico Doctrine came to signify that coastal features within the attraction of the mainland belong to the sovereign territory of the coastal state.[1696] The Portico Doctrine has also been interpreted as supporting the inclusion of shoals and reefs into the territorial sea baseline.[1697] While at its most relevant during the 19th century, the Portico Doctrine continues to be reflected in more recent legislation such as the Spanish Coasts Act 1969, which "provides that islands to be formed belong to the State"[1698]. Today's norms governing the drawing of baselines, such as Articles 5, 7 and 47 of UNCLOS seem to have superseded the Portico Doctrine in their respective application areas.

II. The Doctrine of Minor Geographical Features

The doctrine of minor geographical features concerns the impact of small islands within the border region on the delimitation between states with opposite and adjacent coasts. It should be emphasized that it applies only where the boundary between two or more states is at stake and has no bearing on single-state scenarios. It is also important to recall that situations where islands and rocks complicate matters of maritime delimitation are "so diverse that generalizations are hazardous"[1699]. As *Bowett* has pointed out, "[t]he most that can be done is to identify certain tendencies in state practice"[1700]. The judicial practice that is the doctrine of minor geographical features originated with the *North Sea Continental Shelf Cases* in 1969, over a decade prior to the adoption of UNCLOS, and thus exists independently from the *Regime of islands*. Nevertheless, the language employed in some decisions indicates that the adoption of Article 121 (3) has influenced the doctrine's evolution, or at least affirmed its basic tenets.

[1693] See Part 1 Section 2 I B.
[1694] *Ibid.*
[1695] *O'Connell/Shearer*, The International Law of the Sea, Vol. 1 (1982) 185.
[1696] *Ibid.*
[1697] *Ibid,* 185 et seq.
[1698] *Ibid,* 186.
[1699] *Bowett,* Islands, Rocks, Reefs, and Low-Tide Elevations in Charney/Alexander (eds.), International Maritime Boundaries Vol. I (1993) 131 (150).
[1700] *Ibid.*

In 1969, the ICJ was tasked with drawing equidistant lines between the adjacent maritime zones of Denmark, Germany and the Netherlands and in this context attributed a „disproportionally distorting effect" to "islets, rocks and minor coastal projections", concluding that these should be ignored.[1701] This sentiment has since been reiterated in numerous international decisions, in some later rulings with the adjustment that such minor features could also be given reduced effect or "enclaved", instead of altogether "ignored". The central tenet of the doctrine is the necessity of avoiding that islands disproportionately or otherwise inequitably distort the equidistance line. The terminology employed by its proponents thus usually includes references to the disproportionate or distorting effect of islands,[1702] often accompanied by a warning against the "refashioning of geography" or the fallacy of accounting for islands that are merely "extraneous elements".[1703] Multiple scholars have taken notice of the doctrine of minor geographical features. While *Van Dyke* and *Beckman/Bernard* have pointed out the frequency of small islands in coastal areas being given reduced effect on the boundary or omitted altogether,[1704] it is from *Llanos* that this thesis borrows the designation "doctrine of minor geographical features".[1705] The evolution of the doctrine of minor geographical features can be traced as follows: the doctrine as mentioned in the abovementioned *North Sea Continental Shelf Cases* was referenced in the *Gulf of Maine Case* in 1984 and in the *Maltese Islands Case* of 1985.[1706] The latter decision, in turn, served as a legal basis for the *Black Sea Case* of 2009.[1707] The 2001 *Persian Gulf Case* listed both the decisions in the *North Sea Continental Shelf Cases* and the *Maltese Islands Case* as legal precedents.[1708] The *Black Sea Case* was cited in the *Bay of Bengal Case (Bangladesh/Myanmar)* in 2012.[1709] Now as to the variations of the doctrine of minor geographical features: in the 1977 *English Channel Case*, the arbitral tribunal identified the Scilly Islands' effect on the boundary line, as an "element of distortion", and accorded them

[1701] *North Sea Continental Shelf Cases,* para 57, *supra* note 50.
[1702] *Ibid*; *Persian Gulf Case*, para 219, *supra* note 303; *English Channel Case,* para 244, *supra* note 266; *St. Pierre and Miquelon Arbitration,* para 93, *supra* note 284.
[1703] *Black Sea Case,* para 149, *supra* note 310; *Bay of Bengal Case (Bangladesh/Myanmar)*, para 265, *supra* note 328; *Colombian Islands Case*, para 202, *supra* note 34.
[1704] *Van Dyke,* Legal Issues Related to Sovereignty over Dokdo and Its Maritime Boundary, Ocean Development & International Law 38 (2007) 157 (200); *Beckman/Bernard,* The Significance of Offshore Geographic Features to Maritime Claims in *Wu/Zou* (eds.), Arbitration Concerning the South China Sea - Philippines versus China (2016) 199.
[1705] *Llanos,* Low-Tide Elevations: Reassessing Their Impact on Maritime Delimination, Pace International Law Review 14:2 (2002) 255 (263).
[1706] International Court of Justice, *Case Concerning Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America)*, Judgment, ICJ Reports 1984, para 201; *Maltese Islands Case*, para 64, *supra* note 279.
[1707] *Black Sea Case*, para 149, *supra* note 310.
[1708] *Persian Gulf Case,* para 219, *supra* note 303.
[1709] *Bay of Bengal Case (Bangladesh/Myanmar)*, para 265, *supra* note 328.

half-effect.[1710] It furthermore rejected the United Kingdom's suggestion of "ignoring" the Channel Islands in the spirit of the *North Sea Continental Shelf Cases,* noting that such a solution would "oversimplify the legal situation" and chose to accord the Channel Islands a territorial sea enclave within the French zone.[1711] In 2012, the judgment rendered in the *Colombian Islands Case* invoked the reasoning of the *Black Sea Case*, asserting that the tiny island of Quitasueño had no effect on the provisional delimitation line.[1712] Instead, the ICJ found that Quitasueño was entitled to a territorial sea "enclave" measuring 12 nautical miles from its shores, but did not accord it an EEZ or a continental shelf.[1713] The *St. Pierre and Miquelon Arbitration* is not as seamlessly integrated into the doctrine of minor geographical features as the abovementioned cases as it includes no reference to the *North Sea Continental Shelf Cases* or any other decision in the "family tree" of the doctrine as described above. Yet, similarities are observable. Once more, the maritime zones of comparatively small offshore islands were downsized in service of an equitable delimitation. The French islands of St Pierre and Miquelon, which lie immediately outside the Canadian territorial sea, were granted just a fraction of the EEZ claimed by France on the basis of equity considerations and with special regard to the islands' extremely limited coastline length vis-à-vis the Canadian territory.[1714] The doctrine of minor geographical features provides that, in case a minor island is likely to "distort" a shared maritime boundary, this island can be ignored, given half effect,[1715] or enclaved. It may furthermore occur that an island is accorded a territorial sea, but denied any impact on the EEZ or continental shelf. A "distortion", in this context, refers to the perceived inequitable allocation of ocean space resulting from the use of the island as a base point for the drawing of the maritime boundary. *Bowett* has explained that "[t]he notion of 'distortion' is always linked to a perception of what the line would otherwise be, if the island did not exist"[1716]. Whether an island is prone to distort the boundary may depend upon: the length of the respective coastlines,[1717] the curtailment of a costal state's access to the high seas,[1718] the distance between the island and the mainland or larger islands,[1719] whether the island is "one of a cluster of fringe

[1710] *English Channel Case*, para 244, *supra* note 266.
[1711] *Ibid*, para 237.
[1712] *Colombian Islands Case,* para 202, *supra* note 34.
[1713] *Ibid,* para 238.
[1714] *St. Pierre and Miquelon Arbitration,* para 93, *supra* note 284.
[1715] For further reading on scenarios involving use of the half-effect solution, see *Bowett,* Islands, Rocks, Reefs, and Low-Tide Elevations in Charney/Alexander (eds.), International Maritime Boundaries Vol. I (1993) 131 (140).
[1716] *Ibid,* 144.
[1717] Discounting islands on the basis of "proportionality" is often a synonym for "coastline length disparity". *St. Pierre and Miquelon Arbitration*, para 93, *supra* note 284.
[1718] See for example *Bay of Bengal Case (Bangladesh/Myanmar)*, para 279 et seq, *supra* note 328.
[1719] See *Black Sea Case,* para 149, *supra* note 310; *Colombian Islands Case*, para 238, *supra* note 34.

islands"[1720] and an integral part of the coast, the island's size and its status as a rock or island in the narrow sense.[1721] A comprehensive analysis of every one of these factors is beyond the scope of this thesis.[1722] That an island's legal status under Article 121 (3) is relevant to the doctrine of minor geographical features, a delimitation practice, appears discernible from the fact that the parties to the relevant disputes have invoked Article 121 (3), which points to their estimation of the provision's importance in this context,[1723] and from the fact that the language in decisions relying on the doctrine at times recalls Article 121 (3).[1724] As is evident from case law, the doctrine of minor geographical features was already applied before international law legally distinguished between rocks and islands in the narrow sense. In the wake of the adoption of UNCLOS, states recognized the *Regime of islands* as complementing and corroborating the doctrine of minor geographical features. This is not altogether surprising as the subject matter of the *Regime of islands* and the rules on delimitation between states with opposite and adjacent coasts are closely intertwined and share the common goal of preserving the common heritage of mankind.[1725]

Section 5 Conclusion of Part Three

The *Regime of islands* in its entirety is reflective of customary international law. Its first two paragraphs incorporate legal principles that were widely known and considered authoritative even prior to UNCLOS and are therefore codifications of pre-existing customary international law rules. That Article 121 (3) as well has become reflective of customary international law is corroborated by multiple factors. These are: UNCLOS has obtained near-universal acceptance, which is "particularly indicative" [1726] of this development. Article 121 (3) has "a potentially unlimited, general number of subjects, rather than individualized ones"[1727], and therefore possesses a "fundamentally norm creating character"[1728]. UNCLOS prohibits the submission of

[1720] See for example *Black Sea Case,* para 149, *supra* note 310.
[1721] See for example *Colombian Islands Case*, para 238, *supra* note 34; see also *Bowett,* Islands, Rocks, Reefs, and Low-Tide Elevations in Charney/Alexander (eds.), International Maritime Boundaries Vol. I (1993) 139.
[1722] For additional information see *Bowett,* Islands, Rocks, Reefs, and Low-Tide Elevations in Charney/Alexander (eds.), International Maritime Boundaries Vol. I (1993) 131.
[1723] *St. Pierre and Miquelon Arbitration,* para 43, *supra* note 284; *Black Sea Case,* Public Sitting on September 16, 2008,Verbatim Record CR 2008/31, 11, *supra* note 310; *Bay of Bengal Case (Bangladesh/Myanmar)*, Memorial of Bangladesh, July 1, 2010, fn 261, *supra* note 328. Palatschinke
[1724] Arbitral Tribunal, *Award of the Arbitral Tribunal in the Second Stage of the Proceedings – Maritime Delimitation (Eritrea/Yemen),* December 17, 1999, Reports of International Arbitral Awards, Vol. XXII pp. 335-410, paras 147-148.
[1725] See Part 2 Section 2 IV B 2 a.
[1726] Conclusion 11, Commentary (3) ILC Draft Conclusions on Identification of Customary International Law, *supra* note 1449.
[1727] *Villiger,* Customary International Law and Treaties[2] (1997) 177.
[1728] *North Sea Continental Shelf Cases,* para 72, *supra* note 50.

reservations to the *Regime of islands*.[1729] Despite UNCLOS' near-universal membership reducing the frequency of corroborating practice by non-party states, multiple non-party states have made known and acted on their belief that a customary law provision corresponding to Article 121 (3) has formed. Examples of such state practice include the conduct of France in the *St. Pierre and Miquelon Arbitration*,[1730] the conduct of Denmark in the *Jan Mayen Case (Denmark/Norway),*[1731] the conduct of Nicaragua and Colombia in the *Colombian Islands Case*,[1732] the protests of Antigua and Barbuda, St. Kitts and Nevis and Saint Vincent and the Grenadines,[1733] the positions taken by the United States,[1734] and the remarks made by Greece.[1735] States have often applied Article 121 (3) in a very permissive manner,[1736] where a wide variety of features is entitled to an EEZ and continental shelf. This suggests that states are in favor of a broad interpretation of Article 121 (3). International judicature, which plays an "ancillary role […] in elucidating [customary] law"[1737] confirms that the *Regime of islands* is reflective of customary international law.[1738] Despite holding the view that the emergence of customary law on the basis of a conventional rule "is not lightly to be regarded as having been attained"[1739], the ICJ proclaimed in 2012 that "the legal régime of islands set out in UNCLOS Article 121 forms an indivisible régime, all of which (as Colombia and Nicaragua recognize) has the status of customary international law"[1740].

Turkey and Venezuela, who have not ratified or acceded to UNCLOS, have both been mentioned as possible "persistent objectors" to a customary law rule conterminous with Article

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[1729] A member state can declare itself exempt from UNCLOS' compulsory procedure entailing binding decisions, if select provisions of UNCLOS are affected. The *Regime of islands* is not among these select provisions. See Art 298 (1) UNCLOS.

[1730] *St. Pierre and Miquelon Arbitration,* para 43, *supra* note 284.

[1731] *Jan Mayen Case (Denmark/Norway*), Memorial submitted by the government of the Kingdom of Denmark on July 31, 1989, Vol. 1, para 302, *supra* note 290.

[1732] *Colombian Islands Case*, Counter-Memorial submitted by Colombia on November 11, 2008, Vol. 1, 306; *Colombian Islands Case*, Reply submitted by Nicaragua on September 18, 2009, Vol. 1, 124, *supra* note 34.

[1733] See letter dated 19 June 1997 from the Government of Antigua and Barbuda with regard to maritime treaties and a protest with regard to the status granted to "Isla Aves", Antigua and Barbuda, Law of the Sea Bulletin 35 (1997) 97; Note dated 16 July 1997 addressed to the Secretary-General of the United Nations referring to the bilateral maritime boundary delimitation treaties, St. Kitts and Nevis, Law of the Sea Bulletin 35 (1997) 98; Note dated 8 August 1997 addressed to the Secretary-General of the United Nations referring to the bilateral maritime boundary delimitation treaties, Saint Vincent and the Grenadines, Law of the Sea Bulletin 35 (1997) 100.

[1734] United States Department of State*,* Maritime Claims in the South China Sea, Limits in the Seas 143, December 5, 2014, 8.

[1735] United Nations Office for Ocean Affairs and the Law of the Sea, The Law of the Sea: Régime of Islands, UN Sales No. E.87.V.11 (1988) 112 (Greece).

[1736] *O'Keefe,* Palm-Fringed Benefits: Island Dependencies in the New Law of the Sea, International and Comparative Law Quarterly 45:2 (1996) 408 (411).

[1737] Conclusion 13 Commentary (2) ILC Draft Conclusions on Identification of Customary International Law, *supra* note 1449.

[1738] *Jan Mayen Case (Iceland/Norway)* 3, *supra* note 1201; *Persian Gulf Case*, para 185, *supra* note 303; *Colombian Islands Case*, para 139, *supra* note 34.

[1739] *North Sea Continental Shelf Cases,* para 71, *supra* note 50.

[1740] *Colombian Islands Case*, para 139, *supra* note 34.

121 (3).[1741] And indeed, both states have made their opposition to Article 121 known at the earliest possible moment and before an international audience: at the Third United Nations Conference on the Law of the Sea.[1742] However, both states lost their "persistent objector"-status when they failed to persistently and unequivocally maintain their position. Turkey has consistently protested UNCLOS in a vague and generalized fashion, which makes it difficult to ascertain whether the *Regime of islands* is the target of these protests.[1743] Additionally, Turkey has applied the distinction between rocks and islands outlined in the *Regime of islands* to individual Greek islands, which illustrates that Turkey is not truly objecting to the *Regime of islands*.[1744] Venezuela regularly states its intent to not be bound by UNCLOS or any customary rules reflecting UNCLOS' provisions, yet this generalized type of protest leaves it unclear whether the *Regime of islands* specifically is opposed.[1745] Like Turkey, Venezuela has abandoned its initial "persistent objector"-status.

[1741] *Talmon,* Article 121 - Regime of Islands in Proelss (ed.), The United Nations Convention on the Law of the Sea - A Commentary (2017) 858 (861).
[1742] Part 3 Section 2 I B and Part 3 Section 2 II A.
[1743] Part 3 Section 2 I C.
[1744] *Ibid.*
[1745] Part 3 Section 2 II B.

PART 4 AN AMENDMENT TO THE REGIME OF ROCKS

Section 1 Why an Amendment?

The general, nonspecific wording of Article 121 (3) has raised an abundance of questions and resulted in diverse interpretations: what kind of settlement qualifies as "human habitation"?[1746] In order to constitute "economic life of [an island's] own" must the economic activity in question occur free from outside support?[1747] Is the presence and survival of chickens an indicator of the capacity to sustain human habitation or economic life?[1748] While this thesis has addressed these and similar issues, one cannot but be aware that there is some diversity of opinion on the central question of the true meaning of the terms "human habitation" and "economic life".[1749] The elusiveness characterizing Article 121 (3) casts doubt on the provision's consistency with the principle of legal certainty as well as on its practicality. Any application of Article 121 (3), it would seem, cannot go forward without considerable interpretational work. Critics have in this vein lamented the provision's vagueness and illogicality,[1750] advocated in favor of its amendment and called for its elimination.[1751] The *Regime of islands* is central to some of the most critical disputes in the law of the sea today,[1752] and an amended, clearer provision may be more suitable when aiming to "facilitate international communication, and […] promote the peaceful uses of the seas and oceans"[1753]. Clarification of the *Regime of islands* could also make it easier to acknowledge its limits. There are situations where concurring legal opinions are in themselves incapable of resolving the underlying conflict, rendering it futile to dwell on matters of legal interpretation. Vagueness in the applicable law can obscure the necessity for diplomatic engagement, by creating the impression that the conflict may be easily resolved if it weren't for different interpretations of the relevant

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[1746] See Part 2 Section 2 V.
[1747] See Part 2 Section 2 IV.
[1748] *Gewirtz,* Limits of Law in the South China Sea, East Asia Policy Paper 8 (2016) 9.
[1749] For the prevailing trends and conflicting opinions on the definition of "human habitation" and "economic life" in legal doctrine, see Part 2 Section 2 V A and Part 2 Section 2 VI A, respectively.
[1750] This kind of criticism can be glanced both from the *travaux préparatoires* and international doctrine. See United Nations Office for Ocean Affairs and the Law of the Sea, The Law of the Sea: Régime of Islands, UN Sales No. E.87.V.11 (1988) 97 (Venezuela), 105 (Japan).; *Dipla,* Le régime juridique des îles dans le droit international de la mer (1984) 41; *Gjetnes,* The Spratlys: Are They Rocks or Islands?, Ocean Development & International Law 32 (2001) 191 (202); *Beckman/Bernard,* The Significance of Offshore Geographic Features to Maritime Claims in *Wu/Zou* (eds.), Arbitration Concerning the South China Sea - Philippines versus China (2016) 190.
[1751] See *Song,* The Application of Article 121 of the Law of the Sea Convention to the Selected Geographical Features Situated in the Pacific Ocean, Chinese Journal of International Law 9 (2010) 663 (698); *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 (64); *Hodgson/Smith*, The Informal Single Negotiating Text (Committee II): A Geographical Perspective, Ocean Development and International Law 3:3 (1976), cited in *Kwiatkowska/Soons,* Entitlement to Maritime Areas of Rocks Which Cannot Sustain Human Habitation or Economic Life of Their Own, Netherlands Yearbook of International Law 21 (1990) 139 (140).
[1752] See the example of the *South China Sea Arbitration* discussed in Part 1 Section 2 II A 3.
[1753] Preamble of the UNCLOS.

law. Additionally, some have remarked on a perceived disconnect between the language of Article 121 (3) and the maritime zones claimed by coastal states in practice. Indeed, while states tend to invoke the restrictions imposed by Article 121 (3) when admonishing a neighboring state for exaggerating its maritime entitlements,[1754] one may rarely find a state openly admitting that any part of its territory falls short of the criteria listed in Article 121 (3) and is, thus, a rock.[1755] *Elferink* has for instance remarked on the fact that "[s]tates almost invariably have claimed a continental shelf and exclusive economic zone for all the islands under their sovereignty"[1756], including those islands whose characteristics would – according to *Elferink* – put them in the purview of Article 121 (3). The perception that Article 121 (3) is ignored may stem from the fact that some experts understand "islands in the narrow sense" in a very strict sense, rather than from actual widespread disregard for Article 121 (3).[1757] As has been discussed, the award handed down in the *South China Sea Arbitration* was the first decision by an international tribunal providing an in-depth analysis of the meaning of Article 121 (3).[1758] The award relied on a narrow interpretation of the *Regime of islands*, which included preconditions for EEZ and continental shelf entitlement that are extremely difficult to meet on small insular territories. Unsurprisingly, this narrow interpretation of "human habitation" and "economic life" is somewhat at odds with contemporary state practice.[1759] As *Elferink* noted, "there is an abyss between the tribunal's approach and the practice of many States"[1760]. While the notion of the habitual infringement of Article 121 (3) should thus be taken with a grain of salt, it is true that the majority of coastal states have interpreted the provision – at least as far as their own island territories are concerned – to generously allow for the establishment of EEZ and continental shelf around insignificant islands. In light of these discrepancies, it would not seem unreasonable to suggest that the *Regime of islands* should be formally amended for clarification and in order to more accurately reflect the collective will of the international community.

[1754] See the example of China submitting a complaint concerning the Japanese EEZ in Part 1 Section 3 II E.
[1755] This has occurred only once. Reference is made to the United Kingdom's position on Rockall. See Part 1 Section 3 II A.
[1756] *Elferink,* The South China Sea Arbitration's Interpretation of Article 121(3) of the LOSC: A Disquieting First, The Blog of the K.G. Jebsen Centre for the Law of the Sea, September 7, 2016 <site.uit.no/jclos/2016/09/07/the-south-china-sea-arbitrations-interpretation-of-article-1213-of-the-losc-a-disquieting-first/>.
[1757] See Part 3 Section 1 II E 3.
[1758] See Part 1 Section 2 II A 3.
[1759] *Ibid.*
[1760] *Elferink,* The South China Sea Arbitration's Interpretation of Article 121(3) of the LOSC: A Disquieting First, The Blog of the K.G. Jebsen Centre for the Law of the Sea, September 7, 2016 <site.uit.no/jclos/2016/09/07/the-south-china-sea-arbitrations-interpretation-of-article-1213-of-the-losc-a-disquieting-first/>.

Section 2 The Omission of Article 121 (3)

I. Wording

In an effort to improve the *Regime of islands*' clarity and efficiency, we may consider the possibility of putting all islands – which is to say all "naturally formed area[s] of land, surrounded by water [and] above water at high tide"[1761] – on an equal legal basis. Before delving into why this step appears warranted, let us consider what the new provision would look like in practice:

> *Article 13a*
> *Regime of islands*
> 1. An island is a naturally formed area of land, surrounded by water, which is above water at high tide.
> 2. 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.

As can be seen, the solution proposed would leave the *Regime of islands* and the basic definition of islands, incorporated in the first paragraph, intact, but remove the exception to this general rule. By omitting any reference to rocks, the provision establishes that high-tide elevations are no longer subdivided and thus all entitled to the same maritime zones, irrespective of their size, remoteness, population or economic importance. This would appear to represent a rather extreme departure from the *Regime of islands* as envisioned at the Third United Nations Conference on the Law of the Sea and thereby necessitates a thorough examination of its motives and effects, which shall be presented below. It should also be noted that the amended provision no longer requires an isolated placement in Part VIII of UNCLOS and can be allotted a more fitting slot in Part II, alongside the definitions of other marine features such as low-tide elevations, which is why the numbering above has been changed from "Article 121" to "Article 13a". The re-positioning may appear a mere detail, but it would put the provision in the context it belongs and would in this way facilitate readability. The *Regime of islands* was integrated into UNCLOS as "Part VIII", which separated it from UNCLOS' remaining rules on delimitation and the breath of maritime zones. The reason for placing it in this isolated Part was that UNCLOS' drafters could not agree whether an island's capacity to sustain human habitation or economic life was relevant only to islands bordering the high seas, or whether

[1761] Art 121 (1) UNCLOS.

these aspects should affect delimitation between states with opposite or adjacent coasts as well.[1762] But with the elements of "human habitation" and "economic life" removed, this question becomes obsolete and the provision can be moved to a more appropriate chapter. The abolishment of Article 121 (3) is furthermore without prejudice to the practice of giving reduced or no effect to small islands in maritime boundary delimitations in cases where their presence may otherwise cause an inequitable distortion of the boundary.[1763]

II. Rationale

The reformulated version of the *Regime of islands* is faithful to the aims pursued in UNCLOS in general and the EEZ system in particular, yet allows for an adjustment where the importance of maintaining a maximum of ocean space as a common domain is concerned.

At the forefront of the amended law is naturally a desire to establish a provision that better serves the principle of legal certainty by using clear language and objectively determinable criteria. The *Regime of islands* was, after all, intended to be a means states can rely on in order to resolve disputes, not a cause for further complication. Removing the exception for "rocks" renders it immediately obvious which features are entitled to an EEZ and continental shelf, as the remaining parameters for entitlement are comparatively easy to determine: the feature need only be a "naturally formed area of land, surrounded by water, which is above water at high tide"[1764]. Strictly speaking, not even this basic definition is absolutely necessary as islands are, in this respect, no different than continents, the maritime entitlements of which are beyond doubt. Where UNCLOS on the other hand wishes to exclude certain features, such as low-tide elevations and artificial islands, from maritime zones, this is already separately stipulated in explicit fashion, further visualizing the *Regime of islands'* superfluity.[1765] While it thus appears that the *Regime of islands* could theoretically be abandoned in its entirety, reiterating the obvious by leaving the first two paraphs of the *Regime of islands* intact, does seem to improve UNCLOS' readability and clarity. Additionally, there is something to be said for the historic continuity of retaining a basic definition which has fulfilled its role without exciting controversy for over half a century.[1766] Removing its third paragraph allows the *Regime of islands* to stay true to the original goal of realizing the economic potential of the ocean's living resources.[1767] The amended provision is true to the purpose of the EEZ of "[e]xtend[ing] the jurisdiction of

[1762] See Part 2 Section 1 IV B 1.
[1763] This practice is referred to as the doctrine of minor geographical features and described in Part 3 Section 4 II.
[1764] Art 121 (1) UNCLOS.
[1765] Art 13, 60 UNCLOS.
[1766] Art 10 Convention on the Territorial Sea and the Contiguous Zone, *supra* note 72.
[1767] *Kwiatkowska,* The 200 Mile Exclusive Economic Zone in the New Law of the Sea (1989) 2.

States over the waters adjacent to their coasts and […] preserv[ing] the resources of those waters for the benefit of the population of the coastal State"[1768] as well as "accelerating the socio-economic development of states and reducing the inequalities existing between industrial and developing countries"[1769]. The intended beneficiaries of the EEZ and continental shelf in this way comprises the entire national population, a prioritization that is not new. As has been elaborated earlier, the *Regime of islands* was always intended as a driver of economic growth and prosperity for the benefit of the overall population of the coastal state.[1770] As has been illustrated earlier in this thesis, applying the fundamental principles of interpretation as laid out in Article 31 and 32 of the Vienna Convention on the Law of Treaties reveals that Article 121 (3) already allows for a broad spectrum of tiny islands to generate an EEZ and continental shelf, simply because the capacity to sustain human habitation or economic life neither is nor was intended to be an extremely restrictive criterion. As has been discussed, just one of two criteria must be met: either "human habitation" *or* "economic life". Comparatively minor features may fulfill one of these conditions. For example, a weather station is of considerable economic value, its operation contributes to GDP, its personnel is remunerated and the product it sells – meteorological data – is sought after on the appropriate market.[1771] A weather station does not require a vast home island, or even naturally occurring food, fresh water or shelter, as these demands can be met by supply shipments or the construction of a desalinization plant, if the station requires the continued presence of crew members at all. To sum up, the conditions for EEZ and continental shelf entitlement set forth in UNCLOS are quite permissive. States have acted on this state of affairs by embracing a very broad understanding of what it takes for an island to be entitled to both EEZ and continental shelf, at least as far as their own territories are concerned.[1772] Any amendment to the *Regime of islands* should bear in mind the will of the States Parties, as reflected in their collective practice. And, while state practice is far from uniform, there is undeniably a trend towards recognition of EEZ and continental shelf entitlement in minor islands.[1773] It should be noted that, prior to the inception of the *Regime of islands* there was consensus in international law and practice that all types of high-tide

[1768] *South China Sea Arbitration,* para 513, *supra* note 28.
[1769] *Kwiatkowska,* The 200 Mile Exclusive Economic Zone in the New Law of the Sea (1989) 2.
[1770] Part 2 Section 2 IV B 2.
[1771] Part 2 Section 2 VI D 2.
[1772] *Elferink,* The South China Sea Arbitration's Interpretation of Article 121(3) of the LOSC: A Disquieting First, The Blog of the K.G. Jebsen Centre for the Law of the Sea, September 7, 2016 <site.uit.no/jclos/2016/09/07/the-south-china-sea-arbitrations-interpretation-of-article-1213-of-the-losc-a-disquieting-first/>.
[1773] *O'Keefe,* Palm-Fringed Benefits: Island Dependencies in the New Law of the Sea, International and Comparative Law Quarterly 45:2 (1996) 408 (411).

elevations were in principle entitled to the same maritime zones.[1774] The elimination of Article 121 (3) would thus not only pay tribute to developments in state practice, it would further re-align UNCLOS with the collective will of the international community by returning to trends in state practice that have been perceptible since before the adoption of UNCLOS. On the other hand, the proposed amendment of the *Regime of islands* would seem to alter the balancing of interests between the preservation of the common spaces and coastal states' sovereign rights to maritime resources along their shores in favor of the latter. Via its removal of Article 121 (3), the amendment after all drops an important prerequisite to a lawful EEZ and continental shelf: an island's capacity for human habitation or economic life. By removing one of the few restraints on the maritime zones of islands, the amendment prioritizes the rights of coastal states' to their resources over the preservation of the common heritage of mankind. While this is indeed a change in tone, it is not as dramatic a shift as one would expect, especially if we consider how broadly the terms "human habitation" and "economic life" have been interpreted throughout the international community and how prevalent EEZ and continental shelf claims around relatively minor islands are. Additionally, the abolishment of the exemption for "rocks" produces a Convention that much more accurately reflects the goals and objectives of its signatories. UNCLOS' signatories introduced the world to a multilateral treaty that provided a legal basis for the vast expansion of fishing areas that could be subjected to exploitation by a single state, to the detriment of the concept of the ocean and its resources as common property. As has been discussed, this appreciation of values is apparent throughout UNCLOS and the *travaux préparatoires*, as well has having been endorsed by multiple scholars.[1775] It is especially apparent from the vast expansion of exclusive fishing rights via the introduction of the EEZ. This widening of catch areas under sovereign control to 200 nm can *inter alia* be attributed to "the expansive claims of coastal States in Latin America over their coastal waters"[1776]. Enlarging maritime zones conveying exclusive fishing rights appears to have been a priority, and it is evident that the wishes of those states pushing hardest for it were heeded.[1777] Abolishing Article 121 (3), a provision restricting EEZ entitlement, is thus not at all out of step with the aims of UNCLOS. What is more, the general phrasing of Article 121 (3) is itself a tribute to the objective of bolstering the coastal states' rights to the EEZ. The vagueness of the

[1774] Part 1 Section 1 V.
[1775] Part 2 Section 2 IV B 1.
[1776] *Hafetz,* Fostering Protection of the Marine Environment and Economic Development: Article 121(3) of the Third Law of the Sea Convention, AM. U. INT'L L. REV 15 (2000) 583 (591).
[1777] *Diaz, Dubner* and *Parent* agree in highlighting that "In summary, the purpose behind the establishment of an exclusive economic zone is to give coastal States and mid-ocean, archipelagic States preferential rights of fishing in adjacent waters." *Diaz/Dubner/Parent,* When is a "Rock" an "Island"? - Another Unilateral Declaration Defies "Norms" of International Law, Michigan State Journal of International Law 15 (2007) 519 (545).

provision is in this way a result of the vigorous advocacy of states opposed to any kind of restriction on the capacity of islands to generate entitlement to an EEZ or continental shelf at the Third United Nations Conference on the Law of the Sea. During drafting sessions, eighteen states made statements illustrating their opposition to the subdivision of different types of islands and their support for equal treatment of islands and continental landmasses, without exception.[1778] When it became clear that Article 121 (3) was going to contain a category of islands, labelled "rocks", that was disentitled from certain maritime zones, eleven states called for the removal of Article 121 (3) from the draft convention.[1779] The general wording of the provision may in the end have been the aspect that made the *Regime of islands* in its final version tolerable even to these voices. States in principle opposed to any form of subdivision among islands may have considered that the outcome they desired could still be achieved by interpreting Article 121 (3) in a very wide sense. While Article 121 (3) rejects the notion of complete equality among islands, the final version of Article 121 (3) turned out to disappoint not only those in favor of equal legal treatment of all islands, but also some of the states in favor of subdividing islands.[1780] Out of 160 participating states, sixteen states expressed dissatisfaction with the final version of Article 121 (3) or outright called for its deletion, versus sixteen states who remarked on their satisfaction with Article 121 (3) or at least objected to the prospect of its deletion.[1781] *Beckman* and *Bernard* have similarly commented on the nature of Article 121 (3) as a widely unpopular provision and described it as the result of a failure to compromise.[1782] The amendment proposed in this thesis would therefore remove a provision unwanted by many from the outset, all while remaining faithful to UNCLOS' overall objectives. Beyond these considerations, it should not be ignored that the removal of Article 121 (3) is warranted in view of the provision's severe shortcomings that have gone so far as to utterly isolate the provision within the framework of the Convention. Reference is made of course to

[1778] United Nations Office for Ocean Affairs and the Law of the Sea, The Law of the Sea: Régime of Islands, UN Sales No. E.87.V.11 (1988) 27 (Cyprus); 31, 33, 53 (Greece); 34 (Fiji); 34, 51 (New Zealand); 34, 53 (Western Samoa); 34, 56 (Tonga); 51 (Uruguay); 60 (Canada); 62 (France); 62 (Venezuela); 63 (Jamaica); 66 (United Kingdom); 89, 105 (Japan); 103 (Iran); 107 (Brazil); 107 (Portugal); 108 (Australia); 108 (Ecuador).
[1779] *Ibid,* 89, 105 (Japan); 91 (France); 103 (Venezuela); 105 (Greece); 105 (United Kingdom); 107 (Brazil); 107 (Portugal); 108 (Australia); 108 (Ecuador); 108 (Iran); 108 (Zambia).
[1780] *Ibid,* 27, 95 (Turkey); 88, 95 (Iraq); 88, 96 (Algeria); 88, 103 (Libya).
[1781] The remaining 128 states did not comment on the last-minute proposal to delete Article 121 (3) and remained silent on their general contentment with the final outcome. For the group malcontent with Article 121 (3) see *ibid,* 89, 105 (Japan); 91 (France); 95 Iraq; 95 Ireland; 95 Turkey; Algeria 96; 103 Libya; 103 (Venezuela); 105 (Greece); 105 (United Kingdom); 107 (Brazil); 107 (Portugal); 108 (Australia); 108 (Ecuador); 108 (Iran); 108 (Zambia). For those states satisfied with Article 121 (3) see the remarks of 98 (Dominican Republic); 98 (Ethiopia); 98, 99 (Dominica); 106 (German Democratic Republic); 106 (USSR); 107 (South Korea); 107 (Denmark); 107 (Trinidad and Tobago); 107 (Tunisia); 109 (Colombia); 108 (Mongolia); 108 (Byelorussian Soviet Socialist Republic); 108 (Pakistan); 108 (Uruguay); 98 (Fiji) and 95 (Cyprus) within the same document.
[1782] *Beckman/Bernard,* The Significance of Offshore Geographic Features to Maritime Claims in *Wu/Zou* (eds.), Arbitration Concerning the South China Sea - Philippines versus China (2016) 190.

the curious positioning of the *Regime of islands* in a separate chapter of UNCLOS, "Part VIII", which was created expressly for this one provision and consequently contains nothing else. As has been discussed in the context of the scope of application of Article 121 (3),[1783] this separate part was added due to the failure of the drafters to reach an agreement on the relationship between Article 121 (3) and UNCLOS' rules on maritime delimitation between states with opposite and adjacent coasts, incorporated in Articles 15, 74 and 83. To the drafters, the separate Part created a possibility to take a neutral position on this contentious point, leaving it to subsequent state practice to fill the gap in an otherwise comprehensive regulatory regime.[1784] The decision to leave out legal guidance on the correlation between Article 121 (3) and maritime delimitation between states with opposite or adjacent coasts has left UNCLOS' rules on delimitation fragmented and the *Regime of islands* with no easily distinguishable field of application. While the *Regime of islands* addresses the expanse of maritime zones with regard to islands and rocks, Articles 15, 74 and 83 regulate how a state's maritime boundaries and entitlements change in the event its maritime zone overlaps with that of another state. Both the *Regime of islands* and Articles 15, 74 and 83 are thus provisions that may ultimately determine the width of a state's maritime zones and the location of its outermost maritime border. The thematic overlap between the *Regime of islands* and the rules on delimitation is such that potential interdependencies would seem to merit closer inspection.

Nevertheless, some scholars have described these potential interdependencies as "not a matter of great urgency"[1785] or omitted the topic entirely from their appraisal of the meaning of Article 121 (3).[1786] If we look to the *travaux préparatoires* for a perspective on the importance of the relationship between Article 121 (3) and delimitation, we find that the representative of Algeria "felt the Conference had been wrong to separate delimitation and the régime of islands, which were really two aspects of the same problem"[1787]. While it is evident that Article 121 (3) applies to mid-ocean islands the maritime zones of which share no boundary with another state, the remainder of its application area is contested among scholars.[1788] In the event that an island is located in the vicinity of the maritime boundary between two continental states, does its

[1783] Part 2 Section 1 IV B 1.
[1784] United Nations Office for Ocean Affairs and the Law of the Sea, The Law of the Sea: Régime of Islands, UN Sales No. E.87.V.11 (1988) 3.
[1785] *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 (63).
[1786] *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... », Annuaire français de droit international 40 (1994) 876 (899).
[1787] United Nations Office for Ocean Affairs and the Law of the Sea, The Law of the Sea: Régime of Islands, UN Sales No. E.87.V.11 (1988) 104 (Algeria).
[1788] See Part 2 Section 1 IV.

capacity for human habitation or economic life play a role in the delimitation of said boundary? For example, would an island in the narrow sense outside the territorial sea of the mainland be able to serve as a base point for the maritime boundary, while a rock does not? If a small island is fully surrounded by the EEZ of a foreign state, does its capacity to sustain economic life entail that it should be afforded not only a territorial sea enclave, but the full suite of maritime zones? The *Regime of islands* leaves these questions unanswered. Usually, they can be resolved with the help of the doctrine of minor geographical features,[1789] which is however not so much a clear-cut rule, as a set of guidelines for constellations where islands influence the maritime borders of multiple states. Considering the controversy surrounding the scope of application of Article 121 (3) and in the absence of any clarification of its relation to Articles 15, 74 and 83,[1790] it appears debatable whether the *Regime of islands* is indeed a fully functional provision. These shortcomings were criticized in the late stages of the drafting process, at a time when the negotiating text already contained the finalized version of the *Regime of islands*: during the Seventh Session of the Third United Nations Conference on the Law of the Sea, Ireland notably lamented the provision's failure to shed light on its interrelation with the rules on maritime delimitation, declaring that this matter had not been "satisfactorily resolved"[1791]. Ireland also submitted a draft proposal suggesting to lay down the subsidiarity of the *Regime of islands* to the general rules on delimitation contained in Articles 15, 74 and 83.[1792] Ireland was not alone in its discomfort with the omissions of the negotiating text: during the same session, ten other states submitted their own draft proposal featuring an additional paragraph to the *Regime of islands.* The new paragraph stated that in situations where an island's location may cause a distortion of boundaries between states with opposite or adjacent coasts, the delimitation must be compatible with equitable principles.[1793] Turkey in particular remarked that the final version of the *Regime of islands* was "out of harmony with both international law and articles 15, 74 and 83"[1794]. The abovementioned proposals and statements show that some states were well aware of the *Regime of island*'s deficiency in this regard and (unsuccessfully) sought to rectify it. As can be seen, UNCLOS' silence on the relationship between the *Regime of islands* and the provisions on delimitation between states with opposite and adjacent states is no minor detail.

[1789] Part 3 Section 4 II.
[1790] See also *Kwiatkowska/Soons,* Entitlement to Maritime Areas of Rocks Which Cannot Sustain Human Habitation or Economic Life of Their Own, Netherlands Yearbook of International Law 21 (1990) 139 (180 et seq).
[1791] United Nations Office for Ocean Affairs and the Law of the Sea, The Law of the Sea: Régime of Islands, UN Sales No. E.87.V.11 (1988) 91 (Ireland).
[1792] *Ibid,* 93 (Ireland).
[1793] *Ibid,* 88-89 (Algeria, Bangladesh, Cameroon, Iraq, Libya, Madagascar, Morocco, Nicaragua, Somalia, Turkey)
[1794] *Ibid,* 95 (Turkey).

It raises central questions of applicability and may erase the relevance of Article 121 (3) in a majority of cases, given that islands frequently straddle the maritime boundaries between states. State practice has to some extent stepped in to fill the gap and shown that states invoke the criteria of "human habitation" and "economic life" even in delimitation cases,[1795] thereby removing some of the difficulties arising from the *Regime of islands*' failure to clarify its effect on maritime boundary delimitation. Yet, this does not entirely resolve the confusion the *lacuna* has caused among states and international tribunals.[1796] The omission to explain whether the criteria of human habitation and economic life shall be pertinent to delimitation cases remains a major impediment to the effectiveness of Article 121 (3). In sum, Article 121 (3) is a provision that has not only led to the considerable fragmentation of an otherwise coherent system, it has led to confusion where it sought to clarify, and should consequently be removed in order to create a more easily applicable, unambiguous legal order that is more in sync both with the aims of UNCLOS and established trends in state practice.

Section 3 Conclusion of Part Four

While this thesis has clarified many of the outstanding issues surrounding the *Regime of islands*, one cannot but be aware that some controversy will remain, especially with respect to the true meaning of the terms "human habitation" and "economic life". The inherent vagueness and generality of these terms seem to put the *Regime of islands* at odds with the principle of legal certainty and question its practicality.[1797] Questions relating to the provision's scope of application will, in all likelihood, also continue to cause confusion among states and international tribunals. An effective solution to these issues would consist in amending UNCLOS to the effect that Article 121 (3) is removed from the convention text.[1798] All high-tide elevations would be entitled to the same legal zones: a territorial sea, a contiguous zone, an EEZ and a continental shelf. There would be no legal distinction between "rocks" and "islands in the narrow sense", as both of these categories would simply be "islands". Such a measure would result in a clear-cut and easily applicable legal framework for islands and resolve the uncertainties relating to the *Regime of islands*' scope of application.[1799] Deleting the third paragraph of the *Regime of islands* is compatible with the UNCLOS' original goal of expanding

[1795] See Part 2 Section 1 IV B 1.
[1796] In the *Black Sea Case*, the ICJ for instance redirected the question of the relationship between the *Regime of islands* and the rules on maritime delimitation between states with opposite or adjacent coasts to the litigants. See Part 1 Section 2 II B 7.
[1797] Part 4 Section 1.
[1798] Part 4 Section 2 I.
[1799] Part 4 Section 2 II.

the jurisdiction of the coastal states in order to realize the economic potential of the ocean for the benefit of their peoples.[1800] States have overall embraced a very permissive interpretation of "human habitation" and "economic life" and have allowed a broad spectrum of islands to generate claims to an EEZ and continental shelf.[1801] Allowing all islands to generate an EEZ and continental shelf would therefore also re-align UNCLOS with the will of the international community.

[1800] *Ibid.*
[1801] Part 3 Section 1 V 5 d.

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Annex I Abstract in English

The *Regime of islands* of the United Nations Convention on the Law of the Sea proclaims that "[r]ocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf". The meaning of this wording, in particular that of "human habitation" and "economic life", has been subject to debate.

This thesis shows that an island's status as a "rock" or an "island in the narrow sense", which is an island fully entitled to both an EEZ and a continental shelf, depends on whether it can sustain a long-term socially well-integrated community or a non-transitory economic activity that contributes to national economic output and is useful on the island in question. The key issues of the assessment of an island's status are its contemporary habitability and economic usability. Building and land development are relevant in this respect as well. Contrary to the conclusions of the 2016 *South China Sea Arbitration*, an island's historic, or "natural" state, plays a very limited role in the assessment of its capacity to sustain human habitation or economic life.

This thesis also shows that the *Regime of islands* has become part of customary international law, and that, the Venezuelan and Turkish statements in this regard notwithstanding, there are no persistent objectors in this regard. While Article 121 (3) can and has been clearly interpreted, there would be undeniable benefits to its deletion.

Annex II Abstract in German

Laut Artikel 121 (3) des UN-Seerechtsübereinkommens haben „Felsen, die für die menschliche Besiedlung nicht geeignet sind oder ein wirtschaftliches Eigenleben nicht zulassen, [...] keine ausschließliche Wirtschaftszone und keinen Festlandsockel“. Diese *Ordnung der Inseln* bedient sich allgemein gehaltener Begriffe, weswegen ihre Interpretation und ihr Anwendungsbereich umstritten sind.

Die rechtliche Zuordnung als Felsen oder Insel im engeren Sinne - d. h. als Insel aufgrund derer dem Küstenstaat eine ausschließliche Wirtschaftszone und ein Festlandsockel zusteht - wird richtigerweise nicht durch den historischen Urzustand bestimmt, sondern ist abhängig von der gegenwärtigen Bewohnbarkeit und wirtschaftlichen Nutzbarkeit. Entscheidend ist, ob eine Insel sich für die Besiedlung durch eine auf Dauer angelegte soziale Gemeinschaft eignet oder eine Nutzung zulässt, die dauerhaft zur Gesamtwirtschaftsleistung des Küstenstaates beitragen würde und an der fraglichen Lokalität zweckmäßig erscheint.

Diese Dissertation zeigt außerdem, dass die *Ordnung der Inseln* fester Bestandteil des Völkergewohnheitsrechts geworden ist. Obgleich Venezuela und die Türkei Kritik an der UN-Seerechtskonvention geübt haben, ist dies nicht ausreichend um diese Staaten als „persistent objectors“ zu etablieren, für die die völkergewohnheitsrechtliche Norm gleichbedeutend mit der *Ordnung der Inseln* keine Bindungswirkung entfalten würde. Eine zutreffende und sachdienliche Interpretation der *Ordnung der Inseln* ist zwar möglich, dennoch würde eine Vertragsänderung im Sinne einer vollständigen Aufhebung von Artikel 121 (3) UN-Seerechtskonvention erhebliche Vorteile bringen.

Annex III About the Author

I. Personal details

Name:	Carmen Pölsler
Date of birth:	22.01.1988
Place of birth:	Vienna

II. Education and professional career

2006 – 2012	studied law at the University of Vienna
2009 – 2010	studied abroad at Université Paris 13; research focus on international and European law
2010 – 2011	internship with the Global Programme against Money Laundering (United Nations)
2012 – 2013	internship at court (Oberlandesgericht für Strafsachen Wien)
Summer 2014	Summer Academy of the International Foundation for the Law of the Sea; Moot Court
2012 – 2019	doctorate studies of law at the University of Vienna